Social Security Administration Nonacquiescence on the Standard for Evaluating Pain

Erin Margaret Masson
For more than a decade, the Fourth Circuit has battled the Social Security Administration (SSA), demanding that the SSA comply with the well-established Fourth Circuit legal standard for evaluating pain in Social Security disability claims. The Hyatt v. Heckler battle raged through seven district court decisions, four court of appeals decisions, and one Supreme Court decision

Determining eligibility for Social Security disability benefits requires evaluating allegations of pain. Throughout Hyatt, the Secretary of Health and Human Services (Secretary) required that, in order to qualify for benefits, a claimant must present objective medical evidence of both the existence and severity of pain. The Fourth Circuit required objective medical evidence of the existence of pain but required consideration of subjective as

* I am deeply indebted to Grace Masson, Esq., for her insights into the Social Security disability programs as well as her continued support and encouragement.

1. See Myers v. Califano, 611 F.2d 980 (4th Cir. 1980). This Note uses the Fourth Circuit as a vivid example, but this same issue has been litigated elsewhere. See, e.g., Luna v. Bowen, 834 F.2d 161, 164 (10th Cir. 1987) (class action requiring consideration of relevant evidence of pain once a loose nexus between impairment and pain is shown).


well as objective evidence in evaluating the severity of pain. The substantive question is whether, once objective medical evidence substantiates the existence of pain, other evidence must be considered in determining the severity of the pain.

The SSA, throughout *Hyatt*, followed a policy of nonacquiescence, refusing to be bound by federal district and appellate court decisions beyond the case of the particular litigant. Nonacquiescence is a controversial policy that allows federal agencies such as the SSA to act without check until Congress or the Supreme Court intervenes. As the *Hyatt* litigation demonstrates, without resolution of the procedural question of nonacquiescence, substantive questions cannot be resolved.

The initial district court decision in *Hyatt* found the Secretary’s position frivolous. The court forced the SSA to pay Hyatt’s attorneys’ fees, based on the SSA’s conscious and willful disregard of the law. Not only did the SSA act “in bad faith, vexatiously and wantonly,” but the SSA’s position was “not even marginally justifiable, and it fairly may be characterized as outrageous, at best, both before this case was filed and during the course of this suit.” Nonetheless, the SSA pursued the lawsuit for a decade, at a huge expense to taxpayers. To truly resolve the substantive issues, either the Supreme Court or Congress should ban intracircuit nonacquiescence by ruling that

5. *Id.* at 1000.
6. Other evidence includes statements from the claimant, reports from treating or examining physicians or psychologists, and statements or reports from other persons about the claimant’s medical condition and daily activities. 56 Fed. Reg. 57,933 (1991).
7. See *infra* notes 149-87 and accompanying text.
8. The SSA does “not believe that a Federal agency is constitutionally precluded from relitigating an issue within a circuit that has previously issued a ruling adverse to the Government’s position.” 55 Fed. Reg. 1012, 1014 (1990).
9. See *infra* notes 158-87 and accompanying text.
11. The SSA disregarded both the court’s order to evaluate subjective evidence of pain and the court’s order to change SSA policy within the circuit. *Id.* at 1000.
13. *Id.* at 1156.
federal agencies must follow the judicially-established law of the
circuit which would review the action as long as the venue is
known with substantial certainty

With the SSA’s promulgation of new pain regulations in 1991,
the Fourth Circuit won a tentative victory of the substantive is-
sue—subjective evidence of the severity of pain can be considered
in determining disability. However, the SSA prevailed on the
procedural issue—the substantive change occurred without the
SSA submitting to federal court authority. The casualties of
this battle are the soldier litigants, whose benefits have been
delayed or denied, and the citizen taxpayers, who subsidize the
battalions of lawyers employed by both sides.

This Note introduces the Hyatt litigation by summarizing the
Social Security disability application process, the class of claim-
ants, and the procedural history of the case. The second section
discusses the legislative history of the Social Security Act, focus-
ing on congressional, judicial, and administrative interpretations.
The third section demonstrates that the substantive requirement
of objective medical evidence of the severity of pain has limited
usefulness and certainly cannot justify nonacquiescence. The
fourth section argues that nonacquiescence is indefensible and
fundamentally unfair. This Note concludes that the Supreme
Court or Congress must resolve the procedural issue of nonacqul-
escence in order to determine properly substantive issues such as
the standard for evaluating pain.

15. 56 Fed. Reg. 57,928, 57,929 (1991); see infra text accompanying notes 121-24. Although this Note focuses on evaluating pain, similar evidentiary battles are fought regularly, for example, over the treating physician rule, see Stieberger v. Sullivan, 738 F. Supp. 716, 732-38 (S.D.N.Y. 1990), and over the standard for evaluating alcohol-
ism, see Wilkerson v. Sullivan, 904 F.2d 826, 844-47 (3d Cir. 1990). Consistently, the
SSA has refused to acquiesce in the federal court decisions regarding these issues. Id.
at 847.


17. See infra notes 181-84 and accompanying text.
HYATT v HECKLER

Although the Hyatt v. Heckler battle lasted a decade, the issue remained constant—whether, procedurally, the courts could force SSA compliance with the Fourth Circuit's substantive legal standard for evaluating pain in Social Security disability claims. The class action originated with three class members, although the actual size of the class grew steadily throughout the litigation. 

Application Process

The Hyatt class members fought for benefits within the SSA, struggling through the many steps and stages of review, before appealing to federal court. Appeals within the SSA begin with two paper hearings, proceed to a hearing before an administrative law judge (ALJ), and end with a paper review by a national appeals council. Once claimants exhaust their administrative remedies, they may appeal to the federal courts, beginning with the district court and ending, for those who make it that far, with the Supreme Court. 


22. Id. §§ 404.929, 416.1429.

23. Id. §§ 404.967, 416.1467.

24. Requiring exhaustion of administrative remedies before allowing claimants to appeal to federal court has been criticized when the SSA nonacquiesces because it "puts claimants to further expense and meaningless appeals by forcing them to exhaust their administrative remedies before they can receive benefits." Johnson v. United States R.R. Retirement Bd., 969 F.2d 1082, 1091 (D.C. Cir. 1992).

25. If a social security claimant has the determination and the financial and physical strength and lives long enough to make it through the administrative process, he can turn to the courts and ultimately expect them to apply the law as announced...
At each stage of administrative review, an examiner evaluates the claim using a five-step process. First, the claimant cannot engage in substantial gainful activity. Second, the claimant must demonstrate the existence and severity of a medically determinable impairment or impairments, preventing the claimant from working.

Third, if the claimant’s impairment “meets” or “equals” a Listing of Impairments, the claimant is per se disabled. Pain, by itself, is not currently a listing, although its absence is controversial. If the claimant demonstrates a nonexertional im-

[by the circuit]. If exhaustion overtakes him and he falls somewhere along the road leading to such ultimate relief, the nonacquiescence and the resulting termination stand. Particularly with respect to the types of individuals here concerned, whose resources are by definition, relatively limited, such a dual system of law is prejudicial and unfair.

Id. at 1092-93 (quoting Lopez v. Heckler, 572 F. Supp. 26, 28 (C.D. Cal. 1983)).

26. This step ensures that the person is totally and permanently disabled. 20 C.F.R. §§ 404.1510, 416.910, 404.1571-.1576, 416.971-.976.

27. The claimant must demonstrate the existence of a physical or psychological impairment. 20 C.F.R. §§ 404.1508-1509, 404.1520-.1521, 416.913, 416.920-.921. The claimant must further demonstrate, using medical signs and laboratory findings, a severe impairment by showing the intensity, persistence, and effect of the pain on the claimant’s ability to work. Id. §§ 404.1520-.1521, 416.920-.921.

28. When more than one impairment exists, severity is determined by the combined effects of the impairments. Id. § 404.1522(b). For example, each of the representative Hyatt class members suffered from a combination of impairments. Hyatt v. Heckler, 579 F. Supp. 985, 988-91 (D.N.C. 1984), vacated, 757 F.2d 1455 (4th Cir. 1985).

29. Working is defined as the ability to engage in basic work activities, including, but not limited to (1) physical functions such as walking, lifting, reaching, or carrying, (2) capacities for seeing, hearing, and speaking, (3) understanding, carrying out, and remembering simple instructions, (4) use of judgment, (5) responding appropriately to supervision, co-workers, and usual work situations, and, (6) dealing with changes in a routine work setting. 20 C.F.R. § 404.1521.

30. The Listings of Impairments (Listings) identify common impairments. See Listings of Impairments, 20 C.F.R. § 404, subpart P, app. 1. A claimant “meets” a listing by demonstrating the necessary symptoms, or “equals” a listing by demonstrating symptoms equivalent to the symptoms listed in the Listings. Id. §§ 404.1526-.1528, 416.920-.928.

31. The Committee on Pain, Disability and Chronic Illness Behavior Minority Report recommended that chronic pain syndrome be included as the following listing:

14.00 Impairment due Primarily to Pain:

A. Pain, as evidenced by:

1. Measurable impairment of function with physical tissue damage in body parts specifically related to the complaints of pain; OR

2. a. Pain complaints apparently disproportionate and/or inappropri-
pairment, she can skip this stage of review and move to the next step. Limitations from pain can be exertional, nonexertional, or both.

Fourth, the claimant must be unable to perform past relevant work. Finally, once the claimant establishes a medically-determinable, severe impairment that prevents her from performing

ate in location, intensity or duration to the physical damage and/or its normally expected healing time;
AND
b. Behavioral manifestations of pain which must include THREE of the following:
   (1) Preoccupation with pain as evidenced by persistent and repeated complaints, or willingness to undergo repeated painful diagnostic or therapeutic procedures in search of a cure; (2) Overutilization of health care system as evidenced by frequency of physician visits, or surgical procedures, or frequent changes of health care professionals; (3) Persistent excessive use of analgesic and/or sedative drugs; (4) Consistent audible and body language displays such as grimacing, bracing, guarding movements, or disturbances of station or gait as observed by physicians, interviewers, associates, family, and other observers; (5) Other accepted, objectifiable pain-related behaviors such as sleep disturbances, eating disorders, or sexual dysfunction.

B. Frequent and/or persistent episodes of ALL of the following due to pain:
1. Marked restriction of activities of daily living; AND
2. Marked difficulties in maintaining social functioning; AND
3. Failure to complete tasks in a timely manner; AND
4. Marked restriction in objectifiable functional capacity to perform basic work activities.


32. Non-exertional impairments refer to job limitations other than those related to physical strength, such as, but not limited to, nervousness, anxiety, depression, difficulty concentrating, difficulty in understanding detailed instructions, and problems with seeing, hearing, reaching, stooping, or crawling. 20 C.F.R. §§ 404.1569a, 416.969a.

33. See id. §§ 404.1569a(c)(2), 416.969a(c)(2).

34. Exertional impairments refer to strength demands of a job such as sitting, standing, walking, lifting, carrying, pushing, and pulling. Id. §§ 404.1569a(b), 416.969a(b).

35. Id. §§ 404.1569a(a), 416.969a(a).

36. This determination involves looking at the claimant’s residual functional capacity, id. §§ 404.1545-1546, 416.945-946, or her ability to work, taking into account vocational considerations of age, education, and work experience. See id. §§ 404.1560-1565, 416.960-965.
her past relevant work, the burden shifts to the Secretary to show that work which the claimant is capable of performing is available in significant amounts in the national economy. If a claimant, such as Hyatt, fails any of these five steps, her claim will be denied.

Class Members

Patrick Hyatt, the first class member, suffered from degenerative disc disease, post-lumbrosacral fusion problems, and depressive reaction. Back operations, including several lumbar laminectomies with removal of ruptured intervertebral discs, left him suffering continuous, disabling back and leg pain. In 1981, after receiving Social Security disability benefits for seven years, the North Carolina Department of Human Resources Disability Determination Services (DDS), which handles SSA disability claims in North Carolina through the application of SSA regulations, notified Hyatt that because his disability had ceased, his benefits were being terminated—although there was no evidence of medical improvement.

Hyatt applied to have his disability benefits reinstated, but his claim was denied upon reconsideration. Hyatt appealed to a Social Security ALJ who again denied benefits, although Hyatt’s regular treating physician, a neurosurgeon, testified that Hyatt was “totally and permanently disabled for any type of work and has been for quite some time.” The ALJ found that Hyatt did not suffer from a severe impairment. The SSA Appeals Council

37. See id. §§ 404.1566, 416.966. The Secretary determines the claimant’s ability to perform certain types of work by analyzing the claimant’s age, education, and previous work experience. See id. §§ 404.1569, 416.969; id. § 404, subpart P, app. 2.
39. Id. at 988-89.
40. Id. at 989. The SSA’s termination process was severely criticized and is no longer in effect. See infra text accompanying note 91.
41. The reconsideration decision informed Hyatt “that although he suffered from ‘discomfort,’ he did not suffer from objective physical impairments that would prevent him from doing work activity.” Hyatt, 579 F. Supp. at 989.
42. The treating physician’s reports document ten years of “continuing and severe pain.” Id.
43. The ALJ disregarded the treating physician’s diagnosis, stating that the neuro-
declined review of the ALJ decision.  

In the fall of 1983, Hyatt appealed to the federal district court in a class action on behalf of all similarly situated claimants. The trial court found that the loss of benefits caused Hyatt and his family "severe financial distress" including the loss of their home, automobile, and personal possessions, as well as an inability to afford adequate clothing and food.

Other members of the class suffered similar hardships. Herman Caudle, the second Hyatt class member, suffered from hypertension with Grade II retinopathy, exogenous obesity, passive-dependent personality, and depressive reaction with sleep disorder. The DDS terminated Caudle's Social Security benefits in 1983. He appealed, but his claim was denied upon reconsideration and at a hearing before an ALJ, who found that Caudle's subjective complaints did not demonstrate a severe impairment by objective clinical findings. Caudle appealed to the SSA Appeals Council, but before its decision could be rendered, he died, "apparently from the hypertension and other ailments which had disabled him for several years." Caudle's treating physician concluded that Caudle did not receive necessary medical treatment, including hospitalization, because his benefits, including medical insurance, were terminated.

Mary Lovingood, the third Hyatt class member, suffered from chest pain, high blood pressure, and back and leg pain. A fifty-seven-year-old woman unable to read or write, Lovingood re-
ceived disability benefits from 1974 until the DDS terminated her benefits in 1983.\textsuperscript{53} The DDS explained that "'[a]lthough you may have pain in your back and legs at times, you are able to stand, walk, and use your legs in a normal manner.'"\textsuperscript{54} No medical evidence supported this finding.\textsuperscript{55} Lovingood applied for reconsideration, but her claim was denied because she had not demonstrated a severe impairment and did not meet the listings.\textsuperscript{56} Her appeal for a hearing before an ALJ, filed on October 15, 1983, was still pending as of the February 14, 1984, district court decision.\textsuperscript{57} Loss of her benefits caused anxiety, depression, and an inability to afford food, rent, utilities, insurance, and medical bills.\textsuperscript{58}

The sympathetic nature of the Hyatt class representatives is not unusual.\textsuperscript{59} Loss of benefits caused other class members emotional distress, financial losses, and physical deterioration.\textsuperscript{60} Restoration of benefits would provide class members with minimal financial assistance as well as medical insurance.\textsuperscript{61}

Although Fourth Circuit law requires consideration of subjective allegations of pain in adjudicating Social Security claims, the ALJs did not follow circuit law in these cases. Instead, they followed the SSA policy of nonacquiescence which requires ALJs to

\begin{itemize}
  \item 53. Id.
  \item 54. Id.
  \item 55. Id.
  \item 56. Id.
  \item 57. Id.
  \item 58. Id.
  \item 60. Loss of benefits caused "deep emotional distress due to resultant financial pressures, which tends only to aggravate the severity of their physical or emotional disabilities," as well as the "inability of these persons to secure proper medical treatment for the very conditions from which they are disabled." \textit{Hyatt}, 579 F. Supp. at 991-92.
  \item 61. Benefits include monthly living allowances and access to medical care through Medicare or Medicaid. \textit{HOUSE COMM. ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS}, 102d Cong., 2d Sess. 48 (1994). The financial assistance is minimal. For example, in 1992, Supplemental Security Income (SSI) assured beneficiaries an annual income of $5064, significantly lower than the poverty income guideline of $6810. Peter V Lee et al., \textit{Engendering Social Security Disability Determinations: The Path of a Woman Claimant}, 68 TUL. L. REV. 1477, 1483 (1994).
\end{itemize}
disregard judicially-created legal standards. The struggle between the Fourth Circuit and the SSA dragged out the litigation while leaving the pain standard uncertain for the claimants, many of whom desperately needed their benefits.

**Procedural History**

The procedural history of this class action is "extensive and procedurally tortured." The class of claimants originally sued to enjoin the Secretary from disregarding the Fourth Circuit pain evaluation standard. The district court granted the injunction, certified and enlarged the class, awarded attorneys' fees and expenses under the Equal Access to Justice Act (EAJA), and ordered the Secretary to comply with Fourth Circuit law. At the insistence of the plaintiffs, the district court amended the EAJA fee order to grant the award based on the SSA's bad faith pursuit of the litigation.

The Secretary appealed the merits and fee award to the Fourth Circuit Court of Appeals, who vacated the fee award for reconsideration and remanded, directing the district court to dismiss class members who had not exhausted administrative remedies and allowing the Secretary to reconsider his policy of nonacquiescence under the new pain standard in the 1984 amendments to the Social Security Act.

On remand and reconsideration, the district court upheld the previous fee award and granted two new motions for attorneys' fees but reduced the total award by five percent in light of *Hyatt I*. Plaintiffs also petitioned for a writ of certiorari to the Su-

---

62. *See infra* text accompanying notes 149-87.
63. *Hyatt v. Shalala*, 6 F.3d 250, 252 (4th Cir. 1993); *see supra* note 2.
64. *Hyatt*, 579 F. Supp. at 988.
65. *Id.* at 1002-04. The Equal Access to Justice Act allows courts to award attorneys' fees to litigants when the government's position lacks substantial justification or is pursued in bad faith. 28 U.S.C. § 2412 (1988).
The Supreme Court vacated the decision in *Hyatt I* and remanded for the circuit court to consider the class enlargement issue. On remand from the Supreme Court, the Fourth Circuit affirmed the district court's original decision enlarging the class, affirmed the district court's award of attorneys' fees, reinstated the five percent deducted by the district court on remand, and ordered the district court to award additional fees for appellate services. The court also denied the Secretary's request for a rehearing en banc, and the Supreme Court denied the Secretary's petition for certiorari. On remand, the district court ordered the Secretary to reevaluate the claims of the enlarged class.

Finding that the Secretary continued to disregard Fourth Circuit law, the district court ordered the Secretary to abide by the district court's original pain standard. The court drafted a Social Security Ruling (SSR) on the standard for evaluating pain and ordered the SSR distributed to all SSA adjudicators in North Carolina. The district court also granted two more motions for attorneys' fees and costs.

The Secretary appealed to the Fourth Circuit, which affirmed both the fee award and substantive order. The Secretary 18-
sued a SSR on evaluating pain that differed from the SSR ordered by the district court.\textsuperscript{79} The district court ordered the Secretary to amend the SSR to comply with Fourth Circuit law and the court’s order.\textsuperscript{80} Meanwhile, the Secretary had appealed the fourth and fifth fee awards to the court of appeals, which affirmed the awards based on the Secretary’s bad faith pursuit of the litigation.\textsuperscript{81}

\textbf{Potential Resolution}

The Secretary clarified the pain standard in 1991, allowing consideration of subjective complaints of pain in determining an individual’s ability to work.\textsuperscript{82} Although not specifically formulated in reaction to the \textit{Hyatt} case, the new standard has the potential to resolve the substantive issue. However, resolution is uncertain because the regulation does not require consideration of subjective allegations of pain, it merely allows such consideration.\textsuperscript{83} Without resolution of the procedural issue of nonacquiescence, however, this substantive solution to \textit{Hyatt} is temporary at best. Before addressing the standard for evaluating pain or the policy of nonacquiescence, it is helpful to understand the history and purpose of the Social Security Act.

\textbf{LEGISLATIVE HISTORY AND PURPOSE}

\textit{Congressional Actions}

The Social Security Act contains essentially the same statutory definition of disability as the original federal program developed

\begin{itemize}
\item Id.
\item Hyatt, 6 F.3d at 255-56.
\item Compare 20 C.F.R. § 404.1529 (“In evaluating the intensity and persistence of your symptoms, we consider all of the available evidence, including medical history, the medical signs and laboratory findings, and statements from you, your treating or examining physician or psychologist, or other persons about how your symptoms affect you.”) with 56 Fed. Reg. at 57,928 (“[A]llegations about the intensity and persistence of pain or other symptoms must be considered in addition to the medical signs and laboratory findings in evaluating the impairment and the extent to which it may affect the individual’s capacity for work.”) (emphasis added).
\end{itemize}
in 1956. The definition of disability for adults is "the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." To meet this definition, a claimant must have a severe impairment rendering the claimant unable to perform his or her previous work or any other substantial gainful activity which exists in the national economy in significant numbers. The intention of Congress in drafting this statute was to prevent hardship by providing benefits to all those who are unable to work by reason of a disability.

Increasing numbers of recipients and increasing costs inspired the Social Security Disability Amendments of 1980, which attempted to protect taxpayers by terminating benefits of recipients deemed undeserving. The amendments, however, created confusion because they lacked a concrete and uniform evaluation process. Deserving claimants, such as Hyatt, Caudle, and Lovingood, lost their benefits. Public outcry prompted swift congressional reaction.

Responding to criticism, Congress enacted the Social Security Disability Benefits Reform Act of 1984. The amendment clarified standards of review, seeking uniformity. For the first time,
Congress specifically addressed the issue of pain. 3 Congress enacted section 3 of the act in order to provide a consistent and uniform framework for evaluating pain, 4 requiring consideration of objective medical evidence of the existence of painful impairments. 5 Although this policy required objective medical evidence of the existence of pain, it was silent as to the standard for evaluating the severity of pain and as to whether subjective allegations and other evidence would be considered. 6 Many federal courts continued to grant benefits based on a claimant's subjective allegations of pain, even in the absence of medical evidence supporting the claim. 7

Judicial Interpretations

During the first two decades following the enactment of the Social Security Disability Act in 1956, 8 courts liberally construed the definition of disability. Subjective complaints of pain were considered in addition to objectively determinable medical conditions, and, in some cases, subjective complaints alone were sufficient for courts to find the existence of a disability and grant benefits. 9 However, "[m]any decisions written on this aspect of

3039.

93. "Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability." 42 U.S.C. § 423(4)(A) (1986).


96. Id., see Bunnell v. Sullivan, 947 F.2d 341, 347 (9th Cir. 1991) ("If we interpreted the 1984 amendment and the regulations to require medical evidence to support the degree of pain, we 'would render meaningless' the requirement that an adjudicator must consider all relevant evidence.") (quoting Luna v. Bowen, 834 F.2d 161, 165 (9th Cir. 1987)).


99. 45 Fed. Reg. 55,576 (1980); see, e.g., Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987); Walden v. Schweiker, 672 F.2d 835 (11th Cir. 1982); Aubeuf v. Schweiker, 649 F.2d 107 (2d Cir. 1981); Smith v. Califano, 637 F.2d 968 (3d Cir. 1981); Myers v.
disability litigation, even in the same circuit, seem to reach different results despite extremely similar factual situations.\textsuperscript{100}

Even after the 1984 congressional amendments, courts tended to continue awarding disability benefits based on subjective allegations of the severity of pain even in the absence of objective medical evidence.\textsuperscript{101} By 1991, the Seventh Circuit was the only circuit denying claims merely for lack of objective medical evidence of the severity of pain.\textsuperscript{102}

After the 1991 clarification by Congress, the Seventh Circuit began considering subjective allegations of pain.\textsuperscript{103} The circuit applied the clarification retroactively because it did not change the law but merely clarified an unsettled or confusing area of the law.\textsuperscript{104} Thus, the 1991 standard would be applied to Hyatt, were he in the Seventh Circuit, even though he originally applied for benefits in 1981. He would then be eligible to receive back benefits.

In contrast, the Fourth Circuit interpreted the 1991 clarification as a new policy, which should be acknowledged as such by the SSA.\textsuperscript{105} The concern of Social Security claimants such as

Califano, 611 F.2d 980 (4th Cir. 1980); Northcutt v. Califano, 581 F.2d 164 (8th Cir. 1978); Beavers v. Secretary of Health, Educ. & Welfare, 577 F.2d 383 (6th Cir. 1978); Miranda v. Secretary of Health, Educ. & Welfare, 514 F.2d 996 (1st Cir. 1975); Baez v. Richardson, 500 F.2d 309 (3d Cir. 1974), cert. denied, 420 U.S. 931 (1975); Mark v. Celebrezze, 348 F.2d 289 (9th Cir. 1965); Ber v. Celebrezze, 332 F.2d 293 (2d Cir. 1964); Page v. Celebrezze, 311 F.2d 757 (5th Cir. 1963).

100. Goldhammer & Bloom, supra note 59, at 1129; see Rodgers, supra note 95, at 178 n.39.


102. See, for example, Moothart v. Bowen, 934 F.2d 114 (7th Cir. 1991), and Walker v. Bowen, 834 F.2d 635 (7th Cir. 1987), which were subsequently overruled by Pope v. Shalala, 998 F.2d 473 (7th Cir. 1993).

103. Pope, 998 F.2d at 485 (7th Cir. 1993) (overruling Moothart, 934 F.2d 114; Walker, 834 F.2d 635).

104. Theoretically, this standard should have been applied originally. In fact, the regulations specify that "these final rules make no substantive change in our policy." 56 Fed. Reg. 57,928 (1991).

Hyatt is that without such acknowledgement, past precedent will be controlling and ALJs will continue to make decisions using traditional standards, specifically by continuing to require objective clinical findings to support the severity of pain alleged. Nonetheless, through the clarification, the SSA is moving closer to the Fourth Circuit approach by allowing consideration of subjective allegations of pain.

**Administrative Actions**

SSR 82-58 was the SSA’s first policy statement on the evaluation of subjective complaints such as pain. The ruling required objective clinical findings, including clinical data and a well-documented medical history, to substantiate the intensity and persistence of pain and its effect on the claimant’s ability to work. Objective medical evidence was required to demonstrate both the existence and the severity of an impairment. Absent this objective medical evidence, statements by the individual or others were disregarded.

SSR 88-13 clarified the SSR 82-58 standard, partially in response to the *Hyatt* litigation. The ruling requires objective medical evidence of the existence of pain. Although this policy statement does not mandate objective medical findings supporting determinations of severity, the court in *Hyatt* found it “emphasizes the need to search for objective evidence of pain, its

106. Id.
108. Id.
109. Id.
112. However, where the degree of pain alleged is significantly greater than that which can be reasonably anticipated based on the objective physical findings, the adjudicator must carefully explore any additional limitation(s) imposed by the pain on the individual’s functional ability beyond those limitations indicated by the objective medical evidence before any conclusions about severity can be reached.

*Id.*
intensity or degree, as well as the reliability and superiority of that evidence." The district court in Hyatt interpreted this ruling as merely reiterating the SSR 82-58 policy of requiring objective medical evidence of the severity of pain.114

SSR 90-1p was issued to states in the Fourth Circuit in direct response to Hyatt.115 SSR 90-1p is identical to SSR 88-13 except for its statement of purpose and effective date. The new purpose states that the goal of the ruling is to conform with Fourth Circuit law.116

The Fourth Circuit, however, objected to this ruling because it (1) misstated the circuit's legal standard,117 (2) failed to acknowledge a change in policy,118 and (3) contained essentially the same pain evaluation standard rejected by the court in the original Hyatt decision.119 The substantive issue, the pain standard, is functionally identical to the one struck down by the first Hyatt decision in 1984.120

Regulations promulgated by the SSA in 1991 further clarify

---

113. Hyatt v. Heckler, 711 F. Supp. 837, 841 (W.D.N.C. 1989), aff'd in part, amended in part, vacated in part, 899 F.2d 329 (4th Cir. 1990). The stated purpose of the ruling was to clarify existing policy, and the effective date is listed as Aug. 20, 1980, the date that SSR 82-58 went into effect. SSR 88-13, supra note 111, at 90.
116. Id. The effective date is listed as July 20, 1988, the date that SSR 88-13 went into effect. Id.
117. The ruling states that the "Court of Appeals for the Fourth Circuit found that SSR 88-13 was consistent with Fourth Circuit law. However the court was concerned that some adjudicators could have read SSR 88-13 in a manner inconsistent with circuit precedent." Id. This statement is false. The Fourth Circuit clearly and explicitly found that SSR 88-13 was inconsistent with circuit precedent. See Hyatt v. Sullivan, 757 F. Supp. 685, 685 (W.D.N.C. 1991).
118. The ruling refers to itself as a clarification, never acknowledging that the SSA changed its policy regarding the evaluation of pain. SSR 90-1p, supra note 115. Without an acknowledged change in policy, old precedent may still be valid. Hyatt, 757 F. Supp. at 685.
119. The Fourth Circuit objected to the standard promulgated on the evaluation of the severity of pain because it is identical to the standard in SSR 88-13 which, as discussed above, appears to require objective medical evidence to support findings of severe pain. Hyatt, 757 F. Supp. at 686.
the pain standard. The current standard provides a two-step process. First, objective medical evidence must demonstrate the existence of an impairment which could reasonably be expected to cause pain. Second, subjective allegations regarding the intensity and persistence of pain or other symptoms are considered in addition to the objective medical evidence. Comments to the regulations make clear that the SSA will not disregard subjective evidence of pain solely because the available medical evidence does not support it.

The remaining question, then, is the substantive issue of why the absence of objective medical evidence of the severity of pain justifies the procedural nonacquiescence of the SSA throughout the Hyatt litigation. Answering this question first requires an understanding of the definition of pain and the definition of objective medical evidence.

**Objective Medical Evidence of Pain**

Objective medical evidence of pain is an oxymoron; pain is a subjective experience not measurable with scientific accuracy. The medical evidence that can be generated is, itself, subject to bias, both by legal interpreters and the medical community. Thus, the substantive issue in Hyatt, the standard for evaluating pain, may not be something the medical or legal communities can resolve with precision. Reviewing the nature of pain and the nature of objective medical evidence reveals that the value of objective medical evidence is limited and certainly does not justify nonacquiescence.

**Pain**

Both the medical and legal definitions of pain suggest that there is nothing unique about pain that justifies the SSA's position in Hyatt. Pain is a complex, subjective feeling experienced differently by everyone. Although the existence and severity

---

122. *Id.*
123. *Id.*
124. *Id.* at 57,932.
125. "Well-defined instruments for assessing pain and related variables are all based
of pain are incapable of exact measurement, manifestations of pain are measurable.\footnote{126} These imperfect measurements, however, do not provide unequivocal evidence of the severity of pain.\footnote{127} Medically, there is no accurate way to generate objective evidence of pain; to require such evidence will deprive deserving claimants such as Hyatt of life-sustaining benefits.\footnote{128}

The SSA has been criticized for making its own medical determinations.\footnote{129} Although medical staff participate in the application, reconsideration, and Appeal Council reviews, because they are all paper reviews, the medical personnel never actually see the claimant.\footnote{130} The ALJ, who has no medical training, is the only evaluator who actually sees the claimant.\footnote{131} Thus the SSA is not in a better position than the courts to judge the appropriate pain standard; both have the same qualifications—legal training—and they rely on the same medical reports.

The legal definition of pain should focus less on the severity of ultimately on self-report, observation, or both." Pain Committee Report, \textit{supra} note 31, at 120. Other subjective complaints common in Social Security disability applications include shortness of breath, dizziness, and anxiety. 20 C.F.R. \S\ 404.1529 (1994).\footnote{126} Visible manifestations of pain, or pain behaviors, include facial expressions, color of skin, clamminess, and dilated pupils. Pain Committee Report, \textit{supra} note 31, at 120. These manifestations, or signs, are observable facts that can be medically described and evaluated. \textit{Id}. The manifestations differ from symptoms, which are the claimant's subjective descriptions of pain. \textit{Id}.

127. "There is no direct, objective way to measure pain." \textit{Id}.

128. "We cannot conclude that Congress intended to require objective medical evidence to fully corroborate the severity of pain while aware of the inability of medical science to provide such evidence." Bunnell v. Sullivan, 947 F.2d 341, 347 (9th Cir. 1991).

129. Reed v. Secretary of Health \& Human Servs., 804 F. Supp. 914, 919 (E.D. Mich. 1992) ("An ALJ is not a physician. Courts should be particularly skeptical of ALJs using their own medical opinions to bridge or fill gaps in the record on the functional limitations that are to be interpreted from the medical evidence."); Thomas v. Sullivan, 801 F. Supp. 65, 71 (N.D. Ill. 1992) ("ALJs may not 'play doctor' by relying on their own lay opinions in a context where medical evidence must control.").

130. 20 C.F.R. \S\S\ 404.611, 416.325, 404.907, 416.1407, 404.967, 416.1467 (1994).

131. \textit{Id}. \S\S\ 404.929, 416.1429. "The administrative law judges themselves recently have alleged that they are being pressured to reduce the disability rolls, to maintain certain quotas and to follow the Social Security Administration’s rules rather than district court and court of appeals decisions." Gerald W. Heaney, \textit{Why the High Rate of Reversals in Social Security Disability Cases?}, 1 SOC. SEC. REP. SERV. 1133, 1139 (1983); see \textsc{Deborah A. Stone, The Disabled State} 133 (1984).
pain than on the effect of pain. Disability benefits were designed to support anyone unable to work, not just those who suffer a particular threshold of pain. As with the legal concepts of good will, intent, and obscenity, pain is an inherently subjective determination, but one that courts regularly make. In any case, nothing suggests that the SSA is more capable of making a pain evaluation than the courts.

The concern over allowing subjective evidence of pain derives from the fear that people will take advantage of the system—falsely crying "it hurts" to obtain undeserved benefits. Those who feign illness are malingerers. However, "[t]here is a clear consensus that malingering is not a significant problem, that it can be diagnosed by trained professionals, medical and other, and that increased attention to subjective evidence in the evaluation of the existence and nature of pain will not significantly alter this." Thus the importance of obtaining objective medical evidence of pain is questionable because malingerers easily are detectible; meanwhile, the value of objective medical evidence is limited.

Objective Medical Evidence

Objective medical evidence of disabilities theoretically reduces the potential for bias by creating uniform objective stan-

132. Pain Committee Report, supra note 31, at 120.
134. See NOSSCR, North Carolina Class Action Pain Policy Bogs Down, SOC. SEC. F., Oct., 1988, at 1, 13, (quoting Oct. 21, 1988, amended order in Hyatt case: "[P]ain is no more imponderable than 'good faith,' 'mens rea,' 'fear,' and other familiar 'legal' words which juries and judges daily evaluate ").
135. Pain Committee Report, supra note 31, at 120.
136. Studies show that benefits are granted disproportionately more often to white males than to women or racial minorities. Linda G. Mills, A Calculus for Bias: How Malingering Females and Dependent Housewives Fare in the Social Security Disability System, 16 HARV. WOMEN'S L.J. 211, 217 (1993); see Mary E. Becker, Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Sedman, Sunstein & Tushnet's Constitutional Law, 89 COLUM. L. REV 264, 267-70 (1989) (arguing that "sex discrimination pervades the structure of the social security system" and that "structural inequality remains in the system to the present day"); Lee et al., supra note 61, at 1522-23 (suggesting that racism as well as sexism affects a claimant's ability to obtain benefits).
The dramatic inconsistency in Social Security decisions, however, suggests that decisions are not made objectively. Rather, subtle factors influence outcomes. The credibility determinations made by ALJs and the medical determinations made by medical professionals are particularly susceptible to bias.

ALJs assess the credibility of claimants during the hearing stage of the appeal process. Pain, as a subjective symptom, presents the most difficult issue for judges to resolve, as judges must rely on "innumerable, indescribable and immeasurable facts and feelings." Decisions increasingly are overturned when the ALJ finds claimants' subjective complaints of pain not credible because subjective allegations of pain are not supported by objective medical evidence. Credibility determinations should not be influenced by a lack of objective medical evidence supporting the severity of a claimant's pain.

Disability determinations are based in large measure on the findings of physicians who generate, interpret, and explain the medical evidence upon which the system relies. However, the medical profession is not immune from bias. For example, gender bias is alleged because of under-researching illnesses which affect

---

138. A 1978 Social Security Administration survey of 504 claims found a one-in-eight chance that two examiners would reach the same decision. Mills, supra note 136, at 217.
139. Judge Wald, of the D.C. Circuit Court of Appeals, notes that "there is evidence in the legal literature to suggest that female applicants do not fare as well as others in convincing ALJ's (90% of whom are male) or medical professionals used by the agency that their 'subjective complaints' reflect actual debilitating illnesses." Williams v. Shalala, 997 F.2d 1494, 1504 n.3 (D.C. Cir. 1993) (Wald, J., dissenting).
140. Mills, supra note 136, at 223.
141. Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991) (holding that medical findings that support severity of pain are not required, and thus, adjudicator may not discredit claimant's allegations of severity of pain solely on ground that allegations are unsupported by objective medical evidence); Penn v. Sullivan, 896 F.2d 313, 316 (8th Cir. 1990) ("We have cautioned before that an ALJ may not circumvent the rule that objective evidence is not needed to support subjective complaints of pain under the guise of a credibility finding.").
142. See Hyatt v. Heckler, 711 F. Supp. 837, 842 (W.D.N.C. 1989) (holding that "lack of objective medical evidence of the degree or intensity of a claimant's pain is not a factor that can be considered in evaluating the credibility of the claimant's subjective evidence"), aff'd in part, amended in part, vacated in part, 899 F.2d 329 (4th Cir. 1990).
143. Mills, supra note 136, at 219; Lee et al., supra note 61, at 1488-94.
primarily women, failing to treat women, and not taking women’s complaints seriously. Without proper medical treatment, women are less likely than men to have corroborating evidence of disability. With a standard that requires such corroborating medical evidence, women are less likely to be able to prove their disability cases.

Because objective medical evidence of pain has limited usefulness, pain measurement is an inexact science. Even when evidence exists, credibility determinations and medical bias limit the accuracy of the evidence. Accordingly, the SSA’s continued determination to require objective evidence in the Fourth Circuit is difficult to justify.

NONACQUIESCENCE POLICY

According to the SSA nonacquiescence policy, federal district and appellate court decisions do not bind the SSA beyond the case of that particular litigant; only Supreme Court decisions create binding precedent. The SSA is not the only agency

144. The National Institute for Health regularly excludes women from biomedical research. Mills, supra note 136, at 221. In turn, the SSA excludes from its Listing of Impairments diseases that predominantly affect women. Id. at 222. “When female manifestations of diseases or entire maladies are excluded from the Listings, applicants with these problems are likely to be denied disability benefits, particularly at the initial stages of determination.” Id. at 223.

145. Studies of the medical profession conclude that treating physicians are less likely to perform diagnostic tests on women than on men. Id. at 220.

146. Women are more likely than men to be diagnosed with psychological illnesses. Id.

147. Lee et al., supra note 61, at 1520-22.


149. Carolyn B. Kuhl, The Social Security Administration’s Nonacquiescence Policy, 1984 DET. C.L. REV. 913 (statement of Deputy Assistant Attorney General, Civil Division, Department of Justice); see, e.g., Hillhouse v. Harris, 715 F.2d 428 (8th Cir. 1983).

[W]e note the Secretary continues to operate under the belief that she is not bound by district or circuit court decisions. In its findings the Appeals Council states, “the Secretary is bound only by the provisions of the Social Security Act, regulations and rulings, and by United States Supreme Court decisions. A district or circuit court decision is binding only in the specific case it decides.”

Id. at 430.
that nonacquiesces.\textsuperscript{150} However, the SSA engages in intracircuit nonacquiescence frequently\textsuperscript{151} and has borne much criticism of the practice.\textsuperscript{152}

The SSA publishes formal nonacquiescence rulings,\textsuperscript{153} engages in informal or secret nonacquiescence,\textsuperscript{154} and refuses to acknowledge a conflict.\textsuperscript{155} By refusing to acknowledge a conflict on the issue of evaluating pain, the SSA is, in functional effect, nonacquiescing.\textsuperscript{156} In the evaluation of subjective complaints of

\begin{itemize}
\item Other agencies that nonacquiesce include: the National Labor Relations Board, the Internal Revenue Service, the Occupational Safety and Health Administration, the United States Postal Service, the Federal Communications Commission, and the Railroad Retirement Board. Kubitschek, \textit{supra} note 45, at 399 n.1. "The term nonacquiescence apparently was coined by the Internal Revenue Service in the 1920\textquotesingle s." Deborah Maranville, \textit{Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism}, 39 \textit{VAND. L. REV.} 471, 474 n.5 (1986).
\item Intracircuit nonacquiescence—adjudication without regard to law within that circuit—is more controversial than intercircuit nonacquiescence—adjudicating without regard to the law of different circuits—or venue choice nonacquiescence—adjudicating using the law of the most favorable venue. Samuel Estreicher & Richard L. Revesz, \textit{Nonacquiescence by Federal Administrative Agencies}, 98 \textit{YALE L.J.} 679, 687 (1989).
\item Rebecca H. White, \textit{Time for a New Approach: Why the Judiciary Should Disregard the \textquotedblleft Law of the Circuit\textquotedblright\ When Confronting Nonacquiescence by the National Labor Relations Board}, 69 \textit{N.C. L. REV.} 639, 646 (1991) (arguing that the NLRB has been "tarred by the practices of other agencies that engage in nonacquiescence, most notably the Social Security Administration").
\item Kuhl, \textit{supra} note 149, at 913. In 1990, the SSA began a policy of publishing acquiescence rulings when circuit court decisions conflicted with SSA policy. 55 Fed. Reg. 1012 (1990). No acquiescence ruling has been issued regarding the standard for evaluating pain.
\item The Deputy Assistant Attorney General, Civil Division, Department of Justice explained the practice:
\begin{quote}
[T]he general guidance which the SSA has provided its Administrative Law Judges is that they should follow agency regulations and guidelines, without regard to the law in a particular circuit in which a claimant\textquoteleft s case will ultimately be appealed. In addition to this \textquoteleft informal nonacquiescence\textquoteright, the SSA has sometimes issued formal notices of \textquoteleft nonacquiescence\textquoteright in particularly significant adverse decisions.
\end{quote}
\item The official policy in the Federal Register explains:
\begin{quote}
In the Disability programs, for example, the courts have developed differing expressions of the rules for weighing various types of evidence or assessing subjective complaints or symptoms. Although some of these
pain, the difference between the Fourth Circuit approach and the SSA approach is subtle yet crucial. 157

Justification for nonacquiescence centers around three main issues: separation of powers, equal protection, and cost. It is helpful to put the debate in perspective by looking at the effect of SSA's nonacquiescence policy in the Hyatt litigation. As Hyatt demonstrates, the current responses to nonacquiescence are inadequate. To reach a satisfactory settlement of substantive issues, such as the pain standard, either the Supreme Court or Congress must ban intracircuit nonacquiescence by ruling that agencies must follow the judicially-established law of the circuit that would review the action if the venue is known with substantial certainty. To be effective, this rule must include safeguards against informal, or secret, nonacquiescence.

Separation of Powers

The SSA bases its nonacquiescence policy on a slippery slope argument. The fear is that one judge, looking at one Social Security application, perhaps with particularly moving facts, will make a wrong decision, a decision appropriate for those specific facts, or a decision that undermines competing policy considerations. 158 The SSA clearly cannot change its national policy

formulations differ in their wording, they are not inconsistent with our policy. In such situations, we do not believe that it is necessary to issue an Acquiescence Ruling. Rather, we may provide instructions to adjudicators to ensure that our policy is followed correctly or revise our regulations to provide more specific policy guidance on the matter at issue. 55 Fed. Reg. 1012 (1990) (emphasis added); see Estreicher & Revesz, supra note 151, at 699. Estreicher and Revesz note that:

It may well be that SSA is not issuing Acquiescence Rulings for cases in which there are, in fact, irreconcilable inconsistencies between the agency's position and circuit law, and therefore, decisionmakers at all levels are continuing to apply agency policy even though this policy has been rejected by the court of appeals which will review the agency's action.

Id. (citations omitted).

157. "The Secretary objects primarily to a fine point of semantics—a fine point that for many in the plaintiff class could signify the difference between obtaining and being denied benefits." Hyatt v. Heckler, 711 F. Supp. 837, 841 (W.D.N.C. 1989), aff'd in part, amended in part, vacated in part, 899 F.2d 329 (4th Cir. 1990).

every time a district court rules against it. However, as the *Hyatt* case illustrates, the SSA is nonacquiesing to decisions made not on particular facts but on the agency’s legal standard. On the other end of the separation of powers spectrum is unfettered SSA action. Such deference to the SSA would make the administration’s policy choices unreviewable. An appropriate middle ground between judicial micromanagement and unfettered discretion must be found.

Critics of nonacquiescence argue that judicial oversight is necessary, while administrative lawyers suggest that notice and comment, congressional action, and Supreme Court review are sufficient safeguards. *Hyatt*, however, illustrates that these safeguards are inadequate. Notice and comment does not require agreement or action, and the SSA is free to disregard the comments. Congressional micromanagement and review of every substantive decision is as unworkable as it is undesirable. Although the Supreme Court substantively upheld the Fourth Circuit decision in *Hyatt*, the SSA continued the litigation, maintaining its original position. This administrative solution is

---

159. Efrat M. Cogan, Note, *Executive Nonacquiescence: Problems of Statutory Interpretation and Separation of Powers*, 60 S. CAL. L. REV. 1143, 1155 (1987) ("When an agency is given wide discretion to interpret a statute containing inadequate guidelines, the agency falls back on a politically and bureaucratically slanted viewpoint. This is because agency decisionmaking is not steeped in a tradition of impartiality.").

160. "This raises the problem of agency accountability: how can we structure judicial review of agency action so that agencies have enough discretion to implement complex regulatory programs, and yet assure that they do not become a tyrannical ‘Fourth Branch’ of government, immune from popular control?" Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 994 (1992).

161. See supra note 156.

162. "The national legislature expresses itself too often in commands that are unclear, imprecise, or gap-ridden." Ruth Bader Ginsburg & Peter W. Huber, *The Inter circuit Committee*, 100 HARV. L. REV. 1417, 1420 (1987). In the area of pain, Congress attempted to clarify its intention in 1984, but the SSA and Fourth Circuit interpreted the clarification differently. "[I]t is simply unrealistic, given the vastness of the federal bureaucracy, to expect that the President or his principal lieutenants can effectively monitor the policymaking activities of all federal agencies. Nor does it seem wise or appropriate to leave control of agency behavior to congressional oversight hearings." Merrill, *supra* note 160, at 996-97 (citation omitted).

163. *Hyatt* v. *Bowen*, 476 U.S. 1167 (1985). "While the Supreme Court remains, along with Congress, the arbiter of last resort on statutory issues, its decisional capacity is small compared to the large number of statutory matters addressed by the courts of appeals." Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence*
not enough to ensure that claimants are granted the benefits they deserve.

Acknowledging the necessity of judicial oversight, a ban on intracircuit nonacquiescence is an imperative first step. In Hyatt, banning intracircuit nonacquiescence would have solved the problem of intercircuit nonacquiescence and venue choice nonacquiescence, as federal circuit courts were generally in agreement as to the substantive standard.\textsuperscript{164} The next question is whether forcing the SSA to apply different standards by circuit violates the Fourteenth Amendment.

\textit{Equal Protection}

The Fourteenth Amendment guarantees citizens equal protection of the laws.\textsuperscript{165} However, when federal court interpretation of statutes differs from the SSA's interpretation, inequality results. The two competing choices are horizontal inequality\textsuperscript{166} and vertical inequality\textsuperscript{167} Generally, Americans are more tolerant of discrimination based on geography than discrimination based on wealth or fortitude.\textsuperscript{168}

The SSA objected to the Fourth Circuit's standard for evaluating pain because it creates vertical inequality\textsuperscript{169} However, a

\textsuperscript{164} See supra note 99.

\textsuperscript{165} Uniformity is generally preferred because it promotes the equitable principle of similar treatment, limits forum-shopping, and conveys equality of legal standards. See Note, Collateral Estoppel and Nonacquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equality, 99 HARV. L. REV. 847, 857-59 (1986).

\textsuperscript{166} Horizontal uniformity treats claimants alike throughout the nation but differently depending on level of review sought. Estreicher & Revesz, supra note 151, at 695.

\textsuperscript{167} Vertical uniformity treats claimants alike at every stage of review but differently based on geography. Id.

\textsuperscript{168} The Secretary emphasizes the disuniformity of a rule which would require the SSA to apply one legal standard in Connecticut but another in California. We have just as much, if not more, difficulty with a policy whereby one claimant is governed by one legal standard but his neighbor, lacking in either financial resources, litigational persistence, or physical or mental stamina, is governed by another.

\textit{Id.} at 702 (citing Stieberger v. Heckler, 615 F. Supp. 1315, 1363 (S.D.N.Y. 1985), \textit{prelim inj. vacated sub nom.} Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986)).

survey of the circuits indicates that had the SSA acquiesced to federal court decisions, there would have been greater uniformity because the Fourth Circuit approach was the dominant approach. Even supporters of nonacquiescence acknowledge that greater judicial review may result in uniformity at the federal level.

Vertical inequality is criticized on a more fundamental level because claimants are often unaware that their rights are being violated. Even those who are aware of their rights are in a poor position to litigate in relation to the federal government. Informal, secret nonacquiescence is particularly destructive, as recognized by courts and commentators. Claimants aware

170. See supra note 99.
171. A policy of automatic acquiescence would always result in greater uniformity within a circuit. On the plausible assumption that agencies will not want to maintain two sets of policies in different circuits over long periods of time, a policy of automatic acquiescence would probably result in greater uniformity between circuits as well.


172. The SSA's clandestine policies have been criticized by the Supreme Court: [C]lass members were entitled to believe that their Government's determination of ineligibility was the considered judgment of an agency faithfully executing the laws of the United States. Though they knew of the denial or loss of benefits, they did not and could not know that those adverse decisions had been made on the basis of a systematic procedural irregularity that rendered them subject to court challenge. Where the Government's secretive conduct prevents plaintiffs from knowing of a violation of rights [and] since in this case the full extent of the Government's clandestine policy was uncovered only in the course of this litigation, all class members may pursue this action Bowen v. City of New York, 476 U.S. 467, 480-81 (1986) (quoting City of New York v. Heckler, 742 F.2d 729, 738 (1986)).

173. Vertical inequality "is especially troublesome because the negative impact of the differential policy will probably fall disproportionately on those parties least able to bear it." Estreicher & Revesz, supra note 151, at 750. "The government is thus able to wage a war of attrition—winning some cases, losing others, and counting on the heavy costs of litigation to discourage other individuals from bringing cases." Note, supra note 165, at 855-56.

174. Bowen, 476 U.S. at 475 ("Moreover, "[t]he means of enforcement of the policy, through internal memoranda, returns, and reviews, has meant that the affected SSD or SSI applicant as well as counsel, social workers and advisers for a long time were unaware of its existence.") (quoting City of New York v. Heckler, 578 F. Supp. 1109, 1115 (E.D.N.Y. 1984)); Dixon v. Sullivan, 792 F. Supp. 942, 951 (S.D.N.Y. 1992) (finding that SSA adjudicators systematically misapplied administrative directives im-
of this disparity understandably resent the government, and both the administrative and judicial branches lose credibility.

Although legal standards must be permitted to develop, continually retrying the same issue is unnecessary and unfair. Nonacquiescence, by definition, is pursued in bad faith. For example, in *Hyatt*, the SSA was not making a good faith effort to change past precedent. Rather, it was stubbornly refusing to abide by the court's decision. Courts need the power to protect individual litigants by creating binding precedent for administrative agencies.

**Cost**

The SSA's financial interest in denying the *Hyatt* class members' claims is considerable. The cost of efficiently administering an immense national benefits system further limits the flexibility with which the SSA can approach rulemaking.

---

175. Even supporters of nonacquiescence require candor. "Where the agency disguises its disagreement by means of a disingenuous distinction of adverse circuit precedent, it effectively precludes that court from reexamining its ruling, and, therefore, from participating in the intercircuit dialogue." Estreicher & Revesz, supra note 151, at 755 (footnote omitted).

176. For example, in 26 cases the Second Circuit has reiterated its ruling that opinions of treating physicians deserve special consideration in determining disability. Kubitschek, supra note 45, at 424.

177. None of these three categories is implicated when an agency attempts in good faith, and with reasonable basis in fact and law, to distinguish an adverse decision of a court of appeals. Nonacquiescence arises only where the agency, unable to invoke such a distinction, nevertheless declines to be bound by the adverse circuit rule. Estreicher & Revesz, supra note 151, at 687.

178. "It is a peculiar view of fairness, however, that treats all claimants equally poorly by depriving them of benefits they will eventually receive if they have the fortitude to run an administrative gauntlet." Johnson v. United States R.R. Retirement Bd., 969 F.2d 1082, 1092 (D.C. Cir. 1992).


180. Economies of scale indicate that the cost of administering the program uniformly will be lower than the cost of administering twelve slightly different programs. Besides lost efficiency, the cost of differential administration includes differential training, instruction manuals, and the "less tangible impact on esprit de corps and
The exact cost benefit to SSA of applying their pain regulations uniformly throughout the nation is impossible to calculate. However, administrative convenience is offset by the cost of defending their standard in repetitious federal litigation, especially when, as in Hyatt, the SSA pays attorneys’ fees and costs for both sides. The benefit is offset further by the cost to the claimants and the judiciary.

The Hyatt class representatives accurately portray the extreme suffering caused by delay or denial of Social Security benefits. Death, foregone medical treatment, and loss of home and personal possessions cause irreparable harm to claimants. As Herman Caudle’s death illustrates vividly, eventual payment of back benefits fails to compensate the claimant. This cost outweighs administrative inconvenience.

Nonacquiescence directly increases the workload of the judiciary. Judges, having to rule on the same issue time after time understandably lose patience. Scarce judicial resources

ideological commitment in compelling agency personnel—trained to believe they are responsible for a unitary, internally coherent set of policies.” Estreicher & Revesz, supra note 151, at 749 n.324. Advocates of the cost considerations fail to mention the most significant additional cost to abandoning nonacquiescence—the SSA would be obligated to pay benefits to thousands of additional claimants each year. See supra note 179.

181. Bowen v. City of New York, 476 U.S. 467, 483-84 (1986) (“Many persons have been hospitalized due to the trauma of having disability benefits cut off.”) (quoting City of New York v. Heckler, 578 F. Supp. 1109, 1118 (1984)); Kubitschek, supra note 45, at 410 (“Newspaper articles have chronicled the deaths of people from illnesses that SSA said they did not have, from the exertion of returning to work after losing benefits, or from suicide.”); Diehl, supra note 148 (arguing that loss of social security benefits is a significant factor in homelessness).

182. See Schweiker v. Chilicky, 487 U.S. 412, 428 (1988) (“[S]uffering months of delay in receiving the income on which one has depended for the very necessities of life cannot be fully remedied by the ‘belated restoration of back benefits.’”); Kubitschek, supra note 45, at 411 (“It can only be concluded that the consequences of nonacquiescence, in terms of human suffering, are enormous.”).

183. “Nonacquiescence is likely to increase the volume of cases reaching the federal courts. The contribution that nonacquiescence makes to burgeoning federal caseloads is a cost that must be considered.” Estreicher & Revesz, supra note 151, at 750. “The potential for overwhelming the courts with challenges to agency determinations is staggering.” Diller & Morawetz, supra note 163, at 808.

increase competition and cost for everyone. 185

Intracircuit nonacquiescence is indefensible and unfair. Given the necessity of judicial check on agency power within a circuit, the legitimacy of any nonacquiescence is questionable. 186 Nonacquiescence as practiced by the SSA throughout Hyatt is not justified by the need for administrative independence or concerns for equality and cost. As practitioners have noted, to allow agencies to disregard established law is to allow anarchy. 187

Summary of Responses

Four options exist for banning administrative agency, intracircuit nonacquiescence. First, the Supreme Court could rule that agencies must follow the judicially-established law of the circuit that would review the action, thereby banning intracircuit nonacquiescence. Second, Congress could specifically address nonacquiescence, either in the Administrative Procedure Act or in the Social Security Disability enabling statute. Third, courts of appeals and district courts could sanction agencies by use of injunctions, contempt proceedings, or Rule 11 sanctions. Finally, agencies could show restraint and acquiesce to a circuit’s law.

The Supreme Court has not addressed the constitutionality of intracircuit nonacquiescence, 188 although commentators have urged the Court to do so. 189 Without resolution of the procedural

---

185. The costs of an overcrowded federal court system will probably fall most heavily on poor litigants who may be denied their day in court because of their inability to compete effectively for increasingly scarce judicial resources. To the extent that our procedural system is concerned with the promotion of equal justice and, in particular, with the full and fair opportunity to be heard, this increase in the cost of effective access is especially intolerable. Note, supra note 165, at 857-58 (citations omitted).

186. “The Supreme Court, the courts of appeals, and the district courts all exercise the same constitutional power—the judicial power—and all conduct their affairs in fundamentally similar ways.” Merrill, supra note 171, at 59.

187. Attorneys have characterized SSA’s nonacquiescence policy as “anarchy.” Estreicher & Revesz, supra note 151, at 771.

188. Congress suggested that “the legal and Constitutional issues raised by nonacquiescence can only be settled by the Supreme Court.” H.R. REP. NO. 618, supra note 87, at 38, reprint ed in 1984 U.S.C.C.A.N. at 3096.

189. For a thorough summary of the constitutional arguments, see Dan T. Coenen, The Constitutional Case Against Intracircuit Nonacquiescence, 75 MINN. L. REV. 1399
al issue by the Supreme Court, advocates will be forced to either continually litigate the same issue or to bring every substantive issue to the attention of Congress. The latter tactic succeeded only once.

Congress expressed reservations about nonacquiescence after the uproar in the early 1980s over the SSA’s termination of benefits of thousands of disabled Americans. Congress stepped in to resolve the substantive issue by requiring medical improvement before terminating benefits. Although solving the substantive issue of the termination of benefits, Congress failed to address the procedural issues of nonacquiescence, thereby leaving open the potential for substantive issues such as the standard for evaluating pain to create similar problems.

A 1984 House bill would have forced the SSA to follow court of appeals opinions, thereby barring nonacquiescence. A Senate bill would have required procedural safeguards, including publishing a statement in the Federal Register before the SSA could nonacquiesce. The conference agreement omitted any formal policy, but voiced concerns about the SSA’s nonacquiescence policy.

(1991). For a summary of court decisions on nonacquiescence see Johnson v. United States R.R. Retirement Bd., 969 F.2d 1082, 1091 (D.C. Cir. 1992); Coenen, supra, at 1377; Kubitschek, supra note 45. For a summary of the academic debate, see Coenen, supra; Kubitschek, supra note 45.

190. "[A]s the legislative history of the 1984 Reform Act makes abundantly clear, Congress confronted a paralyzing breakdown in a vital social program, which it sought to rescue from near-total anarchy." Schweiker v. Chilicky, 487 U.S. 412, 438 (1988).


192. S. 476, 98th Cong., 2d Sess. § 7(a)(1) (1984) (“[T]he Secretary shall publish in the Federal Register, a statement of the Secretary’s decision to acquiesce or not acquiesce in such court decision, and the specific facts and reasons in support of the Secretary’s decision.”). Furthermore, a letter from seven Senators urged the conference committee to ban nonacquiescence, saying “this is one of the most crucial issues to be resolved in the debate over disability reform.” 130 CONG. REC. 25, 804 (1984) (letter from Sens. Bingaman, Byrd, Riegle, Sasser, Mitchell, Kennedy, and Metzenbaum to members of the conference committee dated June 25, 1984).


The conference do not intend that the agreement to drop both provisions be interpreted as approval of “non-acquiescence” by a federal agency to an interpretation of a U.S. Circuit Court of Appeals as a general practice.
The *Hyatt* litigation demonstrates that resolution by the Supreme Court or Congress is required to resolve substantive issues without repeated litigation of the same issue, which has caused needless congestion in the federal courts.

Nonacquiescence has been criticized sharply by judges.\(^{194}\) Besides chastising the Secretary for his position, some judges have threatened to sanction the SSA by bringing contempt proceedings.\(^{195}\) In at least two cases, ALJs sued the SSA, challenging policies including nonacquiescence which, they argued, impaired their right to decisional independence.\(^{196}\) Both suits failed because the courts held that the ALJs lacked standing.\(^{197}\)

The Supreme Court, in a six to three decision, held that improper termination of benefits in the early 1980s did not give rise to claims for money damages against the government officials

---

On the contrary, the conferees note that questions have been raised about the constitutional basis of non-acquiescence and many of the conferees have strong concerns about some of the ways in which this policy has been applied, even if constitutional. Thus, the conferees urge that a policy of non-acquiescence be followed only in situations where the Administration has initiated or has the reasonable expectation and intention of initiating the steps necessary to receive a review of the issue in the Supreme Court.

*Id.*

194. Judge Weis, Circuit Judge, United States Court of Appeals for the Third Circuit, summed up judicial sentiment well, saying:

The non-acquiescence policy of an agency results in intolerable and excusable expense to litigants, as well as in the unnecessary and wasteful expenditure of scarce judicial resources. But perhaps most objectionable is the disrespect for the administration of justice generated by the spectacle of a federal agency which refuses to acknowledge that a court's ruling applies to it as well as to other litigants. That an agency, which acts as judge, jury, and prosecutor in proceedings before it, should assert the right to disregard the law expounded by an Article III court is repugnant to our system of government. [W]hen an agency follows that practice, it operates outside the law.


195. "I have no wish to invite a confrontation with the Secretary. Yet, if the Secretary persists in pursuing her nonacquiescence in this circuit's decisions, I will seek to bring contempt proceedings against the Secretary both in her official and individual capacities." Hillhouse v. Harris, 715 F.2d 428, 430 (8th Cir. 1983) (McMillian, J., concurring).


197. *Nash*, 869 F.2d at 678; *D'Amico*, 698 F.2d at 906.
who administered the program, although a number of circuits awarded EAJA fees to litigants.

Judges also have considered imposing injunctions to force the SSA to follow circuit precedent. The Second Circuit declined to impose an injunction requiring the SSA to follow the treating physician rule, hesitating to impose contempt for non-compliance with the injunction. Although the SSA argued that they were acquiescing to the treating physician rule, the court seemed skeptical, especially as counsel for the Secretary acknowledged during the argument that the Secretary had failed to inform adjudicators of the content of the rule. Instead of imposing the injunction, the court ordered the SSA to formulate and issue instructions to all adjudicators explaining the treating physician rule.

---

198. Schweiker v. Chilicky, 487 U.S. 412 (1988). The dissent argued: Acknowledging that the trauma respondents and others like them suffered as a result of the allegedly unconstitutional acts of state and federal officials must surely have gone beyond what anyone of normal sensibilities would wish to see imposed on innocent disabled citizens, the Court does not for a moment suggest that the retroactive award of benefits to which respondents were always entitled remotely approximates full compensation for such trauma.

Because I believe legislators of "normal sensibilities" would not wish to leave such traumatic injuries unrecompensed, I find it inconceivable that Congress meant by mere silence to bar all redress for such injuries. Id. at 431-32 (Brennan, J., dissenting) (citation omitted).


200. See Maranville, supra note 150, at 536-37 (discussing the difficulty of sanctioning administrative agencies for intracircuit nonacquiescence).

201. The treating physician rule provides that a treating physician's opinion on the subject of medical disability is binding unless contradicted by substantial evidence and is entitled to extra weight because the treating physician is most familiar with the claimant's medical condition. Stieberger v. Bowen, 801 F.2d 29, 31 (2nd Cir. 1986) (citing Schisler v. Heckler, 787 F.2d 76 (2nd Cir. 1986)).

202. Id. at 35.

203. Id. at 37.

204. Id. at 38 ("This will minimize intrusion into the administrative process and at the same time accord the Secretary the opportunity to demonstrate his good-faith compliance with the law of this Circuit and his readiness to take appropriate action to see that law implemented throughout the administrative process he supervises."). Actually, the court merely required that the SSA promulgate the instructions ordered in Schusler, 787 F.2d at 84. The court in Schusler, said:

Certainly the detail and complexity of SSA publications belies any claim that an issue as controversial and as litigation breeding as the treating
In the Tenth Circuit, the court imposed Rule 11 sanctions against the Secretary for ignoring the treating physician rule and for denying benefits.\textsuperscript{205} The court stated:

When evidence supporting the Secretary is so slight and the contrary evidence so overwhelming, a reasonable attorney for the Secretary could not have concluded that the minimal supporting evidence constituted the "substantial evidence" needed to affirm the administrative decision. Thus, the Secretary objectively could not have believed the position taken here to be "well-grounded in fact," as Rule 11 requires.\textsuperscript{206}

These sanctions inspired some Justice Department attorneys to refuse to defend the Secretary's position.\textsuperscript{207}

The SSA program of terminating benefits in the early 1980s

\begin{flushright}
\textsuperscript{205} Adamson v. Bowen, 855 F.2d 668 (10th Cir. 1988).
\textsuperscript{206} Id. at 674.
\textsuperscript{207} 130 CONG. REC. 25,986 (1984) (statement of Sen. Moynihan). In addition, Rudolph Giuliani, U.S. Attorney for the Southern District of New York, explained:

One aspect of our decision-making process should be very clear. The decisions of the Second Circuit are the law which we adhere to and apply in our analysis and review. There has been much public discussion this year about HHS's "nonacquiescence policy." It is our view that this policy, whatever it does permit, surely does not allow the United States Attorney's Office, HHS or any other federal agency to refuse to follow clear rules of law decided by the United States Court of Appeals. Properly applied, as it has been for years by the Internal Revenue Service, it permits a federal agency to decline to follow nationwide the ruling in one particular Circuit. However, there has never been any support to my knowledge for the notion that federal agencies within a particular Circuit could disagree with and refuse to follow clear rulings of that Circuit. We have not defended cases in the past by disregarding the law of this Circuit and will not do so in the future.

\end{flushright}
highlighted nonacquiescence.\textsuperscript{208} At least one commentator speculated that "the current uproar over nonacquiescence is in part a product of unique historical circumstances,"\textsuperscript{209} pointing out that the IRS and the NLRB had nonacquiesced for decades.\textsuperscript{210} However, as \textit{Hyatt} illustrates, nonacquiescence is not an isolated event and is not limited to any one substantive issue. Instead, it appears that since the 1984 congressional expression of disapproval of nonacquiescence, the SSA has continued the practice without interruption. Thus, merely encouraging the SSA to limit its own use of nonacquiescence has fallen on deaf ears.

Deferring to Agency restraint and judicial imposition (or threats) of sanctions have proved ineffectual in ending intracircuit nonacquiescence. Thus, the Supreme Court or Congress must impose a ban on intracircuit nonacquiescence. A rule that agencies must follow the judicially-established law of the circuit that would review the action will solve the procedural issue of nonacquiescence and allow the resolution of substantive issues such as the standard for evaluating pain in social security disability claims.

\textbf{CONCLUSION}

As the war between administrative agencies and the federal judiciary rages forward, the battle in \textit{Hyatt} seems a draw. The SSA standard for evaluating pain complies with the Fourth Circuit standard, so that the substantive issue is precariously at peace. However, the SSA never submitted to federal jurisdiction and continues its policy of nonacquiescence, leaving the procedural issue unresolved. As with many legal wars, the litigant soldiers and the citizen taxpayers lose.

It is imperative that the procedural issue—the validity of intracircuit nonacquiescence—be resolved. Without resolution by

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{208} White, \textit{supra} note 152, at 641.
\item \textsuperscript{209} Maranville, \textit{supra} note 150, at 530 n.198.
\item \textsuperscript{210} \textit{Id}. at 530.
\end{itemize}
\end{footnotesize}
Congress or the Supreme Court, substantive issues such as the standard for evaluating pain will remain uncertain. The claimants, whom these laws were created to protect, will suffer unnecessarily and unjustifiably

Enn Margaret Masson