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Social Security Reform: Legal Analysis of Social Security Benefit Entitlement Issues

Emily M. Lanza
Legislative Attorney

Thomas J. Nicola
Legislative Attorney

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Summary

Calculations indicating that the Social Security program will not be financially sustainable in the long run under the present statutory scheme have fueled the current debate regarding Social Security reform. This report addresses selected legal issues that may be raised regarding entitlement to Social Security benefits as Congress considers possible changes to the Social Security program in view of projected long-range shortfalls in the Social Security Trust Funds.

Social Security is a statutory entitlement program. Beneficiaries have a legal entitlement to receive Social Security benefits as set forth under the Social Security Act. The fact that Social Security benefits are financed by taxes on an employee's wages, however, does not limit Congress's power to fix the levels of benefits under the Social Security Act or the conditions upon which they may be paid. Congress's authority to modify provisions of the Social Security program was affirmed in the 1960 Supreme Court decision in *Flemming v. Nestor*, wherein the Court held that an individual does not have an accrued "property right" in his or her Social Security benefits. The Court has made clear in subsequent court decisions that the payment of Social Security taxes conveys no contractual rights to Social Security benefits.

Congress has the power legislatively to promise to pay individuals a certain level of Social Security benefits, and to provide legal evidence of Congress's "guarantee" of the obligation of the federal government to provide for the payment of such benefits in the future. While Congress may decide to take whatever measures necessary to fulfill such an obligation, courts would be unlikely to find that Congress's unilateral promise constitutes a contract which could not be modified in the future. In addition, a congressional promise not to reduce a specific level of Social Security benefits payable to certain eligible individuals would likely not overcome the constitutional principle, subject to due process considerations, that one Congress may not bind a subsequent Congress to legislative action or inaction.

The calculations concerning the possible future insolvency of the Social Security Trust Funds raise a question relating to whether that result would affect the legal right of beneficiaries to receive full Social Security benefits. While an entitlement by definition legally obligates the United States to make payments to any person who meets the eligibility requirements established in the statute that creates the entitlement, a provision of the Antideficiency Act prevents an agency from paying more in benefits than the amount in the source of funds available to pay the benefits. The Social Security Act states that Social Security benefits shall be paid only from the Social Security Trust Funds, and the act appropriates all payroll taxes to pay benefits. Although the legal right of beneficiaries to receive full benefits would not be extinguished by an insufficient amount of funds in the Social Security Trust Funds, it appears that beneficiaries would have to wait until the Trust Funds receive an amount sufficient to pay full benefits in the case of a shortfall unless Congress amends applicable laws.

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Calculations indicating that the current Social Security program will not be financially sustainable in the long run under the present statutory scheme have fueled the current debate regarding Social Security reform.[1] This report addresses selected legal issues that may be raised regarding entitlement to Social Security benefits as Congress considers possible changes to the Social Security program in view of projected long-range shortfalls in the Social Security Trust Funds.[2]

Social Security benefits are administered pursuant to Title II of the Social Security Act, known as the Old Age, Survivors and Disability Insurance (OASDI) program.[3] Title II is part of a larger social insurance program in which Congress uses its power to tax and spend for the general welfare to promote the social goals of aiding the aged, survivors of workers, disabled persons, and persons of limited means. Beneficiaries under Title II have a legal entitlement to receive Social Security benefits as set forth by the Social Security Act and as administered by the Social Security Administration (SSA), an independent agency in the executive branch.

An individual's right to Social Security benefits is in a sense "earned," since there is a general relationship between OASDI benefits and wages earned and the tax paid thereon. However, benefits are not directly measured by the amount of payments made through the years into the system. Thus, the fact that Social Security benefits are financed by taxes on an employee's wages does not provide a limit on Congress's power to fix the levels of benefits under the Social Security Act, or the conditions upon which they may be paid.[4]

Congressional Authority To Modify Entitlements

The Supreme Court's landmark decision in *Flemming v. Nestor*[5] provided an analysis of the relationship between a beneficiary's legal entitlement to receive Social Security benefits and the power of Congress to change that entitlement by amending the underlying statute. The Court in that case upheld a provision, Section 202(a) of the Social Security Act,[6] that terminated Social Security benefits to a person deported for membership in the Communist Party. Nestor at one time had been a member of the Communist Party. Later he began receiving Social Security benefits which were cut off when he was deported to his native Bulgaria. Nestor argued that he had a "property right" in his Social Security benefits and that, by cutting off those benefits, the government had made an unlawful "taking" of his benefits that contravened the Fifth Amendment.[7]

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[1] *See* CRS Report RL33514, *Social Security: What Would Happen If the Trust Funds Ran Out?*, by Noah P. Meyerson.

[2] *See* CRS Report RL33544, *Social Security Reform: Current Issues and Legislation*, by Dawn Nuschler, for more information.

[3] Sections 201 *et seq. o*f the Social Security Act, 42 U.S.C. §§401 *et seq.*

[4] Richardson v. Belcher, 404 U.S. 78 (1971). In addition, Section 1104, 42 U.S.C. §1304, explicitly states that, "The right to alter, amend, or repeal any provision of this Act is hereby reserved to the Congress."

[5] 363 U.S. 603 (1960).

[6] 42 U.S.C. §402(a).

[7] The Fifth Amendment, in relevant part, states that, "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." Language preceding the semicolon is referred to as the Due Process Clause; language following the semicolon is referred to as the Takings Clause.

The Court, however, disagreed. Justice Harlan wrote:[8]

> To engraft upon the Social Security system a concept of "accrued property rights" would deprive it of the flexibility and boldness in adjustment to everchanging conditions which it demands.... It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and has since retained, a clause expressly reserving to it "[t]he right to alter, amend, or repeal any provision" of the act. §1104, 49 Stat. 648, 42 U.S.C. §1304. That provision makes express what is implicit in the institutional needs of the program.... We must conclude that a person covered by the act has not such a right in benefit payments as would make every defeasance of "accrued" interests violative of the Due Process Clause of the Fifth Amendment.

The inherent ability of Congress to modify the provisions of Title II of the Social Security Act, even to the extent of affecting the benefits an individual is currently receiving, is thus well established.[9] The same principle that current benefit amounts may be modified has been applied to other, similar programs involving pensions, such as Federal Civil Service Retirement. One significant example is the Supreme Court affirmance, without opinion, of a decision of a three-judge district court in *National Association of Retired Federal Employees v. Horner.*[10] The district court in that case upheld a provision of the Balanced Budget and Emergency Deficit Control Act,[11] which suspended paying a scheduled cost-of-living adjustment (COLA) for federal retirees, saying that it did not violate the Takings Clause of the Fifth Amendment, which states that private property shall not be taken for public use without just compensation.

The dispute centered on whether the provision of the act, signed by the President on December 12, 1985, which suspended any automatic spending increase that first would be paid during the period beginning with the date of enactment, constituted a taking of private property of the retirees. The section providing for the COLA, 5 U.S.C. §8340(b), provided that it would take effect on December 1 of each year. While Section 8340(b) made the COLA effective on December 1, it was not scheduled to be paid until January 2, 1986. The retirees argued that the COLA for the 12 months after December 1, 1985, became their private property on December 1, 1985, and, consequently, that the suspension signed on December 12, 1985, took their property which had accrued between December 1 and 12 without compensation in violation of the Takings Clause.

The court rejected their claim, asserting that, "It is utterly clear, however, that the statute [Section 8340(b)] cannot be read as plaintiffs wish."[12] It cited an earlier case, *Stouper v. Jones*,[13] as

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[8] 363 U.S. at 610-611.

[9] *See* Richardson v. Belcher*,* 404 U.S. 78 (1971), where the Supreme Court upheld an amendment that reduced monthly Social Security disability benefits from $330 to $225 to reflect receipt of state workmen's compensation benefits. *See also* Milner v. Apfel*,* 148 F. 3d 812 (7th Cir. 1998), upholding suspension of Social Security benefits payable to certain persons in public institutions found not guilty by reason of insanity of offenses punishable by imprisonment for more than one year.

[10] 633 F. Supp. 511 (D.D.C. 1986), *aff'd.* 479 U.S. 878 (1986).

[11] P.L. 99-177, known as the Gramm-Rudmann-Hollings Act.

[12] Horner at 514. *See also* Zucker v. United States*,* 578 F. Supp. 1239 (S.D.N.Y.1984), *appeal dismissed on proced. grounds*, 751 F.2d 373 (2d Cir. 1984), *aff'd.* 758 F. 2d 637 (Fed. Cir. 1985), *cert. denied,* 474 U.S. 842 (1985). The court there upheld a modification of a Civil Service retirement COLA saying that, although retirees may have a protected property interest when they are entitled to immediate payment under pre-existing law, their entitlement to any post-retirement increases in an annuity stems from the underlying statute which may be adjusted at any time. *Id.* at 758 F.2d 638.

dispositive. The appellant in the *Stouper* case retired in 1953 and began receiving disability annuity payments pursuant to the law then in force. In 1956, Congress amended the law to discontinue benefits to recipients whose earning capacity was restored to a level fairly comparable to the current rate of pay for the position held immediately prior to retirement. After the Retirement Division of the Civil Service Commission determined that the appellant had been restored to that earning capacity, her disability annuity was terminated.

The appellant asserted that the 1956 amendment could not constitutionally be applied in her case because at the time she retired she acquired a vested right to an annuity that could not be taken from her by subsequent legislation.[14] The U.S. Court of Appeals for the District of Columbia in *Stouper* said that "[I]t is well settled that a pension granted by the government confers no right which cannot be revised, modified, or recalled by subsequent legislation. *United States ex rel. Burnett v. Teller*, 107 U.S. 64 (1882)."[15]

The court in the *Stouper* case added that benefits under the Civil Service Retirement Act are similar to those under the Social Security Act; they are not based on an employee's contributions to the retirement fund, but instead on the employee's earnings record and years of service. It was noted that the Retirement Act pays higher benefits when a deceased employee is survived by a widow or widower and children, than when he or she is survived only by a widow or widower even though the employee's contribution to the Civil Service Retirement and Disability Fund had been the same in either case. "We conclude that an employee has no right under the Retirement Act based on contractual annuity principles, and hold that the appellant had no vested right to the disability annuity which was terminated."[16]

The U.S. Supreme Court also has made clear that the payment of Social Security taxes conveys no contractual rights to Social Security benefits. In 1937 the High Court upheld the constitutionality of the Social Security Act in *Helvering v. Davis*.[17] In doing so, the Court held that the Social Security program is not an insurance program. The court noted, "The proceeds of both employee and employer taxes are to be paid into the treasury like any other internal revenue generally, and are not earmarked in any way."[18] The Court, in essence, deferred to Congress on the question of which welfare schemes fall within the ambit of the Constitution's General Welfare Clause. Later, in *Flemming*, the Court rejected any comparison of Social Security with insurance or an annuity:[19]

> It is apparent that the noncontractual interest of an employee covered by the act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.

(...continued)

[13] 284 F.2d 240 (D.C. Cir. 1960).

[14] Stouper at 242.

[15] Id.

[16] *Id.* at 243.

[17] 301 U.S. 619 (1937).

[18] *Id.* at 635.

[19] 363 U.S. at 610.

The absence of contractual rights extends to government pensions in general. In *Dodge v. Board Education*,[20] a retired school teacher challenged the constitutionality of a state statute that reduced her retirement annuity from $1,500 to $500. The statute in effect when she retired said that, "Each person so retired ... shall be paid the sum of fifteen hundred ($1500) annually and for life from the date of such retirement." The Supreme Court did not interpret this mandatory language ("shall," "annually and for life") to supersede a subsequent state statute that reduced the amount of the annual annuity, saying that, "The presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy until the legislature shall ordain otherwise."[21]

The presumption that pension statutes do not preclude Congress from decreasing or eliminating benefits at a future time rests on the recognition that legislative bodies require flexibility in public welfare matters.[22] "[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15-16 (1976). While acknowledging this latitude, the Supreme Court in *Flemming* nevertheless indicated that congressional action may be subject to some constitutional restraint: Quoting from an earlier case, the Court in *Flemming* said that

> "Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II [of the Social Security Act], it is not for us to say. The answer for such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom." *Helvering v. Davis,* [301 U.S. 619] *supra,* at 644 [1937]. Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.[23]

Thus, only if Congress were to act in a totally irrational and arbitrary manner would due process considerations invalidate a subsequent amendment.[24] The Court reiterated this view in *United*

[20] 302 U.S. 74 (1937).

[21] *Id.* at 79.

[22] In Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986), the argument was advanced that agreements between Congress and states regarding Social Security coverage of state and local employees conferred contractual rights upon the state and local governments. When Congress revoked the state's right to withdraw from its coverage agreement, California claimed a "taking of private property" under the Fifth Amendment. The Court disagreed. "The provision simply cannot be viewed as conferring any sort of 'vested right' in the face of precedent concerning the effect of Congress' reserved power on agreements entered into under a statute containing the language of reservation [to alter, amend or repeal the underlying statutory provisions]... Rather, the provision simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare." *Id.* at 55.

[23] 363 U.S. at 611. Once a beneficiary receives an actual benefit payment, however, the government cannot take it back. "Pension payments actually made to retirees become their property and are protected against takings, even if and where the payments are unquestionably a gift." National Education Association-Rhode Island v. Retirement Board of Rhode Island Employees' Retirement System, 172 F. 3d 22, 30 (1st Cir. 1999).

[24] "[T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." PBGC v. R. A. Gray & Co., 467 U.S. 717, 729 (1984). *See* Steinberg v. United States*,* 163 F. Supp. 590 (Ct. Cl. 1958), for a case which held that a provision of the Federal Civil Service Retirement Act terminating annuity payments to any person who invoked his Fifth Amendment privilege against self-incrimination was arbitrary and discriminatory in violation of the Due Process Clause and also a bill of attainder, i.e., a legislative punishment, in violation of Art. I, §6, cl. 3 of the Constitution.

States Railroad Retirement Board v. Fritz,[25] which upheld congressional amendments to railroad retirement benefits that reduced benefits for some beneficiaries and eliminated benefits for others. These changes were challenged under the Due Process Clause on the ground that they irrationally distinguished between classes of annuitants. The Court held that because Congress could have eliminated benefits for all classes of employees, it was not constitutionally impermissible to draw lines between groups of employees for the purpose of phasing out the benefits. The Court said, "Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end."[26] The Court added that drawing lines between categories of beneficiaries "is a matter for legislative, rather than judicial, consideration."[27]

Congressional Guarantee of Social Security Benefit Payments

The Social Security program has faced funding shortfalls in the past, and Congress has enacted a variety of measures to deal with financial imbalances.[28] Given the clear judicial precedents to the effect that Social Security benefits under Title II are not property rights and cannot be categorized as contractual in nature, the question may be raised whether Congress legislatively could create a new, legally enforceable right to the receipt of a certain level of benefits by individuals eligible for Social Security benefits.[29] A legislative guarantee of a certain level of Social Security benefit payments with a corresponding obligation upon future Congresses for payment of such benefits would require either a finding of a contractual relationship between the federal government and individual certificate holders, the modification or repeal of which would be constitutionally impermissible, or a right stemming from Congress's implied promise not to enact legislation in the future that would bind a future Congress in the sense that the legislative enactment guaranteeing Social Security benefit payments could not be repealed or altered.

Congressional Power To Modify Its Own Contracts

A legally enforceable guarantee of a certain level of Social Security benefits set forth in legislation may be argued to create a contract between the federal government and individual Social Security recipients. It may be argued further that such a contract constitutionally protects an individual's right to continue to receive full benefits, and prohibits the federal government

[25] 449 U.S. 166 (1980).

[26] *Id.* at 179-180.

[27] Id.

[28] *See* CRS Report RL33544, *Social Security Reform: Current Issues and Legislation*, by Dawn Nuschler.

[29] Examples of proposals to address these imbalances may be found in two 109th Congress bills: S. 1750, which would have created a legally enforceable guarantee for current retirees and workers born before 1950 to receive the level of their monthly Social Security benefits as determined on the date of entitlement plus applicable cost-of-living increases for the rest of their lives, and a related bill, H.R. 1164, which would have provided the same guarantee for all individuals eligible for Social Security benefits under Title II. Current retirees, and workers upon being approved to receive benefits, would, under these proposals, have received certificates guaranteeing the level of benefits that were in effect at the time of retirement. Certificates would have constituted budget authority in advance of appropriations acts, and would have represented the obligation of the federal government to provide for the payment of Social Security benefits to individuals to whom certificates were issued in amounts in accordance with the guarantee as set forth in the certificates. A similar bill, H.R. 1275, has been introduced in the 113th Congress.

from abrogating such a contract by reducing or otherwise modifying the full payment of benefits an individual is entitled to receive.

Under Article I, §10, cl.1, known as the Contracts Clause, the states are forbidden to pass laws impairing the obligation of contracts. Even as applied to the states, since *Home Building & Loan Assn. v. Blaisdell*,[30] this restriction is not very severe, save for state efforts to void their own contracts.[31] As for the federal government, there is no such clause, but this right is subsumed under the Fifth Amendment's Due Process Clause. And that right, as in the case of any economic right under the due process clause, is subject to standards that are not considered rigorous.[32] Even insofar as the government's own contracts are concerned, the usual rule is that they too may be subject to alteration, especially when the right to alter laws is reserved. Thus, Congress, in *Legal Tender Cases* (*Knox v. Lee*)[33] was held to have the authority to make Treasury notes legal tender in payment of debts previously contracted for payment in gold, and in *Norman v. Baltimore & Ohio R. R.,*[34] Congress was held to have the authority to invalidate provisions in private contracts calling for payment in gold coin. When the federal government seeks to abrogate its own contracts in order to serve its own financial purposes or to increase the public fisc, however, a more searching scrutiny, and usually invalidation, follows.[35]

The relevant distinction here is that the federal government acting as sovereign, and the federal government acting as contractor, constitute two separate roles. When the government acts as sovereign, in its legislative or executive capacity, rendering impossible the performance of its obligations, it cannot be held responsible in its capacity as a contractor.[36] In *Horowitz v. United States*, the federal government contracted with the claimant for silk products and for the shipment of silk within a certain time, but the United States Railroad Administration subsequently placed an embargo on shipments of silk by freight. By the time the silk reached Horowitz, the price had fallen, rendering the deal unprofitable. The Court barred any damages award against the United States for the delay. "It has long been held by the Court of Claims that the United States as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as sovereign."[37]

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[30] 290 U.S. 398 (1934).

[31] United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

[32] PBGC v. R.A. Gray & Co., 467 U.S. 717, 732-33 (1984).

[33] 79 U.S. (12 Wall.) 457 (1871).

[34] 294 U.S. 240 (1871).

[35] *See* Perry v. United States, 294 U.S. 330 (1935) (law purporting to abrogate a clause in government bonds calling for payment in gold coin was invalid) and Lynch v. United States, 292 U.S. 571 (1931) (statute abrogating contracts of war risk insurance held invalid as applied to outstanding policies). In the Lynch case, the Court found that war risk term insurance policies for which the insured, former military personnel, had paid monthly premiums, were contracts that were property and created vested rights. The Court contrasted these insurance policies with pensions, noting that "Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress." Lynch, at 577.

[36] *See* Horowitz v. United States, 267 U.S. 458 (1925), and Deming v. United States, 1 Ct. Cl. 190 (1865). *See also* United States v. Winstar Corp., 518 U.S. 839, 894-910 (1996) (plurality opinion of Justice Souter); and Winstar at 932-935 (Chief Justice Rehnquist dissenting).

[37] Horowitz at 461. *See also* Flemming v. Rhodes, 331 U.S. 100, 107 (1947), where the Court upheld a district court injunction against the eviction of tenants, stating that, "So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. *Immunity from federal regulation is not gained through forehanded contracts.* Were it otherwise the paramount powers of Congress could be nullified by 'prophetic discernment.'" (Emphasis supplied; footnote citation omitted).

If a recipient's right under law to a certain level of Social Security benefits is to be viewed as a contract between the recipient and the federal government, this contract arguably is not in the class of contracts that the federal government enters into in its proprietary capacity as a contractor. Title II recipients, whether receiving old age, survivors, or disability insurance benefits, have not, by virtue of the receipt of this promise, paid any money, provided any service or thing of value in exchange for the government's guarantee not to reduce the recipient's payments in the future. The government's commitment is unilateral, and it arguably remains subject to Section 1104 of the Social Security Act,[38] which reserves the right of Congress to revise or modify the Social Security Act by subsequent legislation. While congressional modification of the express terms of the promise in law not to reduce benefits is limited by due process considerations, such constitutional concerns impose a bar only upon the enactment of an arbitrary modification that has no rational justification.

Congressional Power To Promise Future Deference

It may be argued that Congress, by giving eligible individuals a legislative guarantee of a certain level of Social Security benefits, can legally bind itself in the future to pay the full amount of such Social Security benefits plus COLAs to certificate holders. There is no doubt that Congress may validly enact such a provision and promise to pay full Social Security benefits in the future. Congress may also provide for a funding mechanism and judicial recourse for non-compliance. Thereafter, Congress may decide to take whatever measures necessary to fulfill such a promise. The undeniably strong moral duty to do so, however, would not trump the underlying constitutional principle that a legislative enactment such as this cannot bind a future Congress in the sense that the legislative enactment cannot be repealed or altered.[39] "The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted." *Fletcher v. Peck*.[40]

To be sure, some congressional enactments, by their nature, are irrevocable. If Congress should admit a territory as a state, it could not subsequently repeal the law and make that state something else. Moreover, as discussed above, constitutional protection is accorded contracts when the federal government incurs financial obligations while acting in its proprietary capacity. In such cases federal efforts to avoid liabilities arising out of its own contracts have been found to deny due process.[41] Where the federal government acts as lawmaker exercising its sovereign powers to provide for the general welfare, however, it cannot give up such powers by a binding contract. "Contractual arrangements, including those to which a sovereign itself is party, remain subject to subsequent legislation by the sovereign." *Bowen v. Public Agencies Opposed to Social Security Entrapment*.[42]

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[38] 42 U.S.C. §1304.

[39] For an extensive treatment of this principle, see Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity,* 1987 Am. B. Found. Res. J. 379.

[40] 10 U.S. (6 Cr.) 87, 135 (1810) (Chief Justice Marshall).

[41] Perry v. United States, Lynch v. United States, Sinking Fund Cases*, discussed supra.*

[42] 477 U.S. 41, 52 (1986) (internal quotation marks omitted).

Illustrating this principle is the Supreme Court's holding in *Stone v. Mississippi*.[43] The Mississippi legislature entered into a contract with a company to operate a lottery within the state, but the following year the state's voters adopted a constitutional amendment abolishing lotteries. Quoting a state case, the Court observed:

> Irrevocable grants of property and franchise may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police. [44]

These and other cases that might be cited[45] demonstrate the limited role contract principles play in matters affecting the governmental functions, rather than the proprietary functions, of the states and the federal government. In essence, absent the kind of promise involving the essence of contracts covered by the Contracts Clause, a guarantee of the "full faith and credit" of the United States in backing bonds, for example, a statute which in fact promises future congressional action or inaction would likely not be held to constitute a contract enforceable by the courts. Legislative language that obligates the federal government to provide a guaranteed level of Social Security benefits to recipients purports to preclude the possibility that a recipient's benefits may be reduced in the future by either a repeal of the underlying law or by an amendment of the statutory provisions in Title II of the Social Security Act. The weight of judicial authority, however, suggests that Congress may not so bind itself, and that neither concepts of property rights nor contract would disable a future Congress from changing the benefits provided under Title II of the Social Security Act.

Payment of Social Security Benefits From the Trust Fund in Case of Exhaustion

The projected exhaustion of the Social Security Trust Funds, formally known as the Federal Old Age and Survivors Insurance (OASI) Trust Fund and the Disability Insurance (DI) Trust Fund, raises a question regarding whether that possibility would affect the legal right of beneficiaries to receive full Social Security benefits.[46] On July 28, 2014, the Trustees of the Social Security Trust Funds stated that

> The Trustees project that annual OASDI cost will exceed non-interest income throughout the long-range period (2014 through 2088) under the intermediate assumptions. The dollar level of the theoretical combined trust fund reserves declines beginning in 2020 until reserves are depleted in 2033. Considered separately, the DI Trust Fund reserves become depleted in 2016 and the OASI Trust Fund reserves become depleted in 2034. The projected reserve

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[43] 101 U.S. 814 (1880).

[44] *Id.* at 817-818.

[45] *See* United States v. Will*,* 449 U.S. 200 (1980), involving congressional suspensions of automatic cost-of-living adjustments to the salaries of high-level federal officials. The Supreme Court held that Congress could legislate to revoke the salary increases even though they previously had been authorized in legislation. Whenever Congress decides to suspend or repeal a statute in effect, "[t]here can be no doubt that ... it could accomplish its purpose by an amendment to an appropriation bill, or otherwise."

[46] *See* CRS Report RL33514, *Social Security: What Would Happen If the Trust Funds Ran Out?*.

> depletion years were 2033 for OASDI, 2016 for DI, and 2035 for OASI in last year's report.[47]
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> Under current law, the projected cost of Social Security increases faster than projected income through about 2035 primarily because of the aging of the baby-boom generation and relatively low fertility since the baby-boom period. Cost will continue to grow faster than income, but to a lesser degree, after 2035 due to increasing life expectancy. Based on the Trustees' best estimate, cost exceeds non-interest income for 2014, as it has since 2010, and remains higher than non-interest income throughout the remainder of the 75-year projection period. Social Security's theoretical combined trust funds increase with the help of interest income through 2019 and allow full payment of scheduled benefits on a timely basis until the trust fund asset reserves become depleted in 2033. At that time, projected continuing income to the combined trust funds equals about 77 percent of program cost. By 2088, continuing income equals about 72 percent of program cost.
>
> The Trustees project that the OASI Trust Fund and the DI Trust Fund will have sufficient reserves to pay full benefits on time until 2034 and 2016, respectively.[48]

The OASDI Trust Funds are accounts maintained on the books of the U.S. Treasury. The system operates on a "pay-as-you-go" basis; current workers and their employers pay taxes on wages under the Federal Insurance Contributions Act (FICA) and the self-employed pay taxes on self-employment income under the Self-Employed Contributions Act (SECA). Taxes paid now finance benefits for today's beneficiaries. A full 100% of these payroll taxes is appropriated to the Social Security Trust Funds.[49] Interest on and proceeds from the sale or redemption of government securities held in these funds are credited to and form a part of them.[50] Moreover, amounts credited to the trust funds are the only source of funds to pay benefits.[51]

Social Security is a statutory entitlement program.[52] Entitlement authority has been defined as "authority to make payments (including loans and grants) for which budget authority is not provided in advance by appropriation acts to any person or government if, under the provisions of the law containing such authority, the government is obligated to make the payments to persons or governments who meet the requirements established by law."[53] Budget authority is the authority provided by law to enter into obligations that will result in immediate or future outlays involving federal government funds.[54]

According to a publication of the Government Accountability Office, formerly the General Accounting Office:

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[47] The Board of Trustees, Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, *The 2014 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds* at 3 (2014), available at http://www.socialsecurity.gov/OACT/TR/2014/tr2014.pdf.

[48] *Id.* at 23. *See* a press release describing this report at http://socialsecurity.gov/new/press/release.html#!post//7-2014-2.

[49] Section 201(a) and (d) of the Social Security Act, 42 U.S.C. §401(a) and (b).

[50] Section 201(f) of the Social Security Act, 42 U.S.C. §401(f).

[51] Section 201(h) of the Social Security Act, 42 U.S.C. §401(h).

[52] *See* Sections 202 and 223 of the Social Security Act, 42 U.S.C. §§ 402 and 423, which state that every individual who meets the eligibility requirements set forth therein "shall be entitled" to an old age benefit and disability benefit, respectively.

[53] 2 U.S.C. §§622(9) and 651(c)(2)(C).

[54] 2 U.S.C. §622(2).

> Congress occasionally legislates in such a manner as to restrict its own subsequent funding options.... An example ... is entitlement legislation not contingent upon the availability of appropriations. A well known example here is Social Security benefits. Where legislation creates, or authorizes the administrative creation of, binding legal obligations without regard to the availability of appropriations, a funding shortfall may delay actual payment but does not authorize the administering agency to alter or reduce the "entitlement."[55]...
>
> Even under an entitlement program, an agency could presumably meet a funding shortfall by such measures as making prorated payments, but such actions would be only temporary pending receipt of sufficient funds to honor the underlying obligation. The recipient would remain legally entitled to the balance.[56]

An entitlement by definition legally obligates the United States to make payments to any person who meets the eligibility requirements established in the statute that creates the entitlement. A provision of the Antideficiency Act, 31 U.S.C. §1341, however, prevents an agency from paying more in benefits than the amount available in the source of funds available to pay the benefits, in this case the Old Age and Survivors Insurance Trust Fund and the Disability Insurance Trust Fund.

Section 1341, in relevant part, provides that

> An officer or employee of the United States government or of the District of Columbia government may not—
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
>
> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law; ....

The Antideficiency Act prohibits making expenditures either in excess of an amount available in a fund or before an appropriation is made. It would appear to bar paying more money in benefits than the amount of the balance in the Social Security Trust Funds primarily because, as noted earlier, disability and old-age and survivor benefit payments shall be made "only" from the Disability Insurance Trust Fund and the Old Age and Survivors Insurance Trust Fund, respectively.[57]

Violations of the Antideficiency Act are punishable by administrative and criminal penalties. An officer or employee who violates the act's prohibitions is subject to appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office.[58] An officer or employee who knowingly and willfully violates the act can be fined not more than $5,000, imprisoned for not more than two years, or both.[59]

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[55] General Accounting Office (later renamed Government Accoutability Office), Office of the General Counsel, I *Principles of Appropriations Law* 3-49 (3d ed. 2004), available at http://www.gao.gov.special.pubs/d04261sp.pdf.

[56] *Id.* at 3-49, n. 40.

[57] Section 201(h) of the Social Security Act, 42 U.S.C. §401(h).

[58] 31 U.S.C. §1349.

[59] 31 U.S.C. §1350.

If the Social Security Trust Funds should become insolvent (i.e., unable to pay scheduled benefits in full on a timely basis), it appears that beneficiaries who should file suit to be paid the difference between the amount that receipts allow paying and the full benefit amount to which they are entitled would not be likely to succeed in getting the difference. The Supreme Court in *Reeside* v. *Walker*[60] held that no officer of the government is authorized to pay any debt due from the United States, whether reduced to a court judgment or not, unless an appropriation has been made for that purpose. To support its holding, the Court cited Article I, Section 9, clause 7 of the Constitution, which states that, "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." The Court reaffirmed this principle in *Office of Personnel Management* v. *Richmond*.[61] Consequently, unless Congress amends applicable laws, it appears that beneficiaries would have to wait until the Trust Funds receive an amount sufficient to pay full benefits to receive the difference between the amount that can be paid from the Trust Funds and the full benefit amount.

Conclusion

The Old Age Survivors Insurance and Disability Insurance program is a statutory entitlement program. Beneficiaries have a legal right to receive benefits if they meet the Social Security Act's eligibility requirements. Congress, however, has reserved the "right to alter, amend, or repeal any provision of this (Social Security) Act"[62] and the U.S. Supreme Court has affirmed Congress's power to modify provisions of the Social Security Act in *Flemming v. Nestor*[63] and subsequent court decisions. The Social Security program does not accord individuals either vested property rights or contractual rights with regard to future benefits. Congress may modify provisions of the Social Security Act as it exercises its constitutional power to provide for the general welfare.

Congress has the power legislatively to guarantee to pay eligible individuals a certain level of Social Security benefits and not to reduce that level of benefits to such individuals in the future. While Congress may decide to take whatever measures necessary to fulfill such an obligation, courts would be unlikely to find that Congress's unilateral promise constitutes a contract that could not be modified or abrogated in the future. Congressional modification of the terms of a guarantee to pay a certain level of benefits would be limited by due process considerations, but these constitutional concerns would impose a bar only upon the enactment of an arbitrary modification that has no rational justification. In addition, a congressional promise not to reduce a specific level of Social Security benefits payable to certain eligible individuals would not overcome the constitutional principle that a legislative enactment in a social welfare program cannot bind a future Congress in the sense that the legislative enactment cannot be repealed or altered.

The Trustees of the Old Age and Survivors Insurance Trust Fund and the Disability Insurance Trust Fund have projected that these funds on a combined basis will be exhausted (i.e., unable to pay full benefits on time) in 2033. The Social Security Administration would not be able to pay beneficiaries full benefits at that time because the Social Security Act states that benefits shall be

[60] 53 U.S. (11 How.) 272, 275 (1850).

[61] 496 U.S. 414, 424-426 (1990).

[62] Section 1104 of the Social Security Act, 42 U.S.C. §1304.

[63] 363 U.S. 603 (1960).

paid only from the Social Security Trust Funds. Social Security Administration officials are bound by the Antideficiency Act, which prohibits paying amounts that exceed the amount available in the source of funds available to pay them. Although the legal right of beneficiaries to receive full benefits would not be extinguished by the insufficient amount of funds in the Social Security Trust Funds, a court suit to obtain the difference between the amount in them available to pay partial benefits and the full benefit amount would not be likely to succeed in getting the difference. The Supreme Court has held that no officer of the government may pay a debt whether reduced to a court judgment or not unless Congress has appropriated funds to pay it. Consequently, unless Congress amends applicable laws, it appears that beneficiaries would have to wait until the trust funds receive an amount sufficient to pay full benefits to receive the difference between the amount that can be paid from them and the full benefit amount.

Author Contact Information

Emily M. Lanza
Legislative Attorney
elanza@crs.loc.gov, 7-6508

Thomas J. Nicola
Legislative Attorney
tnicola@crs.loc.gov, 7-5004

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