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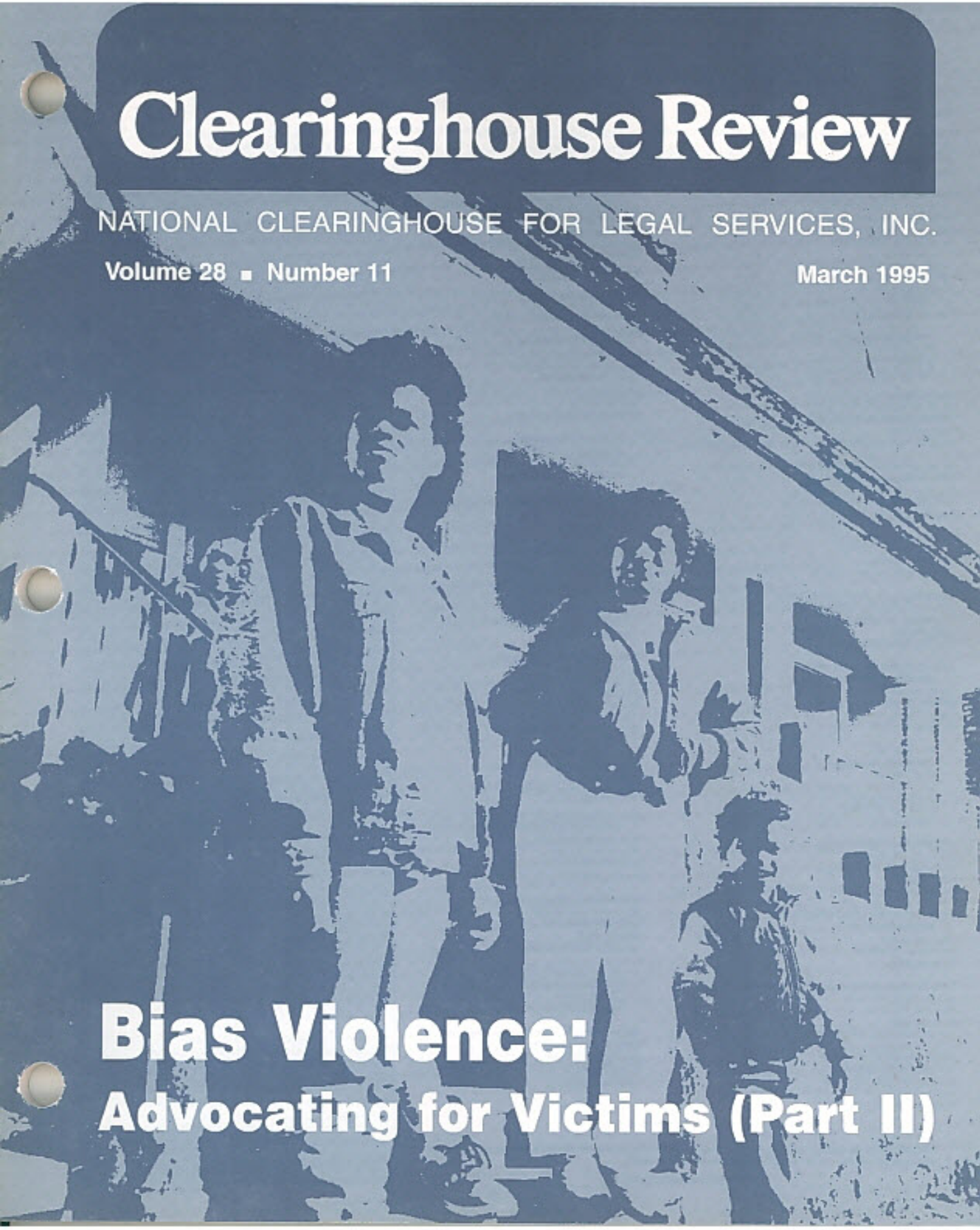

Bias Violence:
Advocating for Victims (Part II)

Judicial Conference Weighs Cutbacks in Federal-Court Jurisdiction

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I. Introduction

The Judicial Conference of the United States, through its Committee on Long Range Planning, has made an array of recommendations to curtail federal-court jurisdiction in civil and criminal cases. /1/ If adopted, these changes will drastically affect litigation by legal services attorneys. This article analyzes those recommendations relating directly to legal services practice. /2/

The Proposed Long Range Plan for the Federal Courts predicts that the federal courts will be inundated with both criminal and civil cases if current trends continue. It forecasts that one million new federal cases will be filed by the year 2020, up from 281,740 in the year ending June 30, 1994.

The report's leitmotif is the shifting of cases brought by individual litigants to state courts and to administrative agencies. This slant on jurisdiction means several changes with direct impact on legal services advocacy, including:

- elimination of federal-question jurisdiction over most claims arising under federal statutes, among which are suits challenging state administration of federal programs and suits brought under Section 1983 of the Civil Rights Act; /3/

- limited appellate review of social security and SSI cases in Article III courts; and

- a shift in the adjudication of employment discrimination cases to administrative agencies.

Following public hearings in December 1994, the Committee on Long Range Planning's final recommendations were to go to the full Judicial Conference in March 1995. The Judicial Conference will present those recommendations it accepts to Congress thereafter. In the current political climate, Congress is unlikely to increase court budgets and personnel and may be receptive to proposals to cut back federal-court jurisdiction instead.

II. Limits on Federal-Question Jurisdiction

Federal courts currently exercise general jurisdiction over all civil actions arising under the Constitution, laws, or treatises of the United States. /4/ Recommendation number 5 in the Long Range Plan would limit federal-question jurisdiction to those cases that (1) arise under the

Constitution, (2) involve foreign relations of the United States, (3) involve the federal government as a party, (4) involve disputes between states, (5) affect interstate or international disputes, or (6) require a uniform national resolution. This would eliminate federal-court jurisdiction over suits involving claims based on federal law which have no independent basis of jurisdiction, including suits that challenge state administration of a federal program. If adopted, this recommendation would divest federal courts of jurisdiction over claims to secure federal statutory rights against state or local officials or private defendants. This recommendation would also exclude suits to protect statutory civil rights brought under Section 1983. The report does not specifically rationalize this recommendation or explain why cases involving the administration of a federal statute by a state or local government do not belong in federal court.

Representation of low-income clients by legal services programs involves many federal/state programs that ensure subsistence-level security for low-income people. These include Medicaid, the Food Stamp Program, AFDC, foster care, and the Agricultural Workers Protection Act. Such cases comprise about 20 percent of legal services caseloads. /5/ Although most of these cases are resolved informally or in agency proceedings, questions of interpretation or application of federal law by a state or local government can require litigation. Federal litigation by legal services programs in these cases, moreover, rarely involves claims limited to individual parties and typically seeks relief affecting a class of plaintiffs or numerous clients.

Federal-question cases of this nature have a minimal impact on federal caseloads. Only 114 cases classified as "public welfare" were filed in federal courts in 1993, compared with a high of 253 such cases filed in 1981. /6/ These cases usually present questions of legal interpretation resolved on summary judgment and usually do not generate extensive discovery or trial.

The recommendation would permit federal-court jurisdiction over claims arising under federal statutes only on a showing of a clear need for national uniformity on the issue. This is a narrow standard that imposes a heavy burden on plaintiffs. In addition, litigation against state or local officials often does not require national interpretation but instead seeks enforcement of federal law where interpretation is not in controversy. /7/

State agencies and state courts are not realistic alternatives to federal courts for resolution of these issues. State agencies are bound by state interpretation of federal law and by state procedures, and usually the state agency determination is at issue in the case. State-court judges are creatures of the state's political process. They typically sit for terms subject to reappointment or reelection; their orientation looks to state law. Federal courts, in contrast, enjoy a tradition of independence and security as a buffer from the effects of decisions that are locally unpopular. Federal jurisdiction remains important for claims arising under federal law, especially where that law is administered by a state or local government.

III. Limits on Review of Social Security and SSI Claims

Recommendations number 8a and 19 would establish a new mechanism for administrative review of decisions of the Social Security Administration (SSA) and would limit appellate review in Article III courts. The proposal provides for a thorough administrative review of ALJ decisions by

a "Benefits Review Board," with full review of the board's decision by the district court, but only discretionary review of questions of law by the courts of appeals and the U.S. Supreme Court. This proposal would jeopardize the critical and vital role played by the federal courts in protecting the rights of social security claimants and beneficiaries.

Over the years, the courts have halted illegal practices by SSA and have provided standards and guidance where the agency has failed to articulate clear policies. The circuit courts' review of individual cases forms the basis for thorough and thoughtful consideration of issues as they arise, providing a background against which to measure the reasonableness of SSA's practices. The circuit courts' familiarity with individual cases has also contributed to the development of uniform standards by SSA and Congress.

For example, in the mid-1980s, the courts addressed the termination of benefits to thousands of individuals whose conditions had not medically improved and SSA's standard of denying benefits to persons with mental impairments without performing an individualized assessment of disability. The courts were highly critical of SSA's actions and, one after another, held that the agency's policies were unlawful and ordered relief for aggrieved individuals. /8/ Congress responded when it passed the Social Security Disability Benefits Reform Act of 1984, /9/ relying on the similarities in the numerous court decisions to develop national standards through legislation.

In another example, in the past SSA failed to promulgate comprehensive rules for weighing medical and subjective evidence in disability claims. Courts stepped in to fill the void and established extensive precedent in these areas. Finally, in 1991, SSA moved to address this problem when it published final rules describing the weight to be given medical evidence, including reports from treating physicians, /10/ and the evaluation of subjective evidence, including pain, in disability claims. /11/ Even SSA admitted that the extensive federal case law played an important role in development of the regulations. /12/

If appellate jurisdiction is limited to discretionary review of legal issues, without the background and experience acquired through the review of individual cases, the important role played by the circuit courts in guiding the direction of national standards in the disability arena will be diminished.

In addition to preserving the legal guidance provided by appellate review, public confidence in the fairness of the judiciary and the social security system must be maintained. Often, an average person's first and only direct contact with the federal court system is in connection with a social security claim. The federal courts should be viewed as the protectors of justice and fairness, and not an elitist judiciary. Any major effort to limit the jurisdiction for social security appeals is very likely to undermine public confidence in the courts over time. Limiting review for social security claimants would be viewed as a way of insulating SSA's decisionmaking from unbiased scrutiny, allowing the courts more time to deal with corporate interests at the expense of individual citizens' issues.

Although the number of social security appeals has increased, social security cases do not impose an unreasonable burden on the courts. Much of the increase occurred in the early and mid-1980s when SSA arbitrarily terminated hundreds of thousands of beneficiaries. Many of the practices that

gave rise to this dramatic increase have been corrected. Further, social security cases involve an administrative record of limited length rather than a full trial transcript, diminishing the amount of judicial time necessary for disposition.

SSA has proposed a plan to redesign the disability-claims process, /13/ which includes an approach to administrative appellate review different from that proposed by the Committee Report. SSA's plan would streamline administrative appeals by eliminating the reconsideration level, encourage a correct decision the first time, and eliminate Appeals Council review as a prerequisite to review in federal court. Although SSA's plan seeks to improve the front end of the process, it nevertheless could lead to more cases being appealed directly from the hearing level, given the Appeals Council's diminished role.

IV. Increased Agency-Level Adjudication of Disputes

Recommendation number 8b urges granting administrative agencies greater authority to resolve disputes under their jurisdiction. In particular, it cites the processing of employment discrimination cases. On its face this proposal does not limit federal-court access to victims of discrimination. Rather, it would create alternative administrative forums that, if used, might offset court filings.

The comment given to this recommendation cites "cursory review" of discrimination charges by the EEOC before issuing "right-to-sue" letters, arguing that increased agency scrutiny would reduce the number of employment cases in federal court. The implication is that current EEOC procedures encourage employment lawsuits. In reality, the exact opposite is the case. The EEOC purports to determine the merits of all charges filed with it that it cannot resolve. Last year, it dismissed 96 percent of these charges on a finding of "no cause to believe that a violation occurred." /14/ EEOC review is indeed cursory; it masks massive case closure; and its finding does not preclude judicial review. More EEOC scrutiny of claims, however, is unlikely to change the result.

Recommendation number 9 goes beyond number 8b and calls for legislation making agencies or Article I courts responsible for adjudication of federal benefits or regulatory cases that typically involve extensive fact-finding. This recommendation would apply primarily to benefit and employment cases arising under federal law, and the analysis of Recommendations number 5 and number 8a above applies equally here.

V. Agency Nonacquiescence with Case Law

Recommendation number 10 calls for legislation to prohibit agencies from refusing to follow legal precedent established within a particular federal circuit, and from relitigating an issue in an additional circuit after a uniform precedent has been established in more than one circuit. The report directs this recommendation pointedly at SSA's practice of refusing to follow, or acquiesce in, applicable case law.

SSA's practice undermines the principle that a circuit court's opinion on a particular issue is controlling and adds to federal caseloads. /15/ SSA nonacquiescence is unfair to claimants because

it results in the application of two sets of rules: one for those who persist through the appeals process and one for those who do not. Forcing claimants to pursue an appeal in order to obtain justice does not achieve a goal of uniform standards.

Nonacquiescence by SSA continues to be a problem. Despite the promulgation of so-called acquiescence regulations, /16/ SSA continues to practice nonacquiescence in the form of "silent acquiescence." /17/ The regulations state that SSA will acquiesce in circuit court decisions that it determines "conflict" with its own interpretation of the law. In those cases where SSA determines there is a conflict, it will issue an acquiescence ruling. In comments on and responses to the regulations published in 1990, SSA made it clear that adjudicators are not to apply holdings of the circuit courts unless and until a ruling is issued. /18/

Very few acquiescence rulings have been issued. In practice, SSA does not issue rulings that address circuit-court decisions assigning more weight to certain evidence or types of evidence -- decisions that have the most significant impact in disability litigation. SSA apparently considers most of these decisions to be disagreements about "facts." In sum, nonacquiescence, although more subtle, is still alive and well.

VI. State-Court Review of Employee Health Claims

Recommendation number 11b urges the abolition of concurrent federal- and state-court jurisdiction over routine claims for benefits under ERISA employee welfare benefit plans.

The recommendation does not appear to limit federal-court access for routine pension benefit claims or for pension or employee welfare benefit plan claims concerning enforcement of substantive ERISA requirements. Congress in its policy findings declared that access to federal courts was necessary to uphold ERISA's requirement of uniform standards in the regulation and administration of ERISA pension and employee welfare benefit plans. /19/

Instead, the proposal would redirect employee welfare benefit cases that can be resolved in state court without any adverse impact on the uniform interpretation of ERISA standards. These cases typically involve questions of employee health coverage that turn on state-law principles under contract and trust law.

VII. Conclusion

In its statement of principles, the Long Range Plan for the Federal Courts describes core values of the federal judiciary that promise equal justice and "to do equal right to the poor and to the rich." Concern with fairness must extend beyond the treatment of those litigants allowed in court to those who seek the court's protection. Perfect justice inside the courtroom becomes meaningless if the courthouse doors are closed to the poor. Conflict between the plan's lofty principles and its specific proposals awaits resolution by the Judicial Conference.

Footnotes

/1/ Judicial Conference of the United States, Proposed Long Range Plan for the Federal Courts (draft report Nov. 1994). A copy of the report is available from the Long Range Planning Office, Administrative Conference of the United States Courts, Washington, D.C. 20544, (202) 273-1810, fax (202) 273-1826.

/2/ In addition to those civil case recommendations discussed in this article, the report recommends elimination of jurisdiction based on diversity of citizenship and new procedures for certification of state law questions to state supreme courts. The final report that is to be submitted to the Judicial Conference in March 1995 may reflect modifications based on public comment in December 1994.

/3/ 42 U.S.C. Sec. 1983.

/4/ 28 U.S.C. Sec. 1331.

/5/ Legal Services Corporation, LSC Fact Book, 1988 -- 89 at 85 (1989).

/6/ Administrative Office of the United States Courts, Caseload Summaries (on file with the National Senior Citizens Law Center).

/7/ See, e.g., Valdivia v. California Dep't of Health Servs., 1992 WL 554299 (E.D. Cal. Aug. 11, 1992) (Clearinghouse No. 45,464), in which the state governor announced that California would not follow federal law relating to nursing facilities.

/8/ See, e.g., Polaski v. Heckler, 751 F.2d 943 (8th Cir. 1984) (Clearinghouse No. 36,482); City of New York v. Heckler, 742 F.2d 31 (2d Cir. 1984), aff'd, 476 U.S. 467 (1986) (Clearinghouse No. 33,773); Lopez v. Heckler, 725 F.2d 1489 (9th Cir. 1984) (Clearinghouse No. 33,630); Mental Health Ass'n of Minn. v. Heckler, 720 F.2d 965 (8th Cir. 1983) (Clearinghouse No. 33,291); Avery v. Heckler, 599 F. Supp. 236 (D. Mass. 1984) (Clearinghouse No. 35,025); Holden v. Heckler, 584 F. Supp. 463 (N.D. Ohio 1984) (Clearinghouse No. 41,456); Doe v. Heckler, 576 F. Supp. 463 (D. Md. 1983) (Clearinghouse No. 35,042).

/9/ Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984).

/10/ Standards for Consultative Examinations and Existing Medical Evidence, 56 Fed. Reg. 36932 (Aug. 1, 1991).

/11/ 56 Fed. Reg. 57928 (Nov. 14, 1991).

/12/ See, e.g., 56 Fed. Reg. at 36934 (SSA was "guided" by basic principles upon which the majority of circuit courts "generally agree") and 56 Fed. Reg. at 57932 ("We believe our policy, as expressed in these final rules, is consistent with circuit court rulings. . . .").

/13/ 59 Fed. Reg. 47887 -- 940 (Sept. 19, 1994).

/14/ EEOC, National Database of Charge Receipts (May 22, 1994) (on file with the National Senior Citizens Law Center, Washington, D.C.).

/15/ Currently, when courts find that SSA failed to follow circuit case law, the outcome on appeal is normally a remand to the agency for application of relevant judicial precedent and results in a new administrative hearing. In cases where the ALJ and Appeals Council again fail to follow case law, it is not unusual for a case to have three or more hearings in federal court. If SSA would apply the correct law in the first place, the case should not need to be appealed even to the hearing level.

/16/ 20 C.F.R. Secs. 404.985, 416.1485.

/17/ See Stieberger v. Sullivan, 738 F. Supp. 716, 728 (S.D.N.Y. 1990) (Clearinghouse No. 39,839).

/18/ 55 Fed. Reg. 1012 (Jan. 11, 1990).

/19/ 29 U.S.C. Secs. 1001 et. seq.