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SOCIAL SECURITY BENEFITS FOR PRISONERS

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SOCIAL SECURITY BENEFITS FOR PRISONERS

Serious concern has arisen over the question whether prison inmates should be receiving social security benefits. The purpose of this paper is to try to explain the principal aspects of this complicated question—policy, constitutional, and administrative—and present possible administrative and legislative alternatives to deal with what are considered the problems in this area. Different people see different problems in the benefits for prisoners area and often this is conditioned on different views of the nature of the social security system—old age, survivors, and disability insurance (title II of the Social Security Act). Also an attempt is made to indicate what is being done to understand the scope of the problem—how many individuals are receiving benefits in prison, how many have been awarded benefits while in prison, and what are the costs and possible savings involved in prisoner benefits?

Congressman Andrew Jacobs introduced the first bill in this Congress (H.R. 3524) on the social security for prisoners issue on April 9, 1979, which would have denied social security benefits to individuals confined in penal institutions or correctional facilities. Six months later, Congressman William Whitehurst introduced a more limited bill (H.R. 5610), to deny disability insurance benefits to prisoners and sought cosponsors through a number of "Dear Colleague" letters and press releases.

SUMMARY OF STAFF FINDINGS

Legislation of this nature does raise policy questions as to the earned right principle of social security and possible constitutional problems. Legislation to deny social security benefits for prisoners generally or for certain classes of prisoners may present definitional and administrative problems. There are also questions of whether the estimates by sponsors of the legislation as to the number of prisoners receiving benefits and the substantial amount of money being paid out of the social security trust funds—$60 million a year—are based on any creditable information base. The GAO is looking at this specific question and their first rough computation indicates that a little over 1 percent of Federal prisoners are receiving social security benefits. This is in contrast to the estimate which has been widely circulated in the Congress and in the press that 10 percent of all prisoners are in disability beneficiary status. Finally our study, so far as the disability awards in New Jersey are concerned, does not support the proposition that prisoners are "ripping off" the system. For a period beginning with the start of 1980, the denial rate of disability claims of prisoners in New Jersey is higher than that for the State or the nation as a whole. There do appear to be some problems in some States in adjudicating prisoner disability claims—primarily in the medical evidence area.

BACKGROUND OF THE ISSUE

Prisoners who have qualified under the eligibility requirements of title II of the Social Security Act have been receiving benefits in penal institutions since benefits were first payable under the Social Security Act. This is in contrast to the old public assistance needs test—welfare provisions of the act (titles I, X, and XIV) and the new supplemental security income welfare program (title XVI), all of which explicitly deny payments to an inmate of a "public institution."

Questions of the acceptability of paying benefits to prisoners have periodically arisen during the history of the program. Prior to the present interest, the issue was in the press briefly during the mid-1950's when it was ascertained that an official of the Communist Party who had been convicted under the Smith Act (advocating the overthrow of the Government) was receiving social security old-age benefits while serving his term in Atlanta. (Legislation was enacted in 1956 which allowed a judge, as part of the sentence, upon conviction of certain Federal crimes dealing with subversion of the Government, to deny social security benefits to the individual convicted. See appendix A for the background on this legislation.)

The great public interest appears to date from a series of articles in a Trenton, N.J., newspaper in August of last year which were consolidated in a New York Times article on Labor Day. Mr. Whitehurst apparently introduced his bill denying disability benefits to prisoners on October 16, 1979, after reading the Trentonian articles by Mr. Ed Leefeldt which were inserted in the Congressional Record on September 11, 1979.

The Trenton newspaper stated that "much of the money" that workers pay in social security taxes was being "syphoned off to criminals in prisons and in State hospitals who have uncovered a clever scheme to get it." The article declared that at one State institution over 10 percent of the inmates are getting social security disability benefits, according to the guards. The newspaper article further stated that prisoners "act a little crazy," get committed to a State mental hospital where a social worker gets them in touch with Social Security, and the process of getting benefits begins. The article also indicates that it is easy for the prisoners to be awarded benefits. It points out that convicts who have been in State hospitals know that being committed by a psychiatrist is a powerful argument when the case goes for review by the Division of Disability Determination in Newark. The article goes on to state "Exactly why some criminals are accepted and others are rejected is unclear, since these hearings are conducted in private and the information involved is confidential." The newspaper reporter, however, has investigated a number of cases which he said "look extremely spurious." He relies primarily on the statements of guards and prison officials. The reporter summarizes his idea of the validity of the disability determination process for prisoners in the following manner:

> When the Trentonian attempted to contact two inmates it knew were getting SS disability, prison officials initially refused permission; one on the grounds that he was running a mail order scam from behind bars, the other because he was crazy and unintelligible.
>
> Guards tend to laugh at this kind of equivocation. They point out that one "disabled" inmate goes down to the gym and bench presses 400 pounds. Perhaps

the most telling evidence is that the inmates—who claim to be either insane or retarded—somehow seem intelligent and rational enough to fill out their claims properly, develop the medical evidence necessary to substantiate those claims, and in some cases, fight the legal battle through the courts.

Personal contact, as well as the statements of guards and hospital attendants, show that some of these mentally disabled prisoners know, down to the last dime, exactly how much they're making in SS benefits.

It's a situation that makes the con happy. Because they're happy prison officials are happy, too. The SS Administration, according to syndicated columnists, finds it easier to give in to claimants like convicts than to fight an extended battle through the courts.

The only real loser is the American Taxpayer.

Most of the material that has appeared throughout the country has come from the New Jersey article. For instance, the leadoff prisoner in NBC's Saturday "Prime Time" program on May 17, 1980, appears to be the same sex offender referred to in the Trentonian article.

The allegation of the award of benefits to individuals in prison on the basis of bogus mental illness has been one of the primary cases of the public outcry. Needless to say, the subcommittee would be extremely concerned if convicts or other persons are being awarded benefits on the basis of feigned mental illnesses. That this could occur would depend to a large degree on the effectiveness of the decisionmaking process of the State agencies making the disability determinations for the Social Security Administration. Somewhat coincidentally, New Jersey—the State where the convict issue arose—has been under rather intensive scrutiny by the subcommittee for over 2 years in the area of the quality of their decisionmaking process. During the November 30, 1979, oversight hearings on the New Jersey agency, Chairman Pickle engaged in the following colloquy on this subject with the New Jersey disability administrator, Mr. Michael P. Malloy.

Mr. PICKLE. Mr. Malloy, one part of my statement at the beginning this morning made reference to some recent allegations seen in the newspapers. I think the Trenton newspaper, specifically with respect to your State, has stated that prisoners in New Jersey are being awarded benefits on bogus mental illnesses, and many of us in Congress have been getting mail about the fact that we are paying disability benefits to prisoners.

Would you comment on that situation? What is happening in New Jersey?

Mr. MALLOY. Yes, sir, we do not in any way segregate the convict claims when they come into the agency, and I would have to say at this point our position is we have no reason to believe the accuracy of the determination being made on the convict claim is any better or worse than the accuracy being made on all claims.

However, yesterday we did announce through the same newspaper, "The Trentonian", starting this week, December 6, the beginning of our new DBI week, we are going to start to do 100 percent quality review of convict claims and flag the convict claims when they come in for this review.

Possibly in a month or two I would be able to better answer your question. In short, we want to make sure our house is in order concerning this issue.

Mr. PICKLE. Do you have any idea, or can you state how many claims are involved?

Mr. MALLOY. No, sir.

Mr. PICKLE. Percent-wise, is it one percent, five percent, 10 percent?

Mr. MALLOY. I have no idea. We never maintained specifics on this.

Mr. PICKLE. What have been the responses to the charges that occurred in the last several weeks? What have you said up until yesterday?

Mr. MALLOY. Up until yesterday I would have to restate what I just mentioned to you, that we have had no reason to believe our accuracy was in any way at fault.

Mr. PICKLE. Why in the last 30 days or 60 days haven't you said that? Why did you say that to the newspaper only yesterday, the day before these hearings?

Mr. VIVIANI. (Joseph S. Viviani, Acting Assistant Commissioner; Department of Labor and Industry, State of New Jersey) If I could comment on that, sir, some of it predisposes Mr. Malloy's situation. The original article appeared while Miss Blackwell was in charge, and I did instruct her at that time to do whatever review was possible. Mr. Malloy points out, they are not flagged in any way; they are not identifiably immediately as convict claims; we don't segregate at all.

However, there was a review made of the file at that time and whatever convict claims could be identified were reviewed for accuracy. We did not turn up one case of an inaccurate convict claim at this time.

However, I have to add that this did not get you a 100 percent review of the convict claims, because, as Mr. Malloy points out, they were not identifiable.

Mr. PICKLE. If the record shows that you do not have one case of that happening, it would seem to me that your agency would have responded to those charges long before now. For better or worse, it has created a national concern about this question, and it may be well that every State look into it.

It is more than just a question of can prisoners receive disability benefits, because we get into a constitutional question and basic rights question there. But if they are being awarded on, say, bogus mental illness or some other indirect manner, that is terribly wrong.

As indicated by Mr. Malloy beginning in December 1979, the New Jersey State agency began reviewing 100 percent of the cases of claimants who were incarcerated. All cases involving a person in prison or confined to a psychiatric hospital from a prison or directly by a judge were flagged for review. The results of the 13 determinations to date show 11 denials—10 on the initial determination and one on reconsideration—one allowance and one continuance on a continuing investigation of disability (CDI). The denial rate on the initial determination is higher than that for the State of New Jersey and the Nation.

The New Jersey quality assurance unit keeps records on these claims and conducts the 100 percent review of the claims after all development actions are taken and a decision made.

The following chart shows the allowance/denial rate by impairment category:

Decision	Claim level	Body system
Allowance	Initial—1, Reconsideration—0, Continuing disability investigation—1.	Psychiatric—2.
Denial	Initial—10, Reconsideration—1	Psychiatric—9, Orthopedic—1, Respiratory—1.

The New Jersey agency also supplied a narrative on several cases which have been adjudicated since the first of the year.

The One Allowance

Disability is alleged due to a mental condition with onset of August 10, 1979. Claimant's wife filed on his behalf. Medical evidence shows that the claimant was admitted to Trenton Psychiatric Hospital on August 10, 1979, from the Mercer County Detention Center where he was being held on charges of Murder, Breaking and Entry with Intent to commit assault and battery, aggravated assault and battery and assault with intent to kill. Although documentation is not in file, there is said to be a history of psychiatric treatment dating from 1975.

Medical exam at A.O.D. and current evidence shows claimant to be withdrawn, flat in affect, depressed, inappropriate giving the impression of chronic schizophrenia. Memory was short with inability to concentrate.

Claim was allowed with a re-exam date of December, 1980, and a diagnosis of schizophrenia, chronic undifferentiated type.

The One Continuance of Disability

A 24 year old claimant who was institutionalized after killing two people, has been receiving disability benefits since April 22, 1977, for Schizophrenia,

Paranoid Type. A medical re-exam date matured and a continuing disability investigation was undertaken. The claimant currently is actively psychotic and is in isolation. His condition clearly meets the severity established in POMS medical listing 12.03 A and B. A decision of continuance was properly made.

Denied Claims

A few of the denials are summarized as follows:

a. The claimant is alleging disability due to depression, a back condition, a lung condition and visual problem.

The claimant said he was arrested in 1963 for "sodomy and carnal abuse of both young boys and girls." He was in Greystone Park Hospital and Trenton State Hospital and is now in the adult Diagnostic Center in Avenel. The latest medical report provided is dated May 19, 1970.

The Diagnostic Center was contacted and the head of the Social Welfare Department told us we would have to send our own doctor to the center if we needed current evidence. A CE was purchased and the mental status report clearly showed the impairment was "not severe." Claim was denied.

b. Claimant alleged disability due to mental illness. He stated that he can't maintain a schedule, is unable to deal with stress and sometimes loses his memory. Although no records are in file, he is said to have a psychiatric history dating to 1972. He is receiving weekly psychotherapy at Rahway State Prison where he has been confined since 1977. There is no explanation in file of the charges against the prisoner.

Current medical evidence shows claimant has no severe constriction of interests or restriction of activities. He relates fairly well to others. There was no obvious deterioration in personal habits. Affect was appropriate. He was oriented X3. Speech was coherent and relevant. There was no hallucinations, delusions. Claimant has 1 year of college and presently attends school in prison two times a week.

Claim was denied (N30–902)(a) impairment not severe. Denial.

c. The claimant has a long history of incorrigible behavior and sodomy. He was sentenced to thirty years of prison, but is currently at the Diagnostic Treatment Center in Avenel.

Development was initiated on December 26, 1979. A second request was sent to the treatment center on January 7, 1980. Evidence was received and a C/E was authorized on January 14, 1980. The C/E was performed on February 7, 1980.

Results of C/E indicate the claimant is not psychotic and his attention span is normal. His activities and interests are not restricted. Diagnosis, antisocial behavior, and sociopathic personality, manifested by alcoholism and imparing the morals of a minor. Claim was denied on medical considerations alone.

d. This 20 year old claimant applied for disability January 2, 1980. His primary allegation is mental condition. The claimant was incarcerated at Passaic County Jail, but was referred to Greystone Park Psychiatric hospital on November 1, 1979. The claimant is serving a sentence for theft and possession of a deadly weapon.

Greystone Hospital was first contacted on January 18, 1980. The medical evidence indicated the claimant is functioning well. He carries a diagnosis of schizophrenia chronic undifferentiated type with depressive features, in good remission. The claimant is non psychotic, affect is appropriate and he is not depressed. The patient has full grounds privileges and presents no behavioral problems. The claim was denied on medical considerations alone.

SCOPE OF THE PROBLEM—PRISON POPULATION RECEIVING BENEFITS

Mr. Whitehurst has stated that some 30,000 prisoners (10 percent of the national population) are receiving some $60 million a year in *disability benefits*. These are the same statistics that were highlighted in the "Prime Time Saturday" program on May 17 of this year. Apparently this estimate is derived from the Trentonian article where the "guards" in one institution estimate that 10 percent of the inmates were getting disability benefits.

Although the Social Security Administration has not compiled data on the number of incarcerated persons who receive social security

benefits, it has been able to locate some data from the 1970 census records and a "1974 Survey of State Prison Inmates" conducted by the Law Enforcement Assistance Administration. The 1970 census data indicated that about 4,000 inmates of Federal, State, and local correctional facilities received social security benefits. This was slightly more than 1 percent of the total number of inmates (about 325,000). However, it should be noted that these statistics include all types of social security benefits—retirement, disability, survivor's, and dependent's benefits. The "1974 Survey of State Prison Inmates" found that about 1 percent of inmates who reported prearrest employment received social security monthly benefits. As with the census data, this information is not current and does not identify the type of social security benefit. The rough data so far received from the GAO is generally in line with these statistics.

The total prison population has been decreasing over the last decade. About 307,000 prisoners were in the custody of Federal, State, and local correctional authorities on December 31, 1978. Even though the overwhelming majority of these individuals were serving sentences of at least a year, more than 14,000 were either serving shorter prison sentences or had their sentences suspended.

The GAO is currently undertaking a study which will give some idea of how many prisoners are receiving social security and other Government benefits. Initially, the GAO is going to compare the social security benefit roll tapes with those of the Federal prison system. This will give the overall number of prisoners receiving benefits along with a breakdown of prisoner by the type of social security benefit. Later they will try to do the same thing with a few selected States and localities.

MAJOR POLICY ISSUES INVOLVED

The primary issue is whether the taking away of a benefit of a prisoner on the basis of his incarceration and/or conviction violates the "earned-right" principle of social security. This "earned right" is derived through a system whereby an employee and his employer make a contribution through a payroll tax so that the individual will be insured against certain risks; namely, the loss of income because of age, death, or disability. The 1939 Ways and Means Committee report gives the basic philosophy of the system:

> It is essential then that the contributory basis of our old-age insurance system be strengthened and not weakened. Contributory insurance is the best-known method of preventing dependency in old age by enabling wage earners to provide during their working years for their support after their retirement. By relating benefits to contributions or earnings, contributory old-age insurance preserves individual thrift and incentive; by granting benefits as a matter of right it preserves individual dignity. Contributory insurance therefore strengthens democratic principles and avoids paternalistic methods of providing old-age security. Moreover, a contributory basis facilitates the financing of a social-insurance scheme and is a safeguard against excessive liberalization of benefits as well as a protection against reduction of benefits. [H. Rept. 728, 76th Cong.]

Once the risk is realized and the eligibility requirements are met in terms of coverage under the social security system, the individual gets his benefit as a matter of "right." The right is not a "vested right" in the contractual sense since Congress can change the amount and nature of social security benefits, but these are benefits, according to the Supreme Court, that are of a nature that cannot be taken away

in an arbitrary and capricious manner. Those who support the legislation to bar benefits see the situation differently; that the loss of earnings does not affect an individual in prison since his needs already are being met. Thus, they equate the program with one which is needs-based—such as public assistance—rather than one under which contributions result in an earned right to some future benefit. Presumably those supporting this position believe that prisoners have committed anti-social acts which differentiate their situation from that of an individual who is an inmate in a non-penal public institution (who also are not affected by the loss of earnings) who would not be touched by the legislation as presently drafted. Of course, as indicated previously, the denial of benefits to welfare recipients in public institutions has always been a distinguishing aspect between the public assistance and the social security social "insurance" program. Supporters of the legislation would point out that some "insurance" and public retirement programs also deny benefits to persons who commit certain types of crimes, and this will be discussed in more detail later.

CONSTITUTIONAL ISSUES INVOLVED

Probably the most pervasive constitutional argument, relevant to almost any type of prisoner bill, including those which might be limited wholly to persons convicted in the future, would be that, absent a rational basis for distinguishing prisoner claimants from other claimants similarly situated for social security purposes, the denial of benefits would be viewed as strictly penal in nature, unrelated to the purposes of the social security program. This "rational basis" standard generally would be that the legislative classification must be rationally related to the achievement of some legitimate governmental objective. If the classification was rational it would not deny "due process." For instance, Justice Frankfurter, citing among others the legislative prohibition against felons being enlisted in the Armed Forces, serving on grand juries, holding Federal office, upheld a statute which in effect disqualified a convicted felon from serving in a waterfront labor organization. The legislature, he stated, was "acting on impressive if mortifying evidence that the presence on the waterfront of ex-convicts was an important contributing factor to the corrupt waterfront situation" *De Veau* v. *Braisted* (1960), 363 U.S. 144, 160.

A second group of constitutional issues may be involved if the benefits which were taken away are those of individuals who have already been convicted of crimes or whose crimes were committed before the law was amended to deny them benefits. This aspect of the legislation might be challenged on the grounds that it constitutes a legislatively imposed punishment for past acts and thus violates the constitutional prohibition against *ex post facto* law. In the *De Veau* case Justice Frankfurter gives the following definition of "ex post facto":

> The mark of an "ex post facto" law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession. Ibid.

The forfeiture of a civil service retirement annuity because of past criminal convictions was declared unconstitutional in *Hiss* v. *Hampton* 338 F. Supp. 1141 (1972). The three judge district court stated:

> The question before us is not whether (Alger) Hiss and Strasburger are good or bad men, nor is it whether we would grant them annuities if we had unfettered discretion in the matter. The question is simply whether the Constitution permits Congress to deprive them of their annuities by retroactive penal legislation. We conclude that it does not. We hold that as applied retroactively to the plaintiffs the challenged statute is penal, cannot be sustained as regulation, and is invalid as an "ex post facto" law prohibited by the Constitution.

PENDING LEGISLATION—SCOPE AND ISSUES RAISED

As previously mentioned, the major pending legislation in the area is H.R. 5610, introduced on October 16, 1979, which now has 105 cosponsors. (Senator Wallop has introduced a similar bill on the Senate side (S. 2722) but requires, in addition to incarceration, conviction of "any crime.") This legislation provides that no monthly benefit shall be paid to a disabled worker during any month that such individual is confined in a jail, prison, or other penal institution. The benefits payable to prisoners on account of age, or survivorship would not be affected as would any types of dependents benefit such as wife, or children's benefits.

H.R. 3524, which was introduced on April 9, 1979, by Mr. Jacobs, would deny not only disability workers benefits (sec. 223 of act) but any *individual* who was entitled to an old-age, survivors, and dependent benefit. Dependents benefits of an insured worker denied benefits would not be affected under either House bill but would be suspended under Senator Wallops' bill.

The approach of the Whitehurst bill presents a number of problems. In the constitutional area, as already mentioned, the legislation may be put to the "rational basis" test and the fact that it applies to persons who have been incarcerated for 30 days, regardless of whether convicted, may raise other "due process" questions. The language "confined in a jail, prison, or other penal institution or correctional facility" may present definitional problems. (See appendix B for Congressional Research Service report outlining certain administrative and language clarifications in dealing with legislation such as the Whitehurst bill.) For instance, it might not include State mental hospitals whose prisoner inmates are said to be qualifying for benefits according to the New Jersey newspaper. (The Wallop amendment would cover an inmate in a facility for the criminally insane or any other psychiatric facility by reason of his having been found not guilty of a crime by reason of insanity or his having been found mentally incompetent to stand trial for a crime.) Moreover, as also noted earlier, neither the Whitehurst bill nor the Wallop bill would affect individuals in prison who are receiving benefits as dependents. (The Wallop amendment would deny benefits to dependents of an incarcerated beneficiary.) A lot of correspondence on the prisoner issue has dealt with prisoners who are "children" who, although over 18, may be drawing benefits because they are "disabled" or on the basis of going to school "full time" while incarcerated. The Jacobs bill, however, would deny benefits to these individuals, too.

OTHER LEGISLATIVE ALTERNATIVES

1. Denial of Benefits by a Court

A possible alternative is to extend the provisions in the law which allow a court to take away social security benefits as part of the sentence for conviction of certain crimes. The alternative would differ markedly in scope from present law in that the crimes would not just be specified Federal crimes relating to subversive activities, i.e., treason, sabotage, etc., prosecutions and convictions for which have been so rare that, as far as we are aware, the provision has never been used. Presumably the reference to criminal activity would have to be more general, such as all crimes which are treated as a felony. The Federal Criminal Code definition of a felony is "Any offense punishable by death or imprisonment for a term exceeding one year." It would, of course, be optional for Federal and State jurisdictions to use this approach and they could delegate the degree of sentencing discretion desired to the individual judges. The provision would apply to crimes committed after enactment to avoid any possible constitutional problems.

2. Common Law Approach

Under Social Security regulations a person may not become entitled to any survivor's benefits or payments on the earnings record of a worker if he was finally convicted of a felony for intentionally causing the worker's death. Presumably the authority for this is common law doctrine that an individual should not profit from his own wrongdoing. Perhaps this doctrine could also support the denial of disability benefits for individuals whose onset of disability occurred during the commission of the crime—presumably a felony. See Congressional Research Service report (appendix B) outlining possible administrative difficulties in defining and administering such an administrative concept. However, this approach would not deal with many of the cases which have drawn the most attention as "abuse" of the system; i.e., Son of Sam, the child abuser in New Jersey, etc.

H.R. 7555 (Mr. Archer and Mr. Conable) amends the definition of disability in the law so that convicted felons could not be awarded benefits on the basis of impairments which came about during the commission of a felony or during incarceration after conviction for a felony.

3. Maintenance of Prisoners

One of the underlying themes of the newspaper article is that prisoners are being maintained at public expense and then, in addition, are getting their social security benefits. The Trentonian states—

> * * * they are able to use their SS payments, which range from $222 to $588 per month, for such luxuries as stereos, electronic games, color televisions, tape recorders, clothes, tennis and jogging suits, weight-lifting and sporting goods equipment, according to guards. Others enter the investment world and buy savings bonds and stocks, guards say.

Some States, however, have passed legislation requiring that the States collect maintenance for prisoners. Such legislation in Florida, according to an article in Corrections Magazine, is said to have origi-

nated because a Florida legislator "was outraged to learn that some inmates were receiving veterans' and social security benefits." Part of the Florida law was a disclosure provision and it is reported that after it went into effect—

> * * * cash accounts in the prison bank dropped from $135,000 on June 1 to $64,000 on July 1. * * * Government checks which were coming into the institution have been diverted, either to other family members or to outside bank accounts. Those inmates who do not wish to transfer their cash have other options, such as buying cars, or real property, which are not assessed.
>
> Nevertheless, the inmates are worse off. At present, extra cash can be used to buy such items as radios, T-shirts or shoes in the canteen. But if pay-as-you-stay is strictly enforced, inmates will have no extra cash. All purchases of any sort will have to come out of the $15 weekly allowance.

The full article from the December 1979 issue of Corrections appears in appendix C. It indicates some of the problems in State legislation for the maintenance of prisoners.

It appears that action can be taken legislatively to bring monthly social security payments more under the control of and available to prison officials for the maintenance of inmates. At present, payments to prisoners seem to be received in a variety of ways: (1) checks sent directly to the individual in prison; (2) the "representative payee" route which could be a check to a relative or an institution to be used on behalf of the prisoner; and (3) direct deposit to a bank—about a third of social security beneficiaries are receiving benefits this way, but how many prisoners do it in this manner is unknown.

Two provisions of title II of the Social Security Act are primarily involved in the payment of benefits to prisoners. Section 205(j) authorizes the appointment of relatives and other representatives to receive benefit payments in certain situations while section 207 prevents the assignment or attachment of social security benefits.

Section 205(j) which is the legislative authority for the "representative payee" is as follows:

> When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person.

The "other person" can be an institution. In practice the institutions which have been designated as payees, or to whom the relative representative payees have had to pay maintenance, have been psychiatric-medical rather than penal. The most pertinent Federal regulations (sec. 404.1606) elaborating on this provides that "where a beneficiary is confined in a Federal, State, or private institution because of mental or physical incapacity, the relative or other person (which could be the institution) to whom payments are made on behalf of the beneficiary shall give the highest priority to expenditure of the payment for the current maintenance needs of the beneficiary, including the customary charges made by the institution in providing care and maintenance." (For full text of representative payee regulations, see appendix D.)

It could be stated legislatively that it is the intent of the Congress that social security benefits be available to pay the current maintenance needs of individuals in penal institutions. This could be done by certifying the entire benefit to the administrator of the penal institution to meet the prisoners maintenance expenses or the Secretary could

be given the option of providing that some of the benefit could go to the prisoner's family if their situation was particularly necessitous. *Of course the States would have to institute the basic mechanism for charging inmates for the cost of their maintenance.* If such action was taken it would also be advisable to state that such provision override section 207 of the act. This section provides that social security benefits shall not be subject to "execution, levy, attachment, garnishment, or other legal process." Except for a few specific exceptions, Congress intended to insulate social security benefits from uses not freely chosen by the beneficiary or his or her payee. (The exceptions to this statutory prohibition are garnishment for child support or alimony payments in title IV of the act, the right of the Social Security Administration to recover social security overpayments, and the IRS levy for Federal income tax purposes.)

It appears that section 207 does not prevent a beneficiary, or his or her payee, from using social security benefits to reimburse a State for subsistence. However, if such use of benefits is not voluntary, a beneficiary or his payee may assert section 207 as a defense against attempts to compel diversion of the benefit payments, even when they are deposited in a bank or savings and loan association. This was the unanimous view of the U.S. Supreme Court in the case of *Philpott* v. *Essex County Welfare Board*, 409 U.S. 413, 417 (1973), where the Court held that section 207 imposes a "bar against the use of any legal process to reach all social security benefits (which) is broad enough to include * * * a State". (See appendix E for full opinion in *Philpott*, *but see* recent opinion in 5th circuit *Davis* case.)

4. Education Expenses in Prison

The subcommittee has also received considerable material about the payment of children's educational benefits to individuals in prison, both under the Veterans' Administration and social security programs.

The Social Security Act continues child's benefits beyond the normal termination age of age 18 and up to age 22 if the individual is in full time attendance in an education institution. Some of the allegations are that some of the prisoners are receiving benefits when they are not really in "full time" attendance in school. In Michigan the major problem cited is that the State is having difficulty being reimbursed for the education courses it provides prisoners who are receiving social security and VA checks. Michigan law and regulation provides for the reimbursement of the State for the cost of the education provided prisoners. Correspondence from various correctional institutions in Michigan indicated that the State has been making attempts to charge "$100 a month from each resident prisoner receiving benefits and enrolled in school." Michigan authorities allege that some prisoners have dropped out of the school programs but their checks continue to come while others are having their checks mailed to relatives or deposited to their bank accounts outside the prison.

There could be added to the possible legislation that social security benefits be made available to pay the current maintenance needs of individuals in penal institutions that they also be available for reimbursement for educational services provided prisoners by public authority. Also consideration might be given to amending the provision in the law whereby benefits are provided for students in any period of 4 calendar months or less in which a person does not attend school if the

student shows to the satisfaction of the Secretary that he intends to continue in full time attendance immediately after the end of the period. This provision which presumably is designed for the summer vacation situation would seem to have little validity for persons in penal institutions and conceivably could be manipulated by prisoners. H.R. 7555 (Mr. Archer and Mr. Conable) would deny incarcerated felons any entitlement to children's educational benefits.

5. Vocational Rehabilitation

The bill introduced by Mr. Archer and Mr. Conable (H.R. 7555) would amend the provision in existing law which provides for the deduction of benefits if an individual refuses, without good cause, to accept rehabilitation services available to him under the Vocational Rehabilitation Act. The proposed legislation would state that such rehabilitation services "shall be generally inappropriate for an individual confined in a jail, prison or correctional facility pursuant to the conviction of such individual of an offense which constituted a felony" and that such individual "therefore shall be deemed for purposes of this subsection (as determined under regulations of the Secretary) to have refused without good cause to accept such rehabilitation, unless a court of law determines otherwise." Under this provision a presumption is created that vocational rehabilitation is inappropriate for individuals in prisons and prisoners are presumed to have refused without good cause to accept them even though they might be available. It would appear that the question would arise whether the denial of benefits to prisoners which would result from this amendment is primarily penal in nature or is consistent with a legitimate aim of the Social Security Act and the Vocational Rehabilitation Act. Whether the clause "unless a court determines otherwise" provides a legitimizing process whereby a prisoner who wishes to undertake rehabilitation, but is presumed to have refused, can be provided rehabilitation services and retain benefits is open to question.

APPENDIX A

DENIAL OF SOCIAL SECURITY BENEFITS FOR INDIVIDUALS CONVICTED OF SUBVERSIVE ACTIVITIES: 1956 AMENDMENTS—WILLIAMS AMENDMENT

The following excerpt from the Congressional Record gives the background for the 1956 act provision. The amendment was originally brought up in the Committee on Finance by Senator Williams but was passed over because of possible constitutional problems. However, it was brought up again on the floor and was taken to conference. In conference it was changed from a denial of benefits to all beneficiaries who had been convicted of the specific enumerated Federal crimes relating to subversive activities to the approach that the judge could impose as part of the sentence the denial of benefits. There follows an excerpt from the Senate debate giving the background of the amendment and the text of the provision which was ultimately adopted by the conference committee (202(u) of the Social Security Act).

[Excerpt from Congressional Record, July 17, 1956, pgs. S13093–S13094]

Mr. Williams. Mr. President, the purpose of this amendment is to terminate any benefits under the social security program to persons who have been convicted of espionage, sabotage, treason, sedition, or subversive activities.

In simple language, the amendment would stop social-security benefits to anyone who had conspired to overthrow the Government of the United States.

I offered the amendment and had it in the committee, and it was discussed, but the day we were to vote on the amendment I was called out and did not have a chance to offer it, so the amendment was neither rejected nor adopted by the committee.

I am hoping the chairman of the committee will agree to take it to conference.

In support of the amendment, I know of no stronger argument for it than an article by Jack Steele, entitled "Red Inmate Gets $88.10 Monthly Security From Hand He Tried To Bite," which was published in the Washington Daily News of October 27, 1955.

I now read the article:

The Social Security Administration each month mails a check for $88.10 to a Communist inmate of the Federal penitentiary at Atlanta, Ga.

It goes to Alexander Bittelman, a highranking Red now serving a 3-year sentence there for conspiring to advocate overthrow of the United States Government by force and violence.

The $88.10-a-month payment is made to the 65 year-old Mr. Bittelman under the Government's old-age insurance program. He can cash the check and spend the money, and furthermore, it isn't subject to income tax.

DOUBLE SECURITY

His monthly check is a sort of double security from the hand of the Government he tried to bite.

Even that isn't the whole story.

Mr. Bittelman gets the check even though he hasn't paid a penny of the $6,000 fine imposed when he was sentenced on February 3, 1953, for violating the Smith Act.

And the Government keeps on paying his social security even though it expects to deport him to his native Russia as soon as he finishes serving his sentence.

Government officials did a lot of stuttering today trying to explain the Bittelman case. They were partially tongue-tied because the social-security laws bar disclosure of details of the cases of individual beneficiaries.

HYPOTHETICAL

This picture was pieced together from what they could and would say about a hypothetical case similar to Mr. Bittelman's.

Social-security laws and regulations do not bar payments to prisoners. Old-age insurance is based on taxes paid by both employees and employers in covered industries. The theory seems to be that it is a statutory right which is not canceled—as many others are—by conviction for a serious crime.

(The only exception, which does not apply to the Bittelman case, is that payments may not be made to a person who would thus benefit from his own crime, such as a woman who murdered her husband and thus became eligible for social security.)

There is no legal bar to payments to persons convicted under the Smith Act or other antisubversive laws. Presumably, anyone serving a sentence for treason would receive social security if eligible.

Social-security checks cannot be seized or garnisheed by the Government or any other creditor.

Both the Justice and Health, Education, and Welfare Departments are investigating the Bittelman case—presumably to see if there is any way these loopholes in the law can be closed.

If not, they may ask Congress to amend the law next year.

CREDIT

Credit for bringing the Bittelman case to light goes to William H. Hardwick, warden of the Atlanta Penitentiary.

Warden Hardwick declined to talk about the case today, but it was learned that he did some vigorous eyebrow raising when Mr. Bittelman's social-security checks began to turn up at the prison several months ago.

He reported the situation to the Bureau of Prisons, which told him to continue delivering the checks until further orders and bucked the case along to the Social Security Administration.

Mr. Bittelman is one of the founders of the Communist Party in this country. He came to the United States in 1912 after having been deported to Siberia by the Czar for revolutionary activity. He attended an underground meeting in 1920 at Kingston, N.Y., at which the party was supposedly formed, and later served as a member of the party's national committee.

Mr. Bittelman was 1 of 13 second-string Communist leaders convicted under the Smith Act in January 1953. He began serving his sentence last January 11. He once worked for a New York publishing house, but it is not known whether this is where he earned his social security.

[End of article.]

I think that article explains the need for the amendment well enough. Certainly, no taxpayer for one moment would condone the payment of social-security benefits to any person who has been convicted of conspiring to overthrow the Government of the United States.

I am wondering if the chairman of the committee will be willing to accept the amendment.

Mr. BYRD. Mr. President, this matter was discussed by the members of the Finance Committee. I am willing to take the amendment to conference for consideration.

Attached herewith is the text of the legislation as approved by the conference committee (202(u) of the act) and the reports on the Williams amendment by the Bureau of the Budget and the Department of HEW, respectively. Both reports urged that the amendment not be adopted in the form as introduced in that it violated the earned right principle of Social Security and raised legal questions because of its retrospective nature.

PROVISION OF SOCIAL SECURITY ACT PERTAINING TO "EFFECT OF CONVICTION OF SUBVERSIVE ACTIVITIES, ETC."

Section 202 (u)

Effect of Conviction of Subversive Activities, etc.

(u) (1) If any individual is convicted of any offense (committed after the date of the enactment of this subsection) under—

(A) chapter 37 (relating to espionage and censorship), chapter 105 (relating to sabotage); or chapter 115 (relating to treason, sedition, and subversive activities) of title 18 of the United States Code, or

(B) section 4, 112, or 113 of the Internal Security Act of 1950, as amended,

then the court may, in addition to all other penalties provided by law, impose a penalty that in determining whether any monthly insurance benefit under this section or section 223 is payable to such individual for the month in which he is convicted or for any month thereafter, in determining the amount of any such benefit payable to such individual for any such month, and in determining whether such individual is entitled to insurance benefits under part A of title XVIII for any such month, there shall not be taken into account—

(C) any wages paid to such individual or to any other individual in the calendar year in which such conviction occurs or in any prior calendar year, and

(D) any net earnings from self-employment derived by such individual or by any other individual during a taxable year in which such conviction occurs or during any prior taxable year.[1]

(2) As soon as practicable after an additional penalty has, pursuant to paragraph (1), been imposed with respect to any individual, the Attorney General shall notify the Secretary of such imposition.

(3) If any individual with respect to whom an additional penalty has been imposed pursuant to paragraph (1) is granted a pardon of the offense by the President of the United States, such additional penalty shall not apply for any month beginning after the date on which such pardon is granted.

BUREAU OF BUDGET,

Washington 25, D. C., March 30, 1956.

Re amendment by Senator Williams.

Hon. HARRY F. BYRD,
Chairman, Committee on Finance, United States Senate,
Senate Office Building, Washington 25, D. C.

MY DEAR MR. CHAIRMAN: This is in further reply to your letter of February 13, 1956, relative to nine amendments to H. R. 7225, the social security revision bill. The following report deals with amendment 2–10–56–A, which is the only remaining amendment on which the Bureau of the Budget has not as yet reported to your committee.

Amendment 2–10–56–A, introduced by Mr. Williams, would deny social security benefits to persons convicted of espionage, sabotage, treason, sedition, or subversive activities. These are heinous crimes, of course, and the perpetrators deserve little consideration. It follows that any gratuitous Government benefit or award quite properly might be withheld from such persons.

There are collateral problems, however, in the proposed amendment that warrant the serious consideration of the Congress. It has always been stressed by the Congress that old age and survivors insurance is not a Federal bounty, but rather a separate self-financed system of insurance, the costs of which are shared equally by employer and employee; that benefits are assured as a matter of statutory right; that the Federal Government is merely a trustee of the system and not a contributor; and that certain benefits are available to surviving dependents of an insured individual without any right of election or other voluntary action on the part of the insured wage earner. The proposed amendment does not seem consistent with these principles. If enacted it might be taken as a precedent for departures in other directions from the independent character of OASI, with consequences that could go considerably beyond the limited purpose of the amendment.

A further question involves the retroactive character of the amendment, since it would deny benefits based on contributions predating its enactment. This raises a legal and policy question as to the propriety of such retrospective action which should be resolved only after careful analysis extending to the whole range of civil disabilities and penalties which may be imposed upon individuals convicted of the particular crimes.

In view of this the Bureau of the Budget does not recommend enactment of this proposed amendment in the context of a revision of the Social Security Act.

Sincerely yours,

ROWLAND HUGHES, *Director.*

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
March 28, 1955.

HON. HARRY F. BYRD,
Chairman, Committee on Finance,
United States Senate, Washington 25, D. C.

DEAR MR. CHAIRMAN: This letter is in response to your request of February 13, 1956, for a report on an amendment intended to be proposed by Senator Williams to H. R. 7225, a bill to amend title II of the Social Security Act now being considered by the committee.

The amendment provides for termination of the old-age and survivors insurance benefit rights of individuals convicted of espionage, sabotage, treason, sedition, subversive activities or similar offenses specified in title 18 of the United States Code and in the Internal Security Act of 1950. The Attorney General would be required to furnish the Secretary of Health, Education, and Welfare with a list of individuals who have been convicted of such crimes and to notify the Secretary of individuals so convicted in the future.

An individual establishes rights to benefits under the old-age and survivors insurance program by working in employment or self-employment covered by the law and paying social-security contributions on his earnings. The costs of benefits and administration are met in their entirety from the contributions of covered workers, their employers, and self-employed persons. There is no contribution from general tax revenues.

One of the basic purposes of paying benefits under the old-age and survivors insurance program is to reduce the likelihood that individuals will have to apply for public assistance to meet their basic living costs when their work income is greatly reduced or ceases altogether at 65 or when the family earner dies. If benefit rights of individuals convicted of crimes were terminated and the individuals later had to apply for public assistance, the cost of supporting them would fall on the general taxpayer.

Moreover, if benefit rights of persons convicted of these crimes were terminated, a worker insured under old-age and survivors insurance would suffer a greater punishment than an individual whose work was in noncovered employment or who was not dependent on earnings from employment for his support. The punishment would be one that would last for the rest of the individual's life. Generally, the Criminal Code sets a maximum limit on the punishment an individual may receive—the amount of the fine and the length of the prison sentence—and gives the court discretion as to the action taken in the individual situation. Under the Criminal Code, for example, an individual who is convicted of the crime of seditious conspiracy may not be fined more than $5,000 or imprisoned more than 6 years, or both. Courts frequently do not impose the maximum sentence permitted. Under the amendment, however, the individual could work in covered employment after completion of his sentence, pay taxes on this employment and yet acquire no benefit rights on the basis of this post-sentence employment.

Moreover, the amendment would apply not only prospectively—i. e., in the case of crimes committed in the future and benefit rights acquired in the future—but also retroactively. It would, thus, apply to (1) benefit rights acquired in the past, whether the crime was committed before or after enactment, and (2) to crimes committed in the past, whether the benefit rights were acquired or the benefits became payable in the past or in the future.

As in the case of private pension and group insurance payments and as in the case of wages and salaries, benefits under old-age and survivors insurance are work-connected payments. It is this work connection—the fact that they are earned through work—that establishes the basic character of the benefits. Hence, under present law benefits are paid to an insured worker and his eligible dependents or survivors without taking into account his attitudes, opinions, behavior, or personal characteristics. The right to benefits having been earned, the individual's actions do not modify or restrict that right.

Because the deprivation of benefits as provided in the amendment is in the nature of a penalty and based on considerations foreign to the objectives and provisions of the old-age and survivors insurance program, the amendment may well serve as a precedent for extension of similar provisions to other public programs and to other crimes which, while perhaps different in degree, are difficult to distinguish in principle.

The present law recognizes only three narrowly limited exceptions to the basic principle that benefits are paid without regard to the attitudes, opinions, behavior, or personal characteristics of the individual: (1) Under section 202 (n) of the Social Security Act benefits will not be paid to individuals who have been deported from the United States under certain sections of the Immigration and Nationality Act on conviction of certain crimes including subversive activities for the period that they are out of the country—on legal entry benefits may again be paid; (2) section 404,344 of regulations No. 4 bars dependent's benefits payments to an individual found guilty of the felonious homicide of the insured worker; and (3) under sections 740 (b), (c), and (d), title 5 of the United States Code, officers and employees of the Federal Government convicted of certain offenses, including treason, sedition, and other subversive activities, committed in the exercise of their "authority, influence, power, or privilege as an officer or employee of the Government" cannot receive social-security credit for their Federal Government employment, but may receive credit for earnings in other covered employment. This latter exception applies, therefore, only where abuse of the Federal office which the individual held is involved. None of these restrictions is analogous to the broad departure in principle which would be involved in the amendment intended to be proposed by Senator Williams.

In view of these considerations, we would recommend that the amendment not be enacted by the Congress.

Time has not permitted us to clear this report with the Bureau of the Budget

M. B. Folson, Secretary

APPENDIX B

Social Security Benefits to Prisoners

(By David Koitz, Specialist in Social Legislation, Education and Public Welfare Division, Congressional Research Service, Library of Congress, May 23, 1980)

There has been considerable interest of late in proposals to preclude the payment of social security benefits to persons who are in prisons. The following list of technical and administrative questions was prepared in response to requests to CRS for elaboration of the issues involved.

POLICY QUESTIONS WITH REGARD TO PRECLUDING SOCIAL SECURITY BENEFITS TO PRISONERS

Treatment of disability benefits/nature of disabling conditions:

Should there be a distinction made, regarding those whose benefits are to be withheld, between persons whose disabilities arise in the commission of a crime, and those whose do not?

Should benefits be withheld, even after incarceration ends, if the disability arose in the commission of a crime?

Potential difficulty.—How to determine whether or not a disabling condition arose in the commission of a crime, where a pre-existing impairment existed, or a subsequent impairment arose creating a greater limitation than that caused by the crime-related impairment?

For instance, a pre-existing impairment (but not a disabling one) might be aggravated by an injury occurring while an individual is committing a crime, which now makes the individual's condition severe enough to qualify for disability benefits.

Determining who is to be affected:

Is "incarceration" the determinant of who will or will not be affected?

Is "conviction with incarceration" necessary?

Will persons who were receiving benefits prior to committing a crime or prior to incarceration be affected?

Will persons convicted of a crime who receive suspended sentences be affected?

Will persons who are not convicted, but who are otherwise institutionalized be affected? (e.g.—not guilty by way of insanity)

Should the decision of whether benefits are to be paid simply be made a part of the sentencing process? (as is done under the present law for certain subversive crimes).

Should social security taxes be paid and earnings credits provided toward coverage for employment engaged in while an individual is incarcerated?

Will individuals incarcerated while awaiting trial be precluded from receiving benefits during that period? If benefits are permitted during that period, and the individuals are subsequently convicted, will overpayments be deemed to have occurred for the earlier months of payment?

Should benefits be paid for months after conviction in which an individual awaits incarceration?

Treatment of dependents benefits:

Should dependents benefits to incarcerated persons be withheld? (e.g.,—students' benefits)

Should benefits to dependents of incarcerated persons also be withheld? Where the incarcerated person's entitlement is based on disability, should a distinction be made, with regard to the payment of benefits to his dependents, depending on whether the disabling condition arose in the commission of the crime?

Treatment of retirement benefits:

Should retirement benefits similarly be withheld?

Should retirement benefits be withheld, if for instance, disability benefits were withheld due to incarceration, but the individual reaches age 62 while still in prison? Should payment begin at age 65 regardless?

Treatment of survivors' benefits:

Should survivors' benefits be paid to incarcerated persons?

Should survivors' benefits be withheld, if for instance, disability benefits were withheld due to incarceration, but the individual becomes eligible for survivors' benefits at age 60 while in prison?

Should survivors' benefits be paid to persons whose entitlement is based on the death of the person they killed? (precluded now by regulation only)

Should benefits be paid to survivors of persons who die in the commission of a crime? Should the lump-sum be paid?

Administrative considerations:

How will enforcement (notification to SSA of conviction, incarceration, etc.) be accomplished?

Will the Courts be responsible for notifying SSA of convictions, sentences, etc.?

Will prisons, mental institutions and the like be responsible for notifying SSA of incarceration?

Will the convicted/incarcerated person be responsible for notifying SSA of their circumstances?

APPENDIX C

[From Corrections Magazine, December 1979]

'Pay As You Stay' Or Stay Longer

by Marc Levinson

IT seemed like a perfectly reasonable idea, at least to those many conservative citizens of Florida who want both to keep criminals off the streets and to keep taxes low. On the one hand, Florida was sending tremendous numbers of criminals to prison; with 20,000 locked up on any given day, the number was wildly out of proportion to the state's size. On the other hand, the state was spending tremendous amounts of money to keep its offenders locked up; the state corrections budget rose from $20 million in 1970 to $154 million in 1978. So two legislators came up with a scheme which looked like it would recover some of the money; they would make the prisoners pay for their stay in prison. The idea seemed outlandish to many. But somehow the bill got through the legislature. Now, 18 months later, the law, nicknamed "pay-as-you-stay," is causing nothing but headaches for prison system officials and inmates alike — and may end up costing state taxpayers a bundle.

The law was the brainchild of then-state representative Earl Dixon of Jacksonville, who was outraged to learn that some inmates were receiving veterans' and social security benefits. Dixon and Rep. Billy Joe Rish of Port St. Joe, another powerful and conservative legislator, proposed requiring each inmate to declare his or her income and assets, with parole eligibility revoked for anyone refusing to declare. Then, the Department of Corrections would assess each inmate for the cost of his stay. The Dixon-Rish bill was "greased," in the words of one observer. It went straight to the House floor, bypassing the liberal Committee on Corrections, Probation and Parole. The Senate passed the bill with minor revision and Gov. Reuben Askew, not looking for a fight with the legislative leadership, let the bill become law without his signature.

Not until May 1 of this year did the Department of Corrections put the law into effect, after it became clear that repeal efforts would fail. At each institution, inmates were asked to fill out disclosure forms, listing all assets and income. The business office at each prison then determined how much each inmate should pay, and notified him accordingly. The amount was based on the current average of the cost of prison room and board — $14.64 a day. If inmates do not earn enough to pay this amount, the assessment is less. They are permitted to keep $60 a month to buy items from the prison canteens.

The first disappointment for the framers of the bill was that, at least according to their own accounts, Florida inmates had few assets. If interpreted broadly, the law would allow the state of Florida to levy against all the inmates' assets, including houses, cars and other property. But Jim Vickers, chief of the Department of Corrections' administrative and fiscal services division, concluded that the intent of the legislation was to include only an inmate's liquid assets — stocks, bonds and cash in the bank — and any income he had. And, Vickers ruled, this income cannot be assessed if it is being used for mortgage payments or family support, provided the inmate can prove he is making such payments. Income used to pay for outside legal assistance can be assessed.

Using these criteria, prison officials found only 193 inmates out of more than 20,000 who had assets that could be counted. By the end of September, those inmates had been assessed $43,000 for their room and board. Worse still, only a handful of inmates with assessments against them had paid. The total amount — $3,103 — won't make much of a dent in that $154 million corrections budget. The reason the inmates have failed to pay is

Marc Levinson is a free-lance writer based in Atlanta, Ga.

that while the law says the penalty for failing to declare assets is loss of parole eligibility, there is no penalty at all for failure to pay.

Worst of all, the state has no way to determine whether the disclosure reports are true. "With us having no investigative staff and no way of checking what the disclosures are, I would assume [an inmate] could do anything he wants to do," says Vickers. "Without some sort of routine investigation, we are basically completely dependent on the inmate's honesty."

Soon after implementation started, Vickers quickly learned that federal law prohibits veterans benefits from being assessed. Since veterans benefits represent between 20 and 40 percent of the inmates' income, according to department estimates, a substantial part of that income is beyond the state's reach. Before the bill passed, Vickers had estimated that about four percent of inmates would have enough resources to pay the state. In fact, fewer than one percent have been assessed. "What we're having to do is use a shotgun approach, dealing with 20,000 inmates rather than the few who have some money," complains Vickers.

Despite the fact that no inmate has yet been forced to pay, pay-as-you-stay has caused consternation in the prisons. One victim of inmate misunderstanding is Henry L. Smart, Jr., who is serving a life sentence at the Florida State Prison at Starke.

"I was approached with the financial disclosure thing in June or July," Smart recalls. "I refused to sign, because I figured if some relative of mine dies, which I don't know, he could leave me some property. I refused to sign it because I didn't know what the hell's going on, and on top of that my lawyer told not to sign anything without his knowledge."

Just before being asked to sign the form, Smart had had his parole hearing, and was given a prospective parole date of March 15, 1983. Just after he refused to sign, the parole board informed him that it had miscalculated, and his correct release date would be March 17, 1983. Within a couple of weeks came a third letter, notifying Smart that his parole date — already agreed to in writing — no longer applied.

Similar letters were sent to inmates at other institutions, informing them that no parole interview would even be scheduled unless they signed. As of the end of August, 866 inmates had refused to sign. By the end of September, the number was down to 843. Smart was one of those who changed his mind. "I want to go home," he says. "My arms are being twisted and I don't see no way out, so I've got to submit to it."

For those inmates who are assessed, and do pay, the impact will be devastating. Any money they might have saved to support themselves after release will have to go to pay for their stay in prison. For instance, Gail Smith, an inmate at the Union Correctional Institution (UCI), now receives $294 a month in Social Security disability payments. From that money he has been able to save $2,000 since he entered prison. Under the new law, Smith will be assessed the maximum $445 a month — all of his monthly check minus $60, plus a portion of his savings. When his savings are exhausted, the assessment will drop to the amount of his Social Security check less $60 a month.

Smith says the word in UCI was "either you signed it, or they wouldn't let you draw your $15 a week for canteen. Quite a few fellows refused to sign and they wouldn't let them draw." UCI officials say that is not so, but Smith, following the advice of prisoner advocate groups in the state, signed the disclosure form. He also joined in a prisoner suit seeking a federal injunction against pay-as-you-stay. So far, he has paid no money. And, he vows, "if it came down to brass tacks where they forced me to pay, I would give it to my children rather than give it to them."

Smith is not alone. According to UCI business manager T.B. Rahn, the total amount of cash accounts in the prison bank dropped from $135,000 on June 1 to $65,000 on July 1, after all inmates had been told of the disclosure law. "It was cut by 50 percent in a 30-day period," Rahn says. "Government checks which were coming into the institution have been diverted, either to other family members or to outside bank accounts." Those inmates who do not wish to transfer their cash have other options, such as buying cars or real property, which are not assessed.

Nevertheless, the inmates are worse off. At present, extra cash can be used to buy such items as radios, T-shirts or shoes in the canteen. But if pay-as-you-stay is strictly enforced, inmates will have no extra cash. All purchases of any sort will have to come out of the $15 weekly allowance.

Ben Patterson, the Tallahassee attorney

who is handling the inmates' suit, suggests the bill may violate inmates' due process rights by depriving them of funds which could be used to hire counsel. Patterson's worry is that while the present corrections administration is enforcing the law loosely, and providing exemptions not guaranteed in the law, the situation could change. "Something like this can become a political football, and I can see some guy coming in and saying, 'We've got this bill, let's make the prisoners pay their own way.' They could proceed to go after homes, real estate or other assets."

Various legal issues — constitutional bars against *ex post facto* punishment, vague rules and regulations, and the absence of an appeals procedure — threaten to sink pay-as-you-stay, if the Department of Corrections does not sink it first. None of the funds collected from inmates stay within the department, leaving little incentive to enforce the law. "A lot of man-hours have gone into this process," complains Jim Vickers. "There's no extra staff appropriated. We just had to divert people from other things. We didn't actively lobby against the law, but we felt then and we feel now that the cost of administering it is going to exceed the benefits from it." And beyond the administrative costs, the department has not figured the additional operating and capital costs if large numbers of inmates are not released on parole.

Rep. Arnett Girardeau, the Jacksonville dentist who now heads the Committee on Corrections, Probation and Parole, predicts pay-as-you-stay will be repealed next year. "I've talked with the speaker of the House and talked with the governor, and as a result the leadership is supportive of repeal," Girardeau says. The legislators who voted for pay-as-you-stay, he says, "just did not know how expensive it was."

But Girardeau may get more of a fight than he thinks if he tries to repeal the bill. Billy Joe Rish, now out of office, says that he still supports the legislation, even though it is never likely to have much impact on the cost of incarceration to the state. "The man in the street thinks this is a good bill," Rish said in a recent interview. "It would pass five-to-one in my district if there was a vote on it." But, he was asked, is it worth the trouble if so few inmates qualify for assessment and even fewer pay? "If it didn't apply to but ten people in the state of Florida," he replied, "it would be right and moral and just and honorable." □

APPENDIX D

REGULATIONS ON REPRESENTATIVE PAYEES
(Sec. 202 (j) Social Security Act)

TITLE 20 CODE OF FEDERAL REGULATIONS

Subpart Q

REPRESENTATIVE PAYEE

Regulation Sec. 404.1601. Payments on behalf of an individual.—When it appears to the Administration that the interest of a beneficiary entitled to a payment under Title II of the Act would be served thereby, certification of payment may be made by the Administration, regardless of the legal competency or incompetency of the beneficiary entitled thereto, either for direct payment to such beneficiary, or for his use and benefit to a relative or some other person as the "representative payee" of the beneficiary. When it appears that an individual who is receiving benefit payments may be incapable of managing such payments in his own interest, the Administration shall, if such individual is age 18 or over and has not been adjudged legally incompetent, continue payments to such individual pending a determination as to his capacity to manage benefit payments and the selection of a representative payee. [As amended, 35 F. R. 14698 (September 22, 1970).]

Regulation Sec. 404.1602. Submission of evidence by representative payee.—Before any amount shall be certified for payment to any relative or other person as representative payee for and on behalf of a beneficiary, such relative or other person shall submit to the Administration such evidence as it may require of his relationship to, or his responsibility for the care of, the beneficiary on whose behalf payment is to be made, or of his authority to receive such payment. The Administration may, at any time thereafter, require evidence of the continued existence of such relationship, responsibility or authority. If any such relative or other person fails to submit the required evidence within a reasonable period of time after it is requested, no further payments shall be certified to him on behalf of the beneficiary unless for good cause shown, the default of such relative or other person is excused by the Administration, and the required evidence is thereafter submitted. [As adopted, 26 F. R. 11827 (December 9, 1961).]

Regulation Sec. 404.1603. Responsibility of representative payee.—A relative or other person to whom certification of payment is made on behalf of a beneficiary as representative payee shall, subject to review by the Administration and to such requirements as it may from time to time prescribe, apply the payments certified to him on behalf of a beneficiary only for the use and benefit of such beneficiary in the manner and for the purposes determined by him to be in the beneficiary's best interest. [As adopted, 26 F. R. 11827 (December 9, 1961).]

Regulation Sec. 404.1604. Use of benefits for current maintenance.—Payments certified to a relative or other person on behalf of a beneficiary shall be considered as having been applied for the use and benefit of the beneficiary when they are used for the beneficiary's current maintenance—i. e., to replace current income lost because of the disability, retirement, or death of the insured individual. Where a beneficiary is receiving care in an institution (see § 404.1606), current maintenance shall include the customary charges made by the institution to individuals it provides with care and services like those it provides the beneficiary and charges made for current and foreseeable needs of the beneficiary which are not met by the institution. [As adopted, 26 F. R. 11827 (December 9, 1961).]

Regulation Sec. 404.1605. Conservation and investment of payments.—Payments certified to a relative or other person on behalf of a beneficiary which are not needed for the current maintenance of the beneficiary except as they may be used pursuant to § 404.1607, shall be conserved or invested on the beneficiary's behalf. Preferred investments are U. S. Savings Bonds, but such funds may also be invested in accordance with the rules applicable to investment of trust estates by trustees. For example, surplus funds may be deposited in an interest or dividend bearing account in a bank or trust company, in a savings and loan association, or in a credit union, if the account is either federally insured or is otherwise insured in accordance with State law requirements. Surplus funds deposited in an interest or dividend bearing account in a bank or trust company, in a savings and loan association, or in a credit union, must be in a form of account which clearly shows that the representative payee has only a fiduciary, and not a personal, interest in the funds. The preferred forms of such accounts are as follows:

.....
(Name of beneficiary)
by
.....,
(Name of representative payee)
representative payee; or
.....,
(Name of beneficiary)
by
.....,
(Name of representative payee)

trustee. U. S. Savings Bonds purchased with surplus funds by a representative payee for a minor should be registered as follows:

.....,
(Name of beneficiary)
....., a minor, for whom ..... is repre-
(Social Security No.) (Name of payee)
sentative payee for social security benefits.

U. S. Savings Bonds purchased with surplus funds by a representative payee for an incapacitated adult beneficiary should be registered as follows:

.....
(Name of beneficiary)
....., for whom .....
(Social Security No.) (Name of payee)
is representative payee for social security benefits.

A representative payee who is the legally appointed guardian or fiduciary of the beneficiary may also register U. S. Savings Bonds purchased with funds from Title II payments in accordance with applicable regulations of the U. S. Treasury Department (31 CFR 315.5 through 315.8). Any other approved investment of the beneficiary's funds made by the representative payee must clearly show that the payee holds the property in trust for the beneficiary. [As amended, 41 F. R. 17891 (April 29, 1976).]

Regulation Sec. 404.1606. Use of benefits for beneficiary in institution.—Where a beneficiary is confined in a Federal, State or private institution because of mental or physical incapacity, the relative or other person to whom payments are certified on behalf of the beneficiary shall give highest priority to expenditure of the payments for the current maintenance

needs of the beneficiary, including the customary charges made by the institution (see § 404.1604) in providing care and maintenance. It is considered in the best interests of the beneficiary for the relative or other person to whom payments are certified on the beneficiary's behalf to allocate expenditure of the payments so certified in a manner which will facilitate the beneficiary's earliest possible rehabilitation or release from the institution or which otherwise will help him live as normal a life as practicable in the institutional environment. [As corrected, 26 F. R. 11938 (December 14, 1961).]

Regulation Sec. 404.1607. Support of legally dependent spouse, child, or parent.—If current maintenance needs of a beneficiary are being reasonably met, a relative or other person to whom payments are certified as representative payee on behalf of the beneficiary may use part of the payments so certified for the support of the legally dependent spouse, a legally dependent child, or a legally dependent parent of the beneficiary. [As amended, 31 F. R. 3394 (March 4, 1966).]

Regulation Sec. 404.1608. Claims of creditors.—A relative or other person to whom payments under title II of the Act are certified as representative payee on behalf of a beneficiary may not be required to use such payments to discharge an indebtedness of the beneficiary which was incurred before the first month for which payments are certified to a relative or other person on the beneficiary's behalf. In no case, however, may such payee use such payments to discharge such indebtedness of the beneficiary unless the current and reasonably foreseeable future needs of the beneficiary are otherwise provided for. [As amended, 28 F. R. 7182 (July 12, 1963).]

Regulation Sec. 404.1609. Accountability.—A relative or other person to whom payments are certified as representative payee on behalf of a beneficiary shall submit a written report in such form and at such times as the Administration may require, accounting for the payments certified to him on behalf of the beneficiary unless such payee is a court-appointed fiduciary and, as such, is required to make an annual accounting to the court, in which case a true copy of each such account filed with the court may be submitted in lieu of the accounting form prescribed by the Administration. If any such relative or other person fails to submit the required accounting within a reasonable period of time after it is requested, no further payments shall be certified to him on behalf of the beneficiary unless for good cause shown, the default of such relative or other person is excused by the Administration, and the required accounting is thereafter submitted. [As adopted. 26 F. R. 11827 (December 9, 1961).]

Regulation Sec. 404.1610. Transfer of accumulated benefit payments.—A representative payee who has conserved or invested funds from Title II payments certified to him on behalf of a beneficiary shall, upon direction of the Administration, transfer any such funds (including interest earned from investment of such funds) to a successor payee appointed by the Administration, or, at the option of the Administration, shall transfer such funds, including interest, to the Administration for recertification to a successor payee or to the beneficiary. [As adopted, 28 F. R. 7182 (July 12, 1963).]

APPENDIX E

[From United States Reports, Vol. 409, Cases Adjudged in the Supreme Court]

Opinion of the Court

PHILPOTT ET AL. *v.* ESSEX COUNTY WELFARE BOARD

CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

No. 71-5656. Argued December 4, 1972—Decided January 10, 1973

A Social Security Act provision, 42 U. S. C. § 407, which prohibits subjecting federal disability insurance benefits and other benefits to any legal process, bars a State from recovering such benefits retroactively paid to a beneficiary, and in this case no exception can be implied on the ground that if the federal payments had been made monthly there would have been a corresponding reduction in the state payments. Pp. 415–417.

59 N. J. 75, 279 A. 2d 806, reversed.

DOUGLAS, J., delivered the opinion for a unanimous Court.

George Charles Bruno argued the cause and filed a brief for petitioners.

Ronald Reichstein argued the cause for respondent. With him on the brief was *Joseph E. Cohen.*

Solicitor General Griswold, Deputy Solicitor General Friedman, Keith A. Jones, Wilmot R. Hastings, Edwin Yourman, and *Arthur Abraham* filed a brief for the United States as *amicus curiae* urging reversal.

George F. Kugler, Jr., Attorney General, *Stephen Skillman,* Assistant Attorney General, and *Joan W. Murray,* Deputy Attorney General, filed a brief for the State of New Jersey as *amicus curiae* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Wilkes,[1] one of the petitioners, applied to respondent, one of New Jersey's welfare agencies, for financial as-

[1] The payment in controversy is in a bank account under the name of petitioner Philpott in trust for Wilkes.

sistance based upon need by reason of permanent and total disability. As a condition of receiving assistance, a recipient is required by New Jersey law to execute an agreement to reimburse the county welfare board for all payments received thereunder.[2] The purpose apparently is to enable the board to obtain reimbursement out of subsequently discovered or acquired real and personal property of the recipient.

Wilkes applied to respondent for such assistance in 1966 and he executed the required agreement. Respondent determined Wilkes' monthly maintenance needs to be $108; and, finding that he had no other income, respondent fixed the monthly benefits at that amount and began making assistance payments, no later than January 1, 1967. The payments would have been less if Wilkes had been receiving federal disability insurance benefits under the Social Security Act, and respondent advised him to apply for those federal benefits.

In 1968 Wilkes was awarded retroactive disability insurance benefits under § 223 of the Social Security Act, 70 Stat. 815, as amended, 42 U. S. C. § 423, covering the period from May 1966 into the summer of 1968. Those benefits, calculated on the basis of $69.60 per month for 20 months and $78.20 per month for six months,

[2] N. J. Stat. Ann. § 44:7–14 (a) (Supp. 1972–1973) provides: "Every county welfare board shall require, as a condition to granting assistance in any case, that all or any part of the property, either real or personal, of a person applying for old age assistance, be pledged to said county welfare board as a guaranty for the reimbursement of the funds so granted as old age assistance pursuant to the provisions of this chapter. The county welfare board shall take from each applicant a properly acknowledged agreement to reimburse for all advances granted, and pursuant to such agreement, said applicant shall assign to the welfare board, as collateral security for such advances, all or any part of his personal property as the board shall specify."

amounted to $1,864.20. A check in that amount was deposited in the account which Philpott holds as trustee for Wilkes. Under New Jersey law, we are told, the filing of a notice of such a reimbursement agreement has the same force and effect as a judgment. 59 N. J. 75, 80, 279 A. 2d 806, 809.

Respondent sued to reach the bank account under the agreement to reimburse. The trial court held that respondent was barred by the Social Security Act, 49 Stat. 624, as amended, 42 U. S. C. § 407, from recovering any amount from the account.[3] 104 N. J. Super. 280, 249 A. 2d 639. The Appellate Division affirmed. 109 N. J. Super. 48, 262 A. 2d 227. The Supreme Court reversed.[4] 59 N. J. 75, 279 A. 2d 806. The case is here on a petition for a writ of certiorari which we granted. 406 U. S. 917.

On its face, the Social Security Act in § 407 bars the State of New Jersey from reaching the federal disability payments paid to Wilkes. The language is all-inclusive: [5] "[N]one of the moneys paid or payable . . . under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process . . . ." The

[3] Title 42 U. S. C. § 407 provides:

"The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

[4] Since respondent did not claim a right to the entire federal payment but only to the amount by which its own payments would have been reduced had the federal benefits been received currently rather than retroactively and because the stipulated facts were ambiguous as to when respondent actually began making assistance payments, the court remanded for a determination of the precise amount of respondent's claim.

[5] *Supra*, n. 3.

moneys paid as retroactive benefits were "moneys paid . . . under this subchapter"; and the suit brought was an attempt to subject the money to "levy, attachment . . . or other legal process."

New Jersey argues that if the amount of social security benefits received from the Federal Government had been made monthly, the amount of state welfare benefits could have been reduced by the amount of the federal grant. We see no reason to base an implied exemption from § 407 on that ground. We see no reason why a State, performing its statutory duty to take care of the needy, should be in a preferred position as compared with any other creditor. Indeed, since the Federal Government provides one-half of the funds for assistance under the New Jersey program of disability relief, the State, concededly, on recovery of any sums by way of reimbursement, would have to account to the Federal Government for the latter's share.

The protection afforded by § 407 is to "moneys paid" and we think the analogy to veterans' benefits exemptions which we reviewed in *Porter* v. *Aetna Casualty Co.*, 370 U. S. 159, is relevant here. We held in that case that veterans' benefits deposited in a savings and loan association on behalf of a veteran retained the "quality of moneys" and had not become a permanent investment. *Id.*, at 161–162.

In the present case, as in *Porter*, the funds on deposit were readily withdrawable and retained the quality of "moneys" within the purview of § 407. The Supreme Court of New Jersey referred to cases[6] where a State which has provided care and maintenance to an incompetent veteran at times is a "creditor" for purposes of

[6] See *Savoid* v. *District of Columbia*, 110 U. S. App. D. C. 39, 288 F. 2d 851; *District of Columbia* v. *Reilly*, 102 U. S. App. D. C. 9, 249 F. 2d 524. See decision below, 59 N. J. 75, 85, 279 A. 2d 806, 812.

38 U. S. C. § 3101, and at other times is not. But § 407 does not refer to any "claim of creditors"; it imposes a broad bar against the use of any legal process to reach all social security benefits. That is broad enough to include all claimants, including a State.

The New Jersey court also relied on 42 U. S. C. § 404, a provision of the Social Security Act which permits the Secretary to recover overpayments of old age, survivors, or disability insurance benefits. But there has been no overpayment of federal disability benefits here and the Secretary is not seeking any recovery here. And the Solicitor General, speaking for the Secretary, concedes that the pecuniary interest of the United States in the outcome of this case, which would be its aliquot share of any recovery, is not within the ambit of § 404.

By reason of the Supremacy Clause the judgment below is

Reversed.

Department of Health and Rehabilitative Services, State of Florida

v.

Rachel G. Davis, as Guardian of the Estate of Arthur Grady Glasscock

U.S. Court of Appeals, Fifth Circuit
No. 78-3652

Opinion dated May 8, 1980. Roney, Circuit Judge

Appeal from U.S. District Court, Middle District of Alabama.

Social Security and Veterans' Benefits—Exemption from Execution—Repayment of Assistance for Past Care and Maintenance.—The state of Florida was not precluded from seeking reimbursement for the past care and maintenance given to an incompetent whose guardian accumulated social security and veterans' benefits by the exemption language contained in the social security and veterans' statutes.

The federal statutes in question would seem to bar any judicial action to collect money out of the benefits. The social security statute provided that none of the benefits paid would be subject to execution, levy or other legal process (42 U.S.C. § 407). The veterans' statute provided that payments would be exempt from the claim of creditors and would not be liable to attachment, levy, seizure, or any legal or equitable process, either before or after receipt by the beneficiary (38 U.S.C. § 1301(a)).

The purpose of social security disability benefits was to provide for the care and maintenance of the recipient. The social security exemption was designed to protect beneficiaries from creditors' claims. Veterans' benefits were also intended primarily for the maintenance and support of the veteran, and the exemption was to protect the recipient against claims of creditors. However, the protective pension law did not intend to create a fund for the welfare of the beneficiary and then, under its restrictions, after receipt by the beneficiary, prevent the use of such funds for care and support of the beneficiary.

Neither the purpose of the benefits, nor the purpose of the exemption, was accomplished by barring Florida from reimbursement for care and maintenance. The federal benefits were for the purpose of assuring the beneficiary's care and maintenance, and the state sought nothing more than to apply them to the reasonable cost of this recipient's care. Since the recipient had the ability to pay, and the funds received by his guardian were for his care and maintenance, the state's request for reasonable reimbursement was entirely justified.

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