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

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

## Summary

Social Security reform is a major issue currently under debate in the 109<sup>th</sup> Congress. Impetus for this debate stems from calculations indicating that in the long-run the current program will not be financially sustainable under the present statutory scheme. This report addresses selected legal issues which may be raised regarding entitlement to Social Security benefits as Congress considers possible changes to the Social Security program, and in view of projected long-range shortfalls in the Social Security Trust Funds.

Social Security is a statutory entitlement program. Beneficiaries have a legal entitlement to receive Social Security benefits as set forth under the Social Security Act. However, Social Security benefits are not directly measured by the amount of payments made through the years into the system. Thus, the fact that Social Security benefits are financed by taxes on an employee's wages does not limit Congress' power to fix the levels of benefits under the Social Security Act, or the conditions upon which they may be paid. Congress's authority to modify provisions of the Social Security program, was affirmed in the 1960 Supreme Court decision in *Flemming v. Nestor*, wherein the Court held that an individual does not have an accrued "property right" in his or her Social Security benefits. The Court has also made clear in subsequent court decisions that the payment of Social Security taxes conveys no contractual rights to Social Security benefits. The courts will accord strong deference to social legislation such as contained in the Social Security Act where Congress exercises its power to provide for the general welfare.

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

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

Social Security reform is a major issue currently under debate in the 109<sup>th</sup> Congress. Impetus for this debate stems from calculations indicating that in the long-run the current program will be financially unsustainable under the present statutory scheme. This report addresses selected legal issues which may be raised regarding entitlement to Social Security benefits as Congress considers possible changes to the Social Security program and in view of projected long-range shortfalls in the Social Security Trust Funds.<sup>1</sup>

Social Security benefits are administered pursuant to Title II of the Social Security Act, known as the *Old Age, Survivors and Disability Insurance (OASDI)* program.<sup>2</sup> Title II is part of a larger Social insurance program in which Congress uses its power to tax and spend for the general welfare to promote the Social goals of aiding the aged, survivors of workers, disabled persons and persons of limited means. Beneficiaries under title II have a legal entitlement to receive Social Security benefits as set forth by the Social Security Act and as administered by the Social Security Administration (SSA), an independent agency in the executive branch.

An individual's right to Social Security benefits is in a sense "earned," since there is a general relationship between OASDI benefits and wages earned and the tax paid thereon. However, benefits are not directly measured by the amount of payments made through the years into the system. Thus, the fact that Social Security benefits are financed by taxes on an employee's wages does not provide a limit on Congress' power to fix the levels of benefits under the Social Security Act, or the conditions upon which they may be paid.<sup>3</sup>

## Congressional Authority to Modify Entitlements

The Supreme Court's landmark decision in *Flemming v. Nestor*,<sup>4</sup> provided an analysis of the relationship between a beneficiary's legal entitlement to receive Social Security benefits and the power of Congress to change that entitlement by amending

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<sup>1</sup> For more information, see CRS Issue Brief IB98048, *Social Security Reform*, by Dawn Nuschler, and CRS Report RL31498, *Social Security Reform: Economic Issues*, by Jane Gravelle and Marc Labonte.

<sup>2</sup> Section 201 *et seq.* of the Social Security Act, 42 U.S.C. § 401 *et seq.*

<sup>3</sup> *Richardson v. Belcher*, 404 U.S. 78 (1971). In addition, Section 1104, 42 U.S.C. § 1304 explicitly states "The right to alter, amend, or repeal any provision of this Act is hereby reserved to the Congress."

<sup>4</sup> 363 U.S. 603 (1960).

the underlying statute. The Court in that case upheld a provision, section 202(a) of the Social Security Act, 42 U.S.C. §402(a), that terminated Social Security benefits to a person deported for membership in the Communist Party. Nestor had, at one time, been a member of the Communist Party. Later he began receiving Social Security benefits which were cut off when he was deported to his native Bulgaria. Nestor argued that he had a “property right” in his Social Security benefits and that, by cutting off those benefits, the government had made an unlawful “taking” of his benefits under the Fifth Amendment.<sup>5</sup>

The Court, however, disagreed. Justice Harlan wrote:

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

*Flemming* at 610-611.

The inherent ability of Congress to modify the provisions of Title II of the Social Security Act, even to the extent of affecting the benefits an individual is currently receiving, is thus well established.<sup>6</sup> The same principle that current benefit amounts may be modified has been applied to other, similar programs involving pensions, such as Federal Civil Service Retirement. One significant example is the Supreme Court affirmance, without opinion, of a decision of a three-judge district court in *National Association of Retired Federal Employees v. Horner*.<sup>7</sup> The district court in that case upheld a provision of the Balanced Budget and Emergency Deficit Control Act,<sup>8</sup> which suspended paying a scheduled cost-of-living adjustment (COLA) for federal retirees, saying that it did not violate the Takings Clause of the Fifth Amendment, which states that private property shall not be taken for public use without just compensation.

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<sup>5</sup> The Fifth Amendment, in relevant part, states that, “No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.” Language preceding the semicolon is referred to as the Due Process Clause; language following the semicolon is referred to as the Takings Clause.

<sup>6</sup> See *Richardson v. Belcher*, 404 U.S. 78 (1971), where the Supreme Court upheld an amendment that reduced monthly Social Security disability benefits from \$330 to \$225 to reflect receipt of state workmen’s compensation benefits. See Also *Milner v. Apfel*, 148 F. 3d 812 (7<sup>th</sup> Cir. 1998) upholding suspension of Social Security benefits payable to certain persons in public institutions found not guilty by reason of insanity of offenses punishable by imprisonment for more than one year.

<sup>7</sup> 633 F. Supp. 511 (D.D.C. 1986), *aff’d*. 479 U.S. 878 (1986).

<sup>8</sup> Pub. L. No. 99-177, known as the Gramm-Rudmann-Hollings Act.

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

The court rejected their claim, asserting that, “It is utterly clear, however, that the statute [section 8340(b)] cannot be read as plaintiffs wish.”<sup>9</sup> *Horner* at 514. It cited an earlier case, *Stouper v. Jones*, 284 F.2d 240 (D.C. Cir. 1960), as dispositive. The appellant in the *Stouper* case retired in 1953 and began receiving disability annuity payments pursuant to the law then in force. In 1956, Congress amended the law to discontinue benefits to recipients whose earning capacity was restored to a level fairly comparable to the current rate of pay for the position held immediately prior to retirement. After the Retirement Division of the Civil Service Commission determined that the appellant had been restored to that earning capacity, her disability annuity was terminated.

The appellant asserted that the 1956 amendment could not constitutionally be applied in her case because at the time she retired she acquired a vested right to an annuity that could not be taken from her by subsequent legislation. *Stouper* at 242. The U.S. Court of Appeals for the District of Columbia in *Stouper* said that “(i)t is well settled that a pension granted by the government confers no right which cannot be revised, modified, or recalled by subsequent legislation. *United States ex rel. Burnett v. Teller*, 107 U.S. 64 (1882).” The court in the *Stouper* case added that benefits under the Civil Service Retirement Act are similar to those under the Social Security Act: they are not based on an employee’s contributions to the retirement fund, but instead on the employee’s earnings record and years of service. It was noted that the Retirement Act pays higher benefits when a deceased employee is survived by a widow or widower and children, than when he or she is survived only by a widow or widower even though the employee’s contribution to the Civil Service Retirement and Disability Fund had been the same in either case. “We conclude that an employee has no right under the Retirement Act based on contractual annuity principles, and hold that the appellant had no vested right to the disability annuity which was terminated.” *Id.*

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<sup>9</sup> See also *Zucker v. United States*, 578 F. Supp. 1239 (S.D.N.Y. 1984), *appeal dismissed on proced. grounds*. 751 F.2d 373 (2d Cir. 1984), *aff’d*. 758 F. 2d 637 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 842 (1985). The court there upheld a modification of a Civil Service retirement COLA saying that, although retirees may have a protected property interest when they are entitled to immediate payment under pre-existing law, their entitlement to any post-retirement increases in an annuity stems from the underlying statute which may be adjusted at any time. *Id.* at 758 F.2d 638.

The United States Supreme Court has also made clear that the payment of Social Security taxes conveys no contractual rights to Social Security benefits. In 1937 the High Court upheld the constitutionality of the Social Security Act in *Helvering v. Davis*.<sup>10</sup> In doing so, the Court held that the Social Security program was not an insurance program. The court noted, “The proceeds of both employee and employer taxes are to be paid into the treasury like any other internal revenue generally, and are not earmarked in any way.”<sup>11</sup> The Court, in essence, deferred to Congress on the question of which welfare schemes fall within the ambit of the Constitution’s General Welfare Clause. Later, in *Flemming*, the Court rejected any comparison of Social Security with insurance or an annuity:<sup>12</sup>

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

The absence of contractual rights extends to government pensions in general. In *Dodge v. Board Education*, 302 U.S. 74 (1937) a retired school teacher challenged the constitutionality of a state statute that reduced her retirement annuity from \$1500 to \$500. The statute in effect when she retired said that, “Each person so retired ... shall be paid the sum of fifteen hundred (\$1500) annually and for life from the date of such retirement.” The Supreme Court did not interpret this mandatory language (“shall,” “annually and for life”) to supersede a subsequent state statute that reduced the amount of the annual annuity, saying that, “The presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy until the legislature shall ordain otherwise.”<sup>13</sup>

The presumption that pension statutes do not preclude Congress from decreasing or eliminating benefits at a future time rests on the recognition that legislative bodies require flexibility in public welfare matters.<sup>14</sup> “[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.” *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16.

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<sup>10</sup> 301 U.S. 619 (1937).

<sup>11</sup> *Id.* at 635.

<sup>12</sup> *Flemming* at 610.

<sup>13</sup> *Id.* at 79.

<sup>14</sup> In *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), the argument was advanced that agreements between Congress and states regarding Social Security coverage of state and local employees conferred contractual rights upon the state and local governments. When Congress revoked the state’s right to withdraw from its coverage agreement, California claimed a “taking of private property” under the Fifth Amendment. However, the Court disagreed. “The provision simply cannot be viewed as conferring any sort of ‘vested right’ in the face of precedent concerning the effect of Congress’ reserved power on agreements entered into under a statute containing the language of reservation [to alter, amend or repeal the underlying statutory provisions]... Rather, the provision simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare.” *Id.* at 55.

While acknowledging this latitude, the Supreme Court in *Flemming* nonetheless indicated that congressional action may be subject to some constitutional restraint:<sup>15</sup>

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

Thus, only if Congress were to act in a totally irrational and arbitrary manner would due process considerations invalidate a subsequent amendment.<sup>16</sup> The Court reiterated this view in *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980), wherein it upheld congressional amendments to railroad retirement benefits that reduced benefits for some beneficiaries and eliminated benefits for others. These changes were challenged under the Due Process Clause on the ground that they irrationally distinguished between classes of annuitants. However, the Court held that because Congress could have eliminated benefits for all classes of employees, it was not constitutionally impermissible to draw lines between groups of employees for the purpose of phasing out the benefits. The Court said: “Where, as here, there are plausible reasons for Congress’ action, our inquiry is at an end.” The Court added that drawing lines between categories of beneficiaries “is a matter for legislative, rather than judicial, consideration.” *Id.* at 179-180.<sup>17</sup>

## **Payment of Social Security Benefits From the Trust Fund in Case of Insolvency**

The projected insolvency of the Social Security Trust Funds, formally known as the Federal Old Age and Survivors Insurance (OASI) Trust Fund and the Disability Insurance (DI) Trust Fund, raises a question whether that possibility would affect the legal right of beneficiaries to receive full Social Security benefits. On

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<sup>15</sup> *Flemming* at 611. Note, however, that once a beneficiary receives an actual benefit payment, the government cannot take it back. “Pension payments actually made to retirees become their property and are protected against takings, even if and where the payments are unquestionably a gift.” *National Education Association-Rhode Island v. Retirement Board of Rhode Island Employees’ Retirement System*, 172 F. 3d 22, 300 (1<sup>st</sup> Cir. 1999).

<sup>16</sup> “[T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.” *PBGC v. R. A. Gray & Co.*, 467 U.S. 717, 729(1984).

<sup>17</sup> See *Steinberg v. United States*, 163 F. Supp. 590 (Ct. Cl. 1958), for a case which held that a provision of the Federal Civil Service Retirement Act terminating annuity payments to any person who invoked his Fifth Amendment privilege against self-incrimination was arbitrary and discriminatory in violation of the Due Process Clause and also a bill of attainder, i.e., a legislative punishment, in violation of Art. I, §6, cl. 3 of the Constitution.



March 23, 2005, the Trustees of the Social Security Trust Funds stated that the funds<sup>18</sup>

. . . are projected to become insolvent (i.e., unable to pay scheduled benefits in full on a timely basis) when assets are exhausted in 2041 under the long-range intermediate assumptions. . . . Based on the Trustees' best estimate, program cost will exceed tax revenues starting in 2017 and throughout the remainder of the 75-year projection period. Social Security's combined trust funds are projected to allow full payment of benefits until they become exhausted in 2041. At that time annual tax income to the trust funds is projected to equal about 74 percent of program costs. Separately, the OASI and DI funds are projected to have sufficient funds to pay full benefits on time until 2043 and 2027, respectively. By 2079, however, annual tax income is projected to be only about two thirds as large as the annual cost of the OASDI program.

The OASDI Trust Funds are accounts maintained on the books of the United States Treasury. The system operates on a "pay-as-you-go" basis. Current workers and their employers and the self-employed pay taxes on wages and self-employment income under the Federal Insurance Contributions Act (FICA) and the Self-Employed Contributions Act (SECA), respectively. Taxes paid now finance benefits for today's beneficiaries. A full 100% of these payroll taxes is appropriated to the Social Security Trust Funds.<sup>19</sup> Interest on and proceeds from the sale or redemption of government securities held in these funds are credited to and form a part of them.<sup>20</sup> Moreover, amounts credited to the funds are the only source of funds to pay benefits.<sup>21</sup>

Social Security is a statutory entitlement program.<sup>22</sup> Entitlement authority has been defined as "authority to make payments (including loans and grants) for which budget authority is not provided in advance by appropriation acts to any person or government if, under the provisions of the law containing such authority, the government is obligated to make the payments to persons or governments who meet the requirements established by law."<sup>23</sup> Budget authority is the authority provided by law to enter into obligations that will result in immediate or future outlays involving federal government funds.<sup>24</sup>

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<sup>18</sup> Board of Trustees, Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds, *The 2005 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds* 3 and 16 (2005). The Annual Report is available at [<http://www.socialsecurity.gov>].

<sup>19</sup> Section 201(a) and (d) of the Social Security Act, 42 U.S.C. § 401(a) and (b).

<sup>20</sup> Section 201(f) of the Social Security Act, 42 U.S.C. § 401(f).

<sup>21</sup> Section 201(h) of the Social Security Act, 42 U.S.C. § 401(h).

<sup>22</sup> See sections 202 and 223 of the Social Security Act, 42 U.S.C. §§ 402 and 423, which state that every individual who meets the eligibility requirements set forth therein "shall be entitled" to an old age benefit or disability benefit, respectively.

<sup>23</sup> 2 U.S.C. §§ 622(9) and 651(c)(2)(C).

<sup>24</sup> 2 U.S.C. § 622(2).

According to a publication of the General Accountability Office, formerly the General Accounting Office,<sup>25</sup>

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

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

An officer or employee of the United States government or of the District of Columbia government may not —

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law; . . . .

The Antideficiency Act prohibits making expenditures either in excess of an amount available in a fund or before an appropriation is made. It would appear to bar paying more money in benefits than the amount of the balance in the Social Security Trust Funds primarily because, as noted earlier, disability and old-age and survivor benefit payments shall be made “only” from the Disability Insurance Trust Fund and the Old Age and Survivors Insurance Trust Fund, respectively.<sup>26</sup>

Violations of the Antideficiency Act are punishable by administrative and criminal penalties. An officer or employee who violates the act’s prohibitions is subject to appropriate administrative discipline, including, when circumstances

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<sup>25</sup> Office of the General Counsel, General Accounting Office, *I Principles of Appropriations Law* 3-49 and 3-49, n. 40. (3d ed. 2004).

<sup>26</sup> Section 201(h) of the Social Security Act, 42 U.S.C. § 401(h).

warrant, suspension from duty without pay or removal from office.<sup>27</sup> An officer or employee who knowingly and willfully violates the act can be fined not more than \$5000, imprisoned for not more than two years, or both.

After the Social Security Trust Funds become insolvent, i.e., unable to pay scheduled benefits in full on a timely basis, it appears that beneficiaries who would file suit to be paid the difference between the amount that receipts allow paying and the full benefit amount to which they are entitled would not be likely to succeed in getting the difference. The Supreme Court in *Reeside v. Walker*, 53 U.S. (11 How.) 272, 275 (1850), held that no officer of the government is authorized to pay any debt due from the United States, whether reduced to a court judgment or not, unless an appropriation has been made for that purpose. To support its holding, the Court cited Article I, Section 9, clause 7 of the Constitution, which states that, “No money shall be drawn from the Treasury, but in consequence of appropriations made by law; . . . .” The Court reaffirmed this principle in *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424-426 (1990). Consequently, unless Congress amends applicable laws, it appears that beneficiaries would have to wait until the Trust Funds receive an amount sufficient to pay full benefits to receive the difference between the amount that can be paid from the Trust Funds and the full benefit amount.

## Conclusion

The *Old Age, Survivors and Disability Insurance* program is a statutory entitlement program. Beneficiaries have a legal right to receive benefits if they meet the Social Security Act’s eligibility requirements. Congress has, however, reserved the “right to alter, amend, or repeal any provision of this (Social Security) Act” and the United States Supreme Court has affirmed Congress’ power to modify provisions of the Social Security Act in *Flemming v. Nestor*, 363 U.S. 603 (1960), and in subsequent court decisions. The Social Security program does not accord individuals either vested property rights or contractual rights with regard to future benefits. Congress may modify provisions of the Social Security Act as it exercises its constitutional power to provide for the general welfare.

The Trustees of the Old Age and Survivors Insurance Trust Fund and the Disability Insurance Trust Fund have projected that these funds on a combined basis will be insolvent, i.e., unable to pay full benefits on time, in 2042. The Social Security Administration would not be able to pay beneficiaries full benefits at that time because the Social Security Act states that benefits shall be paid only from the Social Security Trust Funds. Social Security Administration officials are bound by the Antideficiency Act, which prohibits paying amounts that exceed the amount available in the source of funds available to pay them. Although the legal right of beneficiaries to receive full benefits would not be extinguished by the insufficient amount of funds in the Social Security Trust funds, a court suit to obtain the difference between the amount in the Social Security Trust Funds available to pay partial benefits and the full benefit amount would not be likely to succeed in getting the difference. The Supreme Court has held that no officer of the government may pay a debt whether reduced to a court judgment or not, unless Congress has

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<sup>27</sup> 31 U.S.C. § 1349.

appropriated funds to pay it. Consequently, unless Congress amends applicable laws, it appears that beneficiaries would have to wait until the Trust Funds receive an amount sufficient to pay full benefits to receive the difference between the amount that can be paid from the Trust Funds and the full benefit amount.