§ 9:38 Try taking it away: Social Security as a right *[New]*

Begin by considering the effects of making Social Security completely unavailable or taking it away. Looking at that view of the question provides the clearest analysis of whether there is a ***right*** to Social Security.

It appears to be fairly certain that the United States Supreme Court will make the final decision on the question of whether ***anyone*** has a constitutionally protected right to receive Social Security old-age insurance benefits. There is no U.S. Supreme Court authority directly on point at the present time. We can only reason by analogy to similar cases. Until the U.S. Supreme Court rules on the question, reasoning by analogy will have to govern the outcome of the question of whether there is a constitutionally protected right to receive Social Security old-age insurance benefits.

In any case, this is an outline, not a lawyer's argument. Lawyer's arguments depend upon future cases. Like any Chapter of a treatise on law, this Chapter is intended as a starting point for research, not necessarily the end.

People currently receiving benefits. This group of people has the strongest claim to a right to old-age insurance benefits. They are people who have already begun to receive Social Security benefits, so ending Social Security for them is a matter of taking something away.

On the other hand, Mr. Justice Harlan wrote for a 5-Justice majority in *Flemming v. Nestor*[1] that a person receiving old-age Social Security insurance benefits is not "soundly analogized" to a person holding an annuity. The stated reason, and the only reason given in the opinion, to distinguish insurance annuities from old-age insurance benefits, is that the person holding an annuity paid premiums for it, so, as Mr. Justice Harlan wrote, her or his "right to benefits is bottomed on his contractual premium payments."[2]

Justice Harlan further expressed this understanding of an annuity in the majority opinion immediately after he wrote that a worker's contributions to the Social Security *system* by taxation do not reflect the payments she or he receives from Social Security. Justice Harlan wrote for the majority in this case:

> But each worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the ***system*** by taxation. 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.[3]

What is missing from this comparison is that the holder of an annuity does not receive payments in proportion to her or his premium payments, either.

Moreover, the Social Security system was set up as a reflection of employees' contributions to the ***economy*** of the United States, and ***not*** as a reflection of the amount of payroll taxes they contribute to the Social Security ***system***. The people who wrote the Social Security program recognized that contributions to the U.S. economy and contributions to the Social Security system are not to be confused with each other because they are simply not the same thing:

> This is the approach of contract, not of benevolence.
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> Our approach is that, *within limits, the individual worker establishes the level to his protection by his individual contribution to our economy*. I want to emphasize the distinction, "to our economy," not "to the system." Not to the Treasury of the United States but to our economy.[4]

It is clear that Justice Harlan did not understand annuities. Perhaps because he was a Supreme Court Associate Justice, after all, he felt impelled to make pronouncements about annuities. But he did not know what he was talking about when he wrote about annuities in this case. An annuity is not payable in direct proportion to the total amount of premiums paid by the person holding the annuity. Justice Harlan's opinion seems to imply the opposite, that annuities are payable on the basis of the premiums paid in by the holder, which is not the case now and was not the case in 1960 when Justice Harlan wrote his opinion in Nestor's case.

There are many grounds on which Justice Harlan's opinion has been criticized and evaluated since 1960. Like many of the Court's opinions even tangentially involving any aspect of Social Security, it has attracted many citations by lower courts and commentators.

A prominent ground on which it has been distinguished, is that the case involved the termination of an individual's Social Security benefits by the U.S. Government.

The analogy to annuities is helpful, nonetheless, to understand the nature of Social Security old-age insurance benefits. They are not based on how much the holder has paid for them. And the holder has a contract right to receive them.

When the federal government issues the insurance, the holder may or may not also hold "Due Process" or other ***constitutional*** rights before the federal government takes the insurance payments away.

Considered strictly from an ***insurance*** point of view, there is an interest which the law protects in receiving insurance benefits under a contract of insurance. Supreme Court precedent adds a constitutional perspective—but from our perspective in this book it is an added perspective, not the only or even the central perspective—that when the federal government issues the insurance, then the federal government is constrained by the federal Constitution. Our perspective here begins with looking at the question from the standpoint of insurance practitioners, and for present purposes other issues certainly exist in these cases, but here those noninsurance issues take a second chair.

The federal government offered insurance benefits payable as federally issued insurance under the Risk Insurance Act of 1917. Later, when the Great Depression began, the federal government acted in March, 1933 to terminate the payment of all insurance benefits under this and other laws. Two consolidated challenges to the federal government's termination of insurance benefits reached the United States Supreme Court after lower courts had dismissed the claims, in the consolidated appeals considered in *Lynch v. United States*.[5]

The Supreme Court reversed the dismissal of these claims. In a unanimous opinion authored by Mr. Justice Brandeis, the Court's reasons for decision addressed both the nature of insurance including the status of an insurance policy as a contract, and the nature of the constitutional constraints upon the actions of the federal government, particularly with respect to its contracts. The Court held:

> [W]ar risk policies, being contracts, are property and create vested rights. The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder.
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> * * *

> The Fifth Amendment commands that property be not taken without making just compensation. ***Valid contracts are property***, whether the obligor be a private individual, a municipality, a state, or the United States. ***Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.***[6]

Rights under an insurance contract, in other words, are protected from arbitrary federal government conduct. This analysis is simple and direct:

- The insurance involved is provided under an insurance contract, and not as a gratuity;
- The right to payments under the insurance contract is supported by the payment of premiums; and
- The insurance benefits are taken away under a contract of insurance previously issued by the federal government.

This is the essential holding of *Lynch*, and it has been recognized in federal case law. For example, the U.S. District Court for the Southern District of California wrote in 2016:

> *See Lynch v. United States*, 292 U.S. 571, 576, 54 S. Ct. 840, 78 L. Ed. 1434 (1934) (holding that the government could not avoid its commitment to pay disability and life insurance by enacting a statute repealing the laws granting the benefit without committing a constitutional taking under the Fifth Amendment); . . .[6.50]

The right to receive payment under an insurance contract has given us the law of insurer bad faith when payment is withheld arbitrarily and in violation of the implied contractual covenant of insurer good faith and fair dealing. So strong is the law and the jurisprudence of insurer bad faith that this book discusses over 5,000 cases and statutes at this writing.

When the federal government is the insurance carrier, its allegedly arbitrary or "bad faith" conduct is subject to constraints imposed by the Constitution of the United States. Under any reading of the Supreme Court's decisions which have been discussed here, the Court has recognized that some of the constitutional constraints on the conduct of the federal government with respect to contracts of insurance it has issued, are imposed by the Fifth Amendment. Whether

"just compensation" for taking Social Security old-age insurance benefits, for example, would take the form of a return of premiums, or payment of accrued future benefits, and whether payment would include the amounts of employer contributions, would all potentially be subject to future arguments of lawyers and further decisions of judges. The measurement of "just compensation" for an unconstitutional taking by the federal government may be subject to future dispute in the arena of Social Security old-age insurance benefits, but that potential future dispute cannot distort the legal reality that Social Security old-age insurance benefits are paid under a contract with individuals who are required to pay premiums to keep the contract in place.

The group of persons most clearly entitled to just compensation for taking rights to payment of old-age insurance benefits away, are the people who, having contributed premiums throughout their working lives, have already begun to receive the payments they expected under their insurance contract of old-age insurance.

People who have not yet applied for Social Security benefits, but are eligible right now. The principal question for people falling into this group, as distinct from people who have already begun to receive payments, is whether the people who have not yet applied for Social Security benefits but are eligible to receive them, can allege an "injury in fact." It has been held by a U.S. District Court that with respect to persons who "have not applied for any [Social Security] benefits yet, any injury is at this point hypothetical or speculative, and thus legally insufficient to establish standing."[7]

Predictably, it was held with respect to other persons in the same case who ***had already applied*** for "monthly Social Security benefits," that "[c]onversely," such persons "have a redressable injury and, thus, standing to pursue this claim."[8]

Persons who have not yet applied for old-age insurance benefits, are not eligible yet but are likely to become eligible in the future, and are contributing to the Social Security old-age insurance program now. This group of persons presents an open question. Their expectations and rights are open to development in the case law at this point.

[1]Flemming v. Nestor, 363 U.S. 603, 80 S. Ct. 1367 (1960).

[2]Flemming v. Nestor, 363 U.S. 603, 610, 80 S. Ct. 1367, 1372 (1960).

[3]Flemming v. Nestor, 363 U.S. 603, 609-10, 80 S. Ct. 1367, 1372 (1960) (emphasis added).

[4]J. Douglas Brown, "The Idea of Social Security," speech at the Meeting of the Bureau of Old-Age and Survivors Insurance in Baltimore, Maryland on November 7, 1957, accessible online as the "original version" of this 1957 speech, at https://www.ssa.gov/history/brown3.html, last accessed on Wednesday, May 3, 2017. (Emphasis in original.)

[5]Lynch v. United States, 292 U.S. 571, 54 S. Ct. 840 (1934).

[6]Lynch v. United States, 292 U.S. 571, 577, 579, 54 S. Ct. 840, 842, 843 (1934) (emphasis added). In a footnote, a panel of the Seventh Circuit Court of Appeals later distinguished *Lynch* on the ground that in its view, later Supreme Court decisions on the "Takings Clause" had impliedly overruled *Lynch*. As of the present time, no Supreme Court decision has ever explicitly attempted to limit *Lynch*, let alone overrule it. Moreover, the circuit court panel thought that *Lynch* should have been decided only on the basis of the "Due Process" Clause in any event. Pro-Eco, Inc. v. Board of Comm'rs, 57 F.3d 505, 510 n.2 (7th Cir. 1995), cert. denied, 516 U.S. 1028, 116 S. Ct. 672 (1995).

[6.50]Prime Healthcare Serv's, Inc. v. Harris, 216 F. Supp. 3d 1096, 1115 n.18 (S.D. Cal. 2016).

[7]Hall v. Sebelius, 689 F. Supp. 2d 10, 18 (D.D.C. 2009).

[8]Hall v. Sebelius, 689 F. Supp. 2d 10, 19 (D.D.C. 2009). The claims of all of the plaintiffs, those receiving benefits and those who had not yet applied for Social Security benefits, were based on a change to "Medicare Part A" by the Social Security Administration by which Medicare Part A payments would be deducted from monthly Social Security old-age insurance payments. All of the plaintiffs wanted to "opt out" of the deductions from Medicare and yet receive old-age insurance benefits; in the case of those already receiving Social Security benefits, they alleged further that they wished to continue to receive them without the hindrance of the new regulations.