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The Property Interest In Social Security Benefits

By James P. Lewis

The American people, and attorneys in particular, have in the past few years taken an increasing interest in "Social Security," and especially in that part of the Social Security program consisting of Federal old-age, survivor's, and disability insurance.¹ Although this larger program

¹ Stark, *Social Security: Its Importance to Lawyers*, 43 A.B.A.J. 319 (1957).

Title II of the Social Security Act of 1933 (49 STAT. 622) is found, as amended, in 42 U.S.C.A. § 401 *ff.* The more important of the repeated

also includes joint Federal-State programs of old-age assistance, aid to the permanently and totally disabled, and aid to dependent children, the insurance provisions of Title II of the Social Security Act have taken on increasing importance because they now apply to a larger number of people than the other programs and because they have become the backbone of the Social Security system of benefits and protection to the nation's individuals and families.² While the attention of contributors and their dependents has necessarily centered on such practical matters as the amount of retirement benefits, and survivorship protection and estate-planning, the legal status of the benefits themselves has remained a persistent question. The United States Supreme Court has been squarely confronted with this issue in the case of *Nestor v. Flemming*.³

Old-age, survivor's, and disability insurance may be described as a system whereby employees, their employers, and self-employed persons are taxed in proportion to earnings⁴ to provide trust funds from which benefits are payable. The requirements for eligibility for benefits are contained in Title II of the Social Security Act.⁵ The employee or self-employed person is eligible at retirement age for monthly old-age benefits if he has become "insured" on the basis of his record of earnings which were covered by Social Security. Title II also contains the requirements which must be met by younger disabled workers to become entitled to disability insurance benefits and the

amendments to Title II have been in 1939 (53 STAT. 1360), 1946 (60 STAT. 978), 1950 (64 STAT. 477), 1954 (68 STAT. 1052), 1956 (70 STAT. 807), 1957 (71 STAT. 518), 1958 (72 STAT. 938), 1960 (74 STAT. 927), and 1961 (75 STAT. 131).

² In December, 1960, there were in current status 14,157,138 monthly old-age and survivor's insurance benefits and 687,451 monthly benefits payable to disabled insured persons and their dependents. In round figures, old-age and survivor's benefits for that month totaled \$888,320,500 and disability insurance benefits \$48,000,200. The combined total taxes collected for old-age, survivor's, and disability insurance in the last calendar quarter of 1960 amounted to some \$2,314,407,000, while the two trust funds together amounted to more than \$22,000,000,000 at the end of 1960. Some comparable figures for other Social Security programs for December, 1960, show \$161,257,151 in old-age assistance payments to 2,332,067 recipients; \$25,288,855 to 373,925 recipients of aid to the permanently and totally disabled; and \$92,603,395 to 3,080,124 recipients of aid to dependent children. 24 Soc. Sec. Bull. No. 8, pp. 20 ff. (Aug. 1961).

³ 363 U.S. 603 (1960).

⁴ 1954 I.R.C. §§ 3101, 3102, and 3111, as amended.

⁵ 42 U.S.C.A. § 401 ff (1957). Under these sections, a person who meets the specified conditions of eligibility is "entitled" to benefits if he files an application with the Social Security Administration. The term "entitlement" is used *infra* to indicate that a claimant has thus formally established his eligibility to insurance benefits. As will appear, "entitlement" does not necessarily imply actual payment of benefits.

requirements under which dependents of retired, disabled, or deceased workers may qualify for benefits. The Act provides, in addition to monthly survivor's benefits upon an insured worker's death, a lump-sum death payment.

An important additional aspect of Title II is Section 203,⁶ which may prevent payment of benefits to a worker who, after reaching retirement age, continues to have substantial earnings. Title II also applies similar restrictions to recipients of most types of dependent's monthly benefits. Although the "earnings test" has been repeatedly liberalized by amendments to the Social Security Act, it has, since the 1954 amendments,⁷ also been extended to all types of earnings (including even some which may not be taxed or credited for Social Security purposes). Social Security coverage is thus in effect insurance against retirement rather than against mere attainment of retirement age or, in the case of dependents, against actual loss of income resulting from the worker's death or retirement. The 1954 amendments also introduced restrictions against payment of benefits to certain classes of deported persons,⁸ while the 1956 amendments⁹ barred payments under some circumstances to aliens residing abroad¹⁰ and to persons convicted of subversive activities.¹¹ We shall be particularly concerned with the deportation provision, which resulted in the *Nestor* case.

Ephram Nestor became entitled to old-age insurance benefits in December, 1955, effective November, 1955, in the

⁶ 42 U.S.C.A. § 403 (1957).

⁷ 68 STAT. 1052 (1954).

⁸ § 202(n) of the Social Security Act [42 U.S.C.A. § 402(n) (1957)] reads in pertinent part as follows:

"(n) (1) If any individual is (after the date of enactment of this subsection) deported under paragraph (1), (2), (4), (5), (6), (7), (10), (11), (12), (14), (15), (16), (17), or (18) of [section 241(a) of the Immigration and Nationality Act] then, notwithstanding any other provisions of this [title]—

(A) no monthly benefit under this section or section 223 shall be paid to such individual, on the basis of his wages and self-employment income, for any month occurring (i) after the month in which the Secretary is notified by the Attorney General that such individual has been so deported, and (ii) before the month in which such individual is thereafter lawfully admitted to the United States for permanent residence,

* * *

(2) As soon as practicable after the deportation of any individual under any of the paragraphs of [section 241(a) of the Immigration and Nationality Act] enumerated in paragraph (1) in this subsection, the Attorney General shall notify the Secretary of such deportation."

⁹ 70 STAT. 807 (1956).

¹⁰ 42 U.S.C.A. § 402(t) (1957).

¹¹ 42 U.S.C.A. § 402(u) (1957).

amount of \$55.60 monthly.¹² In July, 1956, he was deported to his native Bulgaria pursuant to Section 241(a)(6) of the Immigration and Nationality Act¹³ for having been a member of the Communist Party from 1933 to 1939. Under Section 202(n) of the Social Security Act, the Secretary of Health, Education, and Welfare was required to stop Nestor's benefit payments upon receipt of notice from the Attorney General that Nestor had been deported under paragraph 6 of Section 241(a) of the Immigration and Nationality Act. The *Nestor* case is concerned not with the deportation itself but rather with the constitutionality of Section 202(n) of the Social Security Act under which Nestor's payments were stopped.

In *Nestor v. Folsom*,¹⁴ the District Court for the District of Columbia held Section 202(n) unconstitutional on the ground that it deprived Nestor of an *accrued property right* without due process of law as required by the Fifth Amendment. From this decision the Secretary of Health, Education, and Welfare took a direct appeal.¹⁵ The Supreme Court's decision, delivered by Justice Harlan, reversed the District Court. Dissenting opinions were written by

¹² The requirements for "entitlement" are found in § 202(a) of the Social Security Act [42 U.S.C.A. § 402(a) (1957)], which provides:

"§ 202. (a) Every individual who—

- (1) is a fully insured individual (as defined in section 214(a)),
- (2) has attained retirement age (as defined in section 216(a)),

and

- (3) has filed application for old-age insurance benefits or was entitled to disability insurance benefits for the month preceding the month in which he attained the age of 65, shall be entitled to an old-age insurance benefit. . . ."

¹³ § 241 (a) of the Immigration and Nationality Act [8 U.S.C.A. § 1251(a) (1953)] provides in pertinent part:

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * *

- (6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; (ii) any other totalitarian party of the United States; (iii) the Communist Political Association; (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt. . . ."

¹⁴ 169 F. Supp. 922 (D.C.D.C. 1959), noted 19 Md. L. Rev. 267 (1959), 73 Harv. L. Rev. 590 (1960).

¹⁵ Pursuant to 28 U.S.C.A. § 1252 (1949).

Justice Black, Justice Brennan (with whom the Chief Justice and Justice Douglas joined), and Justice Douglas.¹⁶

After disposing of a preliminary jurisdictional question,¹⁷ the majority opinion proceeded to discuss the theory of "accrued property rights," commencing with the flat statement, "Appellee's right to Social Security benefits cannot properly be considered to have been of that order."¹⁸ The Court reviewed the statutory requirements for eligibility, and particularly noted that both eligibility and the amount of benefits depend on the earnings record of the insured worker rather than on the amount of taxes which have been paid. Terming the Social Security system "a form of social insurance, enacted pursuant to Congress' power to 'spend money in aid of the 'general welfare,'" "¹⁹ the Court stated, "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 are bottomed on his contractual premium payments."²⁰ The Court also cited Section 1104 of the Social Security Act (contained in the Act since its passage in 1935) to the effect that Congress expressly reserved for itself "[t]he right to alter, amend, or repeal any provision" of the Act,²¹ and stated that "[t]o engraft upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands."²²

While concluding that "a person covered by the Act has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment," the Court stated that "the interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process

¹⁶ *Nestor v. Flemming*, 363 U.S. 603 (1960).

¹⁷ The court was obliged to consider whether 28 U.S.C.A. § 2282 (1950) required a three-judge district court to hear *Nestor v. Folsom*, *supra*, n. 14. If this had been the case, it would have been necessary to remand the case without reaching the merits. Finding that the action below, while it drew in question the constitutionality of § 202(n) of the Social Security Act, did not seek affirmatively to interdict the operation of a statutory scheme, the court held that jurisdiction had been properly exercised by the one-judge district court. 363 U.S. 603, 606-608 (1960).

¹⁸ *Id.*, 608.

¹⁹ A quotation from *Helvering v. Davis*, 301 U.S. 619, 640 (1937), cited at *supra*, n. 16, 609.

²⁰ *Supra*, n. 16, 610.

²¹ 42 U.S.C.A. § 1304 (1957).

²² *Supra*, n. 16, 610.

Clause. [Nevertheless, Congress' conclusion that] the public purse should not be utilized to contribute to the support of those deported on the grounds specified in the statute [was not] so lacking in rational justification as to offend due process."²³ The Court also was satisfied that, since one of the Congressional motives in enacting 202(n) may have been to restrict the payment of benefits to persons living abroad, such a motive may have existed entirely apart from any desire to penalize deportees, and that Section 202(n) cannot be considered punishment. Not being punishment, 202(n) cannot be considered an *ex post facto* law or bill of attainder.

All three of the dissenting opinions stressed their authors' conviction that Section 202(n) is plainly punitive. The opinion of Justice Brennan (with whom the Chief Justice and Justice Douglas joined) confined itself to this aspect. Justice Douglas' opinion is chiefly concerned with showing that 202(n) is a bill of attainder, but makes several references to property interest without defining the nature of such interest.²⁴

The dissent of Justice Black, on the other hand, while stressing that Section 202(n) is an *ex post facto* law and bill of attainder, also disagreed sharply with the majority by asserting that there is indeed a property interest here. After referring, in his opening sentence, to Nestor's right to old-age benefits as "statutory," Justice Black proceeded to describe Nestor's insurance as "that for which he has paid and which the Government promised to pay him."²⁵ Justice Black was convinced that there is a close

²³ *Supra*, n. 16, 611, 612.

²⁴ Justice Douglas referred to 202(n) as "cutting off a person's livelihood by denying him accrued social benefits . . ." 363 U.S. 603, 630, and stated: "Social Security payments are not gratuities. They are products of a contributory system, the funds being raised by payment from employees and employers alike, or in the case of self-employed persons, by the individual alone. * * * The funds are placed in the Federal Old-Age and Survivors Insurance Trust Fund . . . and only those who contribute to the fund are entitled to its benefits, the amount of benefits being related to the amount of contributions made." *Supra*, 631. This statement, relating the amount of benefits to the amount of contributions, does not seem to accord with the law, which was more accurately reflected in the majority opinion (where it was indicated that benefit-amounts are based on earnings records rather than contributions).

²⁵ *Supra*, n. 16, 622. Justice Black's reference to a "statutory" right demonstrates how difficult it is for even his outspoken dissent to escape ambiguity. A statutory right, created by the legislature and presumably revocable at its will, hardly seems to be the sort of right for which Justice Black argues. In regard to the nature of statutory rights, see 11 Am. Jur. 1199, Constitutional Law, § 370: "A right cannot be regarded as vested, in the constitutional sense, unless it amounts to something more than a mere expectation of future benefit or interest founded upon an anticipated continuance of the existing general laws."

analogy here to the situation in *Lynch v. United States*,²⁶ in which the court held invalid a statute repudiating promises to make payments under the War Risk Insurance Act of 1917.²⁷

Since the dissents (even, to some extent, that of Justice Black) rely on the argument from due process, the majority's holding that Social Security benefits do not represent an accrued property right is more definitive than it would at first seem. Nor is it profitable to argue that the Court could not have considered Nestor's case in the light of the Due Process Clause of the Fifth Amendment unless Nestor had had some sort of property interest at stake. There is, at least in the majority's opinion, nothing to indicate that the term "property" (as distinguished from "life" and "liberty") is viewed as anything more than the material reward which any recurring payment or benefit obviously constitutes.

While there is no pretense here of an exhaustive discussion of the history of the Social Security Act in the courts, a brief consideration of earlier decisions will help to place the *Nestor* decision in its proper perspective.²⁸

The initial judicial test of Social Security occurred in 1937 when the Supreme Court, in *Helvering v. Davis*,²⁹ found the provisions for benefits in Title II not to violate the Tenth Amendment. To reach this conclusion, the Court relied on Congress' power to spend money in aid of the general welfare, and conceded that Congress had discretion in wielding this power, citing the desperate plight of the aged in times of depression. The Court (and here Justice Cardozo's reasoning suggested that in *Nestor*) found the problem to be national in scope:

"Moreover, laws of the separate states cannot deal with it effectively. Congress, at least, had a basis for that belief. * * * Whether wisdom or unwisdom reside

²⁶ 292 U.S. 571 (1934).

²⁷ The tone of Justice Black's criticism becomes severe where he says: "The people covered by this Act are now able to rely with complete assurance on the fact that they will be compelled to contribute regularly to this fund whenever each contribution falls due. I believe they are entitled to rely with the same assurance on getting the benefits they have paid for and have been promised, when their disability or age makes their insurance payable under the terms of the law." 363 U.S. 603, 624 (1960).

²⁸ The present discussion is limited to property rights contained in the Social Security Act, as that statute has been elucidated upon by certain court decisions culminating in *Nestor*. For a significant article which employs particularly the legislative history of Social Security, see Willenburgh, *Vested Rights in Social Security Benefits*, 37 Ore. L. Rev. 299 (1958), cited in *Nestor v. Flemming*, 363 U.S. 603, 610 (1960).

²⁹ 301 U.S. 619 (1937).

in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom."³⁰

The Court went on to find the tax on employers³¹ a valid excise (relying on the reasoning in *Steward Machine Co. v. Davis*,³² handed down the same day).

Not until *Nestor* was the Supreme Court again required to treat the property interest in Social Security benefits, but in the interval the lower courts were chronically faced with the problem. In *Beers v. Federal Security Administrator*,³³ the legal representative of the estate of a deceased Social Security beneficiary brought action to recover the amount of ten uncashed checks representing the decedent's monthly retirement benefits and found in the decedent's possession at death. The court of appeals, sustaining the district court, held that the representative was entitled to the proceeds of the checks. Checks, being freely transferable, were held to pass by operation of law on death to the executor or administrator.³⁴

In the same year as the *Beers* case came *Ewing v. Risher*.³⁵ Risher, a wage earner, had applied for monthly retirement benefits in June, 1941, but his claim had been disallowed because his earnings record did not show he was insured. Risher died in 1942. In June, 1946, the Bureau of Old-Age and Survivors Insurance made a determination that Risher was an employee and that he had been insured. In July of that year, Mary Risher, the widow and plaintiff, filed application for widow's monthly insurance benefits. Since a statutory requirement for entitlement was the filing of an application, and since the law at that time provided that such an application could be retroactively

³⁰ *Id.*, 644. Emphasis added.

³¹ This tax was originally found in Title VIII of the Social Security Act, but is now in the Internal Revenue Code, 1954 I.R.C. §§ 3101, 3102, and 3111, as amended.

³² 301 U.S. 548 (1937). This decision held the unemployment compensation provisions of Title III to be separable from the tax in Title IX for their effectuation. The Court insisted that their conclusion that Title IX would stand without Title III would have been reached even if the Social Security Act had not contained a severability clause. For this clause, see 42 U.S.C.A. § 1303 (1957): "If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby."

³³ 172 F. 2d 34 (2d Cir. 1949).

³⁴ The court took cognizance of § 207 of the Social Security Act [42 U.S.C.A. § 407 (1957)] forbidding assignment of future payments made under Title II, but considered it inapplicable to the issue.

³⁵ 176 F. 2d 641 (10th Cir. 1949).

effective for no more than three months before the month it was filed, the plaintiff was unable to receive a benefit for any month before April, 1946. Moreover, the statute required that application for the lump-sum death payment be filed within two years after the worker's death. The Bureau determined that the plaintiff could not qualify for a lump-sum death payment and that there were to be no monthly benefits payable for months from February, 1944 (the month in which she had attained age 65) through March, 1946. The court of appeals, in refusing to reverse the Bureau and the district court, advanced a doctrine of "creative right."³⁶ Where the requirements of the statute were not met, the court stated, the substantive right of the claimant to benefits and the corresponding liability of the Government ended.³⁷

The following year the Court of Appeals for the Sixth Circuit took a different approach to benefit rights in *Ewing v. Gardner*.³⁸ Like *Beers v. Federal Security Administrator*, this case was a suit by the legal representative of a deceased insured worker. The decedent, having attained age 65 on July 11, 1944, had filed an application for monthly benefits but failed to furnish the proof of age which was requested. His claim was disallowed by the Bureau of Old-Age and Survivors Insurance under a regulation providing that an applicant's disregard for one year of a request for evidence should constitute abandonment of his claim.³⁹ In 1946 the wage earner died, and his executor, Gardner, filed proof of the decedent's age, claiming the monthly benefits for which the decedent himself had applied in 1944. The court of appeals, affirming the lower court's decision, held that the decedent had been entitled to benefits under the Social Security Act (whose express requirement was that the claimant have attained retirement age, not that he have submitted proof of it). The right

³⁶ "The rule is well settled that where a statute creates a right, such as the one in this case, unknown to the common law, and limits the time within which the right must be asserted, the limitation defines and controls the right and the right ceases to exist if not asserted within the time fixed in the statute therefor." *Id.*, 644.

³⁷ The court rejected the appellee's contention that she had been misled by the Bureau's action in disallowing her husband's claim. Appellee knew that her husband had had an appeal pending in his case when he died, and by law she was bound to know she must apply for the lump-sum death payment within two years.

³⁸ 185 F. 2d 781 (6th Cir. 1950), rev'd as to taxation of costs, 341 U.S. 321 (1951).

³⁹ Social Security Regulations No. 3, § 403.704(b) (20 C.F.R. § 403.704(b)) (later amended). The Court stated that this regulation was not necessarily invalid if construed as dismissing without prejudice a proceeding to enforce existing rights.

to benefits accrued, said the appellate court, when proof was filed. Furnishing proof was a condition precedent to payment, not to governmental liability. Finding that the executor could enforce this claim, the court added, "The right of the wage-earner to the primary benefit is not a gratuity, but is a property right which can be enforced by court action."⁴⁰

In *Canfield v. Ewing*,⁴¹ the district court affirmed the holding of a referee of the Social Security Administration that deductions might be made from benefits on account of the plaintiff's refusal to give any information about his current net earnings from self-employment. The plaintiff's ground for objection was that his benefit was based on his former earnings as an employee and that his profits from self-employment after retirement age would not cause deductions except for the 1950 amendments to the Social Security Act.⁴² As we shall see, the provisions of the law for deductions because of earnings after entitlement have produced further litigation.

In *Coy v. Folsom*,⁴³ the Court of Appeals for the Third Circuit refused to extend the *Gardner* decision reached in the Sixth Circuit. In *Coy*, the plaintiff was the widow and executrix of the insured worker. The decedent had been sick and not mentally competent to handle his affairs, but he had not been declared legally incompetent, and no guardian had been appointed for him. He had failed to file application to establish entitlement to retirement benefits. The plaintiff, relying on arguments from the law of private insurance, urged that the Secretary of Health, Education, and Welfare was obliged to treat as done what should have been done and to award benefits for 27 months before the month of the insured's death. The court, citing the *Risher* decision,⁴⁴ viewed the filing of application as a condition precedent to creation of an obligation on the part of the United States and upheld the Secretary.⁴⁵

⁴⁰ *Supra*, n. 38, 784.

⁴¹ 108 F. Supp. 130 (E.D.N.Y. 1952).

⁴² 64 STAT. 477 (1950). These amendments extended coverage to self-employed businessmen, thus making their net earnings includable for computing benefits and also cause for deductions from benefits.

⁴³ 228 F. 2d 276 (3d Cir. 1955).

⁴⁴ *Supra*, n. 35.

⁴⁵

"Here there can be no vested interest in the decedent's estate to old-age benefits. * * * It is clear that the Social Security Act has many facets completely unrelated to private insurance contracts or transactions. An examination of the whole statute demonstrates that Congress worked out a complete, yet carefully guarded, system intended to confer specific coverage for the aged under the conditions provided by the statute." *Supra*, n. 43, 278-279.

The judicial background for the *Nestor* case includes, finally, *Mullowney v. Folsom*.⁴⁶ The plaintiff in this case became entitled as of April, 1950, to a retirement benefit which, under the amendments to the Social Security Act later in the same year,⁴⁷ became subject to deductions for self-employment earnings beginning in 1951. The plaintiff argued that he had a vested right to receive the payments awarded in 1950 and increased by the 1950 amendments and that the section of the amendments which provided deductions for self-employment earnings was unconstitutional. The court upheld the constitutionality of the amended law, deciding that the plaintiff had not, by his award, acquired a vested right in the benefit. The court, with citations to *Helvering v. Davis*⁴⁸ and *Steward Machine Co. v. Davis*,⁴⁹ reasoned that social security payments are made out of the general treasury and financed by collections made from employers and employees, and that payments made as a result of Congressional appropriation have not thus far been construed as contractual in nature.⁵⁰ The court also cited Section 1104 of the Social Security Act, which reserves to Congress the right to amend the Act.⁵¹

The district court's decision in the *Nestor* case held Section 202(n) of the Social Security Act to be a denial, without due process, of an accrued property right. Judge Tamm, in his opinion, conceded the right or power of Congress to amend the Act and the need for flexibility in the Act to deal with a national economy which itself changes. But, he continued:

“[T]o say that Congress has the right through its legislative enactments to cope with certain problems that may continually arise and that are relative to the purpose for which the Act was passed is one thing, but is an entirely different thing to say that Congress while legislating and purportedly in accordance with the basic designs and purposes for which the Act was originally passed, can or many deprive a person of a property right”⁵²

⁴⁶ 156 F. Supp. 34 (E.D.N.Y. 1957).

⁴⁷ *Supra*, n. 42.

⁴⁸ 301 U.S. 619 (1937).

⁴⁹ 301 U.S. 548 (1937).

⁵⁰ *Norman v. B. & O. R. Co.*, 294 U.S. 240 (1935); *Ewing v. Risher*, *supra*, n. 35.

⁵¹ 42 U.S.C.A. § 1304 (1957).

⁵² 169 F. Supp. 922, 934 (D.C.D.C. 1959).

To Judge Tamm this case was distinguishable from the *Risher* decision⁵³ because Nestor had fulfilled the conditions precedent to entitlement.⁵⁴

In view of most of the justices (including several dissenters) in *Nestor v. Flemming* that Social Security benefits are not accrued property rights was in line with the present law as it has developed from the 1935 Act by repeated amendments and as it has generally been interpreted by the courts. As we have seen, the Court in *Helvering v. Davis*⁵⁵ justified Title II of the original Act by citing the Congressional power to spend money in aid of the general welfare. The Court simultaneously approved the taxes on employers and employees without regard to their purpose. Congressional amendments have repeatedly brought new groups of workers under the system, making provision for the older persons in these groups to stand on much the same footing as workers who had been covered for many years.

As already noted, the lower courts have tended to uphold these exercises of Congressional power to amend against the repeated attacks of litigants who, as in the *Risher*⁵⁶ and *Canfield*⁵⁷ cases, were unwilling to concede that benefits were payable only under the conditions imposed by Congress, or who, as in *Mullowney*,⁵⁸ objected to the effect of amendments upon their right to receive payments.⁵⁹ If the wording in *Gardner*⁶⁰ indicated a concept of property rights in benefits, that case may be seen as going against the main stream. The facts in the *Nestor* case are harsher than those in the *Mullowney* case⁶¹ or in *Price v. Flemming*⁶² (in each of which the plaintiff might expect to later receive payments). But, like the rights of the

⁵³ 176 F. 2d 641 (1949).

⁵⁴ Where Judge Tamm relied on *Steinberg v. United States*, 163 F. Supp. 590 (Ct. Cl. 1958), he seemed more in accord with the Supreme Court's handling of the *Nestor* case.

⁵⁵ *Supra*, n. 48.

⁵⁶ 176 F. 2d 641 (10th Cir. 1949).

⁵⁷ 108 F. Supp. 130 (E.D.N.Y. 1952).

⁵⁸ 156 F. Supp. 34 (E.D.N.Y. 1957).

⁵⁹ A case, analogous to *Mullowney*, is *Price v. Flemming*, 280 F. 2d 956 (3d Cir. 1960), *cert. den.* 365 U.S. 817 (1961), where the Court of Appeals for the Third Circuit cited *Nestor v. Flemming*, barely five weeks after it was decided, to reject the plaintiff's argument that his earnings as an attorney should not have been made cause for deductions by the 1954 amendments. The plaintiff had relied on the district court's decision in *Nestor v. Folsom*, 169 F. Supp. 922 (D.C.D.C. 1959), noted 19 Md. L. Rev. 267 (1959), 73 Harv. L. Rev. 590 (1960).

⁶⁰ 185 F. 2d 781 (6th Cir. 1950).

⁶¹ *Supra*, n. 58.

⁶² *Supra*, n. 59.

plaintiffs in *Mullowney* and *Price*, Nestor's right to benefits is a statutory right, and subject (within the bounds of Due Process) to the effects of Congressional amendment.

It would be difficult and fruitless to speculate as to what restraint might have been placed on Congressional amendment of the Social Security Act had *Nestor* been decided otherwise. The *Nestor* decision indicates that the pattern of recurrent amendments which have characterized the history of the Social Security Act since 1939 can withstand challenge in the highest court. In particular, *Nestor* demonstrates that Congress is not constitutionally limited to agreeable changes in the law. The amendments to the original Act have for the most part increased benefits (as an adjustment to drastic increases in the cost of living) or provided benefits or insurance coverage on more generous terms to larger and larger groups of workers. It is understandable why the issue in *Nestor* has been so long in reaching the Supreme Court, since past amendments have not represented the type of change most likely to stimulate challenge in the courts. Nor is there any indication that future amendments will deprive any substantial group of contributors of the benefits they anticipate.

Even beyond the possible meaning of this case for the Congressional right to amend existing provisions of the law, we may anticipate that *Nestor* will be cited in the chronic political and philosophic controversy which has gathered around the Social Security program. Some opponents of the term "insurance", as used to describe the program, have already suggested that *Nestor* may serve as ammunition to emphasize the differences between Social Security and private contractual insurance. Against these are ranged defenders who point to "social insurance" as an accepted term in our language.⁶³

⁶³ See the statement of Carlyle M. Dunaway, General Counsel, National Association of Life Underwriters, 55 National Association News 69, 70 (1960):

"As we see it, the decision [in the *Nestor* case] could prove extremely helpful to NALU in its current campaign to persuade Congress to delete all insurance terminology from the Social Security Act and to insert in the Act a forthright declaration that the Social Security program is not, and is not to be represented as, an insurance program."

As evidence that the argument against use of the word "insurance" is not new, see Staff Report to Chairman of Subcommittee on Social Security of Committee on Ways and Means, House of Representatives, *Social Security After 18 Years*, 82d Cong., 2d Sess., 37-41 (1954). The statement of the Democratic members of the subcommittee, issued at that time, takes the opposite view that social insurance is one part of the field of insurance. For the latter view, see also the article by Prof. J. Edward Hedges, University of Indiana, *Insurance*, 12 ENCYCLOPEDIA BRITANNICA (1960 ed.), 454-456.

When the Social Security system was planned, it was decided that the part which would in the future be most basic and inclusive should be financed from contributions of workers and their employers. The size of the benefits payable to the contributor or his dependents was to bear some relation to the amount of his earnings which had been subject to the Social Security tax. The same principles were later applied to the self-employed. It is understandable that American workers and their employers, and the self-employed, feel a justifiable sense of participation — and even ownership — in the social insurance system to which they have contributed.⁶⁴ The contributory nature of the system would certainly seem to impose on Congress certain moral obligations to the contributors. This moral obligation (which continues beyond the term of the individual legislator and even beyond the life of the individual contributor) is to devote to the payment of benefits, by direct expenditure or by investment, the amount of the contributions. The *Nestor* decision should make it clear that this moral obligation does not give to insured persons and their dependents the kind of legal rights which characterize private contractual insurance. Rather, the participants in Social Security must rely on that Court's assurance that any changes in their present or potential benefits must not conflict with the Due Process Clause of the Fifth Amendment and must have the approval of public opinion which can be reflected at Congressional elections.

⁶⁴ That there is such a sense of ownership can hardly be doubted when, for example, the recent Congressional and public controversy over health care for the aged is observed. The proponents of hospitalization benefits as a part of the social insurance system very emphatically insist that such benefits would not be "charity" but rather an earned right.
