106TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT 106–976

FEDERAL AGENCY COMPLIANCE ACT

OCTOBER 12, 2000.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GEKAS, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1924]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1924) to prevent Federal agencies from pursuing policies of unjustifiable nonacquiescence in, and relitigation of, precedents established in the Federal judicial courts, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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89–006

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Agency Compliance Act".

SEC. 2. PROHIBITING AGENCY NON-ACQUIESCENCE IN APPELLATE PRECEDENT.

(a) IN GENERAL.—Chapter 7 of title 5, United States Code, is amended by adding at the end the following:

"§ 707. Adherence to court of appeals precedent

"(a) Except as provided in subsection (b), an agency (as defined in section 701(b)(1) of this title) shall in civil matters, in administering a statute, rule, regulation, program, or policy within a judicial circuit, adhere to the existing precedent respecting the interpretation and application of such statute, rule, regulation, program, or policy, as established by the decisions of the United States court of appeals for that circuit.

"(b) An agency is not precluded under subsection (a) from taking a position, either in an administrative proceeding or in litigation, that is at variance with precedent established by a United States court of appeals if—

"(1) it is not certain whether the administration of the statute, rule, regulation, program, or policy will be subject to review exclusively by the court of appeals that established that precedent or a court of appeals for another circuit;

"(2) the Government did not seek further review of the case in which that precedent was first established, in that court of appeals or the United States Supreme Court, because—

"(A) neither the United States nor any agency or officer thereof was a party to the case; or

"(B) the Solicitor General determines or the agency officer responsible for such determination determines the decision establishing that precedent was otherwise substantially favorable to the agency; or

"(3) it is reasonable to question the continued validity of that precedent in light of a subsequent decision of that court of appeals or the United States Supreme Court, a subsequent change in any pertinent statute or regulation, or any other subsequent change in the public policy or circumstances on which that precedent was based.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 7 of title 5, United States Code, is amended by adding at the end the following new item:

"707. Adherence to court of appeals precedent.".

SEC. 3. AVOIDING UNNECESSARILY REPETITIVE LITIGATION.

(a) IN GENERAL.—Chapter 7 of title 5, United States Code, is amended by adding at the end the following:

"§ 708. Avoiding unnecessarily repetitive litigation

"In supervising the conduct of civil litigation, the officers of any agency of the United States authorized to conduct litigation, including the Department of Justice acting under sections 516 and 519 of title 28, United States Code, should seek to ensure that the initiation, defense, and continuation of proceedings in the courts of the United States, within, or subject to the jurisdiction of, a particular judicial circuit, avoids unnecessarily repetitive litigation on questions of law already uniformly resolved against the United States in 3 or more courts of appeals. A decision on whether to iniate, defend, or continue litigation is not subject to review in any court by mandamus or otherwise on the grounds that the decision violates this section.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 7 of title 5, United States Code, is amended by adding at the end the following new item:

"708. Avoiding unnecessarily repetitive litigation.".

PURPOSE AND SUMMARY

The Federal Agency Compliance Act, H.R. 1924, generally prevents agencies in civil matters from refusing to follow controlling precedents of the United States courts of appeals in the course of program administration and litigation. The Committee on the Judiciary (hereinafter referred to as committee) believes that citizens who file claims or who otherwise are involved in proceedings with Federal agencies have the right to expect that those agencies will

obey the law as interpreted by the courts. Moreover, the committee believes that agencies should be discouraged from relitigating settled questions of law in multiple circuits. Unnecessary litigation is a needless expense for both the Government and private parties and a waste of limited judicial resources. The bill is based upon a recommendation by the Judicial Conference of the United States that Congress "* * * enact legislation to—(a) generally prohibit agencies from adopting a policy of non-acquiescence to the precedent established in a particular Federal circuit; and (b) require agencies to demonstrate special circumstances for relitigating an issue in an additional circuit when a uniform precedent has been established already in multiple courts of appeals." [1]

H.R. 1924 addresses the two kinds of agency nonacquiescence: intracircuit nonacquiescence—refusal to follow controlling appellate precedent within a specific Federal judicial circuit; and intercircuit nonacquiescence—relitigating in other judicial circuits issues on which precedents have already been established in multiple circuits.[2] Regarding intracircuit nonacquiescence, the bill generally requires an agency in civil matters to follow relevant existing court of appeals precedent in that circuit. The committee, however, recognizes that an agency should be able to assert a position contrary to precedent in limited circumstances, for example, such as when intervening legal, factual, or public policy developments may have undermined or changed the rationale for the earlier decision.

With respect to intercircuit nonacquiescence, the committee believes that agencies should not repeatedly relitigate legal issues that have been uniformly resolved against the Government or one of its agencies. The bill provides that officers of any agency of the United States authorized to conduct litigation, including the Department of Justice, should seek to ensure that the initiation, defense, and continuation of proceedings in the courts of the United States, avoid unnecessarily repetitive litigation on questions of law already uniformly resolved against the United States in three or more courts of appeals. The committee believes that it is important to conserve judicial and agency resources, as well as those of citizens and businesses that would otherwise be required to participate in unnecessary litigation. However, a decision by an agency under this provision is not subject to judicial review or enforcement.

The Federal Agency Compliance Act gives effect to the principle of stare decisis. An appellate court's decisions resolving legal issues form precedents, which thereafter serve as controlling law on the legal points resolved. Stare decisis as applied to precedents of a United States court of appeals has been referred to as the "law of the circuit" doctrine. Respect for controlling law provides stability and predictability to our judicial system facilitating settlement of disputes and freeing parties from relitigating established legal precedents. It promotes uniformity by treating everyone alike within a circuit and providing litigants with a sense of fairness, regardless of their financial means. H.R. 1924 ensures that Federal agen-

[1] Judicial Conference of the United States, Long Range Plan for the Federal Courts 34 (1995) (Recommendation 11).

[2] See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989).

cies, as well as other claimants and parties, will respect the law of the circuit.

BACKGROUND AND NEED FOR THE LEGISLATION

Nonacquiescence is an agency's refusal to adhere to judicial precedent in handling or resolving a subsequent matter that presents the same question of law under sufficiently similar facts. As previously noted, H.R. 1924 addresses both types—intracircuit and intercircuit nonacquiescence.[3]

The routine practice of nonacquiescence generates significant social costs. Even though a party who challenges an agency decision in court may be certain to prevail based upon favorable precedent, that party nonetheless has been required to expend considerable resources to achieve that result. Moreover, the nonacquiescent agency may continue to apply its policy to those who are similarly situated, each of whom may ultimately have to file suit to obtain the relief previously deemed appropriate by the Federal court. As a prerequisite to judicial review, those aggrieved by agency action must generally exhaust their administrative remedies, which may involve hearings before administrative law judges, applications to appellate boards, or other proceedings required under the relevant statute. Thus, the process whereby an aggrieved party ultimately receives the relief to which the party is entitled under judicial precedent can be costly and protracted. Agency nonacquiescence has been an ongoing problem. In their study, Professors Samuel Estreicher and Richard Revesz trace the practice back to the 1920's,[4] noting that since that time "many agencies have insisted, in varying degrees, on the authority to pursue their policies, despite conflicting court decisions."[5] The Social Security Administration (SSA) and the Internal Revenue Service (IRS) were among those agencies cited as having practiced nonaquiescence.[6] In 1975, the report of the Commission on Revision of the Federal Court Appellate System (the Hruska Commission) identified significant concerns about the impact of agency nonacquiescence practices.[7] And in the 1980's, the Social Security Administration was strongly criticized by courts, legal scholars, and the Congress for its repeated nonacquiescence in the face of contrary appellate court rulings.[8]

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[3] During the 105th Congress, Mr. Gekas, the Chairman of the Subcommittee on Commercial and Administrative Law, introduced similar legislation, H.R. 1544, together with Mr. Frank of Massachusetts. The bill was passed by the House on February 25, 1998, by a vote of 241–173. On September 11, 1997, a substantially similar bill, S. 1166, was introduced by Senator Ben Nighthorse Campbell. H.R. 1924 was introduced on May 25, 1999, and Senator Campbell introduced similar legislation, S. 932, the "Federal Bureaucracy Accountability Act of 1999," on April 30, 1999.

[4] The origin of the practice of nonacquiescence at the Internal Revenue Service is explained further in Gary L. Rodgers' *The Commissioner Does Not Acquiesce*, 59 Neb. L. Rev. 1001, 1004–05 (1980) (footnotes omitted):

> Historically, the practice began in 1924 when the Tax Court was known as the Board of Tax Appeals. At that time there was no procedure for direct appeal from the Board's decision. If the Service lost, it could bring suit in Federal district court within 1 year to collect any deficiency disallowed by the Board. In order that taxpayers who were successful before the Board would not have to wait a full year to find out if the [S]ervice planned to appeal, the Commissioner would publish the decision to acquiesce or nonacquiesce.

[5] See Estreicher & Revesz, *supra* note 2, at 681.

[6] *Id.*

[7] See Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, app. B at 349–61 (1975).

[8] Estreicher & Revesz, *supra* note 2, at 681–82. During the 98th Congress, the House passed H.R. 3755, "The Social Security Disability Benefits Reform Act of 1984," which barred SSA intracircuit nonacquiescence outright. The Senate took a somewhat different approach, instead

The problem of agency nonacquiescence was also recognized in 1990 by the Federal Courts Study Committee (the Study Committee), which was established by Congress to perform a comprehensive review of the problems and issues facing the Federal judiciary. In its report, the Study Committee recommended to Congress that the practice of agency nonacquiescence in administrative adjudication of Social Security disability claims be prohibited.[9] The recommendation responded to an assertion by the Secretary of Health and Human Services (whose department at that time included the SSA) of a right to disregard the precedential holdings of the courts of appeals if the agency determined that the relevant court decisions were not in accord with its own policy. The Study Committee also called upon Congress to explore whether "legislative control" should be applied to other executive branch agencies as well.[10]

In explaining the Judicial Conference recommendation for legislation to address the continuing problem, the *Long Range Plan for the Federal Courts* noted that the practice of unjustified nonacquiescence "undermines the fundamental principle that an appellate court's decision on a particular point of law is controlling precedent for other cases raising the same issue."[11] It went on to cite the practice's "questionable propriety and inefficiency" and criticized it as "unfair to litigants, many of whom are pro se, who frequently are unaware of precedent favorable to their cases."[12]

In a written statement in support of H.R. 1924 submitted to the subcommittee on behalf of the Judicial Conference of the United States, Judge Walter K. Stapleton of the United States Court of Appeals for the Third Circuit, observed:

> Over the past several decades, some Federal agencies have refused to apply, either in a particular case or across the board in all cases, decisions within the same circuit that are contrary to the legal positions taken by the agency. This intra-circuit non-acquiescence has, at times, resulted in an agency's issuance of internal instructions to administrative decision-makers to apply a rule of law at variance with the circuit precedent. Litigants then have been required to seek Federal judicial review of agency action to avail themselves of existing decisional law in their favor. The Judicial Conference of the United States believes that when the Federal Government has had a fair opportunity to litigate an issue in a court of appeals and

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mandating procedural safeguards whenever nonacquiescence was asserted. Although the relevant provisions in each bill were subsequently deleted, the Conference Report noted that the decision to eliminate them should "not be interpreted as approval of 'non-acquiescence' by a Federal agency to an interpretation of a U.S. Court of Appeals." H. Conf. Rep. No. 1039, 98th Cong., 2d Sess. 37 (1984), reprinted in 1984 U.S.C.C.A.N. 3095. During the 99th Congress, the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee held hearings on "Judicial Review of Agency Action: HHS Policy of Nonacquiescence" at which a substantial body of testimony was received against the Social Security Administration's practice. Judicial Review of Agency Action: HHS Policy of Nonacquiescence: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 99th Cong., 1st Sess. (July 25, 1985).

[9] Report of the Federal Courts Study Committee 59–60 (1990). In the Study Committee's view, an exemption from this prohibition should be recognized for "test" cases designated by the Solicitor General.

[10] *Id.* at 60.

[11] Long Range Plan for the Federal Courts, *supra* note 1, at 35 (commentary on Recommendation 11).

[12] *Id.*

> has lost, all citizens and businesses within the court's jurisdiction who the decision favors are entitled to have the government recognize their right to equal treatment without having to establish that right again through costly agency proceedings and litigation.[13]

In the 105th Congress, Judge Stephen H. Anderson of the United States Court of Appeals for the 10th Circuit testified on behalf of the Judicial Conference on H.R. 1544. In his testimony before the subcommittee, Judge Anderson noted that nonacquiescence "violates all our concepts of the rule of law existing in this country for more than 200 years."[14] He added that, oftentimes, agency nonacquiesence discourages meritorious claimants from pursuing what is their right under favorable precedent.

He stated:

> This is a matter of the invisible statistic, the invisible citizen claimant. What happens to the mass of citizen claimants at the lowest level, the first desk of an agency's consideration? That action we don't know about. The only way that we know that something may be wrong is the announcement over and over again, one way or the other, by agencies that they have the right to disregard the law set by the circuit in which they conduct their affairs.[15]

John H. Pickering, Esq., testifying on behalf of the American Bar Association (ABA) during the 106th Congress, noted that the ABA has a longstanding interest in the issue of Social Security nonacquiescence and has frequently criticized its adverse effects on the bar, the courts and claimants.[16]

The legal and policy concerns surrounding agency nonacquiescence have been the subject of substantial debate. In essence, agencies consider it their responsibility to administer national programs with standards consistent throughout the country. They argue that adhering to divergent precedents established by the various courts of appeals detracts from this goal by fractionalizing those standards. In defense of intercircuit nonacquiescence, agencies argue that to freeze the law based upon a decision of one or two circuits prevents the "percolation" of issues that ensures comprehensive appellate review prior to final resolution by the Supreme Court.

The committee believes, however, that equity and orderly governance require that agencies, like private citizens, should obey the law enunciated by courts of competent jurisdiction. If an agency disagrees with a court's decision, it has several options. It can seek further review of the matter by the court of appeals (the same panel or en banc) or by the Supreme Court until the issue is finally resolved. It can also seek to vindicate its position in other courts of appeals and perhaps obtain review of the matter in the Supreme Court if conflicting rulings are obtained among the circuits. If the

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[13] Federal Agency Compliance Act: Hearing on H.R. 1924 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 106th Cong., 1st Sess. [hereinafter Compliance Act Hearing on H.R. 1924] (written statement of Hon. Walter K. Stapleton, Judge, U.S. Court of Appeals for the Third Circuit at 3).

[14] Federal Agency Compliance Act: Hearing on H.R. 1544 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 105th Cong., 1st Sess. at 11 (1997) [hereinafter Compliance Act Hearing on H.R. 1549] (testimony of Hon. Stephen H. Anderson, Judge, U.S. Court of Appeals for the 10th Circuit).

[15] *Id.* at 16.

[16] Compliance Act Hearing on H.R. 1924, *supra* note 13 (written statement of John H. Pickering, Wilmer, Cutler & Pickering, on behalf of the ABA at 2).

agency disagrees with the outcome of the judicial process, it can petition Congress to amend the law. This structure is consistent with the principle of separation of powers under which it is the courts' constitutional role to interpret the laws governing agency actions. It is true that today some agencies assert that they fully or generally acquiesce in controlling precedents.[17] However, some agencies do not "acquiesce" in a particular court decision until agency officials review the judicial opinion and issue a directive to agency employees to follow the ruling in subsequent administrative proceedings.[18] Thus, some agencies appear to treat controlling precedent as having no binding effect until the agency interprets such precedent and determines how it should be implemented.[19] Under that rationale, the agency has become, in effect, a review level between the appellate courts and the Supreme Court, a view that the committee does not share. The committee believes the Federal agencies are not entitled to craft their own "grace periods" during which they may decline to observe the law as stated in an otherwise binding precedent.

The decision whether or not to acquiesce appears to be premised on the view that Federal agencies apply legal principles from court rulings in the administration of a statutory program only for reasons of comity, not because the precedent is legally binding on the agency.[20] As long as an agency holds the view that following controlling precedent is optional, the committee believes that this bill

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[17] The Department of Justice has stated that "agency nonacquiescence is uncommon" and "[w]here the government has lost a legal issue in three circuits, the Solicitor General only rarely permits a fourth appellate test of the issue." Letter from Andrew Fois, Assistant Attorney General, Department of Justice, to Honorable Henry J. Hyde, Chairman, Committee on the Judiciary (Sept. 17, 1997). In his written statement on H.R. 1924, William B. Schultz, Deputy Assistant Attorney General for the Civil Division of the Department of Justice, added that "[w]e agree with the general proposition that agencies should follow court of appeals" precedent within the circuit—and in the vast majority of instances that is precisely what agencies do. Nonacquiescence occurs only in rare cases." Compliance Act Hearing on H.R. 1924, *supra* note 13 (written statement of William B. Schultz at 1).

[18] Compliance Act Hearing on H.R. 1924, *supra* note 13 (written statement of Arthur J. Fried, Esq., General Counsel, Social Security Administration at 3). The SSA issues "acquiescence rulings" which explain how it will apply the decisions of courts of appeals that are at variance with the agency's national policies for adjucating claims. These "rulings" explain how SSA will apply the appellate court holding to other cases involving the issue at all levels of adjudication in the same circuit. See also 20 CFR 404.985 and 416.1485 48,963 (SSA rules on application of circuit precedent to administrative decision making). During the 105th Congress, Daniel J. Wiles, Deputy Associate Chief Counsel, Office of Chief Counsel, Internal Revenue Service, explained the IRS "Action on Decision" (AOD) program in which he noted that in significant cases an AOD is issued which states whether the IRS position is one of acquiescence, acquiescence in result or nonacquiescence, *supra* note 14 at 30–31. Compliance Act Hearing on H.R. 1544, *supra* note 14 at 30–31.

[19] In 1996 a court of appeals reversed an SSA decision applying regulations the court had invalidated in an earlier case. Although the agency explained its failure to observe the earlier precedent on grounds that an "acquiescence ruling" had not been issued, the court rejected that argument, noting:

> Regardless of whether the Commissioner formally announces her acquiescence, however, she is still bound by the law of this circuit and does not have the discretion to decide whether to adhere to it. "'[T]he regulations of [SSA] are not the supreme law of the land. "It is, emphatically, the province and duty of the judicial department, to say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803) and the [Commissioner] will ignore that principle at [her] peril.'" *Hillhouse* v. *Harris*, 715 F.2d 428, 430 (8th Cir. 1983) (per curiam) (quoting *Hillhouse* v. *Harris*, 547 F.Supp. 88, 93 (W.D. Ark. 1982)).

Hutchison v. *Chater*, 99 F.3d 286, 287–88 (8th Cir. 1996) (bracketed language in opinion).

[20] *United States Department of Energy* v. *Federal Labor Relations Authority*, 106 F.3d 1158, 1165 (4th Cir. 1997) (Luttig, J. concurring) (quoting letter from William Kanter, Deputy Director of the Justice Department's Civil Division Appellate Staff dated Nov. 14, 1996).

is necessary. No one is above the law, especially Federal agencies, whose officials are sworn to uphold the rule of law.[21]

HEARINGS

The Subcommittee on Commercial and Administrative Law of the Judiciary Committee held a hearing on H.R. 1924, the "Federal Agency Compliance Act," on Wednesday, October 27, 1999. Testimony was received from the following witnesses: Senator Ben Nighthorse Campbell, United States Senator for the State of Colorado; Honorable Walter K. Stapleton, Judge, U.S. Court of Appeals for the Third Circuit, submitted a written statement of behalf of the Judicial Conference of the United States; William Schultz, Deputy Assistant Attorney General, Civil Division, United States Department of Justice; Arthur J. Fried, General Counsel, Social Security Administration; John Pickering, Chair of the Senior Lawyers Division of the American Bar Association, Wilmer, Cutler & Pickering; Honorable Ronald Bernoski, Social Security Administration, Office of Hearings and Appeals and President of the Association of Administrative Law Judges, Inc.; and Sheldon Cohen, Senior Counsel, Morgan, Lewis & Bockius, LLP.

COMMITTEE CONSIDERATION

On Tuesday, June 20, 2000, the Subcommittee on Commercial and Administrative Law met in open session and ordered reported the bill H.R. 1924, with an amendment in the nature of a substitute by a voice vote, a quorum being present. On Tuesday, September 19, 2000, the committee met in open session and ordered reported favorably the bill H.R. 1924 with an amendment in the nature of a substitute by voice vote, a quorum being present.

VOTES OF THE COMMITTEE

There were six amendments offered during Full Committee consideration of H.R. 1924.

Mr. Nadler offered an amendment, which was adopted by voice vote, providing that in order for the section of the bill on intercircuit nonacquiescence to apply, the precedent in three or more circuits must have been "uniformly" decided against the position of the government.

Ms. Jackson Lee offered an amendment, which was defeated by a recorded vote of 9–17, to allow an agency to exercise its discretion not to acquiesce in an appellate court precedent if it determines that the precedent would impede the defense and protection of civil liberties or civil rights.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Sensenbrenner		X	

[21] *In Allegheny General Hospital* v. *NLRB*, 608 F.2d 965 (3d Cir. 1979), the court observed:

> Congress has not given to the NLRB the power or authority to disagree, respectfully or otherwise, with decisions of this court. For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law.

Id. at 970 (citation omitted). See also *Lopez* v. *Heckler*, 713 F.2d 1432 (9th Cir. 1983).

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. McCollum		X	
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly			
Mr. Canady		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease		X	
Mr. Cannon		X	
Mr. Rogan			
Mr. Graham		X	
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough		X	
Mr. Vitter			
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Rothman	X		
Ms. Baldwin			
Mr. Weiner			
Mr. Hyde, Chairman		X	
Total	9	17	

Mr. Nadler offered an amendment, defeated by a recorded vote of 11–17, to provide that the requirements of the bill should apply only to "agency actions which involve a Federal health benefits program, a Federal program under which cash is paid based on need or insurance benefits are paid."

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Sensenbrenner		X	
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly			
Mr. Canady		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease		X	
Mr. Cannon		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Rogan			
Mr. Graham		X	
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough		X	
Mr. Vitter			
Mr. Conyers	X		
Mr. Frank		X	
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Rothman	X		
Ms. Baldwin			
Mr. Weiner			
Mr. Hyde, Chairman		X	
Total	11	17	

Mr. Nadler offered three amendments which were considered en bloc and defeated by a voice vote. Mr. Nadler's amendments provided: 1) That in order for an agency to be required to acquiesce to a circuit court of appeals decision it must have not sought review of that decision because it was not a party to that decision; 2) To provide that an agency may not be required to acquiesce to a decision of the circuit court of appeals if "further review of the decision was effectively unavailable"; and 3) To provide that an agency could use a subsequent decision of a court of appeals other than that which rendered an otherwise binding precedent to determine that it "is reasonable to question the continued validity" of that precedent and therefore nonacquiesce.

Committee Oversight Findings

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the committee reports that the findings and recommendations of the committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

Committee on Government Reform Findings

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the rules of the House of Representatives.

New Budget Authority and Tax Expenditures

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the committee sets forth, with respect to the bill, H.R. 1924, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 11, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1924, the Federal Agency Compliance Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Lanette J. Keith, who can be reached at 226–2860.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers Jr.
Ranking Democratic Member

H.R. 1924—Federal Agency Compliance Act.

H.R. 1924 would require federal agencies to abide by appellate court precedents in a particular circuit when administering policies or regulations in that circuit, except under certain circumstances. The bill also would direct federal agencies to avoid unnecessary relitigation of legal issues, especially in instances where three or more judicial circuits have handed down rulings unfavorable to the government.

CBO estimates that enacting H.R. 1924 would have no significant impact on the federal budget. Because enactment of the bill could affect direct spending and receipts, pay-as-you-go procedures would apply—but the amounts involved would not be significant. The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

Based on information from the Department of Justice (DOJ), CBO believes that federal agencies are generally in compliance with federal law and that they usually exercise appropriate discretion when determining whether an appeal in any particular case is warranted. For example, the Social Security Administration (SSA)—one of the agencies potentially most affected by this bill—already has a policy on acquiescence that essentially meets the requirements of H.R. 1924. It is possible that implementing this bill could reduce the amount of litigation concerning policies and regulations of some federal agencies. This could lead to lower litigation costs, as well as changes in the amounts paid for certain federal benefits and the amount of revenues collected. Based on information from DOJ, SSA, and the Internal Revenue Service, CBO expects that the magnitude of such changes would be small.

The CBO staff contact for this estimate is Lanette J. Keith, who can be reached at 226–2860. This estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to rule XI, clause 2(l)(4) of the Rules of the House of Representatives, the committee finds the authority for this legislation in Article I, section 8, clause 18 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short title

Section 1 titles the bill as the "Federal Agency Compliance Act."

Section 2. Prohibiting agency non-acquiescence in appellate precedent

Section 2(a) adds a new section, section 707, at the end of chapter 7 of title 5, United States Code, generally to prevent agencies from pursuing intracircuit nonacquiescence. More specifically, subsection (a) of section 707 provides that an agency must adhere in civil matters to controlling precedent established by the United States court of appeals for a given judicial circuit in administering a statute, rule, regulation, program, or policy within that circuit. "Administering" includes agency action in an administrative or judicial context that is required or arises as part of the agency's responsibilities under a statute, rule, regulation, program, or policy. The committee believes that citizens should be able to avail themselves of favorable circuit case law at every level of the administrative process. Subsection (a) incorporates the same definition of "agency" applicable to other provisions of the Administrative Procedure Act. While the bill does not define the term "precedent," it is intended to carry its common meaning—*i.e.*, a decision that a court will consider as controlling authority for an identical or similar question of law within its jurisdiction. Requiring agencies to adhere within a given judicial circuit to the precedents established by the respective court of appeals, however, does not bind an agency to rulings premised on materially distinguishable facts or circumstances, nor does it limit an agency's ability to seek clarification of earlier decisions. The requirement to adhere to a precedent attaches once the decision in which the precedent is established becomes effective—*i.e.*, when the mandate of the appellate court issues in accordance with rule 41 of the Federal Rules of Appellate Procedure. If the parties in a case are bound by the lower appellate decision pending Supreme Court review, it is appropriate for that decision to serve as precedent in other indistinguishable cases.[22] Nevertheless, proceedings in such other cases might be stayed so that final action is not taken until after the Supreme Court acts.

Although the bill requires an agency to adhere to controlling appellate precedent concerning the laws the agency applies, it is not intended to alter the agency's prosecutorial or enforcement discretion as recognized in existing case law. Thus, even if a court of appeals decision establishes precedent in a given circuit on what acts

[22] Under rule 41(d) of the Federal Rules of Appellate Procedure, a party may seek a stay of the mandate.

or omissions constitute a violation of a particular law, this bill does not require an agency charged with enforcement of that law to initiate or continue administrative or judicial proceedings where an identical or similar act or omission occurs subsequently within that judicial circuit. Subsection (b) of section 707 specifies those instances when an agency is not precluded from taking a position that is contrary to the controlling precedent established by a court of appeals within the same circuit. This subsection, in essence, establishes three exceptions to the requirement in subsection (a). If none of the three exceptions are applicable to the agency, then it must adhere to the applicable appellate precedent within that circuit. The first exception, stated in section 707(b)(1), applies where the administration of a statute, rule, regulation, program, or policy could be subject to review by either the court of appeals that established that precedent or by a court of appeals for another circuit. This situation occurs where several venue options exist under the operative statute, and it is uncertain which circuit will ultimately consider proceedings for the pending claim or case. For example, any person aggrieved by a final order of the National Labor Relations Board (NLRB) can seek review of such order in the circuit in which the unfair labor practice in question was alleged to have been engaged, in any circuit in which the person resides or transacts business, or in the United States Court of Appeals for the District of Columbia. 29 U.S.C. § 160(f) (1994). Thus, during the administrative consideration of the alleged unfair labor practice, it may be uncertain which of the three potential circuits would review the Board's decision. Even where multiple venues are possible, the agency must adhere to any precedents uniformly established by each of the court of appeals in which venue may lie. And, in any event, appellate jurisdiction becomes certain once proceedings are initiated in Federal court. On the other hand, other agencies have more certainty in the venue options for judicial review. For example, while the Social Security Act provides for Federal judicial review where the plaintiff resides or has his or her principal place of business, SSA decisions are typically reviewed within the circuit in which the claimant resides.[23]

The second exception, stated in section 707(b)(2), recognizes that an agency should not be precluded from asserting a position contrary to precedent if the Government did not seek further review of the case in which that precedent was first established either in that court of appeals or in the United States Supreme Court because neither the Government nor any agency or officer thereof was a party to the case; or the Solicitor General determines, or the agency officer responsible for such determination determines, that the decision establishing that precedent was otherwise substantially favorable to the agency. This section ensures that the court will have an opportunity to evaluate its precedents in the context of agency views and expertise that were not available in the earlier proceeding. In addition, there may be situations where the Government did not seek further review because the Government substantially prevailed in the case. If the Solictor General or the appropriate agency officer determines that that was the situation, then the Government should not be bound for all time to rulings on sec-

[23] See 42 U.S.C. § 405(g); see also Estreicher & Revesz, *supra* note 2, at 694.

ondary or incidental issues that did not affect the ultimate result. The third exception, stated in section 707(b)(3), recognizes that changes in the law or other relevant developments following the establishment of the precedent might make it reasonable to question its continued validity. These possible developments are: (1) a subsequent decision of that court of appeals or the United States Supreme Court; (2) a subsequent change in any pertinent statute or regulation; or (3) any other subsequent change in the public policy or circumstances on which that precedent was based. An agency should not seek to relitigate an issue on which there is established controlling precedent unless there are objectively reasonable grounds for believing that the appellate court, consistent with the principle of stare decisis, might decide the issue differently.

The first development listed above involves those instances where, in one or more cases subsequent to the establishment of the precedent, that same appellate court or the Supreme Court has indicated a possible need for reexamination of the issue by questioning the validity of the prior holding, indicating a desire to revisit the issue in a future case, or expressing frustration at the results of the application of the prior interpretation. The second development arises when Congress or the agency changes a statute, regulation, or rule that was interpreted in the precedent. Such a change, if substantive and relevant, might provide a basis for the court to overrule or modify its prior decision. The third development primarily concerns changes occurring during the passage of time. Shifts in public policy may sometimes make it reasonable to argue that an appellate court might approach the same issue differently. Also, after a court of appeals renders its decision, other appellate courts might interpret the provision at issue differently, thereby suggesting a change in circumstances that could lead the same court to reconsider its former precedent. The bill does not purport to abrogate or limit any other rules or principles that may govern the acts or omissions of an agency. For example, H.R. 1924 does not diminish any existing obligations of agencies to acquiesce in appellate court decisions, nor does it otherwise affect existing law with respect to controlling precedent, the law of estoppel, or the ethical responsibility of parties and counsel to acknowledge and characterize faithfully any legal authority that may be relevant in a particular administrative or judicial proceeding. Thus, H.R. 1924 should not be interpreted or construed to lessen the obligation of the Federal Government to adhere to precedents in any other context.

Unlike section 3 dealing with intercircuit nonacquiescence, the committee expects that Federal agencies and the Federal courts will enforce section 2 in appropriate circumstances. A variety of judicial remedies already exist to address the government's unwarranted failure to adhere to circuit precedent. These include the award of sanctions for vexatious multiplication of proceedings pursuant to Federal procedural rules and the award of fees and costs under the Equal Access to Justice Act (28 U.S.C. § 2412). All such sanctions will remain available to help address agency nonacquiescence with the law of the circuit. Finally, the committee notes that, in the past, the Federal courts have occasionally entertained class actions aimed at overturning an agency's stated policy of refusing to acquiesce in particular circuit precedents. In cases of clear non-

compliance (and assuming that provisions otherwise governing review of agency action have been satisfied), the committee expects that victims of agency nonacquiescence could bring actions to enforce the provisions of section 2. Prudential judicial doctrines, such as exhaustion of administrative remedies and ripeness, would permit a court to decline to hear claims that would be unnecessarily disruptive of agency process, thereby minimizing any fears of significant collateral litigation.

H.R. 1924 adopts a balanced approach. The three exceptions in section 707(b) provide Federal agencies with sufficient flexibility to adhere to valid, established precedent so as not to interfere with continued development of the law. If an agency asserts the applicability of any of these three factors, a court will ultimately determine whether the factor is applicable. Thus, H.R. 1924 preserves the judiciary's constitutional role of interpreting the law, while allowing agencies to administer fairly their programs. Section 2(b) is a conforming amendment to the table of sections at the beginning of chapter 7 of title 5, United States Code, that adds a reference to the new section 707.

Section 3. Avoiding unnecessarily repetitive litigation.

Section 3 adds a new section 708 to chapter 7 of title 5, United States Code, that is intended to convey the view of the committee that unnecessary relitigation of well-settled questions of law in multiple circuits should be avoided. Section 708 expresses the committee's belief that in supervising the conduct of civil litigation, the Department of Justice and the officers of any agency independently authorized to conduct litigation, should seek to ensure that the initiation, defense, and continuation of proceedings in Federal court avoid unnecessarily repetitive litigation on questions of law already uniformly resolved against the Government in three or more courts of appeals. Section 708 is intended to discourage the Government from pursuing wasteful and abusive appeals and relitigating settled questions of law. Agencies are expected to give careful scrutiny when deciding whether to relitigate. This section applies to situations where all existing appellate case law is against the Government's or agency's position and is based on the same or similar rationale. It would not, however, be applicable if at least one circuit has decided a case on grounds consistent with the Government's or agency's position. Furthermore, this section does not apply when the Government was not a party in the cases in which the adverse appellate decisions were rendered. A conforming amendment changes the table of sections for chapter 7 of title 5, United States Code, to reflect the new section 708.

AGENCY VIEWS

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,
Washington, DC, October 26, 1999.

Hon. GEORGE W. GEKAS, *Chairman,*
Subcommittee on Commercial and Administrative Law,
Committee on the Judiciary,
House of Representatives, Washington, DC.

Hon. JERROLD NADLER, *Ranking Member,*
Subcommittee on Commercial and Administrative Law,
Committee on the Judiciary,
House of Representatives, Washington, DC.

H.R. 1924: The Federal Agency Compliance Act

DEAR CONGRESSMEN GEKAS AND NADLER: I am writing to express my concerns about the Federal Agency Compliance Act, H.R. 1924. I greatly appreciate your staff members' courtesy in meeting with SEC staff on October 13, 1999 to discuss these concerns.

At the outset, I would like to state that while the purpose of this bill—to eliminate unjustified, deliberate agency refusal to follow existing precedents of courts of appeals ("nonacquiescence")—is salutary, I am not aware of widespread nonacquiescence among federal agencies. I can assure you that the Commission does not engage in such a practice and, instead, seeks to follow applicable appellate precedent. For agencies like the Commission, H.R. 1924, like its predecessor H.R. 1544, cuts too broad a swath. Its effect—to extend and perpetuate judicial outcomes in particular courts of appeals (normally only three judge panels of those courts) which are adverse to agencies' interests—is too a steep price to pay to fix isolated problems with a particular agency or subset of agencies.

Two years ago, my predecessor as general counsel of the Commission, Richard Walker, commented on H.R. 1544, an earlier version of H.R. 1924. H.R. 1544 was introduced during the second session of the 105th Congress. Although H.R. 1924 differs from H.R. 1544 in certain ways, it raises many of the same concerns as did H.R. 1544. I have attached a copy of Richard Walker's letter, originally sent to members of the House Committee on the judiciary on October 16, 1997, setting forth those concerns.

Today, I would like to ask you to consider two of the most significant problems I see as arising from H.R. 1924. First, the bill would cede important litigation decisions of this agency to the judgment of other agencies with different missions and priorities. Second, the bill may inhibit the Commission from challenging judicial decisions made without the Commission's input even where the Commission's position is endorsed by a majority of appellate judges.

H.R. 1924 Cedes the Commission's Important Litigation Decisions to Other Agencies.

Section 2 of H.R. 1924, dealing with intracircuit nonacquiescence, is substantially similar to the provision on intracircuit nonacquiescence in H.R. 1544. Subject to certain exceptions, Section 2 requires all government agencies to adhere "in civil matters, in admin-

istering a statute, rule, regulation, program, or policy within a judicial circuit"[1] to the precedent of that circuit.

I am concerned that this provision, like its parallel provision in H.R. 1544, in effect cedes the important litigation decisions of this agency to other agencies that do not share this agency's mission or expertise. The provision can foreclose the Commission from taking a position at variance with precedent established in a case *in which another agency* has decided not to appeal, even where the Commission, had it been a party, might have chosen to appeal. Moreover, the option offered by Section 2 of allowing an agency to take a contrary position on questions decided in precedent that was "otherwise substantially favorable to the Government" does not mitigate the problem. Where an independent agency such as the Commission has not participated in the decision by another agency not to seek review in a particular case, it may be difficult to determine that agency's basis for not seeking review. What may seem substantially favorable to one agency may not seem so to another.

H.R. 1924 appears to assume that judicial precedent is always clear and unambiguous. As explained in the attached letter, this is not so in the field of securities law. It is not always possible, therefore, to ascertain the scope of a decision until it is tested by presenting the same court of appeals with new cases involving different facts.

It appears that the bill might allow judicial review of a Commission decision to take a position where merely the specter of nonacquiescence may be raised—for example, arguing for an interpretation of law where prior precedent is unclear. I am, therefore, concerned that the bill would promote costly, unnecessary collateral litigation on the appropriateness of the Commission's decisions to litigate. Such litigation would shift the court's focus from the merits of the Commission's substantive positions and would consume our scarce enforcement resources.

The Bill May Inhibit the Commission from Challenging Judicial Decisions Even Where the Commission's Position is Endorsed by a Majority of Appellate Judges.

Section 3 of the bill, dealing with intercircuit nonacquiescence, provides that an agency "should seek to ensure" that it avoids unnecessarily repetitive litigation "on questions of law already consistently resolved against the United States in 3 or more circuits." This provision differs from the parallel provision in H.R. 1544 in certain noteworthy respects. First, apparently because the new provision exhorts ("should seek to ensure") rather than commands ("shall ensure"), it eliminates certain subsections, including one making it clear that litigation decisions are not subject to review on the ground that they violate limits on relitigation. Second, H.R. 1544 barred agencies from relitigating legal issues "already consistently resolved against *the position of the United States, or an agency or officer thereof*, in precedents established by the United States courts of appeals for 3 or more other judicial circuits," while H.R. 1924 prohibits relitigation of issues "*already consistently resolved against the United States* in 3 or more circuits" (emphasis sup-

[1] H.R. 1924 expressly includes "civil matters," which did not appear in H.R. 1544.

plied). In my view, however, these distinctions do not eliminate the problems with the provision.

I remain concerned that Section 3, although now hortatory, may still operate to inhibit the Commission from challenging judicial decisions made without benefit of its participation and expertise. Even though Section 3 now appears to be limited to government cases (by virtue of the second change mentioned above), I believe, for the reasons stated at length in Richard Walker's attached letter, that it is still unwise to bind the Commission by precedents in criminal cases, which, of course, are not prosecuted by the Commission.

Moreover, the bill could substantially impair the Commission's ability to enforce the securities laws to the extent that Section 3 can be read to mean that a view of the law articulated by a minority of appellate judges could inhibit the Commission from taking a position endorsed by a majority.[2] This is illustrated by the judicial history of the "misappropriation theory" of insider trading, as recounted in the attached letter. As that letter explains, even if a majority of courts of appeals had endorsed the theory, a minority could have removed this important enforcement tool from the legal landscape had even one more court followed the minority.[3] And yet the theory ultimately was adopted by the Supreme Court.

Moreover, because the bill eliminates the provision in Section 3(d) of H.R. 1544 that precluded judicial review of litigation decisions, it raises the specter of the same sort of collateral litigation on questions of litigation strategy as does Section 2.

In sum, as the attached letter explains in more detail, while the proposed legislation reflects a balancing of interests that may be appropriate in litigation involving clear principles applied over time in administering benefits programs and the like, it is inappropriate as applied to the sort of complex enforcement litigation in which the Commission engages. As a consequence, I urge you to consider whether amendments can be made that would reduce the bill's adverse effects on enforcement programs such as the Commission's. Thank you for your consideration.

Sincerely,

HARVEY J. GOLDSCHMID, *General Counsel.*

Attachment

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[2] If the bill is not intended to operate in this manner, its language ought to be modified to make it clear that litigation on an issue is not "unnecessarily repetitive" simply because three courts of appeals have resolved that issue against the agency's position. For example, when other courts of appeals in earlier decisions have resolved the issue in favor of the agency's position, the later position of three courts of appeals ought not inhibit an agency from pursuing a view of the law previously embraced by at least one circuit.

[3] Moreover, Section 2, the "intracircuit nonacquiescence" provision, so limits the grounds for asking a given court of appeals to revisit precedent, that it would prevent the Commission from asking a court of appeals that has issued an early adverse ruling to reconsider that ruling even if several—or indeed all—of the other courts of appeals had reached a different result.

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,
Washington, DC, October 16, 1997.

Hon. GEORGE W. GEKAS, *Chairman,*
Subcommittee on Commercial and Administrative Law,
Committee on the Judiciary,
House of Representatives, Washington, DC.

H.R. 1544, the Federal Agency Compliance Act

DEAR CONGRESSMAN GEKAS: I appreciate this opportunity to express my concerns, as the General Counsel of the Securities and Exchange Commission, regarding the Federal Agency Compliance Act, H.R. 1544. I recognize that this bill has already been marked up in the House Committee on the Judiciary, but I hope that there may still be an opportunity to modify the proposed legislation as the legislative process moves forward.

I understand and support the core purpose of H.R. 1544—to rein in federal agencies that deliberately refuse to follow existing precedents of U.S. Courts of Appeals (called "agency nonacquiescence"). I assure you that the Commission, an independent regulatory agency, does not engage in such a practice. In fact, the Commission is careful to follow applicable appellate precedent in all of its litigation and administrative decisions.

I am concerned, however, that H.R. 1544 makes other fundamental changes in the current system of judicial review of agency cases that will significantly impair the Commission's ability to fulfill its congressional mandate to protect investors and preserve the integrity of the nation's securities markets.

There are several troublesome aspects of the bill. As explained below, these give rise to serious problems for the Commission, including the potential that H.R. 1544 could foreclose the Commission from asserting important but controversial legal theories because those theories have been rejected by three appellate courts, without the benefit of the Commission's expertise, in cases in which the Commission was not a party and did not participate. Moreover, adverse decisions by three courts of appeals could preclude the Commission from a legal theory even if a majority of appellate courts endorsed it. The recent history of the "misappropriation" theory of insider trading, which is discussed more fully below, and which the Commission has used in some of its most significant securities fraud cases of the last fifteen years, illustrates the potential for unintended adverse consequences.

H.R. 1544 Could Foreclose The Commission From Challenging Ill-Reasoned Judicial Decisions Made Without The Commission's Participation and Expertise.

H.R. 1544 requires federal agency officials to avoid litigating questions of law already resolved against the government's position in precedents established in three appellate circuits, even if a majority of the circuits have already endorsed the government's position. Federal securities law is made not only in the Commission's civil law enforcement litigation but in private securities litigation outside the Commission's control and in criminal cases independently prosecuted by numerous United States Attorneys' offices around the country. H.R. 1544 would bind the Commission by ad-

verse decisions in those cases even though the Commission was not a party to, or participant in, those cases and even though the courts did not have the benefit of the Commission's expertise.

Even if the portion of the legislation relating to the effect of adverse rulings by three courts of appeals were limited to government cases, I believe it would still be unwise to bind the Commission by precedents in criminal cases. Criminal prosecutors must devote their limited resources to more than just prosecuting securities law violations and may not be as well-equipped as the Commission to deal with the complex frontiers of the federal securities laws. Typically, the Commission is not involved in criminal prosecutions at the trial stage. The Commission may be consulted on an informal basis in some cases when the Department of Justice determines whether to appeal a criminal securities fraud case. If a criminal defendant appeals, however, the Commission may not learn about a case until a court of appeals renders its decision. As a result, adverse precedents specific to the securities laws administered by the Commission may develop without the Commission's input

Recent judicial developments in the "misappropriation theory" of insider trading illustrate the potentially adverse effects of H.R. 1544 on the evolution of the securities laws. Up to 50% of the Commission's insider trading enforcement cases rely on the misappropriation theory, and many of our biggest cases were brought on that theory, such as *SEC* v. *Drexel Burnham Lambert*, *SEC* v. *Ivan Boesky*, and *SEC* v. *Dennis Levine*. Beginning in 1981, the Second, Seventh, and Ninth Circuits endorsed the theory, but in 1995 the Fourth Circuit rejected it in a criminal case. The Commission only became involved in the Fourth Circuit case after the adverse decision, when the government sought rehearing of the misappropriation issue by the full court. Rehearing was denied. The government did not seek Supreme Court review because the case was not a compelling one on the facts. Subsequently, the Eighth Circuit, following the Fourth Circuit's lead, also rejected the misappropriation theory in a criminal case, reversing a conviction. The government sought Supreme Court review of the Eighth Circuit case, because the facts were far more favorable to the government. The Supreme Court, fortunately, reversed the Eighth Circuit and upheld the misappropriation theory.[1] But events could easily have taken a different turn.[2]

If H.R. 1544 had been the law when the Eighth Circuit decided against misappropriation, and if the Supreme Court had not granted review, the legal theory would have been in jeopardy. Another criminal case involving the misappropriation theory could have arisen, and the Commission would have been at risk of losing an important legal theory: (1) without having had the opportunity itself to develop the arguments, and (2) even though the entire Second Circuit (sitting *en banc*) and two other courts of appeals had endorsed it

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[1] *See U.S.* v. *O'Hagan*, U.S. , 117 S.Ct. 2199, 138 L. Ed. 2d 721 (June 25, 1997).

[2] The facts in the Eighth Circuit might have been less favorable for seeking review, for example. In any event, Supreme Court review is by no means certain. Indeed, the proposed legislation might make it more difficult to obtain Supreme Court review, since the government would be more likely to seek review in cases for which it would not have sought review before the legislation. Thus, H.R. 1544 would dramatically change the calculus for determining whether to seek review, with possibly unforeseen results.

A Minority View Could Bar The Commission From Taking A Position Actually Endorsed By A Majority Of Appellate Judges.

H.R. 1544 bars an agency from taking a position "resolved unfavorably in "precedents established" by three courts of appeals, regardless of whether one or two or even six or eight other circuits have ruled in favor of the position. Thus, it may be possible for a majority of appellate judges who address an issue to endorse a government position even while three courts of appeals reject it. As illustrated by the misappropriation theory example above, the potential that a minority view could become binding is not insignificant. The Fourth Circuit decision that first rejected the misappropriation theory departed from the views of three other courts of appeals.[3] That decision was followed by the Eighth Circuit's adverse decision. Even if a majority of the courts of appeals had endorsed the misappropriation theory, either before or after these two decisions, that majority of appellate courts ruling on the issue would not have prevented a minority from removing the theory from the Commission's arsenal if just one more court had followed the Fourth and Eighth Circuits.

The Commission, Like Other Agencies With Independent Litigating Authority, Would Have Special Problems Complying With H.R. 1544.

The bill requires all government agencies to adhere to precedent in a specific circuit unless the government did not seek review because the decision was "otherwise substantiatIly favorable" to the government. This would create significant problems for the Commission, and the other agencies with independent litigating authority. Where an agency has not participated in the decision by another agency not to seek review in a particular case, it may be difficult to determine the basis for not seeking review. Moreover, what may seem substantially favorable to one agency may not seem so to another; and it seems inappropriate to bind one agency on an issue of importance to it based on another agency's determination that an adverse ruling on that issue is not important to that other agency.

This also would curtail the independence of the Commission's litigating authority. The Commission would be foreclosed from appealing in cases in which another agency has declined to appeal for reasons other than that the decision was "substantially favorable" to the government.

H.R. 1544 Would Promote Costly, Unnecessary Collateral Litigation That Would Consume Scarce Enforcement Resources.

H.R. 1544 seems to assume that precedent is always clear and unambiguous. The precise holding of many judicial decisions, however, is not clear, particularly in complex areas of the law such as securities regulation. Defendants in securities fraud cases often argue for broad readings of decisions adverse to the government.[4]

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[3] Actually, only one Fourth Circuit judge was sitting on the case. He wrote the opinion, in which the two district court judges sitting by designation concurred.

[4] The Commission, for example, has been repeatedly met with the argument that the Supreme Court's decision in *Central Bank of Denver. N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), which held that there is no private right of action for aiding and abetting secu-

Continued

For this reason, the Commission's decision to pursue a case. will frequently be open to attack under H.R. 1544. Although H.R. 1544 specifies that federal agencies and officials may not be subject to mandamus actions, the legislation would only encourage defendants to harass the Commission with claims for sanctions and the like for pressing disputed positions allegedly in violation of the restrictions of H.R. 1544.

H.R. 1544 Reflects A Balancing of Interests That May Be Appropriate For The "Cookie Cutter" Litigation Of Some Agencies, But That Would Be Detrimental To The Kind Of Complex Enforcement Litigation In Which The Commission Engages.

H.R. 1544 addresses problems that arise in "cookie cutter" litigation about which the Committee appears concerned, where the applicable principle is clear and is applied over and over again in administering a benefits program. This concern, however, does not apply to an enforcement litigation program such as the Commission's, which often involves questions about how prior decisions apply in new situations, as securities violators, ever-creative, engage in new schemes to defraud. The application of antifraud laws to new and evolving conduct is important.

Clearly, the Committee must balance the benefits H.R. 1544 would provide in resolving the problems of administering a benefits program that yields unfair results, against the problems H.R. 1544 would create for enforcement litigation programs like the Commission's. I recognize that in drafting H.R. 1544, the Committee has focused its attention on an area that the Committee has determined requires close attention. I believe, however, that the Commission's litigation does not raise the problems addressed by the legislation, and that including the Commission's enforcement litigation within the scope of H.R. 1544 would create problems that far outweigh any potential benefit of including the Commission's enforcement litigation. For this reason, I respectfully request that as the bill moves forward, you consider whether appropriate amendments can be made to reduce the adverse effects of H.R. 1544 on enforcement litigation programs that routinely encounter novel issues requiring flexibility in their resolution. As currently drafted, H.R. 1544 does not distinguish between enforcement litigation to protect the public by stopping and preventing violations of law, and other kinds of agency litigation in which an agency seeks to apply "cookie cutter" principles.

In sum, I urge you to consider amending H.R. 1544 to avoid the problems it would create for the Commission. I would be happy to meet with you to discuss further how that might be done or to discuss in more detail the Commission's concerns.

Sincerely,

RICHARD H. WALKER, *General Counsel.*

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill,

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rities fraud, governs in cases having nothing to do with aiding and abetting. Defendants contend that *Central Bank* stands for a variety of propositions, such as that the securities laws must be construed narrowly and that the purpose of the securities laws to protect investors has no bearing in interpreting the statutory text.

as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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PART I—THE AGENCIES GENERALLY

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CHAPTER 7—JUDICIAL REVIEW

Sec.
701. Application; definitions.

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707. Adherence to court of appeals precedent.
708. Avoiding unnecessarily repetitive litigation.

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§ 707. Adherence to court of appeals precedent

(a) Except as provided in subsection (b), an agency (as defined in section 701(b)(1) of this title) shall in civil matters, in administering a statute, rule, regulation, program, or policy within a judicial circuit, adhere to the existing precedent respecting the interpretation and application of such statute, rule, regulation, program, or policy, as established by the decisions of the United States court of appeals for that circuit.

(b) An agency is not precluded under subsection (a) from taking a position, either in an administrative proceeding or in litigation, that is at variance with precedent established by a United States court of appeals if—

(1) it is not certain whether the administration of the statute, rule, regulation, program, or policy will be subject to review exclusively by the court of appeals that established that precedent or a court of appeals for another circuit;

(2) the Government did not seek further review of the case in which that precedent was first established, in that court of appeals or the United States Supreme Court, because—

(A) neither the United States nor any agency or officer thereof was a party to the case; or

(B) the Solicitor General determines or the agency officer responsible for such determination determines the decision establishing that precedent was otherwise substantially favorable to the agency; or

(3) it is reasonable to question the continued validity of that precedent in light of a subsequent decision of that court of appeals or the United States Supreme Court, a subsequent change in any pertinent statute or regulation, or any other subsequent change in the public policy or circumstances on which that precedent was based.

§ 708. Avoiding unnecessarily repetitive litigation

In supervising the conduct of civil litigation, the officers of any agency of the United States authorized to conduct litigation, including the Department of Justice acting under sections 516 and 519 of title 28, United States Code, should seek to ensure that the initiation, defense, and continuation of proceedings in the courts of the United States, within, or subject to the jurisdiction of, a particular judicial circuit, avoids unnecessarily repetitive litigation on questions of law already uniformly resolved against the United States in 3 or more courts of appeals. A decision on whether to iniate, defend, or continue litigation is not subject to review in any court by mandamus or otherwise on the grounds that the decision violates this section.

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DISSENTING VIEWS

As a general matter, we agree that agencies should comply with circuit court decisions. However, we dissent from H.R. 1924, the "Federal Agency Compliance Act," because we believe it to be an inappropriate and overbroad means of responding to the perceived problem of nonacquiescence.

H.R. 1924 attempts to curb the perceived problem of "intracircuit nonacquiescence"[1] by legislatively mandating that Federal executive branch agencies adhere to precedents of the courts of appeals for disputes which arise within a particular circuit.[2] The legislation only permits an agency to take a contrary position to such precedent where: (1) it is not certain whether the issue in question "will be subject to review exclusively by the court of appeals that established that precedent or a court of appeals for another circuit;" (2) the Government did not seek further review of the case in which that precedent was established "because neither the United States nor any agency or officer thereof was a party to the case" or "because the decision establishing that precedent was otherwise substantially favorable to the Government;" or (3) "it is reasonable to question the continued validity of that precedent in light of a subsequent decision of that court of appeals or the United States Supreme Court," a subsequent change in the law, or any other subsequent change "in the public policy or circumstances on which that precedent was based."[3]

In attempting to diminish the instances of nonacquiescence, H.R. 1924 would create significant new problems. It would indiscriminately reduce the discretionary authority of every Federal agency to decide when to challenge circuit court decisions, not just the agencies that legislative proponents claim have abused their discretion. In doing so, H.R. 1924 would diminish the effectiveness of the agencies that protect the rights of our citizens under the labor, civil rights, environmental, consumer safety, and other important laws. Moreover, the terms of H.R. 1924 are so vague that they will inevitably lead to uncertainty and confusion concerning their scope and applicability.

It is for these reasons that the Department of Justice opposes H.R. 1924,[4] which would likely lead to a Presidential veto if it

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[1] Agency failure to comply with circuit court precedent within a particular circuit.

[2] H.R. 1924, 106th Cong., 1st Sess. § 2 (1999) [hereinafter *H.R 1924*].

[3] Section 3 of H.R. 1924 also urges agency officers to ensure that questions of law already consistently resolved against the United States in 3 or more courts appeals are not unnecessarily relitigated. However, an agency decision on "whether to initiate, defend, or continue litigation" is not subject to court review on the grounds that the agency decision violates the section.

[4] See *Hearing on H.R. 1924, Proposing The Federal Agency Compliance Act Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. (Oct. 27, 1999) (forthcoming) [hereinafter *1999 House Judiciary Hearings*] (statement of William Schultz at 2).

passes.[5] And it is for these reasons that groups such as the AFL–CIO,[6] the Mexican American Legal Defense and Educational Fund,[7] and environmental grounds such as Natural Resources Defense Council, Environmental Defense, Alliance for Justice, Friends of the Earth, Earthjustice Legal Defense Fund, and OMB Watch[8] strongly oppose H.R. 1924, or its predecessor.[9] We join in dissenting from this well intentioned, but ultimately misguided legislation. A summary of our concerns follows.

I. H.R. 1924 IS UNNECESSARY

In our view, H.R. 1924 is a "solution in search of a problem." The Department of Justice testified that except where "relitigation of a legal issue is later determined to be justified in prescribed circumstances," Federal agencies follow the holding of the circuit courts of appeals.[10] Congressional intervention is particularly unnecessary with respect to the many agencies that depend on the Justice Department for their Federal court litigation[11] due to the appellate restrictions already imposed on them by the Solicitor General's office. As Deputy Assistant Attorney William Schultz explained:

> [I]n cases within the litigation authority of the Department of Justice, every appeal to a court of appeals must be authorized by the Solicitor General. Authorization comes only after an internal deliberative process involving the agency, the responsible litigating division of the Justice Department, and the Solicitor General's staff. Adverse precedent in the same circuit is a weighty reason not to authorize appeal. (By the same token, if circumstances are such that it is appropriate to request an appellate court to revisit a legal issue previously decided, or to preserve a legal argument for possible Supreme court review, an appeal might be entirely appropriate despite the existence of binding circuit precedent).[12]

Agencies are also hesitant to challenge court precedent because they face the possibility of paying other parties' attorneys fees under the Equal Access to Justice Act if it is determined that the government position was not "substantially justified."[13]

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[5] See Statement of Administration Policy, *H.R. 1544: Federal Agency Compliance Act* (February 25, 1998).

[6] Letter from Peggy Taylor, Director for Dept. of Legislation, American Federation of Labor and Congress of Industrial Organizations (Sept, 20, 2000) [hereinafter *AFL–CIO Letter*].

[7] Letter from Antonia Hernandez, President and General Counsel of Mexican American Legal Defense and Educational Fund, to the Hon. Henry J. Hyde, chairman, Committee on the Judiciary (Nov. 3, 1997) [hereinafter *MALDEF Letter*].

[8] Letter from Alyssondra Campaigne, Legislative Director of Natural Resources Defense Council, Elizabeth Thompson, Legislative Director of Environmental Defense, Nan Aron, President of Alliance for Justice, Courtney Cuff, Legislative Director of Friends of the Earth, Joan Mulhern, Legislative Counsel for Earthjustice Legal Defense Fund, and Gary D. Bass, Executive Director for OMB Watch (September 22, 2000)(on file with the Minority Staff of the Committee on the Judiciary).

[9] H.R. 1544, 105th Cong., 1st Session (1997)[hereinafter *H.R. 1544*].

[10] See *1999 House Judiciary Hearings, supra* n. 4 (statement of William Schultz at 2).

[11] 28 U.S.C. § 516 (1993) (except as otherwise authorized by law, the conduct of litigation in which an agency is a party is reserved to the Department of Justice).

[12] See *1999 House Judiciary Hearings, supra* n. 4 (statement of William B. Schultz at 11).

[13] 28 U.S.C. § 2412(d)(1)(A) (1994) (except as otherwise specifically provided by statute, a court shall award to a prevailing party in any civil action, other than the United States, fees and other expenses incurred by the party unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust).

Those of us who support the concept of statutory acquiescence believe that the legislation should be limited to benefits programs, such as those administered by the Social Security Administration ("SSA"). SSA has often been criticized for failing to acquiescence court decisions and precedent.[14] It is important to note that the American Bar Association only endorses this bill as it applies to the Social Security Administration, but takes no position with regard to its application to other agencies.[15] John Pickering, Chair of the Senior Lawyers Division of the American Bar Association testified that, "We take no position regarding other applications to other agencies."[16] Moreover, recently SSA has taken several actions to ameliorate the problem of nonacquiescence. Prior to June 1985, when a circuit court decision was inconsistent with SSA's interpretation of the law and regulations, their practice was to apply the decision only to the named litigants in that particular case. However, SSA announced a new policy wherein they would apply such circuit court decisions at the hearings level, following an acquiescence ruling, in adjudicating claims in the circuit.[17] In 1990, SSA went even further adopting an explicit rule requiring such intracircuit acquiescence.[18] As recently as September 18, 1997, SSA responded to concern that it occasionally takes too long to issue its acquiescence rulings by publishing a proposed regulation requiring it to offer litigants preliminary guidance within 10 days and requiring it either to appeal the circuit court decision or to adopt an appropriate acquiescence ruling within 120 days. In addition to publishing acquiescence rulings when they are issued, SSA will be required to identify and notify individuals whose cases may be affected by them.[19]

II. H.R. 1924'S CATEGORICAL RESTRICTIONS DIMINISH NEEDED DISCRETION

H.R. 1924's narrowing of agency discretion over whether to challenge circuit court precedents could have a number of adverse policy consequences. As noted above, H.R. 1924 provides only three exceptions to the intracircuit acquiescence rule.[20] It omits a number of other justifiable exceptions—such as cases including two alternative holdings (only one of which the agency likes) or cases involving litigation fact patterns which do not lend themselves to Su-

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[14] See *1999 House Judiciary Hearings, supra* n. 4, transcript at 40 and 42.

[15] See *Hearing on H.R. 1924, Proposing The Federal Agency Compliance Act Before Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, Cong., 1st Sess. (Oct. 27, 1999) (forthcoming) [hereinafter *1999 House Judiciary Hearings*] 106th (Testimony of John H. Pickering).

[16] Id at 38.

[17] See *Hearing on H.R. 1544, Proposing The Federal Agency Compliance Act Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 105th Cong., 1st Sess. (May 22, 1997) (forthcoming) [hereinafter *1997 House Judiciary Hearings*] (statement of Arthur J. Fried, General Counsel, Social Security Administration at 2).

[18] 20 C.F.R. § 404.985 a–c (1990) (SSA will apply a holding from a Federal circuit court which conflicts with SSA legal interpretations, and publish an acquiescence ruling, unless SSA seeks further review or decides to relitigate the issue despite an acquiescence ruling after consulting the Department of Justice).

[19] 20 C.F.R. § 416.1485 (1997).

[20] *H.R. 1924, supra* n. 2, § 2 ((I) it is not certain whether the issue will be subject to review by the court of appeals that established the precedent; (II) the government did not seek further review of the case in which the precedent was established because it was not a party to that case or the decision was otherwise substantially favorable; and (III) it is reasonable to question the continued validity of the precedent).

preme Court review (e.g., cases involving sympathetic parties violating important laws). The net result will be to unduly hamstring the government in developing its litigation strategies.

This is one of the principal reasons why initiatives of this nature have been opposed on a bipartisan basis. Rex Lee, Solicitor General under President Reagan, argued that a similar 1984 bill[21] "represents an unprecedented interference with the ability of the Justice Department to determine the cases it will appeal."[22] Similarly, in their recent testimony opposing H.R. 1924, the Clinton Justice Department explained that the bill would significantly "inhibit the Solicitor General in protecting the litigating interests of the United States. . . . [T]he Solicitor General should have the discretion, where the stakes are important enough, to continue to seek a circuit conflict and thus to facilitate Supreme Court review of decisions harmful to the United States."[23]

Preserving the litigation prerogatives of our agencies is an important function of separation of powers and helps foster development of the case law. For example, in *United States* v. *Mendoza*,[24] a unanimous Supreme Court held that the government could not be foreclosed from relitigating a legal issue it had previously litigated unsuccessfully in another action against a different party, even within the same judicial circuit:

> Government litigation frequently involves legal questions of substantial public importance; indeed, because the proscriptions of the United States Constitution are so generally directed at governmental action many constitutional questions can arise only in the context of litigation to which the government is a party. Because of those facts the government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues. A rule allowing nonmutual collateral estoppel against the government in such cases could substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.[25]

It is particularly important to recognize that all of the Federal agencies are unique in some respects and therefore that the categorical prohibitions of H.R. 1924 would affect each agency dif-

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[21] Congress previously sought to address this matter with reference to SSA in 1984, during proceedings leading up to the enactment of the Social Security Disability Benefits Reform Act, Pub. L. No. 98–460, 98 Stat. 1794. Prior to enactment of the final legislation, the House passed a bill that would have required the SSA to acquiesce to circuit court precedent in Social Security disability benefits cases unless it sought Supreme Court review. See H.R. Rep. 98–618, 98th Cong., 2d Sess. 22–26 (1984). The Senate bill did not contain such a provision; instead it would have required the SSA to publish a notice of nonacquiescence whenever it determined not to acquiesce. See S. Rep. 98–466, 98th Cong., 2d Sess. 21 (1984). Congress ultimately declined to include any provision on nonacquiescence in the act as finally passed. Rather than impose statutory restrictions on nonacquiescence in the 1984 legislation, the conferees urged SSA to change its policy of nonacquiescence. See H.R. Conf. Rep. No. 1039, 98th Cong., 2d Sess. 37, (1984).

[22] 130 Cong. Rec. S11454 (1984) (Letter by Rex Lee, Solicitor General, to Hon. Robert Dole).

[23] *1999 House Judiciary Hearings, supra* n.4 (statement of William B. Schultz at 14).

[24] 464 U.S. 154 (1984).

[25] *Id.* at 160.

ferently. Harvey J. Goldschmid, the General Counsel of the Securities and Exchange Commission, highlighted the problems that his agency would face under the bill:

> I am concerned that this provision, like its parallel provision in H.R. 1544, in effect cedes the important litigation decisions of this agency to other agencies that do not share this agency's mission or expertise. The provision can foreclose the Commission from taking a position at variance with precedent established in a case in which another agency has decided not to appeal, even where the Commission, had it been a party, might have chosen to appeal. Moreover, the option offered by section 2 of allowing an agency to take a contrary position on questions decision in precedent that was "otherwise substantially favorable to the Government" does not mitigate the problem. Where an independent agency such as the Commission has not participated in the decision by another agency not to seek review in a particular case, it may be difficult to determine that agency's basis for not seeking review. What may seem substantially favorable to one agency may not seem so to another.[26]

The SEC went on to explain how acquiescence rules could prove to be particularly damaging to them since they do not have the opportunity to challenge adverse precedents in criminal cases[27] which can have an adverse impact on the SEC's ability to bring civil cases.[28]

III. H.R. 1924 IS OPENED-ENDED AND VAGUE

Implementation of the provisions in H.R. 1924 would require the interpretation of terms that are inherently vague and ambiguous in their meaning. Under the legislation, even seemingly appropriate exercises of discretion might be subject to challenge. For instance, circuit court decisions frequently are subject to a variety of legal interpretations. It may not be possible to ascertain a decision's true scope and effect until an opportunity arises to test it by presenting the same court of appeals with a different factual scenario. Rather than challenging a precedent, an agency may merely be attempting to limit its effect. However, under H.R. 1924, such a legitimate strategy could be subject to challenge as violating the new acquiescence rules.

In addition, the exceptions in the bill which allow an agency to challenge precedents are inherently subjective. In deciding whether to take a position at variance with intracircuit precedent, the agency must make determinations such as whether the government did not seek further review of the case because the precedent was "otherwise substantially favorable." Another subjective exception would

[26] Letter from Harvey J. Goldschmid, General Counsel, United States Securities and Exchange Commission, to the Hon. George W. Gekas and the Hon. Jerrold Nadler (Oct. 26, 1999).

[27] The Justice Department has criminal jurisdiction over the securities laws.

[28] For example, several circuit courts issued adverse precedents in criminal cases negating the "misappropriation theory" used to challenge insider trading before the Supreme Court ultimately adopted the SEC's new.

require the agency to determine whether "it is reasonable to question the continued validity of that precedent."[29]

Accordingly, the enactment of H.R. 1924 ultimately could create a whole new category of litigation. This would result in wasteful preliminary litigation over whether a case can proceed, in addition to litigation over the substance of the dispute. This type of collateral litigation is costly; it consumes scarce enforcement resources; and it can create the very type of delay that H.R. 1924 is intended to avoid.

IV. H.R 1924 WILL HARM ENFORCEMENT OF THE LABOR, ENVIRONMENTAL, CONSUMER SAFETY, AND CIVIL RIGHTS LAWS

Perhaps most seriously, we oppose H.R. 1924 because of the adverse consequences it will have on the ability of government agencies to protect our citizens' rights under important laws concerning labor, employment, workplace safety, consumer protection, civil rights, and the environment, to name but a few.

H.R. 1924 will force agencies such as the National Labor Relations Board, the Department of Labor, the Occupational Safety and Health Administration, the National Highway Transportation Safety Administration, the Equal Employment Opportunity Commission, the Justice Department Civil Rights Division, the Environmental Protection Agency, and the Bureau of Land Management to litigate from a disadvantageous position. Unlike the well-funded interests the government frequently opposes in court, under the bill, such agencies will face complex new legal constraints when they determine which cases to appeal. To the extent this translates into less capable enforcement of these important laws, we will all be disadvantaged.

It is for these reasons, among others, that the AFL–CIO has taken a position strongly opposing H.R. 1924, writing:

> Under this bill, agencies could be compelled to seek Supreme Court review of cases that would not otherwise warrant such review. Agencies could also be precluded from making certain legitimate choices. For example, an agency could be precluded from foregoing an appeal of an adverse circuit court decision to the Supreme Court in anticipation of a later case with stronger facts. Of particular concern to us, this bill would prevent agencies with jurisdiction over labor matters from properly enforcing the labor and employment law.[30]

The same concerns lie with civil rights enforcement. At the committee markup, Rep. Jackson Lee singled out her concern for the adverse impact H.R. 1924 would have in this critical legal area:

> Civil rights cases by nature challenge judges at every level of our judicial system to properly scrutinized those constitutional or statutory protections that all Americans which is not addressed by this measure. These are precisely the type or nature of precedents that are subject to differing interpretations because judges reasonably inter-

[29] H.R. 1924, *supra* n. 2, § 2.
[30] *AFL–CIO Letter, supra* n. 6.

> pret a point of law or principle from totally opposite viewpoints. . . . The limitations on these agencies' ability to appeal decisions by circuit courts to the Supreme Court in addition to their ability to create novel and ingenious ways of protecting the right of citizens is a sacred craft and should only be regulated with the highest level of scrutiny.[31]

Similarly, the Mexican American Legal Defense and Educational Fund, a staunch defender of civil rights, took a position against H.R. 1544, the predecessor version of H.R. 1924, noting, among other things,

> [b]y limiting each agency's discretion in determining the cases it will appeal, agencies such as the *U.S. Department of Justice* and the Social Security Administration can only do *less* to adequately and legally interpret and pursue particular cases deemed to be significant in determining substantive policy.[32]

We are aware that some would argue that the fact that under the bill agencies would be constrained in developing their litigation strategies could be a positive or negative development, depending on the political orientation of the administration. In our view, however, this argument ignores the fact that by and large agencies are in the posture of seeking to enforce laws designed to protect our workplace safety, civil rights, and environmental and health safeguards against culpable parties. If an agency chooses not to protect these rights, it doesn't need the "cover" of acquiescence requirements such as those set forth in H.R. 1924—the agency can simply exercise its discretion not to bring particular enforcement actions. It is only those agencies who desire to enforce these laws against recalcitrant interests which will face new difficulties under H.R. 1924. We therefore reject the assertion that H.R. 1924 will have a neutral impact on both pro- and anti-enforcement administrations.

CONCLUSION

In our view, supporters of H.R. 1924 have not established that abusive nonacquiescence exists on a sufficiently wide-spread basis to justify legislation limiting the litigation authority of every agency in the government. In an effort to assist people who are having difficulty enforcing their own individual rights, H.R. 1924 would reduce the effectiveness of the agencies that are charged with the responsibility of protecting the rights of our citizens as a whole, including critical safeguards concerning employment rights, civil rights, consumer safety, and the environment.

We believe that on the rare occasions when dangerous legal precedents are written—such as *Plessy* v. *Ferguson* (upholding "separate but equal" facilities),[33] and *Korematsu* v. *United States* (Japanese-American interment upheld)[34]—agencies protecting pub-

[31] Markup of H.R. 1924, *The Federal Agency Compliance Act, Before the Subcommittee on Commercial and Administrative Law of the House Comm. on the Judiciary*, 106th Cong., 2st Sess. (Sept. 20, 2000) (statement of Rep. Jackson Lee).
[32] *MALDEF Letter, supra* n. 7 (emphasis added).
[33] 163 U.S. 537 (1896).
[34] 324 U.S. 885 (1944).

lic safety and welfare should have unfettered discretion to challenge them. Accordingly, we dissent from this legislation.

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