I am a Public Member of the ACUS, serve on the Committee on Judicial Review, and declined to endorse the proposed recommendation addressing certain social security litigation commenced in federal court. Before I briefly explain my position, I would like to compliment the work of the Committee Chair, members, and consultants. Prof. Levin devoted tremendous thought and attention to what was a thorough, fair, and impressively coordinated process.

In my view, the proposed recommendation would urge the Judicial Conference to address matters more appropriately resolved by the Congress and would recommend that the Conference do so in a manner in tension with determinations Congress has already made. Social Security benefits and litigation challenging the denial of certain benefit awards are extremely sensitive matters that are important to a broad segment of the public and to Congress itself. Indeed, Congress has legislated directly and extensively to address the same matters now proposed to be addressed by the Judicial Conference. *See* 42 U.S.C. § 405(g) (text set out below). Section 405(g) reflects Congress's determination that challenges to Social Security orders be directed to District Courts throughout the nation rather than to particular appellate courts. That determination and the particular language of Section 405(g) indicate that Congress intended that these challenges employ the usual district court processes, subject to the usual trial judge discretion over fashioning the processes appropriate in particular cases. Congress set forth the procedure for initiating a challenge in District Court and determined certain aspects of the proceeding and determination. It specifically directs that the Commissioner of Social Security respond to the commencement of litigation by filing an "answer," which strongly implies that the litigation would employ the standard process of complaint, answer, and defendant's motions to dismiss or for summary judgment. Section 405(g) also directs that the administrative record be attached to that "answer" and that the court "may at any time order additional evidence to be taken before the Commissioner."

Even apart from whether the Judicial Conference should address such matters of unusual legislative concern, Section 405(g)'s basic determinations and specific statutory language are in tension with the recommendation's "appellate model" of proceeding. Under the proposal, plaintiffs, often unrepresented by counsel, must frame the legal issues and proceed initially. A standard set of rules and processes would apply. Plaintiffs would not receive the benefit of generous standards applicable to complaints, the equitable discretion the district court may afford in fashioning appropriate procedures to address the nature of the particular challenge, or the advantages in being able to formulate an argument in response to the government's motion to dismiss or for summary judgment. When I have

litigated challenges to agency rules or orders in District Court, my clients have benefited from the ability of the parties or Court to craft the briefing process to fit the particular case and from having the government proceed initially (as through sequenced cross-motions for summary judgment). The "appellate model" also does not accord with Section 405(g)'s provisions for securing additional evidence (and the section already provides for the government's provision of the administrative record).

The recommendation that the Judicial Conference proceed "in consultation with Congress as appropriate" underscores rather than cures these deficiencies. Any consultation should be directed to the statutes that have the formal asset of both the House and Senate rather than undertaken through less formal processes, and Section 405(g) provides all the guidance that it necessary. Because the proposed recommendation would urge the Judicial Conference to address matters at the core of Congressional concern and which Congress has already addressed in detail, and would do so in a manner in tension with Congress's approach, I do not agree with the proposed recommendation addressing rules for social security litigation in federal court.

Richard Klingler

rklingler@sidley.com
(202) 736-8063

* * * * * * *

Text of 42 U.S.C. § 405(g):

(g) JUDICIAL REVIEW

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall

be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.