

# SOCIAL SECURITY

THE HOUSE THAT ROOSEVELT BUILT

PAMELA J. PERUN  
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## Executive Summary

Critics of the Social Security program are fond of disparaging it as a “Ponzi” scheme or as a redistributive transfer of income from the young to the old. Others go even further, labeling the Social Security trust fund as a fiction or claiming the program is bankrupt. Some also suggest that the government bonds held in the trust fund are mere IOUs. Still others say that the program’s legal basis is ephemeral, subject to the whims of Congress.

These assertions are untrue. President Franklin Delano Roosevelt intentionally endowed the Social Security program with a strong legal and financial foundation to protect against such spurious claims. In doing so, President Roosevelt sought to protect the “legal, moral, and political” integrity of Social Security, ensuring the program can continue to be the financial mainstay for Americans who are older, have disabilities, or are dependent children, as it has for generations.

From the perspective of economists and budget analysts, a federal dollar is a federal dollar and dollars are fungible. Budgetary and accounting projections made for general government purposes have been used to argue that Social Security threatens the fiscal integrity of the United States. These projections, however, do not accurately reflect Social Security’s financial strength and legal status. From the perspective of the law, Social Security is funded through a dedicated stream of payroll-based insurance contributions and their associated earnings. By law, these dollars are not fungible with other federal dollars, and Congress has consistently honored their special status.

This brief sets the record straight on Social Security on the following points:

- Social Security is neither a “Ponzi scheme” nor an income transfer program from the young to the old.
  - Social Security is a pension plan in the form of a defined benefit plan.
  - Like most other defined benefit plans, contributors earn a right to a benefit paid at retirement based on their earnings.
- The Social Security trust is a valid trust, and the trust fund is invested as required by law.
  - By law, contributions are held in a trust.
  - Trust assets not needed to pay current benefits and costs are invested to increase revenues to pay for future benefits.
  - Federal law requires trust assets to be invested in the safest possible investment: special government bonds backed by the full faith and credit of the United States government.
  - The bonds held by the Social Security trust are entitled to the same legal status and repayment rights as other full faith and credit obligations of the United States.
- Social Security’s financial status is strong, and the program is not a major contributor to the long-term federal deficit.
  - Social Security’s trust holds \$2.4 trillion in assets for retirement benefits alone.
  - The program is projected to be able to pay 100% of scheduled benefits for the next 25 years. After 2036, non-interest income is sufficient to pay approximately 77% of scheduled benefits for decades, and 74% of scheduled benefits in 2085.

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## Introduction

Hardly a day goes by without some new story or commentary on the federal deficit and how “entitlements” such as Social Security must be cut, in the opinion of some, quite drastically, to bring the deficit under control.<sup>1</sup> This conceptual linkage of the federal deficit and Social Security has undermined the confidence of the American people that Social Security, one of the most popular and successful federal programs, is financially sustainable. A recent survey by AARP finds that just 35% of adults express confidence in the future of Social Security.<sup>2</sup> These sentiments are echoed in a *USA Today*/Gallup poll conducted in July 2010. In this poll, six of ten non-retirees predict that Social Security will not be able to pay out benefits when they retire.<sup>3</sup>

This is not the result intended by President Roosevelt who fought for Social Security to be a contributory, self-financing and self-supporting program.<sup>4</sup> He resisted the call from his own advisors to use general government tax revenues and other federal government subsidies to support Social Security. To this day, the program has been funded primarily by dedicated revenues from insurance contributions paid by workers and matched by their employers as well as by taxes on Social Security benefits received by higher-income retirees. President Roosevelt did not want the program funded through general tax revenues for several reasons: first, to prevent the program from being perceived as welfare (“the same old dole under another name”), second, to prevent the program from adding to the government’s deficit, and third, to strengthen the program politically to preserve its future viability. As the President put it, “We put those payroll contributions there so as to give the contributors a legal, moral and political right to collect their pensions ... with those taxes in there, no damn politician can ever scrap my social security program.”<sup>5</sup>

In the following 75 years, the structure of the program has not changed significantly. In simple terms, this is how Social Security works:

- workers and employers make payroll-based insurance contributions to the federal government,
- these contributions are deposited into a special legal entity known as a trust,
- the contributions not needed to pay benefits and costs today (the trust fund) are invested by an officer of the federal government acting as trustee,
- the trustee uses these trust assets to buy special Treasury bonds on which the issuer (the federal government) agrees to pay interest and return principal at a stated rate and date.

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1 It is curious how the term “entitlement” has come to have extremely negative connotations, almost as equivalent for welfare. Legally speaking, it is, in fact, an honorable term standing for the proposition that those individuals who meet stipulated criteria have a lawful right to a promised benefit. “Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right.” *Estate of Floyd Covart, Petitioner v. Nicklos Drilling Company*, et al., 505 U.S. 469, 477, 112 S.Ct. 2589, 2595 (U.S.,1992) citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972) (discussing property interests protected by the Due Process Clause and contrasting an entitlement to an expectancy); *Black’s Law Dictionary* 532 (6th ed. 1990) (defining “entitle” as “To qualify for; to furnish with proper grounds for seeking or claiming”).

2 Colette Thayer, “Social Security 75<sup>th</sup> Anniversary Survey Report: Public Opinion Trends,” (“AARP Survey”), AARP Strategic Issues Research, August 2010, p. 18. Available at: [http://assets.aarp.org/rgcenter/econ/social\\_security\\_75th.pdf](http://assets.aarp.org/rgcenter/econ/social_security_75th.pdf).

3 Highlights from the *USA Today*/Gallup poll. Results for this poll are based on telephone interviews conducted July 8-11, 2010, with a random sample of 1,020 adults, aged 18 and older, living in the continental U.S., selected using random-digit-dial sampling. Available at: <http://www.gallup.com/poll/141449/six-workers-hold-no-hope-receiving-social-security.aspx>.

4 Sylvester J. Schieber and John B. Shoven, *The Real Deal: The History and Future of Social Security*, Yale University Press, 1999, pp. 33-37. See also Nancy J. Altman, *The Battle for Social Security: From FDR’s Vision to Bush’s Gamble*, John Wiley & Sons, Inc., 2005, pp. 82-83.

5 Larry Dewitt, Social Security Historian’s Office, Research Note 23, Luther Gulick Memorandum re: Famous FDR Quote (2005). Available at: [http://www.archives.gov/exhibits/treasures\\_of\\_congress/text/page19\\_text.html](http://www.archives.gov/exhibits/treasures_of_congress/text/page19_text.html).

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President Roosevelt said, as he signed the original Social Security Act in 1935, “This law represents a cornerstone in a structure which is being built but is by no means completed.”<sup>6</sup> In truth, Roosevelt did much more than lay down a cornerstone. President Roosevelt built a strong house for Social Security by framing it through the passage of a strong and comprehensive statutory scheme and furnishing it with dedicated contributions and uniquely strong investments. Those seeking to label Social Security as a major driver of out-of-control federal spending fail to distinguish between economic, financial and accounting analyses of the federal government writ large and the true legal and fiscal structure of the program.

President Roosevelt built a strong house for Social Security by framing it through the passage of a strong and comprehensive statutory scheme and furnishing it with dedicated contributions and uniquely strong investments.

## The Facts

The Social Security program that provides retirement benefits is one of the most popular and successful government programs.<sup>7</sup> The program has widely been credited with reducing old-age poverty and dependency among the elderly.<sup>8</sup> According to the 2011 Annual Report of the Social Security and Medicare Trustees, at the end of 2010, some 54 million people were receiving retirement benefits.<sup>9</sup> Surveys have repeatedly shown that Americans hold the Social Security program in high regard. AARP, for example, reports that “adults of all ages view Social Security as an important government program and this view has remained consistent over time. Over nine in ten adults held this view in 1995, 2005, and 2010. In fact, over 60% view it as one of the *very most* important programs, as they did in 1985, 1995 and 2005.”<sup>10</sup>

From a fiscal perspective, Social Security is a large government program that encompasses both disability and retirement benefits. In 2010, in retirement benefits alone, Social Security collected \$677 billion in revenue, including \$546 billion in insurance contributions, and paid out about \$585 billion.<sup>11</sup> The annual cost of the combined disability and retirement benefit program represented 4.8% of GDP and, while that cost is expected to increase gradually to 6.2% in 2035, it will fall to about 6% by 2050 and then hold at that level.<sup>12</sup>

Pension systems can be funded in a variety of ways. Some are “pay-as-you-go” systems where only current revenues pay benefits to retirees. Some are “funded” systems, either partially or fully, in which revenues over and above those required to pay current benefits are collected and invested to meet the future needs of the program. In the Social Security Amendments of 1983, Congress made a deliberate choice to prefund the Social Security trust fund, at least in part, for future benefit payments.<sup>13</sup> The

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6 Available at: <http://www.ssa.gov/history/fdrstate.html>.

7 The Social Security program encompasses two separate trust funds: the original trust for the old-age insurance component (OASI) of the program began in 1940 and the one established for the disability insurance (DI) component began in 1957. This brief focuses primarily on the OASI trust, which pays the old-age retirement benefits familiarly known as Social Security. Statistics cited in the text will primarily refer to the OASI trust. In some cases, disaggregated information is not available and the text will explicitly note where DI trust data are referenced. According to the Social Security Trustees Report, the DI program will require changes to secure its financial status much sooner than the OASI program. The Trustees Summary of “The 2011 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds,” (“2011 Annual Report”), May 2011, p. 2. Available at: <http://www.socialsecurity.gov/OACT/TRSUM/tr11summary.pdf>.

8 Paul N. Van de Water, “Social Security Reduces Poverty” podcast, Center on Budget and Policy Priorities (Aug. 17, 2010). Available at: <http://www.cbpp.org/cms/index.cfm?fa=view&id=3266>.

9 The Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, “The 2011 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds,” (“2011 Annual Report”), May 2011. Available at: <http://http://www.ssa.gov/oact/TR/2011/tr2011.pdf>

10 See footnote 2, AARP Survey, p. 5.

11 See footnote 9, 2011 Annual Report, p. 24.

12 See footnote 7, The Trustees Summary of the 2011 Annual Report, p. 3.

13 See William G. Dauster, Protecting Social Security and Medicare, 33 Harv. J. on Legis. 461, 476-77 (1996). The Social Security trust fund has run a surplus in almost every year since it was created, as the consistent goal was to have at least one year’s benefit payments in reserve. Between 1973 and 1983, the trust fund came close to exhaustion however,

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result of that pre-funding is that, by the end of 2010, the OASI Social Security trust fund held over \$2.4 trillion in assets for retirement benefits, a net increase of \$92 billion over 2009.<sup>14</sup>

For the next several years, the retirement benefit portion of the Social Security trust fund will continue to grow. Annual costs of retirement benefits will begin to exceed current contribution revenues, excluding interest income, in 2017. Annual trust fund income, including interest payments, will exceed benefit costs beginning in 2025. At that time, trust fund assets will need to be redeemed until the trust fund is exhausted in 2036. From that point on, unless the funding system is changed, Social Security will become a pay-as-you-go program with current contributions projected to be sufficient to pay about 77% of scheduled benefits in 2038, and then to decline to 74% in 2085.<sup>15</sup> According to Social Security Board of Trustees projections, full payment of both disability and retirement benefits through 2084 could be achieved by raising the combined employer-worker payroll tax today from 12.4% to 14.55%.<sup>16</sup>

These, then, are the Social Security fiscal facts:

- Social Security benefits are paid for through a dedicated stream of revenue from payroll-based contributions and investment income.
- For decades, Social Security has received more in annual revenues than it has paid out in annual benefits and costs.
- The Social Security program is capable of paying full benefits as scheduled for the next 25 years and 77% of scheduled benefits for the following 47 years and 74% thereafter.

In addition, retirement benefits from the Social Security program are not projected to increase significantly as a share of GDP. Of the three major federal entitlement programs, Medicaid, Medicare and Social Security, it is the health-related programs whose spending is projected to accelerate in the future. The Long-Term Budget Outlook from 2010 of the nonpartisan Congressional Budget Office (CBO) makes the point clearly:

Under CBO's scenarios, all of the projected growth in primary spending as a share of GDP over the long term stems from increases in mandatory spending, particularly in outlays for the government's major health care programs: Medicare, Medicaid, the Children's Health Insurance Program (CHIP), and insurance subsidies that will be provided through the exchanges created by the March 2010 health care legislation. Under both of CBO's scenarios, **total outlays for those health care programs would grow much faster than GDP, increasing from 5.6% in 2011 to about 9% or 10% in 2035...Spending on Social Security would rise much more slowly, from almost 5% of GDP in 2011 to about 6% in the 2030s and beyond.**<sup>17</sup> [Emphasis added]

As these numbers indicate, Social Security is not responsible for the majority of the increased costs of entitlement programs in

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and Congress acted in 1983 to address its immediate shortfall. Among other changes, Congress changed the benefit structure and increased the amount of payroll taxes collected to put the program into actuarial balance.

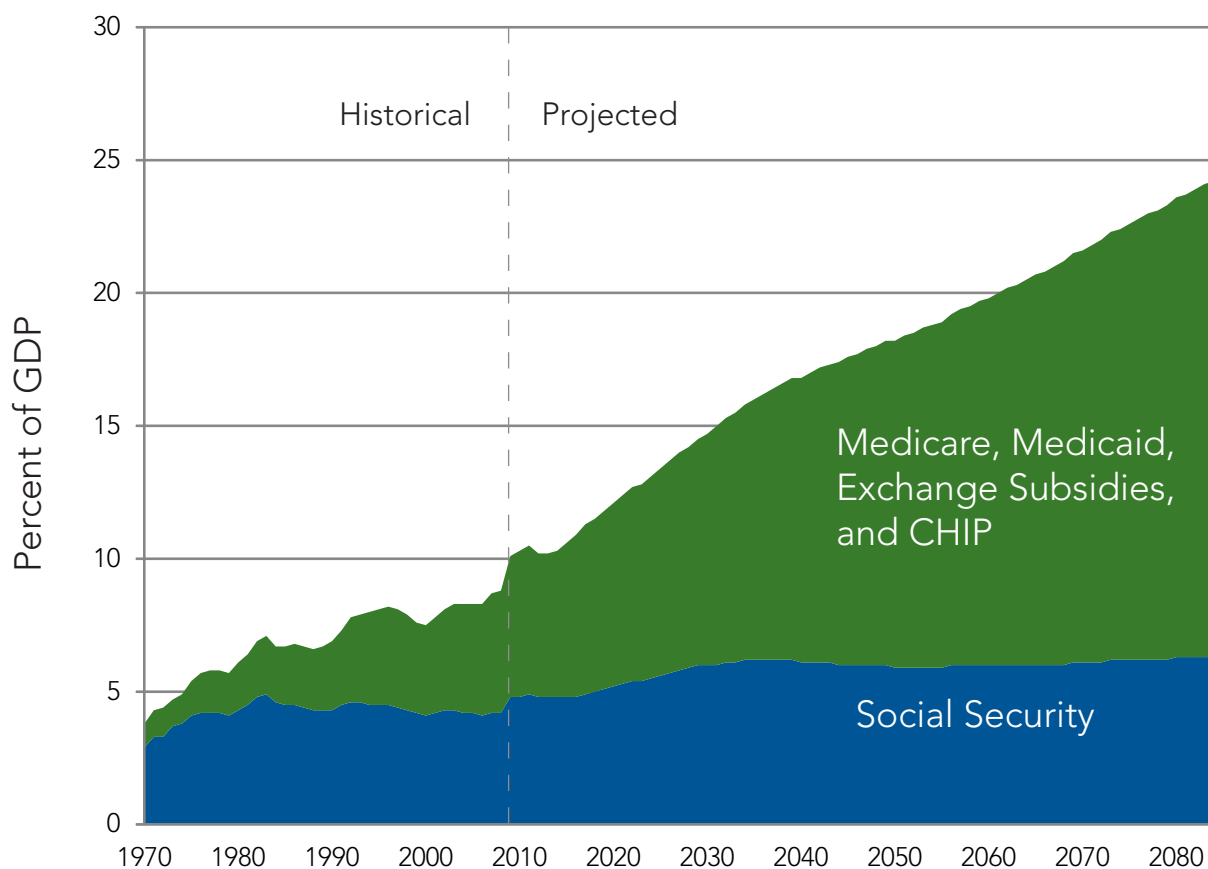
<sup>14</sup> Beginning in 2010, Social Security expenditures began to exceed insurance contribution revenues for the first time since 1983 as a result of the Great Recession, and this will continue in 2011. However, it is important to note the OASDI trust fund will continue to grow until 2023 as a result of interest earnings significantly exceeding the non-interest income deficit. *See* footnote 7, The Trustees Summary of the 2011 Annual Report, p. 6.

<sup>15</sup> *Ibid.*, p 9.

<sup>16</sup> *See* footnote 9, 2011 Annual Report, p. 11.

<sup>17</sup> Congressional Budget Office (CBO) Report, "The Long-Term Budget Outlook," June 2011. Available at: [http://cbo.gov/ftpdocs/122xx/doc12212/06-21-Long-Term\\_Budget\\_Outlook.pdf](http://cbo.gov/ftpdocs/122xx/doc12212/06-21-Long-Term_Budget_Outlook.pdf).

Figure 1. Historical and Projected Costs of United States Social Insurance System



Source: Congressional Budget Office, 2011.<sup>18</sup>

the federal budget. Instead, it is health care costs that are the primary drivers. As the CBO concludes in its report, “The health programs are the main drivers of that growth; they are responsible for 80% of the total projected rise in spending on those mandatory programs over the next 25 years.”<sup>19</sup>

## The Law

The arithmetic of the Social Security program cannot be disputed. But there are many who would like the result to be different. To create a crisis that doesn’t exist, critics of Social Security turn, as the Mock Turtle explained in *Alice in Wonderland*, to “the different branches of arithmetic – Ambition, Distraction, Uglification, and Derision.” The plan is to dismiss and deny the authenticity of federal law that defines and controls the operation of two key variables in the Social Security financial equation: the trust fund and the trust fund bonds.

The negative arguments about Social Security are wrong but the following assertions are continually recycled in the popular

<sup>18</sup> *Ibid.*, p. 9.

<sup>19</sup> *Ibid.*

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media. Argument #1: there is no trust. “There is probably no single, more enduring myth among Americans than the existence of some separately-constituted Social Security trust fund...Such a fund does not exist and was never envisioned even when Social Security was created.”<sup>20</sup> Argument #2a: the Social Security bonds are mere IOUs. “The Social Security trust fund contains nothing but IOUs the government has written to itself.”<sup>21</sup> Argument #2b: Even if Social Security bonds exist, they are not “real” bonds because they are not marketable. “The ‘special’ bond obligations held by the Social Security Trust Fund ‘do not consist of real economic assets.’ They are not marketable bonds, nor do they pay market rates. They represent nothing more than political promises to fund future retirees based on future revenues.”<sup>22</sup> Argument #3: Social Security is a Ponzi scheme. “The link between the payroll tax and benefit payments is part of a confidence game to convince the public that what the Social Security Administration calls a social insurance program is equivalent to private insurance, in that, in the Administration’s words, ‘the workers themselves contribute to their own future retirement benefit by making regular payments into a joint fund.’ Balderdash. Taxes paid by today’s workers are used to pay today’s retirees.”<sup>23</sup> Argument #4: Social Security benefits are legally vulnerable. “Your Social Security benefits are always subject to the whim of 535 politicians in Washington.”<sup>24</sup> These arguments are demonstrably false in fact and in law.

## The Social Security Trust Is A Valid Trust

Fundamentally, a trust is a legal device for holding property. Trusts have been used for this purpose for centuries, and the basic legal requirements for establishing and maintaining a trust have long been settled law. To create a trust, the creator (typically called the “settlor”) transfers the legal ownership and control of property (the “trust corpus”) through a legal writing (the “trust”) executed by the settlor. The individual or entity (the “trustee”) given legal ownership and control over the trust corpus is charged with using it on behalf of individuals named in the trust document (the “beneficiaries”) according to the instructions in the legal writing.

The original 1935 Social Security legislation did not contain a trust fund mechanism, largely due to uncertainty over whether the program would pass constitutional muster. Once the Supreme Court ruled favorably in 1937, the 1937-38 Advisory Council on Social Security recommended that the reserve account then being used “be ‘specifically’ converted into ‘a trust fund, with designated trustees acting on the behalf of the prospective beneficiaries of the program.’”<sup>25</sup> Those recommendations were carried out in the Social Security Amendments of 1939.<sup>26</sup>

Specifically, Congress, acting as settlor, established a trust for the Social Security program in Title 42, U.S. Code, Chapter 7, Subchapter II. Section 401(a) of that Act states: “There is hereby created on the books of the Treasury of the United States a trust fund to be known as the ‘Federal Old-Age and Survivors Insurance Trust Fund.’”

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<sup>20</sup> Richard Kaplan, “Top Ten Myths of Social Security,” 3 *Elder Law Journal*, no. 2, 191-214 at 192-193 (1995). Available at: <http://law.bepress.com/cgi/viewcontent.cgi?article=1088&context=uiucwps>.

<sup>21</sup> U.S. Chamber of Commerce, “The Trust Fund Myth”. Available at: <http://www.uschamber.com/issues/retirementpension/socialsecurity/trust-fund-myth>.

<sup>22</sup> Jeffrey Folks, “A Generational Divide,” *The American Thinker*, May 27, 2011. Available at: [http://www.americanthinker.com/2011/05/a\\_generational\\_divide.html](http://www.americanthinker.com/2011/05/a_generational_divide.html).

<sup>23</sup> Milton Friedman, “The Biggest Ponzi Scheme on Earth,” *Hoover Digest*, No. 2, April 30, 1999. Available at: <http://www.hoover.org/publications/hoover-digest/article/7523>.

<sup>24</sup> Michael D. Tanner, “Is There a Right to Social Security?,” *Cato.org*, November 25, 1998. Available at: [http://www.cato.org/pub\\_display.php?pub\\_id=5776](http://www.cato.org/pub_display.php?pub_id=5776).

<sup>25</sup> *Op. cit.* at 67. (quoting Advisory Council on Social Security, “Final Report,” December 10, 1938, reprinted in Committee on Economic Security, *The Report of the Committee on Economic Security of 1935*, p. 200).

<sup>26</sup> Social Security Act Amendments of 1939, Pub L. No. 379-76, H.R. 6635, § 201 (1940). Available at: <https://socialsecurity.gov/history/1939amends.html>. The relevant statutory provisions can be found in 42 U.S.C. Section 401 *et seq.*

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Section 401(a) also defines the trust corpus to include:

- Initially ... the securities and amounts held by the Secretary of the Treasury in the existing Old-Age Reserve Account on the books of the Treasury as of January 1, 1940, and
- “Amounts equivalent to 100 per centum of” the insurance contributions paid by employers, workers and the self-employed.

Section 401(c) appoints a Board of Trustees consisting of the Commissioner of Social Security, the Secretary of the Treasury, the Secretary of Labor, the Secretary of Health and Human Services and two members of the public, both of whom may not be from the same political party. The Board of Trustees is charged with the following duties under the statute, namely:

- to hold the trust fund,
- to report annually to the Congress on the operation and status of the trust fund,
- to report immediately to the Congress if they believe the trust fund to be too small,
- to recommend improvements in coordinating Social Security with unemployment compensation, and
- to review policies and recommend changes in the law governing the management of the trust fund.

The subsequent sections of Subchapter II define, among other things, the beneficiaries of the trust, the benefits to be paid from the trust, and the methods by which benefits are to be paid.

By what lawyers call “black letter law,” the Social Security trust satisfies the legal requirements of a trust. There is a settlor – Congress. There is a trust corpus – a stream of dedicated tax revenues. There are designated trustees. There is a trust document in the controlling statutes, and those statutes define the beneficiaries of the trust and the mandatory benefits they are eligible to receive. Congress has the power to create trust funds, and currently several hundred of them exist in the federal government.<sup>27</sup> The Social Security trust is both one of the oldest such federal trust funds and one of the largest.

By what lawyers call “black letter law,” the Social Security trust satisfies the legal requirements of a trust. There is a settlor... There is a trust corpus... There are designated trustees. [And] there is a trust document.

The Social Security trust has benefited from a strong Congressional commitment to preserve its financial and political integrity.<sup>28</sup> Congress has been vigilant in insuring that the trust is credited with payroll tax revenues and their proper investment in a way most advantageous to Social Security.

- The 1983 Amendments to restore the financial security of Social Security requires the trust fund to be credited at the beginning of each month with an amount equal to the expected payroll tax income for

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27 Paul L. Posner and Susan J. Irving, Government Accountability Office, “Federal Trust and Other Earmarked Funds: Answers to Frequently Asked Questions,” GAO-01-199SP, January 2001. Available at: <http://www.gao.gov/new.items/d01199sp.pdf>.

28 Since the creation of the Social Security trust, Congress has repeatedly acted to limit the ability of the Secretary of the Treasury to do anything with the trust funds other than deposit incoming revenues, invest in a manner that will maximize interest earnings to the funds, and use incoming revenues plus accumulated assets as and when needed, to pay benefits under the Social Security program. In addition, the Social Security statute goes far beyond mere deposit and holding requirements, requiring specific schedules for crediting the trust funds with payroll tax contributions and for holding these amounts in special issue bonds. The bond holdings of the trust fund, including the interest earned for each instrument and the bond’s maturity date, are set out in exacting detail in the yearly Trustees’ report, as required by law. *See* Social Security Act of 1935, 42 U.S.C. § 201(b) (1935), which demonstrates the requirement to invest the program’s surplus in Treasury bonds, which are interest bearing obligations of the United States, since the inception of the Social Security Act.

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that month.<sup>29</sup> The “advance tax transfer” is required to be invested in short-term Treasury securities and redeemed a day or two later to finance Social Security benefit checks that go out on the third of each month.

- In 1985, the Treasury Department cancelled \$28 billion in Social Security bonds to avoid exceeding the statutory debt ceiling. This “disinvestment” had the effect of converting internally-held government debt in the form of OASDI trust fund held bonds, into new public borrowing authority, allowing financing of its obligations until the debt ceiling was increased. Congress reacted swiftly and negatively to this action, including toward its longer-term effects of losing interest earnings permanently on the higher interest disinvested bonds. Hearings, and a lawsuit filed by the AARP and other interested parties, were followed by the Balanced Budget and Emergency Deficit Control Act (PL 99-17), which required Treasury to restore the trust fund to the position it was in, with respect to bond holdings, prior to the disinvestments.<sup>30</sup>
- In 2010, the HIRE Act gave employers who hired unemployed workers an exemption from contributions for part of 2010. Congress insisted that the Social Security trust fund be made whole through “deemed” Social Security contributions by requiring that “amounts equal to the reduction in revenues ... shall be transferred from the general fund at such times and in such manner as to replicate to the extent possible the transfers which would have occurred to such Trust Fund had such amendments not been enacted.”<sup>31</sup> The General Fund of the Treasury has already reimbursed the Social Security trust fund over \$2 billion in these deemed Social Security contributions.<sup>32</sup>
- Also in 2010, Congress gave employees a partial contribution holiday in 2011 by reducing their required contributions from 6.2% to 4.2% up to the FICA wage limit. In doing so, Congress protected the fiscal integrity of the Social Security trust by requiring the same transfers of deemed Social Security contributions from the general fund that it had authorized in the HIRE Act.<sup>33</sup>

These actions demonstrate the seriousness with which Congress views any attempts to treat the Social Security trust fund as anything other than regular obligations of the U.S. government to the American people, holding these funds in trust and using them only for Social Security program purposes.

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29 Social Security Act of 1983, Pub. L. No. 98-21, Sec.141, 97 Stat 65, (1983). It is important to recognize, however, that the 1983 changes affected only the timing of crediting amounts from incoming contributions, not the ultimate disposition of those revenues as the source of payment of Social Security benefit and administrative obligations. This measure was put in place in the context of the immediate and severe trust fund shortfalls that prompted the enactment of the 1983 legislation to insure that sufficient funds were in place in the trust funds at the beginning of every month when benefits are actually paid.

30 *See* Balanced Budget and Emergency Deficit Control Act of 1985, Pub.L.No. 99-177, § 272, 99 Stat. 1037 (1985). Available at: <http://thomas.loc.gov/cgi-bin/bdquery/z?d099:Hj00372:@@D&summ2=m&>.

31 *See* Hiring Incentives to Restore Employment Act, 74 Public Law 111-147, Mar. 18, 2010. Available at: <http://www.google.com/search?q=74+PUBLIC+LAW+111%E2%80%93147&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a>.

32 *See* footnote 9, 2011 Annual Report, p. 22.

33 *See* the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Public Law 111-312, Dec. 17, 2010. Available at: <http://www.thomas.gov/cgi-bin/query/z?c111:H.R.4853>.

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## The Social Security Bonds Are Valid Obligations Of The United States

Section 401 of the Social Security statutes sets forth rules for how the trust corpus should be managed and invested. In Section 401(c), the Secretary of the Treasury is designated the Managing Trustee of the Board of Trustees. In Section 401(d), the Secretary of the Treasury is charged with investing the trust corpus as follows:

It shall be the duty of the Managing Trustee to invest such portion of the Trust Funds as is not, in his judgment, required to meet current withdrawals. Such investments may be made only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States ...

Each obligation issued for purchase by the Trust Funds... shall be evidenced by a paper instrument in the form of a bond, note, or certificate of indebtedness issued by the Secretary of the Treasury... **and stating on its face that the obligation shall be incontestable in the hands of the Trust Fund to which it is issued, that the obligation is supported by the full faith and credit of the United States, and that the United States is pledged to the payment of the obligation with respect to both principal and interest.**<sup>34</sup> [Emphasis added]

Critics of the Social Security program are correct when they say that there are no dollar bills in the trust fund. There are also no shares of domestic or foreign corporate stocks, real estate investment trusts, mutual funds, money market funds, variable annuities, private equity funds or any of the other investments typically found in large pension plan trusts today. By law, the investments held by the Social Security trust are not and cannot be diversified. Although Congress could decide to diversify the trust fund portfolio of investments, it has never done so.<sup>35</sup> The Social Security trust is full, however, of the most-valued investment in the world: U.S. government bonds.

Some critics question the validity of the Social Security bonds because they are evidenced by a paper instrument as required by Section 401(d). As former President George W. Bush once said, “I went to West Virginia the other day to look at the filing cabinets, to make sure the IOUs were there – paper. And it’s there. And it’s, frankly, not a very encouraging sight.”<sup>36</sup> No one seriously believes, however, that their brokerage or savings account holds a pile of dollars or actual stock certificates stashed away in a locked drawer with their name on it. In fact, in this day and age, the Social Security trust is unusual in holding actual physical evidence of the bonds it owns.

Critics are correct when they say a Social Security bond is just an IOU. By definition, any debt instrument is an IOU. “A bond is a security that is issued in connection with a borrowing arrangement. The borrower issues (i.e. sells) a bond to the lender for some amount of cash; the bond is the “IOU” of the borrower. The arrangement obligates the issuer to make specified

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<sup>34</sup> Social Security Act, 42 U.S.C. § 401(d) (2010).

<sup>35</sup> The 1994-1996 Social Security Advisory Report, commissioned by the HHS and SSA to report on the long-term financing options available for Social Security, suggested in “Option 1” of the report that a portion of OASDI Trust Funds should be invested in the private equity market to improve long-term solvency. “Under the plan, Social Security, like other public and private defined benefit pension plans, would invest a sizable portion of the growing fund in private equities.” See Social Security Administration, “1994-996 Advisory Council Report: Findings, Recommendations, and Statements.” Available at: <http://www.ssa.gov/history/reports/adCouncil/report/findings.htm#option1>. More recently, notable retirement policy expert, Christian Weller, Senior Fellow at the Center for American Progress, amongst others, have suggested a portion of the OASDI Trust Funds be invested in marketable equity securities. See Christian E. Weller, “Building it Up, Not Tearing It Down.” Center for American Progress, December 2010. Available at: [http://www.americanprogress.org/issues/2010/12/pdf/social\\_security.pdf](http://www.americanprogress.org/issues/2010/12/pdf/social_security.pdf).

<sup>36</sup> President Discusses Strengthening Social Security in South Carolina, April 18, 2005. Available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2005/04/20050418-1.html>.

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payments to the bondholder on specified dates ... When the bond matures, the issuer repays the debt by paying the bondholder the bond's par value (equivalently, its face value)."<sup>37</sup>

The Social Security bonds are IOUs from the federal government, but they are not ordinary bonds. They have two special features. First, under Section 401(d) of the Social Security statutes, they are entitled to a special rate of interest. In 2010, the effective annual rate of interest earned on the assets of the Social Security trust fund was 4.6%.<sup>38</sup> Second, Social Security's trust fund bonds are backed by the full faith and credit of the United States government. While the bonds are a special issue to the trust fund and cannot be sold to third parties outside of the U.S. government, much like U.S. Savings Bonds, they are in every detail U.S. Treasury Bonds, backed by the full faith and credit of the United States.<sup>39</sup>

This backing is more than mere words. The Trust Funds' assets are Treasury bonds, which are enforceable legal obligations by which the federal government promises to repay its lenders. While parties often breach their contractual obligations, Treasury bonds are a uniquely powerful promise because the U.S. government puts its full faith and credit behind its debts. Putting one's trust in Treasury bonds is hardly a sign of financial naiveté: financial managers and economists treat Treasury bonds as risk-free. Indeed, Treasuries are the gold standard of risk-free assets against which compare all other financial assets ... the most trusted instrument in human history.<sup>40</sup>

The bond is incontestable in the hands of the Trust Fund; the bond is supported by the full faith and credit of the United States, and the United States is pledged to the payment of the bond with respect to both principal and interest.

As the specimen bond pictured in Figure 2 indicates, the United States of America "for value received promises to the Federal Old-Age and Survivors insurance Trust Fund" an amount stipulated on the bond. The specimen also recites the required statutory language: the bond is incontestable in the hands of the Trust Fund; the bond is supported by the full faith and credit of the United States, and the United States is pledged to the payment of the bond with respect to both principal and interest. The Social Security Treasury bonds are undeniably legal obligations of the federal government, entitled to the same legal status and protection, in terms of U.S. government guarantees, as similar Treasury bonds held by private individuals, foreign governments, corporations or other investors.<sup>41</sup>

Similarly, the argument that Social Security bonds are not "real" bonds because they are not marketable bonds must be dismissed. Under the U.S. Treasury Department definitions, "marketable securities consist of bills, notes, bonds, and TIPS. Non-marketable securities consist of Domestic, Foreign, REA [Rural Electrification Administration], SLGS [State and Local Government Securities], US Savings, GAS [Government Account Securities] and Other. Marketable securities are negotiable and transferable

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37 Zvi Bodie, Alex Kane, and Alan J. Marcus, *Investments*, 8th Edition, New York, McGraw-Hill Irwin, 2009, p.446.

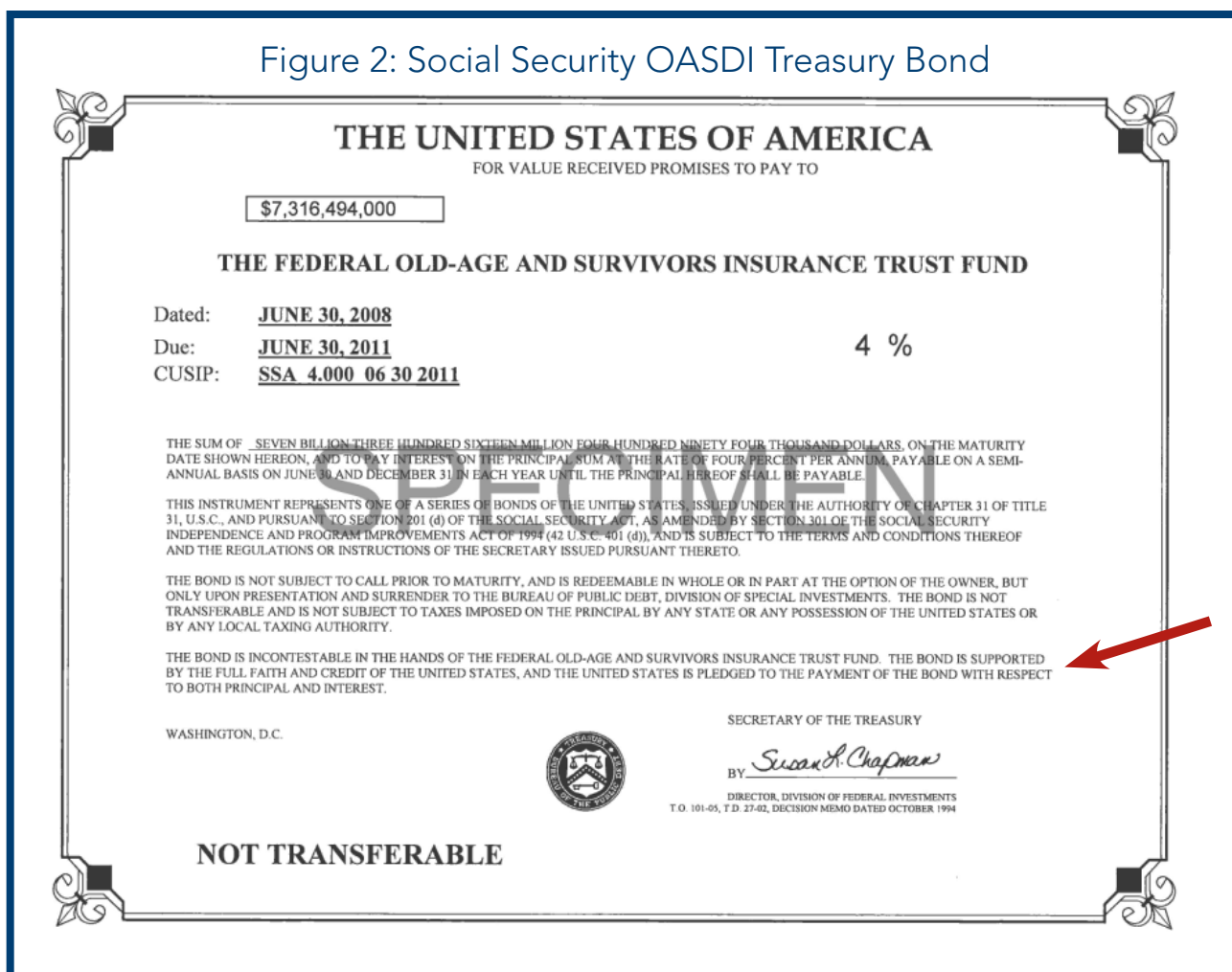
38 See footnote 9, 2011 Annual Report, p. 25.

39 See Treasury Direct, "Marketable and Non-marketable (Principal)," February 3, 2011. Available at: [http://www.treasurydirect.gov/govt/charts/principal/principal\\_mark.htm](http://www.treasurydirect.gov/govt/charts/principal/principal_mark.htm).

40 Neil H. Buchanan, "Social Security and Government Deficits: Why Should We Worry?," 92 Cornell Law Review 2, January 2007, 257-290 at 273-274. Available at: [http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Buchanan\\_92-2.pdf](http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Buchanan_92-2.pdf).

41 Curiously, President Bush, arguing for privatizing Social Security, proposed that one investment option should be composed entirely of "Treasury bonds, which are backed by the full faith and credit of the United States Government," April 30, 2005. Available at: [www.presidency.ucsb.edu/ws/index.php?pid=58769](http://www.presidency.ucsb.edu/ws/index.php?pid=58769).

Figure 2: Social Security OASDI Treasury Bond



and may be sold on the secondary market.”<sup>42</sup> As Figure 3 demonstrates, non-marketable securities make up over one third of the United States outstanding debt securities. Although critics of Social Security seem to be suggesting that non-marketable securities are somehow inferior to marketable securities, this is not necessarily true.<sup>43</sup> In fact, the non-marketable – and the resulting stability of value – of Social Security bonds is arguably better suited for the purposes of the Social Security program. As the Social Security Administration explains

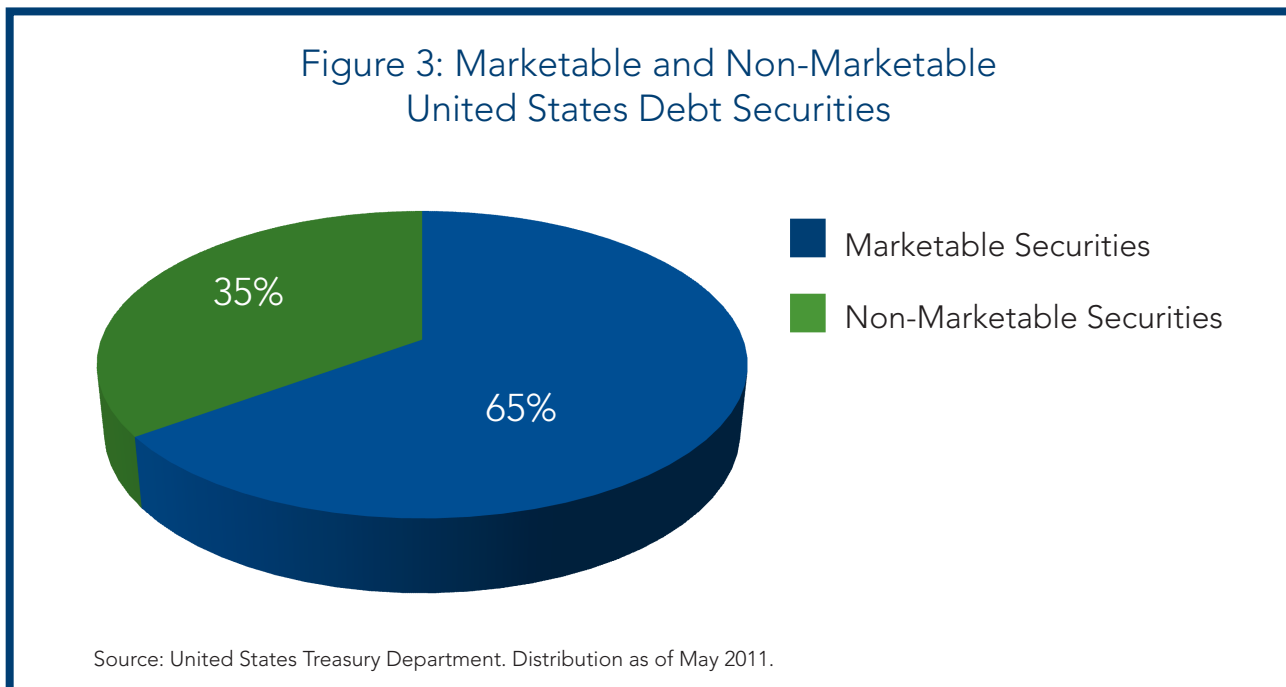
In the past, the trust funds have held marketable Treasury securities, which are available to the general public. Unlike marketable securities, special issues can be redeemed at any time at face value. Marketable securities are subject to the forces of the open market and may suffer a loss, or enjoy a gain, if sold before maturity. Investment in special issues gives the trust funds the same flexibility as holding cash.<sup>44</sup>

42 See [http://www.treasurydirect.gov/govt/charts/principal/principal\\_mark.htm](http://www.treasurydirect.gov/govt/charts/principal/principal_mark.htm).

43 This argument, to the extent it has any validity, reflects a budgetary, not a legal, perspective on Social Security. As the Social Security Administration explains, “The assets of the trust funds are required to be invested in interest-bearing securities guaranteed as to interest and principal by the full faith and credit of the U.S. government. As a result, all assets are currently invested in nonmarketable special-issue obligations of the Treasury. In scoring assets and liabilities for the federal government as a whole, the trust fund assets are generally assumed to be a wash: an asset for the trust funds, but an equal liability for the General Fund of the Treasury. This is a valid perspective, but it does not lessen the claim that the trust fund assets have for future cash when needed. Trust fund securities have always been redeemed on maturity or when needed, and there is no risk of default on these securities. Moreover, it is reasonable to assume that the financial markets understand that securities held by the trust funds may be redeemed in the future, requiring the Treasury to collect additional taxes, lower other federal spending, or borrow additionally from the public. Available at <http://www.socialsecurity.gov/policy/docs/ssb/v70n3/v70n3p111.html>.

44 See <http://www.ssa.gov/oact/progdata/fundFAQ.html>.

In sum, the argument that the non-marketability of Social Security bonds somehow makes the debt obligations less legitimate is a red herring. The critical issue is the legal backing to which these securities are entitled to from the federal government. And Social Security bonds enjoy the best possible: the full faith and credit of the United States.



## Social Security Benefits and Their Legal Protection

From a legal perspective, much of the criticism leveled at the Social Security program results from a misunderstanding of its structure. Some critics call it a “Ponzi scheme” or say it is merely an income transfer program from the young to the old. Others say that workers have no ownership rights to Social Security benefits, and the program is subject to the whims of Congress.

Social Security is a pension plan. It fits the traditional definition of a pension plan as a “plan established and maintained ... primarily to provide systematically for the payment of definitely determinable benefits ... over a period of years, usually for life after retirement.”<sup>45</sup> Social Security is not a 401(k) plan for wealth accumulation. In a 401(k) plan, contributions go into individual accounts and workers are entitled to the value of their accounts at a given point in time. That value depends on the amount of contributions and the market performance of their account investments. Social Security is a pension plan in the form of a defined benefit plan. In a defined benefit plan, workers do not own a proportionate share of the pension plan’s assets. They are entitled instead to a benefit from the plan that is payable at retirement and usually lasts for life. Each worker’s benefit is determined by a formula in the plan, usually related to earnings levels and years of employment. Contributions to a defined benefit plan are held in a trust separate from the assets of the plan sponsor. The trust assets are pooled and invested to ensure that the promise to pay benefits to generations of beneficiaries over long periods of time and far out into the future can be kept.

Social Security is in no way a Ponzi scheme. The central element of a Ponzi scheme is an intent to defraud. It requires an intent by the fraudster to obtain financial gain by cheating or stealing from contributors. The Social Security program, in contrast,

<sup>45</sup> Treasury Regulation § 1.401-1(b) (1960).

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Social Security is in no way a Ponzi scheme. The central element of a Ponzi scheme is an intent to defraud. The Social Security program, in contrast, has paid out trillions of dollars to millions of Americans over the past seventy five years.

has paid out trillions of dollars to millions of Americans over the past seventy-five years. Neither is Social Security a wealth transfer system. It is a defined benefit plan. Current contributions to a pension plan belong to its trust, not to individual contributors. Current contributions can be used to pay current beneficiaries; otherwise, trust investments are used for that purpose. It is a judgment call by the plan trustees as to which makes more economic sense. Further, it is unfair to criticize Social Security for failing to be what it never was intended to be – a wealth accumulation device like a 401(k) plan. It is a defined benefit plan where participants earn benefits related to their employment histories, and it delivers valued and valuable income in retirement that 401(k) plans are not currently able to produce.

### Why Is Social Security Not A Ponzi Scheme?

According to the SEC, a Ponzi Scheme is “an investment fraud that involves the payment of purported returns to existing investors from funds contributed by new investors...the fraudsters focus on attracting new money to make promised payments to earlier-stage investors and to use for personal expenses, instead of engaging in any legitimate investment activity.”<sup>46</sup>

Social Security:

- 1) is not an investment scheme, it’s a defined benefit plan,
- 2) has dedicated tax revenues, which are invested in legitimate investments, i.e., government bonds that pay real returns, and
- 3) investment earnings are available to pay benefits if and when current tax revenues are insufficient.

Critics of Social Security have also asserted that the program lacks critical legal protections for contributors and can be changed any time at the whim of Congress. They point to the reasoning in the Supreme Court’s fifty-year old decision in *Flemming v. Nestor* as support for their position. Congress, of course, can change any laws it wishes, except the laws of physics, unless the Supreme Court disagrees. A close look at *Nestor*, however, reveals that the Court said nothing to bring into question the legal validity of the Social Security trust or the integrity of its bonds.

*Flemming v. Nestor* was about a very different issue. It arose in the context of the anti-Communist fervor of the 1950s.<sup>47</sup> Nestor was deported in 1956 for having been a member of the Communist Party from 1933 to 1939. Nestor was denied further Social Security benefits under Section 402(n) of the Social Security statutes, which provides for the termination of Social Security benefits under these circumstances. He sued, claiming, among other reasons, that his Social Security benefits were an accrued

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<sup>46</sup> Available at: <http://www.sec.gov/answers/ponzi.htm#PonziSchemes>.

<sup>47</sup> *Flemming v. Nestor*, 363 U.S. 603, 610-611 (1960).

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property right protected by the Due Process Clause of the Fifth Amendment.

The Supreme Court disagreed. It said, first, that Social Security contributions to the program are not the equivalent of premiums used to purchase an annuity from an insurance company because benefits are based not on a worker's contributions but on his or her earnings history.<sup>48</sup> Therefore, Nestor had no contractual interest in his benefits protected by the Takings Clause of the Fifth Amendment. Second, it pointed to Section 1104 of the Social Security statutes in which Congress reserved its "right to alter, amend or repeal any provision of this Act."<sup>49</sup> The Court concluded

To engraft upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands ... That provision [to alter, amend or repeal] makes express what is implicit in the institutional needs of the program ... We must conclude that a person covered by the Act has not such a right in benefit payments as would make every defeasance of "accrued" interests violative of the Due Process Clause of the Fifth Amendment.<sup>50</sup>

What is the lesson of *Nestor*? It is really about the vesting of Social Security benefits, that is, whether contributors have a non-forfeitable right to a benefit based on the amount and timing of their contributions under the Constitution. The Supreme Court said, no, Congress can set conditions beyond contributions for the receipt of benefits. This is not a surprising result. The concept that workers had an earned right to their pension benefits effectively did not exist at the time Social Security was enacted. Until relatively recently, vesting rights in private sector pension plans were rudimentary. In 1940, federal law only required vesting (to the extent the plan was funded) in private sector plans when a participant reached normal retirement age (generally, age 65) or the plan terminated.<sup>51</sup> Employers could voluntarily adopt a vesting schedule for their plans, but even then participants could forfeit their benefits under a "bad boy" clause like the one Nestor encountered. This remained the law at the time *Nestor* was decided. It was not until 1974, almost thirty-five years after Social Security was created, that the Employee Retirement Income Security Act imposed mandatory vesting schedules on private sector plans and did away with bad boy clauses. But even then, and continuing through today, federal law gives special leeway to pension plans sponsored by governmental entities in terms of vesting, leaving that issue to the discretion of individual states and the federal government in the design of its own plans.

Congress, of course, can change any laws it wishes, except the laws of physics, unless the Supreme Court disagrees. A close look at *Nestor*, however, reveals that the Court said nothing to bring into question the legal validity of the Social Security trust or the integrity of its bonds.

It is also not surprising that the Court validated the reservations of rights provision in the Social Security statute. Such a clause is standard operating procedure in private sector pension plans so that plan sponsors retain some flexibility to adjust their benefit programs in response to changing conditions. The Court concluded that the law underpinning Social Security is entitled to remain flexible for similar reasons because

[The] program was designed into the indefinite future, and its specific provisions rest on predictions as to

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<sup>48</sup> The Supreme Court is affirming here that the structure of Social Security program is a defined benefit plan.

<sup>49</sup> 42 U.S.C. § 1304 (1954).

<sup>50</sup> *Fleming v. Nestor*, *supra* footnote 41.

<sup>51</sup> Isadore Goodman, "Vesting Under Erisa," CCH Pension Plan Guide 159, April 14, 1978.

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expected economic conditions which must inevitably prove less than wholly accurate, and on judgments and preferences as to the proper allocation of the nation's resources which evolving economic and social conditions will of necessity in some degree modify.<sup>52</sup>

*Nestor* speaks only to the payment of benefits from the trust. It says nothing about the structure of the trust itself, its obligations and responsibilities to hold contributions into the program, or the assets it holds in the form of government bonds and their validity.

So, are the critics correct? Does *Nestor* mean that Congress can do as it pleases with Social Security contributions? No, it does not. The Supreme Court in *Nestor* merely upheld the constitutionality of the power Congress reserved to itself to change the benefit structure of the program. Neither does *Nestor* bring into question the legal structure of the Social Security trust or the validity of its bonds. *Nestor* speaks only to the payment of benefits from the trust. It says nothing about the structure of the trust itself, its obligations and responsibilities to hold contributions into the program, or the assets it holds in the form of government bonds and their validity. In fact, the Court explicitly recognized that Social Security “tax proceeds are paid into the Treasury...and appropriated to a Trust Fund, from which benefits and the expenses of the program are paid....It was evidently contemplated that receipts would greatly exceed disbursements in the early years...surplus funds are invested in governmental obligations, and the income returned to the Trust Fund.”<sup>53</sup>

Fifty years after *Nestor*, it is not at all clear where and where not the Court would sanction more expansive Congressional action under its power to amend the program, such as forfeiting the expected benefits of a large segment of the population or defaulting on the Social Security bonds. The Court has not been asked to decide such issues. The Court has said, however, Congress is subject to “constitutional constraint” in actions that lead to “defeatance” of “accrued” interests, which actions may not be “utterly lacking in rational justification.” In addition, the concept of vesting rights for pension-like benefits has matured in the eyes of the public and in the law. Further, the benefits provided by the Social Security program have increased in importance in the financial well-being of the elderly. And the trust fund consists of trillions of dollars of tax revenue dedicated to the program. Such issues may well come before the Court in the future but *Nestor* does not necessarily determine how the Court might resolve them.

Fifty years after *Nestor*, it is not at all clear where and where not the Court would sanction more expansive Congressional action under its power to amend the program, such as forfeiting the expected benefits of a large segment of the population or defaulting on the Social Security bonds.

## Social Security and The Federal Deficit and Debt

Social Security is a partially pre-funded public pension plan that has substantial assets in its trust fund. The Baby Boomers have done much to pay in advance for their retirement. It is well recognized, however, that the changing demographics of American society require adjustments in the Social Security program from time to time to keep it in “actuarial balance” for the next seventy-five years.<sup>54</sup> It is also well recognized that the program needs only modest adjustments to satisfy that standard.<sup>55</sup>

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<sup>52</sup> *Flemming v. Nestor*, *supra* footnote 41.

<sup>53</sup> *Flemming v. Nestor*, *supra* footnote 41.

<sup>54</sup> See footnote 7, The Trustees Summary of the 2011 Annual Report, p. 9.

<sup>55</sup> The Urban Institute, “The Future of Social Security: Solvency, Work, Adequacy and Equity,” Program on Retirement Policy, Brief # 31, November 2010. Available at:

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Why are so many convinced that the program is broke or bankrupt or a major contributor to the U.S. deficit? In part, many do not understand the legal structure of the Social Security trust. Others choose to ignore it. Some genuine confusion arises from the projections of economists and fiscal analysts who focus on overall federal revenues and spending. For their purposes, there is no real economic difference between contributions to the trust funds or from general tax revenues. Many take the position, as David Stockman did in the 1980s, that a tax dollar is a tax dollar and “federal receipts [are] fungible, and all claims [have] to be justified in competition for every other national need.”<sup>56</sup>

But budget analyses are essentially just a theoretical exercise under the Congressional Budget Act, which attempts to impose discipline on Congress’ own spending and revenue raising committees. It confers no authority to either appropriate or authorize spending or to raise or modify taxes. In fact, since 1993, the Social Security trust fund has been considered to be “off-budget” and is exempted from any general across-the-board budget cuts.<sup>57</sup> But many budget analyses continue to report Social Security as if it were still “on-budget” to provide what they see as a more complete picture of government spending and revenue raising. When they do so, the result contradicts the perception that Social Security is a major driver of the federal deficit. In fact, Social Security has for decades been “a cash cow that provides excess funds to the remainder of the federal budget.”<sup>58</sup> In other words, Social Security revenues have masked the size of the federal deficit, not expanded it.

Budget analyses are essentially just a theoretical exercise under the Congressional Budget Act, which attempts to impose discipline on Congress’ own spending and revenue raising committees. It confers no authority to either appropriate or authorize spending or to raise or modify taxes.

The role that Social Security plays in the federal debt is more complex. The federal government must repay the trust fund bonds when due because they are entitled to the full faith and credit of the United States. Social Security bonds have the same right to be repaid as other government debt entitled to the full faith and credit of the United States, such as a savings bond held by a child, a 30-year bond held by a foreign government or a federal government bond fund held in a 401(k) plan. It is important, however, to put the debt owed to Social Security in context. As of January 2011, the total public debt outstanding was \$14.13 trillion, as follows:

- Debt held by the public, U.S. Treasury securities held by institutions or individuals outside the United States Government equal to \$9.49 trillion
- Intragovernmental holdings representing U.S. Treasury securities held in accounts which are administered by the United States Government, such as the Social Security Trust Fund, equal to \$4.64 trillion.
- The Social Security trust fund represents \$2.5 trillion or just 18% of the total federal debt.<sup>59</sup>

Obviously, if the debt to Social Security could be made to disappear or to shrink, then the federal government’s fiscal position would substantially be improved. The desire to do so in large part explains the constant refrain that the Social Security trust does not exist and its bonds have no substance.

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<http://www.urban.org/publications/412253.html>.

<sup>56</sup> See footnote 4, *The Battle for Social Security: From FDR’s Vision to Bush’s Gamble*, pp. 229-230.

<sup>57</sup> See <http://www.ssa.gov/history/BudgetTreatment.html>.

<sup>58</sup> Douglas Holtz-Eakin, “The Fed and an Uncertain Fiscal Future,” *Cato Journal*, Vol. 27, #2, Spring/Summer 2007: 232.

<sup>59</sup> See Treasury Direct, “Monthly Statement of the Public Debt of the United States, January 31, 2011.” January 31, 2011. Available at: <http://treasurydirect.gov/govt/reports/pd/mspd/2011/opdm012011.pdf>.

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The fact remains, however, that we are a nation of laws, not budgets. As this brief has shown, the legal status of the trust is clear, as is the status of the bonds in which the trust fund reserves are invested. The Social Security trust is a legal entity, with legal obligations and restrictions. The Treasury can neither divert funds away from the trust fund, nor refuse to honor obligations to the trust fund, any more than it could cease paying Social Security benefits themselves, without a change in the law. The importance of this restriction cannot be overstated: the law requires Social Security revenues to be held and invested in government bonds in the trust funds, to be used only for Social Security program purposes, and that is exactly what has taken place over the entire history of the Social Security program.

## Conclusion

There are many who would have the American people believe that the house that Roosevelt built for Social Security never existed. There are many others who would say the house must be foreclosed upon or bull-dozed to make way for a new structure. But President Franklin Delano Roosevelt's genius was to intentionally structure the Social Security program to stay standing in the face of the continuous political winds of opposition he predicted would blow against it. The two most critical elements of his design are 1) the earmarked payroll-based insurance contributions and 2) the trust fund. President Roosevelt understood deeply the explicit economic and social compact he was making with the American taxpayer: Contribute from *your* earnings today, and you will receive *your* benefits in retirement. "We put those payroll contributions there so as to give the contributors a legal, moral, and political right to collect their pensions," affirmed President Roosevelt. "With those taxes in there, no damn politician can ever scrap my social security program."<sup>60</sup>

Social Security exists not as an exercise in economic theory or the product of fiscal analysis, but as a matter of law. There is a trust, there is a trust fund, there is a funding source, and there are investments, all defined by a body of law that has existed for over seventy-five years.

Whether the house that Roosevelt built for Social Security is strong enough to withstand today's gale force political winds is unclear. But one thing is clear: if Social Security does not remain standing, it will not be because of any "legal, moral, or political" defect in the original structure. Social Security exists not as an exercise in economic theory or the product of fiscal analysis, but as a matter of law. There is a trust, there is a trust fund, there is a funding source, and there are investments, all defined by a body of law that has existed for over seventy-five years. No significant changes can be made to Social Security without a change in its legal structure by Congress.

Ultimately, the fate of Social Security is a moral and political question. "The trust fund has strengthened a social compact based on the explicit exchange of taxes in return for future benefits, encouraging millions of American workers to rely on the government's commitment."<sup>61</sup> By and large, the American public stands strongly behind the Social Security program and their compact with their government. They themselves think the house provides necessary shelter for those who are elderly, have disabilities, or are dependent children. They have consistently indicated they would be willing to pay more to bring it up to

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<sup>60</sup> See footnote 5, Dewitt.

<sup>61</sup> Patashnik, *supra* footnote 22, p. 93.

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current code.<sup>62</sup> Even polls that inappropriately conflate the budget deficit with Social Security solvency issues reveal strong public support for the program.<sup>63</sup>

The American people have an enormous moral and economic stake in the program and its future. Congress has required them to contribute to the program, and, in exchange, they have been promised benefits. Their extremely positive opinions about the program, however, have seemingly fallen on deaf ears in the current political debate around the future of Social Security. The fate of Social Security rests not on law or economics, but on politics. Ultimately, the central question is whether Congress will honor the commitment made to generations of Americans through the Social Security program and the will of the American people itself.

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62 AARP Survey, pp. 13-16; Janice M. Gregory, Thomas N. Bethell, Virginia P. Reno, and Benjamin W. Veghte, "Strengthening Social Security for the Long Run," National Academy of Social Insurance Issue Brief, No. 35, November 2010, p. 9. Available at: [http://www.nasi.org/sites/default/files/research/SS\\_Brief\\_035.pdf](http://www.nasi.org/sites/default/files/research/SS_Brief_035.pdf). In addition, results from the unbiased General Social Survey of the National Opinion Research Center at the University of Chicago conducted between 1984 and 2010 indicate that the American public places a consistently strong value on Social Security. In 1984, 54% felt the U.S. was spending too little on Social Security while only 10% felt it was spending too much. In 2010, 58% felt the U.S. was spending too little while only 8% felt it was spending too much, and Social Security was the 4<sup>th</sup> ranked spending priority. See Tom W. Smith, "Trends in National Spending Priorities, 1973-2010," General Social Survey, National Opinion Research Center, University of Chicago. (March 2011). Available at: [http://www.norc.uchicago.edu/NR/rdonlyres/17B3AD1F-1BB4-4B29-B8D7-7C823EE00A70/1820/SpendingPrioritiesRpt\\_08March2011.pdf](http://www.norc.uchicago.edu/NR/rdonlyres/17B3AD1F-1BB4-4B29-B8D7-7C823EE00A70/1820/SpendingPrioritiesRpt_08March2011.pdf).

63 See Ipsos/Reuters Poll (March 2011). Available at: <http://www.ipsos-na.com/news-polls/pressrelease.aspx?id=5157>; Harris Poll of February 14-21 (2011). Available at: <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/719/ctl/ReadCustom%20Default/Default.aspx>; and Wall Street Journal/NBC News poll (March 2011). Available at: <http://online.wsj.com/article/SB10001424052748704728004576176741120691736.html>.





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