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In the

# Supreme Court of the United States

F. David Mathews, Secretary Of Health, Education And Welfare,

Petitioner

v.

Mister Sanders

No. 75-1443

Washington, D. C.
January 11, 1977
January 12, 1977

Pages 1 thru 39

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IN THE SUPREME COURT OF THE UNITED STATES

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Petitioner

v. No. 75-1443

MISTER SANDERS

Washington, D. C.

Tuesday, January 11, 1977
Wednesday, January 12, 1977

The above-entitled matter came on for argument at 2:43 o'clock p.m. on Tuesday, January 11 until 3:00 o'clock p.m. at which time it was continued until the following morning when it came on for argument at 10:12 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MAURICE ROSENBERG, ESQ., Special Assistant to the Attorney General, Department of Justice, Washington, D.C.
For the Petitioner

WILLIAM A. KOWALSKI, ESQ., Kowalski, Kanz and O'Drobinak, 4732 Indianapolis Boulevard, East Chicago, Indiana 46312 For the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 75-1443, Matthews agaist Sanders.

Mr. Rosenberg, you may proceed whenever you are ready.

ORAL ARGUMENT OF MAURICE ROSENBERG, ESQ.

ON BEHALF OF PETITIONER

MR. ROSENBERG: Mr. Chief Justice and may it please the Court:

The question presented here is whether the federal courts have jurisdiction to review the refusal by the Secretary of HEW to reopen a disability claim. The disability claim was presented and decided some seven years before and the Secretary at that time made a decision denying the claim.

The history of the case falls into two chapters. The first chapter was in the period January 1964 to June 1966. In that period, the Respondent made a claim to the Social Security administration for disability benefits.

It received initial consideration and was rejected. It received reconsideration and was rejected.

He asked for a hearing. He received a hearing. Evidence was submitted. The examiner made a lengthy decision and in the lengthy decision which he rendered, the hearing examiner, now an administrative law judge, by title -- the hearing examiner found that the Respondent had not qualified for insured status up to the -- at the point when he had

submitted his claim. His insured status had come to an end in June of 1962. He had not submitted his claim until 1964 and he was not in insured status at the time he contended, when disability struck.

The hearing examiner further found that he was not disabled at all within the meaning of the statute at the time when he was within insured status.

The Respondent then appealed to the appeals counsel in the administration. The appeals counsel affirmed the administrative law judge, told in its affirmance, told the Respondent that he had 60 days within which to take an action in the court if he were so minded.

He chose not to. Instead, after seven years, he brought the second round of proceedings before the Social Security Administration. These embraced the period March 1973 to mid-1974. In that period he once again had initial consideration of the claim which he made.

He received reconsideration of that claim. He then asked for a hearing before an administrative law judge. The ALJ decided that he had not presented anything warranting a reopening of his claim which was based upon the same disability benefits period as the earlier round had been.

That is to say, the Respondent showed no entitlement subsequent to June 30, 1962.

Accordingly, on the basis of res judicata, the

Respondent having shown nothing new in the second round of proceedings, the administrative law judge rejected his claim.

The Respondent then appealed to the appeals counsel and the appeals counsel affirmed the rejection on the second round.

This is the reopening round.

Following that rejection, the Respondent moved into the federal courts. Now for the first time, he was advised by counsel. In the federal court he claimed that under Section 205(G) of the Social Security Act, he was entitled to get court review of the refusal of the administrative proceedings of the Secretary to reopen his claim.

The district judge in the Northern District of Indiana dismissed this claim on the ground that Section 205(G) of the Social Security Act is not a proper jurisdictional footing for a request to review a claim to reopen.

He appealed, the Seventh Circuit dividing decided that although it was correct that Section 205(G) and the Social Security Act are not a proper jurisdictional footing for reviewing in the federal courts, they denied reopening the claim.

Nevertheless, under the Administrative Procedure Act, there would be jurisdiction.

It was in that posture of the case that this Court granted the government's petition for certiorari.

There are several points to notice about this brief historical narrative. One is that, although without counsel throughout the administrative proceedings, Respondent exercised a number of options pursuing vigorously, as he was entitled to do and should have done, the opportunities which the law afforded him to get consideration, reconsideration and review again and again.

He came back to the administrative process after a lapse of more than seven years.

The administrative process has rules about such matters. It allows a rejected claimant to come back within a year on virtually no new showing -- on no new showing and ask for reopening.

Within four years after the final decision denying his claim he can come back and if he shows good cause, he can get a reopening. Good cause usually goes to the evidence, new material evidence.

After four years, he may still go back at any time, the regulations say, but in that event he is limited in his return to the administrative process for reopening. He is limited to showing that there was error of a clerical sort or error on the face of the evidence.

It was the latter sort of evidence which the Respondent in this case set up as the error involved but the record does not say, and we do not know to this date what the

nature of that error in the evidence is.

The government's case here is simple in two points. It is that there is no jurisdiction bestowed on the federal courts by the Social Security Act to review a reopening denial and that there is no jurisdiction --

QUESTION: The government prevailed on that in the Court of Appeals, didn't it?

MR. ROSENBERG: Yes, your Honor.

QUESTION: So why do you raise it? If you won on it below.

MR. ROSENBERG: Your Honor, it is raised very strenuously by Respondent, who argues it here and we believe --

QUESTION: Well, you petitioned. I don't understand why your petition raised it when you won it below. You really, what you lost on was Section 10 of the Administrative Procedure Act, didn't you?

MR. ROSENBERG: Yes, your Honor.

QUESTION: And now you argue with the new statute, that disappears in the case, too.

MR. ROSENBERG: Yes, your Honor.

QUESTION: Well, now, how much --

MR. ROSENBERG: Your Honor, there is an explanation. Intervening --

QUESTION: But you lost anyway, didn't you?

MR. ROSENBERG: We lost below. We managed to lose on

whatever ground. The explanation --

QUESTION: Well, the ground, now, on which you lost was the Administrative Procedure Act.

You won that 205(G) was not a jurisdictional predicate.

MR. ROSENBERG: Yes, your Honor, we won below on that and all fo the courts of appeals have agreed on that. However, my colleague says that this Court, in its decisions in Weinberger v. Salfi and Matthews v. Eldridge, worked to change in the necessary interpretation of 205(G) and it is to forestall or, if I may use the term, abort, any wrong turn by the Court in that direction, that I raise the point now with 205(G).

QUESTION: He didn't raise it by cross-petition or any other way, did he?

MR. ROSENBERG: He didn't raise it by cross-petition, Mr. Chief Justice but he does set forth alternative grounds for affirmance, one of which is the liberalization of Section 205(G) by the interpretations of this Court intervened.

QUESTION: And you take the position that he is entitled to defend the result on that ground, perhaps.

MR. ROSENBERG: Yes, I can see, your Honor, that the Respondent can raise a new point, if such it be, on appeal to defend his results.

First, as to the Social Security Act and specifically,

Section 205 of the Act, our submission is that it precludes jurisdiction to review a denial of reopening of a disability claim. The decision not to reopen does not come within the carefully-drawn language of Section 205(h) of the statute and if your Honors please, I would like to call your attention to the specific language of Section 205(h) since so much turns upon it, in this first argument.

On page 2a of the Appendix to our brief, Section 205(a) appears and it is three sentences. It is to the second and third sentence I call your attention.

The second sentence says, "No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal or government agency except as herein provided."

The third sentence says that "No action against the United States, the Secretary or any officer or employee thereof shall be brought under Section 41 of Title 28 to recover under any claim arising under the subchapter, Title 2 of the Act."

Section 205(h) is a statute that precludes jurisdiction. It talks in terms of nonreviewability of findings and decisions. It talks in terms of no actions being brought. So it is preclusive with the narrow exception that specifies.

That is, the herein provided exception and that herein provided exception takes us apage ahead to Section 205(g) which this Court has said is the only way of reviewing a decision of the Administrator under the Social Security Act.

Section 205(g) in its relevant phrase says that any individual after any final decision of the Secretary made after a hearing may go into court to bring an action in the district court. The rest of the section deals with the venue of the action, the time of the action -- within 60 days after the notice of the decision -- the record which will be before the district court, the court's powers to remedy error by the Administrator, the scope and standards of review that the court will follow.

That is an integrated plan for court review of Social Security administrative decisions and it is precisely to that plan and that channel of court review that Section 205 by its preclusive language points the Court in this case.

And this Court has said that when the Administrator has made a decision -- said in Weinberger against Salfi, whether a final decision or not, a decision and when the Administrator or the Secretary has made a decision, then 205(g) gives the only avenue for access into the court.

Now, if the Court please, I do not find in the Salfi decision or in the Eldridge decision any indication that those decisions were calculated to change that carefully-wrought statutory plan which is very-well balanced and which brings about a harmonious relationship so far as the law should require between the Court's power to review and the Administrator's power to decide in the first instance.

There is nothing, certainly, in the language of Section 205(g) that suggests that a decision such as is before the Court in this case, a decision not to reopen, is a final decision made after a hearing.

Of course, it is made after a hearing in some chronological and temporal sense but it isn't made after a hearing in the sense that that phrase occurs in Section 205(g).

QUESTION: What if the Secretary were to grant a hearing in connection with the application to reopen? Would that make his denial of reopening reviewable under 205(g)?

MR. ROSENBERG: Your Honor, I believe not. I believe that it would not be a final decision after a hearing in the sense in which a final decision is used in that statute.

It is my submission that a final decision after a hearing is intended to deal with the determination of the core and hard issues in the case. That is, a final decision made after a hearing on the merits, when the merits of the case have been exposed and a decision finally made upon it.

Now, there isn't any liberalization of that language, if that is the term, in Salfi and Eldridge. They did not rewrite Section 205(g) which would be necessary to do.

Those cases dealt with extraordinary circumstances and issues. The issues had to do with the constitutionality of standards or procedures under the Social Security Act.

This is an ordinary case. The application of

standards by the Administrator to facts. There is nothing extraordinary about this case and it would be absurd to suggest, I submit, that the Respondent can carry an open-end statute of limitations, move for a rehearing or reopening and, upon getting this, whether with or without a hearing, have brand-new period of time in which to go to court.

QUESTION: Your contention, then, is that the phrase, "final decision made after a hearing" limits the review on both sides. A person can't come in before that is handed down but he can't come in a long time after it is handed down, either.

MR. ROSENBERG: No, Mr. Justice Rehnquist. My contention is substantially as you say but I would point out that the language "final decision made after a hearing" does refer to a hearing that is required by the statute.

The hearing on reopening is not a hearing that is required by the statute. That is a hearing that is a matter of grace with the Administrator.

If the Administrator or the Secretary chooses to give a hearing at that time, that should not prolong the opportunity of the Respondent to go into court.

Otherwise, the whole idea of a 60-day limitation on entering into court is defeated.

MR. CHIEF JUSTICE BURGER: We will resume there at 10:00 o'clock, Mr. Rosenberg.

[Whereupon, at 3:00 o'clock p.m., the Honorable

Court was adjourned until 10:00 o'clock a.m.

the following day.]

MR CHIEF JUSTICE BURGER: We will resume arguments in Matthews against Sanders.

Mr. Rosenberg, you have about 13 minutes remaining.

MR. ROSENBERG: Mr. Chief Justice and may it please the Court:

I am at the point of concluding the government's submission with regard to the jurisdiction and review provisions of Section 205 of the Social Security Act. The state is cast in words and clothed with purpose to show that jurisdiction for court review of the Secretary's action refusing reopening are precluded unless they are permitted.

Section 205(g) does not grant jurisdiction but Section 205(h) does positively bar jurisdiction by reason of both its second and its third sentences.

The second sentence alone carries the argument. It says, "No findings of fact or decisions of the Secretary shall be reviewed by any tribunal except as 205(g) provides"and as we have seen, 205(g) makes no provision for review here.

That preclusion leaves no room for any other exceptions, the government urges, whether the exception is related to the Administrative Procedure Act or mandamus or any other outside source of purported jurisdiction.

QUESTION: Mr. Rosenberg, if you have a case where,

for example, taking a way-out hypothetical, the denial of reopening was squarely stated to be on the grounds of the applicant being black -- that you are a black and that is why we won't reopen.

MR. ROSENBERG: Your Honor, if the question involves the intrusion of an unconstitutional standard by the Administrator, it appears to me that the attack would be upon that unconstitutional standard.

QUESTION: And review in the federal court?

MR. ROSENBERG: I believe that review would be sought in the federal court. Whether it would be granted or not --

QUESTION: Well, would there be jurisdiction under your submission?

MR. ROSENBERG: In my submission there would not be jurisdiction unless it could be found under Section 205(g), as it was in Weinberger v. Salfi and in Matthews v. Eldridge by viewing the constitutional attack upon the action of the Administrator as so fundamentally at odds with the constitutional doctrine that an implied exception would be carved, almost stretched out of 205(g) but other than that --

QUESTION: And the statutory predicate of jurisdiction would be what? What section?

MR. ROSENBERG: It would have to be Section 205(g) of the statute, if there were --

QUESTION: Well, would you carve such an exception

in that kind of case?

MR. ROSENBERG: Your Honor, the case is a very difficult one for me and all I can say is that since the Federal District Courts sit to hear such cases as Congress in its wisdom arrogates to them jurisdictionally, that in the absence of any jurisdictional investiture -- and I find none in that sort of case unless Section 205(g) were stretched to cover it. I would have to say that the --

QUESTION: Well, can it be stretched or not?

MR. ROSENBERG: Well, I haven't -- I haven't, your Honor, Mr. Justice Brennan, I haven't tried to decide that case in my own mind.

QUESTION: And if you couldn't stretch it to cover it, what would the applicant do? Where would he go?

MR. ROSENBERG: Well, I believe that he would be in the same situation that those applicants for Veterans' benefits find themselves in when they are not able to get review of actions by the Veterans Administration in connection with benefits sought under that system.

QUESTION: You don't think it could go to a state court?

MR. ROSENBERG: Oh, I assume, your Honor, that if a state court allowed jurisdiction in a matter of this kind he most assuredly would.

QUESTION: He would file his federal constitutional

claim?

MR. ROSENBERG: Yes, your Honor.

QUESTION: But he couldn't go into federal court, perhaps? Unless you can stretch 205(g) to let him go there.

MR. ROSENBERG: That, your Honor, is where I come out on a difficult case.

QUESTION: Well, could you sue the officer for an unconstitutional deprivation -- for a deprivation of constitutional rights?

MR. ROSENBERG: Your Honor, the question is, under what statute, I take it, Mr. Justice Brennan is pressing me and --

QUESTION: Well, if you have been denied equal protection of the law by an officer of the United States Government, do you suppose he can have a direct action under the Constitution?

MR. ROSENBERG: I believe that under the amendment, PL94-754 which Congress enacted on October 21st, 1976, that allows for review of any agency action without regard to jurisdictional amount, we may now have a basis under that statute for review of such a question as Mr. Justice Brennan's hypothetical poses.

If the Court agrees that Section 205(h) precludes this action, that will end the case.

QUESTION: Before you leave that, wouldn't there be

a Bivens suit in the situation Mr. Justice White just --

MR. ROSENBERG: Well, your Honor, Bivens is going through my mind, but it is not finding much purchase.

QUESTION: It was occurred under 1331 jurisdiction, doesn't it, Bivens?

MR. ROSENBERG: I do believe, your Honor.

QUESTION: And the statute here precludes 1331 jurisdiction.

MR. ROSENBERG: It does here with respect to actions brought on claims under the Social Security Act. I am not sure that in the case posed that the contention would be that there was a claim brought under the statute. It might be that it would --

QUESTION: You are claiming that.

MR. ROSENBERG: So I believe, Mr. Justice Marshall, and that may be our solution, that it is not a claim brought under the statute and it is therefore not precluded by Section 1331 under the third sentence of 205(h).

QUESTION: At any rate, it doesn't arise under the statutes we have been talking about.

MR. ROSENBERG: We don't have any such question here, your Honor. If the Court agrees with --

QUESTION: We have to have something like that in mind in deciding this case, I daresay.

MR. ROSENBERG: If the Court agrees that Section

205(h) is absolutely preclusive of this action, that will end the case. It will not need to reach the question of whether Section 10 of the APA creates jurisdiction above and beyond the careful and complete scheme which is embodied in Section 205 of the Social Security Act.

That results from the language of the APA as well as from the preclusive effect of Section 205 itself. The APA is in terms not applicable to the extent that a statute precludes court review of agency actions.

Similarly, it is, in its own terms, not applicable because the decision to reopen or not is committed to the agency's discretion and under Section 701(a) of the APA, that is a matter to which the APA is not applicable.

Beyond that, and even if we crossed the threshold into the land of the Administrative Procedure Act, there is no bestowal of jurisdiction in that statute.

The Administrative Procedure Act, not ununderstandably, regulates procedures. It regulates the forms and standards for judicial review. It prescribes what judges may do with cases properly before them but it does not act as a vehicle to bring cases into the court before the judges.

Mr. Chief Justice, if I may, I would like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Rosenberg.

Mr. Kowalski.

ORAL ARGUMENT OF WILLIAM A. KOWALSKI, ESQ.

ON BEHALF OF RESPONDENT

MR. KOWALSKI: Mr. Chief Justice and may it please the Court:

I would like at the outset to request leave to file reply or a response to a reply brief that was filed by the Secretary and which was served upon me since arriving in Washington, two days ago.

MR. CHIEF JUSTICE BURGER: You have that opportunity.

MR. KOWALSKI: I would like to say, too, that in this case let it be clear that I do not represent any cause or any class other than the initial original plaintiff, Mister Sanders and by the way, his first name is Mister so that his correct designation is Mr. Mister Sanders.

I am not here for any academic exercise and as I said, I am not looking to establish any legal precedent for any reason. I am here only to represent the claim of Mister Sanders.

Mister Sanders, not because any constitutional claim is raised, Mr. Justice Brennan, happens to be a black man. He is an illiterate black man. The nature of his claim is that he filed a disability claim alleging that he was disabled and that he failed, however, to prosecute timely his appellate rights to the district court.

Several years elapsed -- four and a half, I believe --

when he again went to the Social Security because he was still unable to work and his family physician confirmed his disability.

He again filed an application. He was summarily denied and it was at this point that he retained counsel, that counsel being myself.

After the final decision of the appeals counsel was rendered, district court action was filed in the Northern District of Indiana and the cause was summarily dismissed for lack of jurisdiction.

This Court knows that a divided court of appeals reversed that decision on the basis of the Administrative Procedure Act. I would like, because it is central to the Respondent's argument, to direct the Court's attention, in addition to the statutes already cited, to the Social Security regulation which is found on page 15 of Respondent's brief and known as, codified as 20 C.F.R. 404.957 which in pertinent part states that an initial revised or reconsidered determination of the Administration or a decision or a revised decision of a hearing examiner or of the appeals counsel which is otherwise final may be reopened (c) at any time when (8) such determination or decision is unfavorable to the party thereto but only for the purpose of correcting error on the face of the evidence on which such a determination or decision was based.

Continuing, I would like to call the Court's

attention to the definition of error on the face of the evidence or, as some courts have referred to it, as manifest error on the face. The definition is also found at page 15 of the Respondent's brief and it is to be found also in the Social Security Claims Manual, Section 7015 and it reads as follows:

"An error on the face of the evidence exists where, on the basis of all the evidence in the file on which the determination or decision was based and any evidence or record anywhere in the administration at the time such a determination or decision was made, it is clear that the determination or decision was incorrect."

Now, I point that out to the Court because the complaint that was filed by Mr. Sanders alleged error on the face of the evidence. He was obviously late in filing his claim, more than 60 days and in fact, over four years had elapsed from the time of the initial determination.

If we strip this case to the bone, what we have is this. Mr. Sanders, who had contributed to the Social Security fund at one time, became, in the course of his life, disabled.

He filed a claim for benefits. It was summarily denied. He did not timely prosecute his appeal but he was later advised that the Social Security Administration affords him relief to have his case reopened at any time if there is manifest error on the face of that evidence.

The question then becomes --

QUESTION: I suppose, Mr. Kowalski, that has been made possible, among other reasons, precisely because some of the recipients, some of the beneficiaries would be, in the posture of your client, not advised by counsel on relatively minor claims and not sophisticated enough to move promptly.

I suppose that is why that safety valve is left there, isn't it?

MR. KOWALSKI: I would presume, your Honor, any basis which would result in fairness to the claimant -- the Social Security claim, a Social Security claim is not an adversary proceedings and I would agree, your Honor, that that is undoubtedly one of the many purposes of that section.

QUESTION: That section doesn't give you access to the federal courts.

MR. KOWALSKI: That is correct, your Honor. In and of itself. That is correct. There are four aspects of the argument which I would like to point out before I get to it.

One is, as counsel has stated, whether or not Section 405(h), that is, the U.S. Code section 405(h) is a preclusion of any manner of review except as that is specified in Section 405(g) of the Act.

The second question is, can Section 405(g) of the Act serve as the basis of jurisdiction to review the opening petitions?

The third question is whether the Administrative

Procedure Act can be regarded as the basis of jurisdiction in reopening petitions.

The fourth item of the argument refers to whether or not the entertainment of jurisdiction in this type of case would result in a flood of relitigation of stale claims and this point is made because the Secretary makes much of it in his brief and in the court below and we will explain in the course of the argument that this has not occurred and that it will not occur.

The first question, then, is whether or not Section 405(h) of the Act is a total preclusion of any review other than that specified in Section 405(g) of the Act.

I would like to admit at the very outset that all of the three questions that are raised are extremely close questions and that, very candidly, they can, with reason, be interpreted either way.

I refer to a comment that Mr. Justice Brennan made in his dissent in Salfi, that is, the case of Weinberger versus Salfi, decided by this Court last year -- where he says, discussing that very problem of the interpretation of 405(h), the Justice says, "The question involves complicated questions of legislative intent and statutory provisions" 42 USC Section 405(h) "which has baffled district courts and courts of appeals for years in this and other contexts.

So let it be known that it is a difficult question.

The problem of this Court, then, is what is the more reasonable construction of that statute?

Should it be construed as a total preclusion or should there be an avenue of escape, for example, Justice Brennan just raised by his question the hypothetical of one being denied any benefits because he was a black man.

Would Section 405(h) be a total preclusion?

The leading case in the court of appeals, which I think started this matter of petitions to reopen, is the frequently-cited case of Cappadora versus Celebrezze out of the Second Circuit, which is cited at -- I am reading from page 7 of the Respondent's brief -- where the Court recognized this problem in that case and also admitted that the statute could be construed in more than one manner.

Reading from the opinion of the Court it is stated, "Although it could be argued that the second sentence of Section 405(h) of the Social Security Act is a statutory preclusion of such review. The more reasonable construction is that this simply forbids attempts to review final decisions on the merits by any route other than provided in Section 405(g).

As we will point out later, that served as the leading case for many other circuits which have followed in line but to point to the very language of the second sentence of 405(h) where it says, "No findings of fact or decisions of the Secretary shall be reviewed by any person, tribunal or

governmental agency except as provided herein,"that "as provided herein" can mean "in the manner provided herein," as opposed to stating that only this type of situation is amenable to judicial review and I believe that is the way the Court, in Cappadora versus Celebrezze interpreted it.

As I stated, many circuits followed the lead of Cappadora. There was only one that did not and that was the case of Stuckey versus Weinberger which is also cited at page 7 of Respondent's brief but it is interesting to note that in that lone, maverick decision five -- five of the Justices filed a concurring opinion in which they stated as follows, and I am reading from page 7 of Respondent's brief, "The second sentence of 42 USC Section 405(h) should not be construed to preclude judicial review."

QUESTION: Mr. Kowalski, the second sentence of Section 205(h) or 405(h) of the statute which you have just quoted, "No finding of fact or decision of the Secretary shall be reviewed by any person, tribunal or governmental agency except as herein provided."

Now, you say it is possible to read that as "except in the manner herein provided." How does one read it that way? I mean, just as a matter of analysis of those words.

MR. KOWALSKI: Well, by the very plain meaning.

QUESTION: Well, how do you do it? Tell me.

MR. KOWALSKI: Well, I could -- in all due deference,

your Honor, I could read it that way, where it says, "Except as herein provided," to me could reasonably be meant "Except in the manner herein provided."

QUESTION: You just substitute the words "In the manner" for "As herein provided."

MR. KOWALSKI: What I am saying, your Honor, is that --

QUESTION: "In the manner --" you construe the word "as" to mean, "In the manner."

MR. KOWALSKI: I am saying, your Honor, it can reasonably so be construed.

QUESTION: Or to put it another way, how could you make it clearer? What language could you use?

QUESTION: Use "In the manner."

MR. KOWALSKI: Well, it depends on what the true meaning of the Congress was.

QUESTION: Congress meant that the federal courts should not have any jurisdiction. How could they have said it clearer?

MR. KOWALSKI: I have asked myself that question. I think the whole 405(h) could have been reworded something to the effect that, there shall be no judicial review of final decisions on the merits under this statute or any other statute except by following the procedures set out in 405(g).

I believe that would do it.

The cases --

QUESTION: Is that an interpretation in the nature of an exhaustion of the procedures under 405(g) and then go into the district court? Is that what you are saying?

MR. KOWALSKI: I am not certain I understand your question, your Honor, I --

QUESTION: Well, I am not quite clear. The 405(g) sets up a procedure, step by step within an administrative procedure and you come to the bottom line when the Secretary finally makes a decision. Is that right?

MR. KOWALSKI: Correct.

QUESTION: Are you suggesting that all that really is required is that you go through that preliminary procedure, get the Secretary's final determination and then go into the District Court?

MR. KOWALSKI: I believe that is correct. The Court in Cappadora and the many cases that follow it, followed it stated that in their --

QUESTION: Well, they say, "Attempts to review final decisions on the merits by any route other than that provided in 405(g)"and the route requires you to go through several steps of an administrative procedure.

MR. KOWALSKI: That is correct and Cappadora --

QUESTION: And once you have done that, your argument is that 405(g) permits you then to go into district court.

Is that it?

MR. KOWALSKI: That is not what Cappadora said, your Honor. In fact, it said the opposite.

I will get to that later in the argument. Cappadora, as well as the court below in the Southern Circuit, as counsel brought out to the Court stated that 405(g) was not the jurisdictional route to go in these cases and that is the reason that the Administrative Procedure Act was invoked as the correct jurisdictional base.

At any rate, Cappadora and the cases following it held that 405(h) was not a total preclusion and jurisdiction was allowed under the Administrative Procedure Act. The many cases that followed Cappadora are set forth at page 6 of Respondent's brief and by circuits, they constitute the First, Second, Third, Fifth, Sixth and Seventh Circuits which have followed Cappadora.

As I will discuss later, the Fourth and the Eighth Circuits entertain petitions to reopen but on a different jurisdictional basis.

QUESTION: Well, do I understand, then, you agree with the holding below that you can't get in under 1331 or any other? The only way you can get in is under the Administrative Procedure Act?

MR. KOWALSKI: I, personally, your Honor, believe you can get in under 1331.

QUESTION: Also.

MR. KOWALSKI: But that is not in this Court.

QUESTION: That was held against you, wasn't it?

MR. KOWALSKI: This is correct.

QUESTION: And are you accepting that for the purposes of this case?

MR. KOWALSKI: Well, it is not really an issue in this case, your Honor. And since Weinberger v. Salfi --

QUESTION: Well, certainly, the government tried to make it an issue.

MR. KOWALSKI: Well, I would agree with your Honor in the dissent. It may not help my cause before this Court. It was observed in the dissent which you wrote in Weinberger v. Salfi in which Justice Marshall concurred that Section 1331 can serve as the jurisdictional basis because a petition to reopen is not a claim --

QUESTION: Well, let's just say that is a dissent. That is a dissent.

MR. KOWALSKI: That is correct. But you avoid personally --

QUESTION: Are you accepting the holding below for the purposes of this argument that you can't get in under 1331?

MR. KOWALSKI: Yes, your Honor.

QUESTION: You are. All right.

MR. KOWALSKI: I am prepared to abide by this Court's

holding in Weinberger v. Salfi.

QUESTION: And that if you can get in, you can only get in under the administrative teaching.

MR. KOWALSKI: As I developed further, your Honor, and the reason we are making a point that under this Court's recent decision in Weinberger v. Salfi and Eldridge v. Matthews, that Section 205, 405 or other of the Code can be stretched and it has been stretched, with all due deference to this Court, I believe.

The Louisville requirements of a final decision made after a hearing have been construed by this Court in a liberal manner so that I am prepared to argue and demonstrate to this Court that from the language of that section, there may very well be and in my opinion is, jurisdiction in the district court under Section 405(g) and that is pointed out in the event this Court may not see fit to apply the Administrative Procedure Act which, again, is a very close question and I won't deny it and there are divided authorities as to whether or not the Administrative Procedure Act is the appropriate basis. That comes later in the argument.

QUESTION: Mr. Kowalski, I don't know about the Cappadora case, but in the others, did the party get the relief he wanted? Or did -- in Cappadora they found jurisdiction and then said that you lose.

MR. KOWALSKI: That is correct, your Honor. I

believe the Plaintiff --

QUESTION: Was that true in the others, too?

MR. KOWALSKI: I do not recall, your Honor. I do know that in Cappadora they said there was not an abuse of discretion. In Cappadora, the jurisdictional basis was whether or not there was an abuse of discretion in refusing to reopen the initial determination. The Court, while stating that the district court had jurisdiction to review that question, on the merits they found that there was not an abuse of discretion but in this particular case the record will show that the record of the Secretary was never produced in the district court and the Court of Appeals points it out in its very decision that that record was never produced until the case was up on the day of oral argument.

In the Seventh Circuit Court of Appeals, the record was produced and therefore, the District Court not only failed to concern itself with the record, it had no concern in obtaining it so that there was no concern of the record in the District Court.

So ,and I understand, your Honor, that that could be dispositive of the question. However, in this particular case, we never got as far as the merits.

QUESTION: Mr. Kowalski, I realize your structured argument may be kind of disorganized but that is kind of par for the course here, not as a result of your own careful

preparation, but as a result of the questions.

Your 405(g) point, I take it, would be that the only thing the District Court would have power to review is that refusal to reopen is a final decision and all the District Court has power to review is whether the Secretary complied with the reopening provisions.

You don't claim that you would be able to go back and relitigate the merits as if you had petitioned for review the first time.

MR. KOWALSKI: I do advance a theory in the brief, your Honor, where that may be done and if I can skip to that, I would say, essentially, what you say is correct, that the decision to be reviewed is the decision not to reopen.

However, at page 18 of the Respondent's brief -- I might say this before I get into that, that I advanced several theories of how Section 405(g) may serve as the jurisdictional base and this would be one of them.

It is to be noted that Section 405(g) states that the statute of limitations is 60 days or within such further time as the Secretary may allow and when that provision is read in conjunction with the reopening regulation, I feel that a reasonable construction of the statute is that a party is entitled at any time to ask for a reconsideration or, rather, a reopening for alleged error on the face of the evidence, that the 205(g) requirements would be satisfied because there

had been a hearing. Mr. Sanders had a hearing, initially and when he goes back to ask for a review of the decision denying the reopening, it is a final decision under Section 405(g).

I know this is not as clear as it might be. It is set forth in the brief.

To put it another way, because Section 405(g) gives the Secretary the authority to extend the statute of limitations and since the Secretary has extended the statute of limitations in cases of error on the face of the evidence, I say basically it is possible to have the initial determination reviewed but only -- not on the merits but only for the purpose of ascertaining the existence of error on the face of the evidence.

QUESTION: Under your hypothesis, if the Secretary were to repeal his regulations permitting reopening administratively, then there would be nothing you could do in the District Court by reopening it.

MR. KOWALSKI: I agree with that, your Honor. But I feel this, that the regulation is in effect. It was promulgated and I believe that Claimants have a right to rely on its continued existence.

As I stated, since this Court's decision in Weinberger v. Salfi and in Eldridge v. Matthews, the Section 405(g) requirements have been liberalized. I won't get into the area -- I was prepared to get into the waivable and the

non-waivable which is referred to by this Court in Eldridge but basically what seems to be central to the jurisdictional facet under 405(g) is, in the language of Weinberger v. Salfi, that a claim be filed -- that a claim for benefits be filed and it was in that case that the members of the class who never filed a case were dismissed out because they had never filed a claim and as I read these new decisions, other elements of a final decision after a hearing can be raised. They can be dispensed with so long as there has been the filing of a claim for benefits.

And I would direct the Court's attention to the brief of amicus curiae in this case at page 11 where the theory is advanced that, since those decisions and since Mr. Sander's second application constitutes a claim for benefits under Section 405(b) of the Act, that the requirements of 405(g) have been satisfied and therefore, there is jurisdiction under 405(g).

To proceed, finally, we come to the question of whether the APA is a jurisdictional base. Again, this is an extremely difficult question, a question upon which the text-writers have agreed and disagreed but I would say this, that --

QUESTION: Do you think the amendment contributed anything to resolving the ambiguity?

MR. KOWALSKI: Not a thing, your Honor. Not in my estimation. As I read it just briefly now, if anything, I would

say it would be supportive of the fact that the APA is available in this type case because the amendments specifically refer to claims against governmental officials, specifically.

I would point out, too, that the APA was not in existence when the Social Security Act was enacted. The APA was enacted in 1946 so it could not have been envisioned in 1939 when the Social Security Act was passed.

Also, that by excluding Section 1331 in Section 405(h), by implication, other sections of the statute are not excluded. There is a fancy Latin name, I believe, for that theory which escapes me right now but, by implication, the APA, not being excluded by 1331, it is, by implication, included.

The again, amicus curiae, handled this part of the brief which Respondent adopted and at pages 41 and 42, the cases, the many cases are cited where the courts have found that the APA is a jurisdictional grant, although by admission, those courts did not thoroughly analyze that specific question and there were three cases in this very Court which are cited in the brief, United States Supreme Court cases which held that the Administrative Procedure Act was the jurisdictional basis to review an administrative decision.

Those cases likewise are cited at pages 41 and 42 of the amicus curiae brief. Since I am about out of time, I won't get into them. But the very plain language of Section 702 states, again in effect, "There shall be a right of

judicial review for abuses of discretion from administrative action," and in Section 704 of the Act, the effect is, without quoting it, that where there is no other way of getting into court for an abuse of an administrative discussion, then the APA affords an opportunity to go to court.

The final comment, as I said, the Secretary has made much of the fact that if petitions to reopen are allowed, there would be a flood of relitigation. I call the Court's attention to this fact. You can only relitigate -- litigate a petition to reopen once.

Once the District Court passes upon that, it becomes res judicata. It cannot be litigated again.

The Court in Cappadora versus Celebrezze very wisely made the observation too, that, quoting from the case, "A reviewer refuses to reopen necessarily limited to abuse of discretion would impose a relatively slight burden on the agency and the Court."

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kowalski.

Do you have anything further, Mr. Rosenberg?

REBUTTAL ARGUMENT OF MAURICE ROSENBERG, ESQ.

MR. ROSENBERG: Mr. Chief Justice, on the Cappadora case, in that case the Court said that the only thing precluded by subsection (h) was what was permitted by (g).

That turns the statute on its head. The package of

(g) and (h) are a preclusive package, an effort to canalize review of the Administrator's and the Secretary's action and to say that everything is permitted to go into court that is not absolutely precluded is simply to turn that upside down and to reach some rather curious results.

For example, that the only decision of the Secretary that must be brought into Court within 60 days and according to prescribed procedures, as Mr. Justice Brennan has mentioned, are those that reach the merits of the claim and are decided after a hearing as a final decision but every other interlocutory, premature, post-mature or whatever sort of administrative decision that can be made then has open-end time jurisdiction, no rules at all about the procedures or the scheme of review. Congress could --

QUESTION: You have the first hearing and then you wait four and a half years and file for the second. Right?

MR. ROSENBERG: Yes, your Honor.

QUESTION: And it appears that there was no hearing. There never had been one. There is no record. There is no anything.

MR. ROSENBERG: Well, your Honor, then it seems to me that you would not have reached the point where the 60-day limitation built in --

QUESTION: Well, my point is, can you go to the federal court then?

MR. ROSENBERG: In the absence of a final decision --

QUESTION: The Secretary said, "You had as much as you were entitled to," which is nothing.

MR. ROSENBERG: It does appear to me, your Honor, that if there has been a refusal to grant a hearing, that the Court would -- and a dismissal, in effect, on the law, that the decision made at that stage of the game would be deemed to be one made after a waiver by the Secretary of the requirement of a hearing, as was done --

QUESTION: He could come into federal court.

MR. ROSENBERG: I believe, your Honor, that that would get us pretty close to the Salfi and Eldridge situation.

QUESTION: He could come into the federal court.

MR. ROSENBERG: Yes, your Honor.

QUESTION: So it is not never.

MR. ROSENBERG: Well, your Honor puts the case in which something approaching the constitutional fundamental defects of those cases.

QUESTION: WEll, I understand in this case the record was never produced.

MR. ROSENBERG: Well, the record was in a particular form handed up to the Court of Appeals.

QUESTION: Was it before the Secretary? Did he look at it?

MR. ROSENBERG: The record was before the Secretary

and the Administrator. The question was, whether the Court had the record before it and there is in the papers an indication that a form of the record was produced on the appeal in these cases.

QUESTION: You lose me on, what is a form of a record?

MR. ROSENBERG: Your Honor, the terminology is a bit abstruse for me and I searched for the exact form of it in the record, but I have not been able to locate it.

QUESTION: I don't think it is that important.

MR. ROSENBERG: It is in the record. It is also in the petition for certiorari.

I just wanted to make two other points.

First, with respect to whether S800 affects any change, I believe the important point to notice here is that it would not have been necessary for Congress to have enacted last October an amendment to Section 1331 if the APA already conferred that broad jurisdiction that was contended for here.

The very fact that Congress saw fit to remove the amount in controversy limitation on federal jurisdiction as applied to agency action and the sovereign immunity defense is the clearest evidence that Congress thought the APA did not confer jurisdiction.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.
[Whereupon, at 10:55 o'clock a.m., the case was submitted.]