OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1772

TITLE MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner v. FREEMAN H. RINGER, ET AL.

PLACE **Washington, D. C.**

DATE February 27, 1984

PAGES 1 thru 57

ALDERSON REPORTING

IN THE SUPREME COURT OF THE UNITED STATES

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MARGARET M. HECKLER, SECRETARY OF :

HEALTH AND HUMAN SERVICES, :

Petitioner, :

v. : No. 82-1772

FREEMAN H. BINGER, ET AL. :

- -x

Washington, D.C.

Monday, February 27,1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 o'clock a.m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

MALCOLM J. HARKINS, III, ESQ., Beverly Hills, California; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Heckler against Ringer.

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

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KNEEDLER: Thank you, Mr. Chief Justice, and may it please the Court.

This case presents questions of fundamental importance to the orderly administration and adjudication of the millions of claims that are filed under the Social Security Act each year. Congress has enacted a special self-contained procedure for the administrative and judicial review of Social Security claims, and it has assigned to the Secretary of Health and Human Services the responsibility for prescribing the administrative steps in that process that must be pursued before a claimaint seeks judicial review.

The Court of Appeals in this case, however, excused the respondents from exhausting the administrative procedures the Secretary has prescribed before they sought judicial review within the special statutory procedure that Congress has enacted, and in addition, the Court of Appeals held that respondents

could challenge the Secretary's interlocutory decisions denying their claims outside of that special procedure by bringing a separate action under the general grants of subject matter jurisdiction in Sections 1331 and 1361 of the Judicial Code.

We have sought review in this case because the Court of Appeals' decision is flatly inconsistent, in our view, with this Court's prior decisions in Weinberger versus Salfi and later cases with attached legislative history and consistent administrative implementation of the Act.

If the Court of Appeals' interpretation were affirmed by this Court, the interlocutory and piecemeal review of the Court of Appeals has permitted would substantially disrupt the administrative and judicial review of Social Security claims.

There is a pressing need in this area involving many claims for the Secretary and the courts to have clear rules that can be easily and uniformly applied in all cases without the need to litigate in particular cases their applicability, and the rules the Secretary and Congress have established for this purpose are fair and reasonable.

Before stating the facts of this case, I would like to briefly outline those procedures that Congress

and the Secretary have prescribed. The basic statutory framework is simple and straightforward. It is contained in Section 205 of the Act, which was enacted in 1939, and is now codified in Section 405 of Title 42.

Section 405(b) directs the Secretary to make findings and decisions on claims for benefits under the Act. Section 405(b) then provides that if the claimant is dissatisfied with the Secretary's initial determination, the Secretary must afford him an opportunity for a hearing on the claim.

QUESTION: Mr. Kneedler, can the claim be made before the surgery?

MR. KNEEDLER: No, under the Medicare program, as under most insurance programs, the claimant files a claim for payment which can be made only for services that have already been rendered.

QUESTION: Then how is it possible for someone who wants the surgery performed to get a determination about reimbursement before having the surgery?

MR. KNEEDLER: The Act does not provide for this sort of procedure. The administrative procedure that Congress has established, particularly Section 405(b), refers to determinations and hearings on applications or determining the rights of people who

have applied for payment under the Act, and a person wouldn't even have a right to payment until he applied for benefits after having the surgery.

QUESTION: Well, under your view, is there any way at all that a person could get that kind of determination --

MR. KNEEDLER: Well, the person could request, I suppose, the Secretary to perhaps offer advice, but for part of the reasons, I suppose, that were developed in the preceding case for one of the intermediaries to suggest the particular service might be covered before the person has even had the surgery might create problems, and ordinarily the intermediary would decline to do that.

QUESTION: Well, for someone looking at elective surgery, something that isn't going to done no matter what, and of modest means, it does put them in a difficult position, doesn't it?

MR. KNEEDLER: Well, it might. In the typical Medicare claim situation, the rules are fairly well established, and by reference to what private insurance carriers do, but even quite aside from whether -- from any policy of general applicability the Secretary has, in any individual case, surgery can only be paid for if it is reasonable and necessary, and that is a

determination that could not be made until after the individual had the surgery in any event.

QUESTION: Oh, well --

QUESTION: Of course, this is Mr. Ringer's position, the one that Justice O'Connor refers to, isn't it? Mr. Ringer's.

MR. KNEEDLER: That he is entitled to review now?

QUESTION: No, that he -- he is in a position where he wants this procedure, but can't afford to pay for it, and how does he find out?

MR. KNEEDLER: Well, as I say, there is no established procedure for that. As it turns out in this case, the physician who is responsible for most of the -- or virtually all of this particular surgery is adjudicating claims on -- as the representative for other claimants who have had the surgery, so in this particular instance, that doesn't present a problem, because the question of the coverages will be litigated anyway.

As I was saying, the Act in Section 405(b) provides for administrative hearings, and then also authorizes the Secretary to conduct such other proceedings as are necessary to determine individual claims, and immediately after Section 405 was enacted in

1939, the Secretary established a four-level procedure for administrative review of claims, an initial determination, a reconsideration, the hearing required by the Act, and Appeals Council review.

Then the special provision for judicial review is contained in Section 405(g), which provides for review only of the final decision of the Secretary, and the Secretary's regulations since 1940 have made clear that the final decision subject to judicial review is that rendered after the Appeals Council has looked at the case.

And then, to make clear that all challenges to decisions on Social Security claims are channeled through Section 405(g), Section 405(h) provides that no decision of the Secretary shall be reviewed in any other manner except -- by a tribunal in any other manner except under 405(g), and Section 405(h) says that no action may be brought under any of the general grants of jurisdiction.

QUESTION: Mr. Kneedler, as to surgery performed after the Secretary's new regulation, and under the regulation it provides that this particular procedure would never be reimbursed, approved for reimbursement, why doesn't it fall under the Mathews against Diaz exception as a waiver of exhaustion

requirements?

MR. KNEEDLER: Well, the basis of the Court's decision in Mathews versus Diaz was the same as that in Salfi, and that was -- first of all, these cases both were limited to a very narrow situation that is really somewhat unique, and that is where the claimant is challenging the constitutionality of the Act itself.

In those circumstances, there were -- in both those cases there were special factors present. The claimant conceded that there were no facts in dispute. The claimant conceded that the Secretary's interpretation of the statute -- he didn't quarrel with the Secretary's interpretation of the statute. All other issues were resolved except for the constitutionality of the Act of Congress, which was beyond the Secretary's competence to decide.

And even then the Court held in Salfi that just because a court might believe that exhaustion of remedies would be futile does not furnish a basis for the court to excuse exhaustion. What the Court held, though, in Salfi was that the Secretary's failure to contest the allegations of exhaustion would be deemed a waiver of exhaustion in the circumstances of that case.

That was the rationale explicitly that the Court adopted in Diaz. Similar circumstances --

QUESTION: But, Mr. Kneedler, in Diaz, the Secretary did raise the exhaustion point.

MR. KNEEDLER: Yes, he -- the Secretary raised it on a motion to dismiss. I would note that the District Court rejected the motion to dismiss in Diaz on the ground that exhaustion would be futile, which was a ground that was subsequently rejected by this Court in Salfi.

QUESTION: Subsequently rejected in Salfi? Salfi came before that.

MR. KNEEDLER: No, the District Court's decision. I am sorry.

QUESTION: Oh.

MR. KNEEDLER: So that the issue was rejected in District Court, so the Secretary didn't litigate it on other grounds. In this --

QUESTION: In Diaz, the Secretary continued to litigate the exhaustion issue all the way to this Court.

MR. KNEEDLER: Yes, his objection to the exhaustion issue in this ground, there were several claimants in Diaz. For two of the claimants, Clara and Diaz, the Secretary conceded that under the rationale of Salfi, because there were no facts in dispute and the statute -- there was no quarrel about the interpretation of the statute, that there would be jurisdiction over

those two.

The only ground that the Secretary objected to jurisdiction over the third, Espinoza, which the Court discussed, was that the Secretary hadn't issued a decision at all on the claim, and as it turns out, the reason the Secretary didn't is because the District Court had entered a temporary -- or an injunction barring the Secretary from issuing such a decision.

But the Secretary litigated it in this Court really only on that narrow ground, but the Secretary did not object to the -- to --

QUESTION: Do you ask us to modify Diaz today?

MR. KNEEDLER: Do we ask -- No, we do not. Diaz is confined, as I said, to a situation involving constitutional claims. This case is much different, and perhaps it would be useful to point out the contrasts.

It can't be said here that there is no dispute over the facts of the claims for benefits. Respondents vigorously contest the Secretary's view as to whether this particular procedure is safe and effective. There is also a dispute over the meaning, interpretation, and application of the statute, unlike in Salfi and Diaz, because here the respondents contend that the Secretary has misconstrued, misapplied the statute. In Salfi and Diaz that wasn't the case.

Another point is that the issues --

QUESTION: Mr. Kneedler, is it not correct that if the Secretary's regulation means what it says, the ALJ's will be under a duty in the future to deny all these claims?

MR. KNEEDLER: Well --

QUESTION: Is that correct or not?

MR. KNEEDLER: Assuming prospectively after the effective date of the ruling. As to these respondents, the ruling doesn't apply to them.

QUESTION: Well, let's take it in two steps. First, an operation performed today, the claim must be denied under the regulation.

MR. KNEEDLER: Yes, that's correct.

QUESTION: What is the Secretary's position with respect to the three parties here who had the operations before but who have not had their cases ruled on?

MR. KNEEDLER: With respect to the three who were decided before, the formal ruling itself said that the rule did not apply to surgery that was performed before the effective date of the ruling.

QUESTION: So the Secretary does not take the position that the ruling applies to them.

MR. KNEEDLER: That's correct, and even as to

persons who had the surgery after the effective date of the ruling, the respondents argued in the administrative proceedings, which are still ongoing, that the ruling should not apply even to them. There is a technical argument that the particular regulation that binds the Appeals Council and the ALJ's to rulings issued by the Health Care Financing Administration doesn't apply to Medicare cases. And so that argument was made.

So that's precisely the sort of reason why, even though there's a regulation that has been issued that says a particular sort of service is not covered, that there should be exhaustion, because it will be up to the Appeals Council and the -- and before that the ALJ to determine whether the regulation actually applies to these claimants.

And it is also important, I think, to recognize that a ruling on the merits or an issue involved in the merits is really just one aspect of a claim for benefits. In the administrative adjudication of a claim, just as in the judicial determination of a lawsuit, a decision is reviewed only after final judgment which resolves all of the issues in the claim.

Here, respondents are challenging just one ruling or one regulation, a policy. There are other issues involved in a claim, whether the person is

eligible --

QUESTION: Well, how about in the future, though, where the only issue is whether recovery can be had for this particular surgery, and in the face of the rule that has been adopted? Why is it anything but futile to exhaust an administrative remedy?

MR. KNEEDLER: Well, first of all, Justice O'Connor, even if it were futile, that would not be a basis for excusing exhaustion. This Court made explicitly clear, stated several times in Salfi that the Court's view that exhaustion might be futile would not be sufficient to excuse exhaustion.

And in Salfi itself, the statute barred the recovery, and precisely this argument could have been made, that the Secretary was obligated to apply the statute, which would have denied benefits.

QUESTION: I suppose the better argument is that somehow the Secretary has waived the exhaustion requirement.

MR. KNEEDLER: That would be an alternative way to look at it, but to view the issuance of a ruling of general applicability, this doesn't focus on a named claimant. It is a ruling of general applicability. To find a waiver on the basis of that would really tear the waiver rationale from the special circumstances, narrow

circumstances that were present in Diaz and Salfi.

Any time the Secretary made a statement of general applicability, a person could go immediately into court.

QUESTION: Why would it be in the Secretary's interest to have the validity of this position determined as early as possible? Say you have 1,000 people who have had this operation, and you can get all 1,000 cases decided at once. Why do you want 999 administrative proceedings to have the single issue decided?

MR. KNEEDLER: Well, in this case, in fact, there are not a multitude of proceedings. The case -- because they raise a common --

QUESTION: The case is only important, as you explained to us, because of its general -- that it ma apply to large numbers of situations.

MR. KNEEDLER: Well, it may apply to large numbers of situations, but any individual's attempt to go into court might just be on his own particular claims. He may say, well, the Secretary has a regulation that governs this, and I want the validity of that to be determined in the proceeding.

QUESTION: Well, assume 100 people had this operation. Call it Operation X. The Secretary has a

rule that says nobody gets reimbursed for Operation X. And somebody has got a claim on file, so he comes within the statute. Would you say the Secretary would require exhaustion of all 100 claims before being willing to let the matter reach adjudication?

MR. KNEEDLER: It is always possible that the Secretary would decide to waive exhaustion if he decided that it was not necessary.

QUESTION: If it is totally futile, why should the court wait for the Secretary to say -- What is the purpose to be served?

MR. KNEEDLER: Well, it enables the Secretary to determine that the regulation in fact applies. I mean, I think this case is a good example of that.

QUESTION: Well, there is no doubt about it, if it is a particular -- there isn't any question about this being the kind of operation that is covered by the regulation.

MR. KNEEDLER: That's right, but the Court of Appeals apparently believed that this ruling applied to these respondents, and on that basis decided that exhaustion would be futile. As it turns out, the ruling on which it relied as an example of futility did not even apply to them. So this is, it seems to me, a very good example of why the court's own assessment that

exhaustion would be futile is wrong, even where a regulation that appears to bar recovery is thought by the claimant to apply, because here it doesn't apply to them.

QUESTION: Well, Mr. Kneedler, I suppose as to the three or however many people there were who had the operation before the regulation was issued --

MR. KNEEDLER: Yes.

QUESTION: -- or before that October date, or whatever it was.

MR. KNEEDLER: It's the same, yes.

QUESTION: -- I would think they would have standing to challenge the ruling at all anyway.

MR. KNEEDLER: Well, that's true. They don't have --

QUESTION: And without regard to 405(g) or (h) or anything else.

MR. KNEEDLER: That's right. They would have --

QUESTION: Even 1331.

MR. KNEEDLER: Right. They wouldn't have standing to challenge the regulation as such, but the Court of Appeals also apparently viewed the regulation as some sort of evidence that the Secretary had made up her mind as to whether a particular type of surgery

would be covered, and I suppose the respondents could argue that even if the regulation doesn't technically apply to them, the Secretary has expressed a view on this through the issuance of this regulation that will indicate that exhaustion is futile.

That is obviously not correct either, because the issue is litigated on the merits before the ALJ.

QUESTION: And the people who haven't had the operation, you say, haven't any basis for a suit at all anyway.

MR. KNEEDLER: That's correct.

QUESTION: But that is part of this case. That is an issue in this case, I suppose.

MR. KNEEDLER: The persons who have not had the surgery?

QUESTION: It is the question Justice O'Connor asked you.

MR. KNEEDLER: Right, that's correct.

QUESTION: The person who hasn't had the operation, and can't afford to have it unless it is going to be reimbursed, certainly has some kind of an interest.

MR. KNEEDLER: It is true that he has an interest, but the statute simply does not provide for a means of adjudicating it.

QUESTION: As I recall in Besio's claim the Administrative Law Judge decided not that this kind of an operation could never be reimbursed, but that it was just not a reasonable and necessary procedure.

MR. KNEEDLER: That's correct.

QUESTION: So I suppose even though the Secretary may have adopted a regulation that this operation is not reimbursible, period, in proceedings before an Administrative Law Judge the thing could go off on other grounds.

MR. KNEEDLER: Well, although the basis of the Administrative Law Judge's decision in this case that it was not reasonable and necessary was not related to her personally. It was a determinated based -- the broader determination that the procedure isn't safe and effective.

QUESTION: But not based on the Secretary's regulation.

MR. KNEEDLER: Because it was --

QUESTION: Because it was before.

MR. KNEEDLER: -- pre-surgery, but you are correct, it is possible in a case like this that the ALJ would decide, even if the regulation applied, that for reasons particular to the individual, she didn't have the condition that would have warranted the surgery even

if compensation can be paid for BCPR surgery.

It also provides an opportunity for the Appeals Council and the ALJ to receive any evidence that the claimant might want to present to attack the rule on arbitrary and capricious grounds if the claimant is going to subsequently seek judicial review. Any opportunity the claimant might want to make a record on that question, the ALJ and the Appeals Council could receive evidence on that.

QUESTION: Do you think you have to make any special argument in response to the suggestion or the claim that the Secretary had no authority to issue this kind of a regulation foreclosing ALJ's from making decisions?

MR. KNEEDLER: Well, as far as the exhaustion question goes, that can be reviewed on a judicial review under Section 405(g), on a review of the Secretary's final decision. That claim will not be lost in the adjudication of the individual claims.

QUESTION: But it is a foregone conclusion how the Secretary is going to answer it, isn't it? I mean, the Secretary has issued the -- has certainly issued the regulation and asserts the authority to do so.

MR. KNEEDLER: That's true, but he --

QUESTION: In this manner, rather than by the

adjudication of --

MR. KNEEDLER: Well, that's true, but even if the Court were to conclude that the Secretary did not have authority to do that, I don't know --

QUESTION: This is sort of a procedural claim.

MR. KNEEDLER: Well, the fact that it's procedural does not take it outside of the scope of Section 405(g). From 1940 on it has been clear that procedural claims, and as this Court held in Salfi, constitutional claims, all sorts of --

QUESTION: How about Eldridge?

MR. KNEEDLER: Well, Eldridge was a claim, though, that was entirely collateral to the merits. It wasn't that it was -- It wasn't simply that it was procedural, because under, for instance, under the collateral order doctrine this Court has adopted under Section 1291 for appeals from District Court decisions, it is not enough that a claim be procedural in order to obtain immediate review.

There are all sorts of issues, such as the disqualification of counsel the Court decided last week that may be procedural, but that is not enough to obtain immediate review. It also has to be a claim that is entirely separate from the merits, and it has to be

effectively unreviewable on review of the final decision, and that was true of the right to a pretermination hearing in Mathews versus Eldridge, because the asserted right to a pretermination hearing could not be vindicated in subsequent proceedings after the benefits were terminated.

QUESTION: Why doesn't that reasoning apply to a preoperation hearing here?

MR. KNEEDLER: Well, the reason here again is that one can't even get into the Section 405 procedure, administrative review process, without filing an application. Just as under Mathews and Salfi the filing of an application is a jurisdictional prerequisite -- it can't be waived by anyone -- to getting -- to filing a claim, here the claimants cannot file an application for benefits and therefore invoke the administrative procedure without filing an application for benefits.

QUESTION: That is a real bootstrap. The claim is that you can get into court without having the operation, and you must be able to get into court.

MR. KNEEDLER: I am speaking about invoking Section 405 of the Act. This Court made clear in Salfi and Eldridge that the filing of an application for benefits, application for payments, is jurisdictional. Now, the Act -- the scheme Congress established simply

did not provide for people to get advisory opinions, declaratory judgments in advance of their surgery as to whether a particular medical procedure would be covered.

Respondents cite no authority for that proposition.

QUESTION: If they get a favorable result, that is, that it would be covered, could the government compel them to have the operation thereafter?

MR. KNEEDLER: I am certain that it could not.

QUESTION: Congress couldn't even expressly authorize compulsive operations?

MR. KNEEDLER: I should think so.

QUESTION: Again, who, when this case was started, who had what you might call standing to press the case? I know it was a class action, but --

MR. KNEEDLER: Well --

QUESTION: -- but it was two classes.

MR. KNEEDLER: The standing -- There were three claimants who had the surgery. They had standing, I suppose, in the sense that they were injured, but they had not exhausted their administrative remedies, so the court did not have jurisdiction, even though they had -- they had the surgery and properly sought administrative

review. They hadn't finished the step.

QUESTION: So you concede -- you think there was standing in all of these plaintiffs to --

MR. KNEEDLER: Not --

QUESTION: I mean, to have -- so the Court could reach the questions at least that we are faced with now.

MR. KNEEDLER: Oh, that it could -- It could reach the jurisdictional questions, yes. That is correct. Claimant Winter we don't -- or Winger, and Winter, the physician, we don't concede have standing, because the statutory scheme simply did not provide for --

QUESTION: But if somebody filed suit, just said, I read that regulation the Secretary issued, and I want to challenge it, somebody who isn't even interested in having the operation, you certainly would throw him out of court without ever getting into these questions.

MR. KNEEDLER: That's right. The system --

QUESTION: You think all of these people are different from that? From that person?

MR. KNEEDLER: Well --

QUESTION: In terms of standing.

MR. KNEEDLER: -- respondent Ringer is in the position of someone who hasn't had the surgery. The

other three who have at least have satisfied the requirement of filing an application, but they haven't satisfied the exhaustion requirement for bringing a claim.

QUESTION: You would say that even if one of the three had had the operation after the regulation was effective.

MR. KNEEDLER: He would have to exhaust his remedies. That is clear. I would like to point out that the -- immediately after Section 405 was passed in 1940, the Secretary promulgated the regulations that require the four-step procedure. Congress amended the Medicare Act in 1966 and explicitly provided for review according to 405(b) and 405(g), which must be seen in these circumstances as a ratification of the provision that the claimant exhaust his remedies.

The other point I would like to make, though, is that this does not have to be a prolonged process. If the claimant files a request for an ALJ hearing, and the ALJ looks at the case and says, there are no facts in dispute here, and if the respondent agrees and doesn't want a hearing, the ALJ can decide it without a hearing, and the HHS hearings manual directs the ALJ's to try to dispose of such cases in 30 days, and if in fact the claimant's claim is covered by a regulation

that appears to govern, the Appeals Council could be expected to deny review.

So we are talking about a relatively short period of time, but it is an important period of time, because, as I say, it gives the ALJ and the Appeals Council the opportunity to make sure that the claim can't be awarded on other grounds or isn't invalid for other reasons. It gives the ALJ and the Appeals Council the opportunity to construe the regulations and to provide some basis of reasoning to support the Secretary's position on judicial review.

QUESTION: What about jurisdiction under Section 1361, mandamus? I guess our prior cases really haven't answered that question, have they?

MR. KNEEDLER: They haven't in so many -- in so many words, but the obvious thrust of Salfi and Eldridge and Diaz has been, I think, that which Congress intended, which was to channel all challenges to an interlocutory decision of the Secretary through Section 405(g), and to --

QUESTION: I guess the Courts of Appeals have been allowing mandamus actions in various jurisdictions under 1361.

MR. KNEEDLER: They have, but a number of the decisions arose before this Court gave its full scope to

Section 405(g). It is not clear that 405(g) is a fully satisfactory, self-contained system. For a truly crucial collateral claim, a person doesn't have to exhaust his remedies.

Now, that would -- under Eldrigdge, given that, there is no need for a person to go outside the statutory review procedure and invoke mandamus jurisdiction, and both the second and third sentences of Section 405(h) in our view bar that jurisdiction.

QUESTION: Well, how about cases like the one argued here recently, Heckler versus Day, that have to do with the time limits?

MR. KNEEDLER: We would view that as a case in which the issue was collateral under Mathews versus Eldridge, that if the person had to exhaust his remedies, his claim to an immediate hearing would have been lost, couldn't be effectively reviewed on review of the Secretary's final judgment on the claim.

QUESTION: Well, here, I guess -- all right.

MR. KNEEDLER: I would like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Very well.

Mr. Harkins.

ORAL ARGUMENT OF MALCOLM J. HARKINS, III, ESQ.,
ON BEHALF OF THE RESPONDENTS

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

It is respondents' position here that there are only two issues which the Court needs to address. The first is that the Secretary is telling this Court that she has the unfettered discretion to determine when judicial review is available under Section 405, that her determination on finality is binding on this Court, and that this Court cannot look behind a motion to dismiss for failure to exhaust administrative remedies.

The second question, which I will come back to after addressing the first, is a question that the Secretary completely ignores, and that is the one of how are Medicare beneficiaries who are too poor to advance the cost of treatment and obtain the surgery ever able to file a claim to exhaust their administrative remedies or to obtain a determination of their eligibility for benefits?

QUESTION: I will put to you the question I put to your friend. If the Secretary then acts in advance, gives the advisory opinion, can the government in any way compel the person to go ahead with the operation?

MR. HARKINS: No, Mr. Chief Justice, I do not believe the government can.

QUESTION: Then they might be spending a lot of their time spinning their wheels, would they not?

MR. HARKINS: That might be the case, sir, but I think that this is a different situation, in that the policy, the ruling in this instance precludes recipients from obtaining treatment which in ten out of eleven cases, that is, ten out of eleven Administrative Law Judges have held that they are entitled to, and I think that that is an aspect of this case which makes it unique and distinguishes it from the situation which you suggest.

Now, with respect to --

QUESTION: The holding that they are entitled to it has nothing to do with whether the recipient or the claimant is going to go ahead with the surgery.

MR. HARKINS: That is correct, but in this case the complaint alleges, and in fact there was an affidavit presented to the District Court that Mr. Ringer would in fact have the procedure if coverage were available, but that he was unable to do so solely because of the Secretary's coverage determination.

QUESTION: What is the medical opinion on the subject? There was some discussion of it in the briefs. What is the medical opinion on the utility or necessity of this particular procedure?

MR. HARKINS: First of all, Mr. Chief Justice, we believe that that is a question which has already been resolved by the Secretary's Appeals Council and by her Administrative Law Judges, and that is something that has not been presented to the District Court, and which we frankly believe the District Court should not have to address in this case.

There is some disagreement, however, with respect to the utility of the treatment. However, as we point out in our brief, the Appeals Council found that it was reasonable and necessary in the cases before it, and also found that there are segments of the medical community which do prescribe this treatment and are in fact of support of it.

With respect to the first issue --

QUESTION: Are there any segments outside southern California?

MR. HARKINS: There have been, and there is evidence in the Appeals Council record of other doctors, one in North Carolina, for instance, one in West Virginia, and in some other areas who have used this treatment in given cases, sir.

With respect to the question of 405 jurisdiction, we believe that there is no question that jurisdiction is available under Section 405 here, and we

would suggest that the only way that the Court can conclude that there is no Section 405 jurisdiction is to accept the Secretary's invitation to first of all ignore the facts of this case, and to ignore the holdings in Salfi and Eldridge and Diaz.

QUESTION: Who in this case has standing, can, you say, invoke 405 jurisdiction?

MR. HARKINS: First of all, the question of standing, as far as I am aware, has not been raised in the case. It was not addressed --

QUESTION: It is a jurisdictional question.

MR. HARKINS: Okay. It is our position that the class of claimants includes those who have had their claims denied solely on the basis of the ruling.

QUESTION: Are there any of the named plaintiffs who are in that class?

MR. HARKINS: No, Mr. Justice Rehnquist.

QUESTION: Then the class can't possibly include them, I would think, since if none of the named plaintiffs have that characteristic, they couldn't represent a class that had that characteristic.

MR. HARKINS: I think that that may be a question that the District Court needs to address in the first instance. However, it seems to me that at worst, this may be a situation where we have to amend the

complaint to add a group of individuals, of named individuals that fall into that category.

QUESTION: Maybe you should go back to answering Justice White's question.

MR. HARKINS: Okay. I also believe that Mr. Ringer insofar as he has been dissuaded from having this treatment solely on the basis of the ruling would have standing to challenge it.

QUESTION: Well, standing to challenge it, but he certainly wouldn't be invoking 405 for jurisdiction, would he?

MR. HARKINS: I'd like to come back to that. I think that he can.

QUESTION: Well, how could he? How could he? He would just have to qualify under 1331, wouldn't he?

MR. HARKINS: I don't think so, sir. I think that in order to find that Mr. Ringer --

QUESTION: You can get judicial review under 405 without ever having an operation or filing a claim or anything of the sort. Is that right?

MR. HARKINS: I don't think so. I think that the thing that makes this case different is that the Secretary has taken a position which is final and is binding, and I think that what we have to do is, we have to go back and we have to look at the purposes of the

Medicare Act in order to answer your question.

Any number of courts have held that the purpose of the Act was to alleviate the burden that healt care imposes on the elderly and on the sick, on those who are least able to afford it. What is happening here is that the Secretary is interpreting 405 in a way that establishes a financial prerequisite to even being able to get into the system, to file the claim, and then to exhaust the remedies.

And I think that it is totally inconsistent with Congress's purposes in establishing the Medicare program that the Secretary would be able to impose a financial requirement to get into the system on those who are unable to foot the bill up front. That is, it seems to me, precisely what Congress intended to avoid, was to avoid the burden that health care costs impose on these very individuals.

And I think that beyond that, if you interpret 405 to preclude people like Freeman Ringer from getting into the system, I think that you are then raising a constitutional question.

QUESTION: What constitutional question would that be?

MR. HARKINS: As to whether or not 405 as applied to these facts discriminates against people like

Mr. Ringer solely on the basis of their poverty, because --

QUESTION: Well, we have held that poverty is not an invidious basis of discrimination.

MR. HARKINS: But in this instance, Justice Rehnquist, I realize that poverty itself is not an invidious basis of discrimination, but I think that the Court should interpret 405 in a fashion that avoids the need to address that constitutional question.

QUESTION: But in view of the fact that poverty is not an invidious classification, what substantial constitutional question would there be?

MR. HARKINS: I think that the question is one of denying access to the system, denying access to both administrative review and judicial review, solely because of Mr. Ringer's indigency, particularly in these facts, sir.

QUESTION: You are suggesting that the Constitution requires Congress to set up a system of administrative declaratory judgment proceedings?

MR. HARKINS: No, sir, I don't think it has to set up a system of administrative declaratory judgment proceedings, but I do think that there has to be some route through which, consistent with the purposes of the Medicare Act, that people like Mr. Ringer can obtain

some kind of determination of their eligibility for coverage, that they are not, as this case illustrates, put in a position of being denied benefits solely because they can't even get into the system in the first place.

QUESTION: May I ask you a question about what might possibly be a solution? Why wouldn't it have been possible for someone in 1981 who could afford the operation -- there are such people, I am sure, in the area where this doctor practices -- to have the operation and then start this whole proceeding and challenge the regulation in that proceeding, and then Mr. Ringer could get the benefit of that ruling if it held the regulation invalid.

MR. HARKINS: The problem with that, Justice Stevens, is that as we have set forth in our brief, and as the complaint indicates, Mr. Ringer is a person who is suffering right now. He has severe respiratory illness. He is also an elderly individual. And denying him access to benefits which the Administrative Law Judges are almost consistently ruling he is entitled to puts him in a situation of suffering pain, of suffering disability, and there is the possibility that Mr. Finger may be dead and may never have the opportunity to take advantage of that.

For instance, I point out that three of the six named plaintiffs in this case initially have died since the case was started, because they are by definition elderly and ill people.

QUESTION: But the case has been going on -- How long has the case been going on?

MR. HARKINS: Since about 1980, roughly.

QUESTION: And couldn't someone have the operation just a few weeks later than this complaint was filed, and we wouldn't have all these procedural problems? I mean, I don't understand. You don't have among the parties here a person who everybody agrees is covered by the new regulation, do you?

MR. HARKINS: Among the named parties, that's correct. We do not. But I would suggest, first of all, that I think that there is at least an argument that the class will include those individuals.

Secondly, to the extent that that presents a problem, it does not affect the underlying issue that is in front of this Court nor the issue that will be presented to the District Court, because the policy is effective. There are people who are receiving the treatment at this point, and the complaint can easily be amended to include a named individual that has had the treatment and been denied solely on the basis of the

ruling.

In existence, as my colleague has indicated, one of the named plaintiffs, Dr. Winter himself serves as representative for the patients in the administrative proceedings pursuant to the Secretary's own regulations, and we have set that forth at Paragraph -- or Footnote 4 of our brief.

QUESTION: You are not going to amend up here, are you?

MR. HARKINS: Pardon me, sir?

QUESTION: You are not going to amend in this Court, are you?

MR. HARKINS: No, I don't think we have to. It may be that when we get back to the District Court, we do.

QUESTION: You don't think it's him, do you?

MR. HARKINS: No, sir.

QUESTION: Do you think you can argue that what you are arguing, you will have any member of the class eligible to argue the point that you are arguing?

MR. HARKINS: Yes, sir. I believe so. The reason --

QUESTION: Is that your position?

MR. HARKINS: Yes, it is, Justice Marshall.

QUESTION: By what right do you make that

argument?

MR. HARKINS: Because there are two subclasses in our case, the one that we have been talking about for some time with Mr. Ringer, who has not had the treatment and therefore not filed a claim. The other subclass includes people who have had the treatment and have filed the prerequisite claim.

QUESTION: They had the treatment before the regulation.

MR. HARKINS: That is correct. The named plaintiffs did. We believe that that class also includes individuals who had the treatment after the ruling was issued for this reason. That ruling essentially formalizes a policy that was in existence for several years before the ruling was published. It had been in existence at least since 1972. The only impact of that ruling is to make it absolutely clear that the beneficiaries can never win at any stage in the process.

The class that we allege that had had the treatment and filed the requisite claims included people who were denied treatment based on the policy before it was published. It at that point had been published in manuals which were issued to the Secretary's intermediaries and which the intermediaries were bound

to follow.

The effect of the ruling was merely to take it one step further and to assure that the Administrative Law Judges as well denied the claims.

QUESTION: If we just vacated, sent it back, you could amend and do all of that, couldn't you?

MR. HARKINS: Yes, we could, and I suspect that we would be back here in short order, sir.

QUESTION: Well, why are we spinning our wheels right now?

MR. HARKINS: Because, as I say, I don't think that the underlying issues are affected by the ruling, except that the ruling exacerbates the situation.

QUESTION: Well, why upset a clear ruling of the Court just to meet a situation that can be corrected without a decision of this Court on a point that is not before the Court?

MR. HARKINS: The only answer I can give you, Justice Marshall, is that we are satisfied with the Ninth Circuit's ruling at this point, and we don't think that amendment, even if it were necessary, would present any problem.

QUESTION: Well, it is difficult for us to write an opinion and cite you for an authority.

(General laughter.)

MR. HARKINS: I see. That would be flattering, but I realize the problem.

QUESTION: Let me put a hypothetical question to you, pursuing some of the earlier questions. There has been a statutory or -- I think it's a statutory allowance that people get a tax cut if they insulate their homes. There is legislation being discussed about giving a tax credit if people put air bags in their cars pending the time when it would be compulsory, if ever.

Suppose someone comes into the IRS and says, I am old and I am poor, and I want to put an airbag in my car but I can't afford to do it unless you absolutely assure me that I will get a tax credit for it. Do you think they could insist on that?

MR. HARKINS: I must confess, in all the things that we talked about in preparing for argument, that is one that hadn't come up, but I think that the answer to that is, first of all, that this case is different because it is not a question where someone is asking for an absolute assurance that coverage will be available.

It is a situation in which the Secretary has already provided absolute assurance that coverage is not available.

And secondly, when you get beyond that, I

think that the question then becomes one of, on the facts, is the decision sufficiently final for judicial review, and in this instance I don't think that there is any question on the facts that the decision is final for purposes of judicial review.

I think that when you look at the facts of this case, as the Court did in Salfi and in Eldridge and in Diaz, that there is absolutely no room for disagreement on that.

QUESTION: Let's look at the facts of these particular named parties for a minute. Now, Ringer is the one who has not had the operation. Is that right?

MR. HARKINS: That's correct.

QUESTION: The other three had the operation, and are now in the administrative process.

MR. HARKINS: That's correct.

QUESTION: And it's agreed that the Secretary's regulation doesn't govern the claim of any one of those three.

MR. HARKINS: Yes, sir.

QUESTION: So unless you are right about Ringer having kind of a constitutional right to get an an administrative declaratory judgment, none of these four parties really have standing to challenge the Secretary's regulation as she would have it applied.

MR. HARKINS: In that instance, those individuals are still covered by the policy that the Secretary had issued, the informal policy that was in place prior to the effective date of the ruling. Now, if in fact it is the case that those individuals don't have standing to challenge the ruling, again, I would suggest that that is a situation that can easily be cured by amendment.

QUESTION: Well, but perhaps before the Ninth Circuit or this Court should have to pass on the question, we ought to have a complaint that actually raises the question, and I would think also that perhaps -- it seems to me part of your argument for challenging the Secretary's regulation is that it is kind of an ironclad, no holds barred type of thing. You lose in this kind of suit, whatever you do. I would think an informal policy would have less of those manifestations than an actual regulation.

MR. HARKINS: As a matter of fact, Justice Rehnquist, it did not, because the individuals that were involved in the class of those who had filed the claims were denied initially and upon reconsideration based solely on the policy.

They were then put in a position of litigating, and up until the time the lawsuit was filed,

what we had was a situation that those who litigated got benefits and those who did not litigate did not get benefits, and the award of benefits was conditioned not upon the individual plaintiff's treatment or upon their condition, but upon whether they survived long enough to litigate, whether they had the resources and the desire to litigate.

QUESTION: Isn't it true normally that you don't recover unless you litigate?

MR. HARKINS: I am not sure I understand the question, but in this instance it is certainly true. I don't think that that is normally the case, though. I think the benefits are normally available without litigation.

QUESTION: I imagine certain benefits are available, like gambling, but I mean, if you've got a cause of action, don't you have to litigate in order to recover?

MR. HARKINS: If there is a cause of action, yes, you do, but I am not sure that I understand the question, sir. I am sorry.

QUESTION: I thought you had to have a party to a litigation, a party in interest in that litigation, and although you can have a class, you had to have at least one named party who had that interest.

MR. HARKINS: Well, I would suggest again that these individuals have had their coverage denied solely on the basis of a policy initially and on reconsideration. I believe that they are in a position where they can at least arguably represent those who have had coverage denied based on the ruling, but in addition to that, sir, Dr. Winter is serving right now as a representative for individuals who are in precisely that position, who have had coverage denied based solely on the ruling.

In fact, earlier there was a reference to the Administrative Law Judge proceeding that occurred while the lawsuit was pending. There were individuals there who were denied on the merits. There was also a group of indivdiuals represented by Dr. Winter -- in fact, the case is styed In Re Benjamin Winter as Representative for 132 Claimants.

QUESTION: But in this case, does Dr. Winter represent the whole group?

MR. HARKINS: He represents at least those who had the treatment and were denied based solely on the ruling by the Administrative Law Judge.

QUESTION: And how many are there?

MR. HARKINS: There are about 50, sir.

QUESTION: Where do we find that? Did the

District Court make that finding, that Dr. Winter was a class representative?

MR. HARKINS: No, the District Court never reached the question of the status of the class.

QUESTION: I thought Dr. Winter's claim was that he wanted to perform some more of these operations, not that he was seeking reimbursement.

MR. HARKINS: That is part of his claim. It is not that he is seeking reimbursement, sir, but he is appearing as a plaintiff, as representative of his patients, some of whom are now in the administrative process.

QUESTION: What standing does he have in that capacity?

MR. HARKINS: The Secretary's regulations confer on Dr. Winter, and we pointed this out in Footnote 4 of our brief, confer on Dr. Winter the status of representative --

QUESTION: But she can't confer standing in the court, can she?

MR. HARKINS: I believe that insofar as he is -- he is authorized to appear as representative in the administrative proceedings, that he is defined by the Administrative Procedure Act as a party. He is given the specific right by the Secretary's regulations to

take whatever action is necessary with respect to the claims of the individuals in the administrative proceeding.

QUESTION: So he can come into the District Court -- I take it he is not an attorney -- and simply say, I represent 20 plaintiffs under an administrative regulation. None of them have to be named parties in this court. Just take my word for it.

MR. HARKINS: I would think that on judicial review, that he could do exactly that, insofar as he is representative of named individuals in the administrative proceeding.

QUESTION: Mr. Harkins, I thought Mr. Kneedler suggested that even the three who had the operation before the regulation came out might have standing, technical standing, Article 3 standing to challenge the validity of the regulation because it would affect nevertheless the disposition of their cases.

MR. HARKINS: Well, I think in fact --

QUESTION: It would make ALJ's much more likely to turn them down.

MR. HARKINS: In fact, that is exactly what happened here, because the only claimants who have been denied coverage in front of an ALJ were those who had not had the treatment and the ALJ hearing occurred after

the ruling was issued, and it certainly -- the facts would suggest that those claimants were biased by that ruling.

QUESTION: At least that's a claim enough to give you technical standing, you suggest, in this case.

MR. HARKINS: I would think so.

QUESTION: In which event then we have to reach these other questions, you are arguing.

QUESTION: I must confess I am still puzzled about why the ruling doesn't apply to pending cases. I know Mr. Kneedler agreed -- said it did not apply, but if I read your stipulation, it says in so many words that this particular operation is excluded from Medicare coverage under the authority of Section 1862(a)(1). Isn't that an interpretation of the statute by the Secretary that should be binding on the ALJ's even with respect to earlier filed claims? Why isn't that binding on the ALJ's?

MR. HARKINS: The situation that had existed prior to the time that the ruling was published was that there was a manual provision which provided exactly the same thing as the stipulation you just read.

QUESTION: Well, how could the ALJ's deny -- how could they refuse to follow that?

MR. HARKINS: The ALJ's, I think, were

persuaded on looking at the facts of the individual cases that they should not follow it, that they gave perhaps weight to that policy, but that given the results of the treatment, and listening to the testimony of the individuals involved, that they could not follow that policy provision, sir.

To be honest with you, I cannot point a finger at a specific provision that says that the ALJ's were not bound by that. However, the ALJ's took the position that the informal policy was not binding.

QUESTION: Well, this is surely not an informal policy, where there is a formal ruling that this is not covered within the -- not reasonable within the meaning of the Act. I should think that would -- I don't know why that wouldn't apply to a claim filed in advance as well as one filed later.

MR. HARKINS: I believe that the ruling is --

QUESTION: I just don't understand the law, I guess.

MR. HARKINS: I believe the ruling itself states that it was to have prospective effect only.

QUESTION: How can -- Has prospective effect only whether this operation is reasonable?

QUESTION: Well, that's what the regulation says.

MR. HARKINS: That's what it says.

QUESTION: Where does it say that? I can't find it in the papers. Is it in the papers?

MR. HARKINS: It is in the Federal Register, sir.

QUESTION: But it is not in anything that you people have filed with us? We have to read the Federal --

MR. HARKINS: Not that I'm aware of. Not that I'm aware of. But I do think that, as I indicated a few minutes ago, that that ruling has certainly had some effect. I find it far more than coincidental that the only Administrative Law Judge out of eleven that has denied coverage did so only after that ruling was issued.

QUESTION: Well, I am not surprised that it had effect. I can't understand why it wouldn't be controlling in every one of these cases. That is my problem. She said this is for the future only, that this operation may have been reasonable in the past, but it is unreasonable in the future. I can't understand that kind of interpretation of the statute.

MR. HARKINS: Well, actually, she said that -- it was our position that it was -- excuse me. The Secretary said a little bit more than that. The

Secretary said, look, we are tired of these Administrative Law Judges and the Appeals Council ruling against us on this coverage question, and we are going to put an end to that. The ruling on its face says that the purpose of the ruling was to assure that the Administrative Law Judges and the Appeals Council never decided another claim for this treatment against the Secretary.

QUESTION: What is the citation in the Federal Register, if you have it before you there?

MR. HARKINS: It is 45 Federal Register 71,426, and the date is October 28th, 1980. The provision on the effective date is on the subsequent page, 71,427.

QUESTION: Well, I am sure you hope that Justice Stevens is correct.

MR. HARKINS: I would have a difficult time disagreeing with that.

QUESTION: May I just ask one other very brief -- the language that says it is prospective only is just -- gives an effective date? Is that all?

MR. HARKINS: That's correct, sir.

QUESTION: But it doesn't say in so many words that it will not apply to operations that took place before?

QUESTION: Are you going to read the language? You've got it right there. Why don't you read it?

MR. HARKINS: There is an entire paragraph, sir. It says, "As explained above, we have previously issued policy in manual instructions excluding this service from Medicare coverage. However, since ALJ's and the Appeals Council have ruled in several cases that claims for these services are payable, it is possible that some beneficiaries, relying on these rulings, have proceeded to have the operation performed in expectation of Medicare payment. In fairness to those beneficiaries, we are making the ruling effective for services furnished after the date of publication."

QUESTION: Mr. Harkins, have all the claims which have been allowed by Administrative Law Judges occurred in California or that region?

MR. HARKINS: No, Justice O'Connor. There have been ten different Administrative Law Judges, 26 proceedings, and they have occurred all over the country.

I think if I could leave the Court with one point, I think that point would be that in the District Court, in the Court of Appeals, and in this Court, the Secretary has stated over and over again that the intent

and the effect of that ruling is to bind the Administrative Law Judges and the Appeals Council and to absolutely prohibit reimbursement for this treatment.

I think that that fact brings this case squarely within this Court's holdings in Salfi, in Eldridge, and in Diaz, and as much as the Secretary wants to ignore the rulings in those cases and to quote language from those cases, those decisions found jurisdiction at least as far as the named plaintiffs were concerned.

Each of those cases found jurisdiction under Section 405 despite the fact that the plaintiffs had not completely exhausted the administrative process. In fact, Salfi points out that the named plaintiffs had not satisfied the finality requirements imposed by the Secretary's regulations. In Eldridge and Diaz, there was a concession that there had not been complete exhaustion.

More than that, each of those cases found jurisdiction under Section 405 despite the fact that the Secretary had moved to dismiss in each case for failure to exhaust administrative remedies. Indeed, in Eldridge, the Court notes that the Secretary made out the same argument that she makes here, that this Court is bound by her determination on finality.

And the Court answered that very simply: We disagree; and proceeded to look to the merits of the finality question. It suggested in each of those cases that exhaustion was unnecessary because the Secretary had taken a conclusive position on the issue. In Eldridge, it was as a result of a statutory provision -- excuse me -- as a result of the impact of the Secretary's regulation. In the other two cases, it was the result of a statutory provision.

But that is precisely the situation that we have here. Diaz in particular supports the result of the Ninth Circuit, because the Secretary's counsel in colloquy with the District Court there as far as one plaintiff is concerned insisted that the decision -- that benefits could not be awarded to that plaintiff.

And I think that while the Secretary never comes right out in saying it, what she's telling you is that she wants you to overrule Salfi, Eldridge, and Diaz. She is actually asking this Court to hold that it cannot do precisely what it did in each of those three cases, that you cannot look behind a motion to dismiss, or a statement that further exhaustion is required.

But I think there is more to it than that, because when you see the big picture, what the Secretary, I think, is really saying is that this Court

is bound by her determination on finality but that she can't be bound by the decisions of the Administrative Law Judges within their jurisdiction or by the decisions of the Federal Court.

I think that when you put this in perspective, the Secretary is asking for a license to continue to ignore decisions even within the jurisdiction in which those decisions were rendered.

QUESTION: Who has the authority to construe a statute? The agency entrusted with its enforcement? Isn't that so?

MR. HARKINS: In the first instance I believe that's correct.

QUESTION: And until a court says otherwise.

MR. HARKINS: Until the court says otherwise.

QUESTION: Do you think an Administrative Law Judge can ignore --

MR. HARKINS: I think that that is a question that the Secretary has committed to the Administrative Law Judges and given them the authority to decide.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Kneedler?

ORAL ARGUMENT BY EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. KNEEDLER: Yes, Mr. Chief Justice. I have several things.

First, I would like to point out that it is my opponent who is asking this Court to overrule Salfi. This Court could not have been clearer in Salfi that a court cannot substitute its judgment for whether exhaustion of the administrative remedies would be futile for that of the Secretary.

If the prohibition in the 1980 Heckler ruling that the respondents challenged here had been in the statute under Salfi, the Court could not have waived exhaustion. The Court said that. The basis of the finding of jurisdiction in Salfi was that the Court deemed the Secretary to have waived exhaustion.

This would seem to follow a fortiori from Salfi, because here it is a regulation, an issue arising under the statute, not a question beyond the competence of the Secretary, as in Salfi, the constitutional question. There is no stipulation here, as in Salfi and Diaz, that the facts are not in dispute. There is no stipulation here that the respondents and the Secretary agree on the interpretation and application of the statute in question.

Those are the very reasons why exhaustion of administrative remedies is appropriate. While

respondent argues in this Court that the Secretary has taken a firm position on this ruling that won't be changed because of this binding regulation, the respondents have argued in the administrative proceeding that that regulation is not binding.

Not only is it not binding on the people who had the surgery before 1980, but they argued that it wasn't even binding on the people who had the surgery after 1980, because of the particular interpretation of the regulations.

That is the very reason why exhaustion of administrative remedies should be required even when a person is challenging the regulations, because it gives the Secretary, through the Appeals Council and the ALJ's, the opportunity in the first instance to decide whether the regulation applies and what the statute means.

The other point I would like to make goes to the question of Mr. Ringer having standing. The reason Mr. Ringer cannot bring a lawsuit is because Congress has foreclosed it. The only available way of judicial review is under Section 405(g) of the Act, which requires a filing of an application. Congress foreclosed judicial review under 1331 and 61, and the system would break down with 200 million Medicare claims

filed a year on behalf of people who have already had services if beyond that a claimant could seek a declaratory judgment when it is still speculative as to whether he would be reimbursed for the surgery.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 12:00 o'clock noon, the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-1772- MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner v. FRAAMAN H. RINGER, ET AL.

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