OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., Petitioners v. ILLINOIS COUNCIL ON LONG TERM CARE, INC.

CASE NO: 98-1109 C-1

PLACE: Washington, D.C.

DATE: Monday, November 8, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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DONNA E. SHALALA, :
SECRETARY OF HEALTH AND HUMAN :
SERVICES, ET AL., :
Petitioners :
v. : No. 98-1109
ILLINOIS COUNCIL ON LONG :
TERM CARE, INC. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Monday, November 8, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

JEFFREY A. LAMKEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

KIMBALL R. ANDERSON, ESQ., Chicago, Illinois; on behalf of the Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 98-1109, Donna Shalala v. The Illinois Council on Long Term Care.

Mr. Lamken.

ORAL ARGUMENT OF JEFFREY A. LAMKEN

ON BEHALF OF THE PETITIONERS

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

The Medicare Act provides a special mechanism for judicial review in section 405(d). The principle that governs this case is that claims that can be raised through that judicial review procedure must be.

Section 405(h) bars efforts to circumvent that procedure by singling out particular legal issues and seeking judicial resolution before the Secretary applies those rules to the claimant in a final decision. That conclusion flows from the text of the statute and this Court's decisions in Weinburger v. Salfi, Heckler v. Ringer, and Bowen v. Michigan Academy.

Under the Medicare Act, nursing homes that meet the Secretary's minimum health and safety requirements may voluntarily enter into contracts with the Secretary to provide services to medicare beneficiaries. The Medicare

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Act makes the same mechanisms for administrative and then judicial review that are applicable to beneficiaries also applicable to nursing homes that have or seek to enter into those contracts.

In particular, section 1395cc(h) provides that any nursing facility that is dissatisfied with the determination, that does not meet the minimum health and safety requirements, and is subjected to a remedy as a result, is entitled to, first, a hearing before the Secretary under section 405(b) and, second, to judicial review of the Secretary's final decision following that hearing.

QUESTION: Mr. Lamken, I guess what respondents really want is preenforcement review of the regulations.

MR. LAMKEN: Yes, that's correct, and --

QUESTION: And is that possible, in your view, under this scheme?

MR. LAMKEN: No, Your Honor, it is not. The structure of the scheme in section 405(h) specifically exclude preenforcement review. That comes from the language of section 405(h) in particular, the third sentence of which says that no action against the United States, the Secretary, or any employee shall be brought under the general Federal question statute, which is section 1331, to recover on a claim arising under the

Medicare Act.

QUESTION: And so what -- in your view, the nursing homes have to wait for a deficiency citation?

MR. LAMKEN: That's precisely correct, Your Honor.

QUESTION: But if they then try to raise administratively some constitutional claim, for example, about the regulations, that can't be decided administratively before the level of the Secretary, I assume.

MR. LAMKEN: That's correct. As the Court noted in Weinburger v. Salfi, the Secretary typically will not address constitutional claims in the administrative proceedings, but in Salfi itself there was a facial constitutional challenge to a provision of the statute. Accordingly -- but the Court nonetheless held that even constitutional claims, facial constitutional challenges to the statute, must be channeled through the specific review mechanism provided by the act, and that the party could not bypass that mechanism by seeking a declaratory judgment under the general Federal question statute in advance.

QUESTION: Mr. Lamken, assume for the sake of argument that I don't agree with you that the text of the statute, the text of the sentence that you referred to, is

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dispositive, so that there would be some, at least practical point to this question.

The question is this. Is it possible for a provider who wants to challenge the regs as vague or beyond legal authority or what-not to carry that challenge all the way through to the point where they could be heard, i.e. to the district court and court of appeals level for that matter, this Court, without risking the possibility that if the provider loses, the provider would be terminated, or subject to termination by the Secretary as a provider.

Is it possible, in other words, to challenge the regulations without at the same time assuming liability for the most draconian of possible results, which is exclusion from the provider scheme?

MR. LAMKEN: The answer is yes, although we don't believe that this case presents that type of problem.

QUESTION: I realize.

MR. LAMKEN: And although the Secretary ordinarily would not impose termination or expose medicare providers to extreme risks, because it's a voluntary program, they don't have to --

QUESTION: But that's a matter of grace. I mean --

MR. LAMKEN: Correct.

QUESTION: -- the Secretary may, the Secretary may not. Is there a way for this kind of challenge to be made without risk that the Secretary may?

MR. LAMKEN: Termination is an extreme remedy that is reserved for the most extreme circumstances and violations. What normally occurs when a provider violates the statute is, the Secretary or the surveyors issue a letter which specifies the remedies that will be imposed on a time schedule, including denial of payments after -- if the remedy is --

QUESTION: All right. May I interrupt you --

MR. LAMKEN: Yes.

QUESTION: -- there just for a second? I take it from what you're saying that the Secretary could right up front say, one of the remedies that I'm going to impose, if you lose at the end of this process, is termination. Now, if the Secretary did not say that up-front, would the Secretary be foreclosed from terminating at the end of the process if the provider lost?

MR. LAMKEN: I don't believe so, Your Honor, no, but the ordinary --

QUESTION: So the risk would always be there. Any provider would know, whatever the odds might be, that at the end of the process, if the provider lost, the

provider in effect could be eliminated from the benefit, or the administrative scheme entirely.

MR. LAMKEN: It's true that the absence of declaratory relief does subject them to some risk, but it is not the case that there is an extreme risk of termination for a provider that actually does nothing more than preserve his right to appeal.

QUESTION: But there is some risk.

MR. LAMKEN: I could not -- I -- we would consider it a -- the -- an abuse of the Secretary's decision to terminate a provider for doing no more than necessary to preserve its right to appeal. What the provider ordinarily would do would be --

QUESTION: No, but we -- I think --

MR. LAMKEN: -- to violate the statute, draw some remedy, and then the Secretary -- and then it would come into compliance following that and dispute only the remedy, and if a provider comes into compliance shortly after the remedy is imposed, it ordinarily would not be terminated.

QUESTION: Okay, but one of the provider's arguments is that the risks can be so extreme that there really isn't a proper challenge scheme on your view of the law, because any provider is going to knuckle under rather than take the risk of being terminated at the end of the

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day.

And so the -- I think your colleague on the other side would say, well, sure, we may commit a compliance before the end of the day, but the reason we might commit a compliance is that the risk of losing is not merely the risk of losing a legal challenge, but the risk of losing our provider status entirely, and that, in fact, they're saying is not a legitimate appeal mechanism, and it ought to influence the way we read this statute.

MR. LAMKEN: In fact, Your Honor, we believe that that risk has been overstated in the way the Secretary implements it. In fact, providers do not have to risk termination in order to bring their challenges, but this is about --

QUESTION: Mr. Lamken, as I read Judge Easterbrook's opinion, he essentially agreed with what you're saying now, but he put it on a ripeness point. He said, these regulations are brand new. We don't know how they're going to be applied. We don't know what the Secretary will do, and we don't know whether a court might say, at the end of the line, that what the Secretary -- he said they need fleshing out.

So I think on this point Judge Easterbrook said, well, they won this victory, but they may lose the war, because -- well, they may even have no permanent victory

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here because of the ripeness question, that the regulations have been untried, untested.

MR. LAMKEN: I think that's correct. I think Judge Easterbrook concluded that some of the claims were unripe for that reason. In fact, because it's not clear that any of the regulations will ultimately be applied, these are merely enforcement regulations that are being challenged, not anything that's -- requires the providers to change their behavior immediately.

QUESTION: But there is something to the point that the Seventh Circuit made that Michigan Academy, that what you are essentially asking the Court to do is to declare Michigan Academy passe because part B regulations are now subject to judicial -- part B rulings are subject to judicial review. If that had been the case, Michigan Academy never would have been decided the way it was.

But that's what the Seventh Circuit said, that Michigan Academy stands in the way of cutting out altogether preenforcement review.

MR. LAMKEN: I -- Michigan Academy we don't believe is passe in the sense that for the category of claims that Michigan Academy identified, claims that could not be raised through the express judicial mechanism, but for which Congress did not express a clear and unambiguous intent to preclude the review altogether, that remains

good law, and that remains applicable to cases that fall into that category.

What Congress did when it restructured the act is, it took one particular set of claims out of that category, and those claims were challenges to the methodology used in determining the amount of part B --

QUESTION: Oh, but I didn't understand Michigan Academy to be written that way, that, you know, there is preenforcement review with respect to those claims that can't be challenged otherwise, although there may not be with respect to claims that can be challenged otherwise. I mean, I think we were interpreting 405(h) and 1395ii, and we said -- we said there is no pre -- there is preenforcement review.

MR. LAMKEN: No --

QUESTION: Now you're telling us that there isn't.

MR. LAMKEN: If, in fact --

QUESTION: Because of no change in the -- no change in either the language of 405(h) or the language of 1395ii.

MR. LAMKEN: That construction, Your Honor, would place Michigan Academy in direct conflict with Ringer, for example, Heckler v. Ringer, for example, which specifically held that an individual may not slice off one

individual issue bearing on -- one individual legal issue and seek its resolution in advance.

What the Court did in Michigan Academy was, it distinguished Ringer by saying -- noting the respondent's argument that it's possible to construe section 405(h) as not applying for those claims that can't be raised under its neighbor, section 405(g).

QUESTION: Well, in particular, these claims.

MR. LAMKEN: In particular, the claims that were at issue there under the statute as it then existed, but when Congress went and restructured the statute, it took certain -- the claims that were at issue there and --

QUESTION: It's an interesting question of statutory construction. The review provision in Michigan Academy was interpreted a certain way and, it said, there is review.

Now, you're telling us that without any modification of that section, just because another section has now been altered to allow judicial review in some other fashion, the section now has a different meaning.

MR. LAMKEN: No, Your Honor, we don't believe its meaning's changed. The only ambiguity the Court noted in section 405(h), without discussing the language, the only possible ambiguity it noted was the possibility that it might only preclude review for those claims that can be

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raised under section 405(g).

If that's the holding of the Michigan Academy, and that is the only ambiguity, or only aspect of the language in 405(h) it addressed --

QUESTION: Now, is that the -- you contend that's the holding of Michigan Academy?

MR. LAMKEN: To the extent Michigan Academy addresses the language of section 405(h), that is the only potential ambiguity identified.

QUESTION: Where does it say that? Where does it say that -- I mean, I understand that that was its rationale for the interpretation of the section, but does it say in so many words that the section only permits judicial review where there is no other review available?

MR. LAMKEN: It does not actually hold that that is the language of the statute, but what it does is, it first says -- there's two possible interpretations that are posited to us. The Government's position, that it's so clear that it bars review altogether, and respondent's view, which -- and I'm going to quote -- which the Congress' purpose was to make clear that whatever specific procedures it provided for judicial review of final action by the Secretary were exclusive, and could not be circumvented by resort to the general jurisdiction of the courts.

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The Court then went on and said, whichever may be the Ringer -- better reading of Ringer and Salfi, we need not pass on the meaning of 405(h) in the abstract. We're not going to address the language. Section 405(h) does not apply by its terms to part B of the program, and the legislative history -- and then it went into the legislative history, showing that Congress did not have a clear and unambiguous intent to exclude judicial review altogether.

QUESTION: But the first part of what you read referred to review in an administrative agency, I think, and there is no such review in this case.

MR. LAMKEN: Your Honor, the way the structure, the statute is structured is that all claims are channeled through a review in the administrative agency.

QUESTION: Well, all claims -- all of these cases really turn on the meaning of the words, to recover on any claim arising under this subchapter within the meaning of 405(h), don't they?

MR. LAMKEN: That's correct, they do turn on that, and in fact --

QUESTION: Some have been held to be such claims, and some have not been. Those that have been held to be such claims are all claims that could have been decided by the administrative agency, and this is not such

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a claim.

MR. LAMKEN: No, that's not correct, Your Honor.

QUESTION: Which one could not have been decided --

MR. LAMKEN: Weinburger v. Salfi could not have been decided by the administrative agency.

QUESTION: The claim that the class representative in Salfi had been presented to the agency, and it could have been presented to the agency.

MR. LAMKEN: Right, but the --

QUESTION: Not on behalf of the whole client.

MR. LAMKEN: -- constitutional challenge to the statute, and they sought pure declarative relief in the abstract as an alternative remedy, could not be decided by the Secretary. It was identical to this claim.

Heckler v. Ringer, there was a challenge to the Secretary's rule, that it was promulgated in violation of the APA, and that the rule was invalid. That, again, was not something that an ALJ could address, yet this Court held that that challenge had to be channeled through the administrative agency and be -- that rule could only be challenged on judicial review of the administrative agency's final decision applying that rule to Mr. Ringer.

QUESTION: It seems to me that language setting forth a particular manner of judicial review is either

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exclusive or it's not exclusive.

I don't know how we -- you're putting it to us in every case to interpret legislative language as exclusive in some cases, not exclusive in other cases. It's too much of a headache. If Congress wants to amend it and have it exclusive in some and not exclusive in the other, it can say that.

MR. LAMKEN: Your Honor, we believe that the language of 405(h) is clear, and that as the Court applied it in Ringer and Salfi, any claim that can be raised through 405(g) must be.

In Michigan Academy, this Court recognized in the fact that it would not apply the literal language of the statute --

QUESTION: You admit that these claims, if by claim you mean the gravamen of the complaint, the constitutional issues can't be raised in the administrative process.

MR. LAMKEN: Right, but they can be raised on judicial review through 405(g), exactly like the constitutional --

QUESTION: All right, suppose in that respect that you have -- let's not take this case, where I think probably the issues are not ripe, but let's imagine one that would be plainly ripe.

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Suppose the Secretary has a completely unreasonably regulation. Every nursing home has to build its entire home on 10-inch thick steel girders, and then it says, and any nursing home who doesn't comply with this is deprived of their eligibility forever. All right, completely unreasonable rule, and moreover they're put to the choice of either complying or not. At enormous expense they comply, or they run the risk.

Now, that's a ripe, preenforcement review issue. In your opinion, how would -- if that were the reg, how would they get review?

MR. LAMKEN: Although the Secretary would never be able to impose that kind of rule, because participation is strictly voluntary, and she would drive all the providers out of the program and have nobody to provide --

QUESTION: No, no, but I'm simply trying to get an example of a rule that's ripe.

MR. LAMKEN: -- but assuming the argument that there is such a grossly unreasonable rule --

QUESTION: Yes.

MR. LAMKEN: -- providers, sometimes the absence of declaratory relief can impose difficult choices for a providers, just as it does for beneficiaries.

In Ringer, for example, this Court held that Freeman Ringer had to bring his claim through section

405(g), even though he asserted first that he could not -- he wanted a medical procedure. He asserted he could not afford it, and because the Secretary had a rule providing -- prohibiting payment for it, he claimed that he could not obtain the procedure absent a declaratory ruling --

QUESTION: Why wouldn't the following be a fairer result?

MR. LAMKEN: Pardon?

QUESTION: Why wouldn't it be fairer and consistent with all the statutes simply to say, you've just mixed up ripeness and exhaustion? Their claim is ripe. 405(g) is an exhaustion statute. They don't have to violate the reg to exhaust. They're -- if it's ripe, it's preenforcement and ripe.

Exhaustion means, you give the Secretary a chance to pass on it, so you write the Secretary a letter and say, Dear Secretary, I think your reg is out to lunch, but you have a chance to pass on it first, so pass on it.

And then, having done that, they bring the results to court, without having to violate the statute. There, we have both ripeness and exhaustion. What's wrong with that?

MR. LAMKEN: Two things. First, I should note that there has been no presentation in this case that

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that's what's missing for -- under 405(g), so --

QUESTION: So, but they -- you're saying that they have to violate. That's what they don't want to do.

MR. LAMKEN: Right.

QUESTION: And so they could go and present without violating by writing the Secretary a letter.

MR. LAMKEN: That's one --

QUESTION: All right. Is that ripe, though? That's why I'm putting this to you. Are you saying that's what they should do?

MR. LAMKEN: As an initial matter, that's one thing they would have to do, but we do not believe that would be -- that's a necessary but not a sufficient condition. We believe we also have to violate the statute and then --

QUESTION: In order to present a claim, they have to violate the statute and present it to the Secretary?

MR. LAMKEN: That's right. As this Court explained in Ringer, the requirement --

QUESTION: That's where members of the Court are a little hung up, why you have to do both. Why isn't it enough to just go to the Secretary?

MR. LAMKEN: Because the statute provides a specific mechanism under 405(g), and that mechanism says

that you have to challenge a determination by the Secretary that you're not in compliance. That's the only mechanism for bringing review under the statute, and the statute -- as Heckler v. Ringer points out, this is not merely a provision that requires exhaustion.

QUESTION: But then you've made -- you've turned it into a ripeness statute, whereas Ringer and Salfi and Bowen and everyone else have considered it an exhaustion statute, and Easterbrook and everybody say, we're not discussing ripeness, and so what I'm thinking is, suppose it really is ripe, it's really ripe.

What you happen to have are cases where maybe it isn't ripe, but suppose it really were?

MR. LAMKEN: Even where it's ripe, the way the -- because of the enormous size of the administrative program and the enormous number of potential legal issues it could raise, Congress established a system where all challenges, the challenges of beneficiaries and the challenges of medicare providers who voluntarily contract to the Secretary, are channeled through what is in essence a quasi-adjudicative system, and as -- you get a final decision of the Secretary, and that is how you challenge the rule, is by challenging the final decision of the Secretary. For example,

QUESTION: If you made it ripeness, that would

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certainly be contrary to Salfi, because Salfi was a fully ripe claim, and the Court said you couldn't do it under 1331, even though it's clear that the Secretary cannot rule on the only issue in dispute.

MR. LAMKEN: That's correct. It would -- if it were a ripeness statute, it would be contrary to Salfi; Mathews v. Eldridge as well. It was a clear procedural challenge thing that we needed predeprivation review. This Court held that the only way the claim could be raised was under section 405(g).

Now, it said that you could get -- you could determine the Secretary's denial of predeprivation review was a final decision, and you could immediately go and get review in the courts, but it said the only mechanism for review, even though it was purely procedural and clearly ripe, was under 405(g) itself.

QUESTION: So Salfi didn't involve this issue. Salfi -- the person whom they permitted to proceed in Salfi was a person who had exhausted. The person whom they did not permit to proceed were the group of class action plaintiffs who hadn't exhausted.

So there's no problem with Salfi, and Bowen is an effort to get the people who don't have any other route an appeal, a way of proceeding, and consistent with both of those two would be to say, if you're ripe, you

exhaust -- you know. I don't want to repeat myself.

MR. LAMKEN: No, I -- we believe that it's -- the statute is more than a mere exhaustion statute. It channels everything through a quasi-adjudicative process, even in claims like Freeman Ringer, who said that he could not actually channel his claim thorough the administrative process because he couldn't have the surgery first and then submit a claim to the Secretary.

QUESTION: Well, you don't say it's just an exhaustion statute, either. I mean, your point is not that it has to be presented to the Secretary, but that it has to be presented in this unique fashion and in no other fashion.

MR. LAMKEN: Absolutely, Your Honor, that's correct.

QUESTION: So it's much more than an exhaustion statute.

MR. LAMKEN: That's correct.

QUESTION: It's a channeling statute.

MR. LAMKEN: Exactly our position, and the reason for that is, Congress not only needed to channel these things to give the Secretary the opportunity to eliminate any possible way of avoiding these legal issues and eliminate overloading the courts with potentially millions of claims for beneficiaries and nursing homes

that participate alike, but it also ensures that all the claims arise in the most concrete factual context possible --

QUESTION: Earlier on in your discussion with Justice Souter, in answering his questions, you began to say that the provider need not risk termination, but then you didn't get to complete that. Why is that, or did I misunderstand you?

MR. LAMKEN: No, that's correct.

QUESTION: What's the reason for that?

MR. LAMKEN: As the Secretary implements the statute, as the Secretary implements these requirements, termination is only imposed as the first remedy when serious extreme health and safety requirements are violated, when basically the health and safety of the beneficiaries --

QUESTION: Is there a way for the provider to test termination as being an abuse of discretion?

MR. LAMKEN: Yes. If the Secretary's procedures did place them in such an extreme consequence that it violated the Constitution, for example, that would be precisely the kind of claim that could be raised under 405 --

QUESTION: Again, but only in the context of making a specific claim for reimbursement?

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MR. LAMKEN: Only in the context of a specific application, yes. There would be two opportunities to do that, Your Honor, I should point out.

The first is, if the person immediately -- if the facility immediately corrected, and the Secretary said, because you immediately corrected I'm not going to impose a remedy but I'm going to deny you a hearing, the provider could say, no, because you've put me to this choice that I had to correct, you coerced me to correct, you have to give me a hearing even though there's no remedy, the Constitution requires it, that claim could be raised under 405(g) and, in fact, that claim has been raised under 405(g) by several providers.

QUESTION: Well, as to that part of your prong, then the only way he can avoid -- the provider can avoid the risk is to comply.

MR. LAMKEN: That -- Congress specifically --

QUESTION: Now you're going to talk --

MR. LAMKEN: Yes.

QUESTION: -- tell me about a second route that he has.

MR. LAMKEN: And the second is, if it would violate the Constitution, and we do not believe that our applying 405(h) would violate the Constitution, given the voluntary nature of the program.

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But a court would always have jurisdiction under section 1331 to decide whether applying section 405(h) would violate the Constitution and, obviously, if it were unconstitutionally applied, section 405(h), because it put the providers to too great a risk -- it would effectively foreclose judicial review altogether -- the Court would not apply 405(h) but would proceed and adjudicate the claim directly, but we should --

QUESTION: Well, you're reading any claim, to recover on any claim as a term of art. You would -- would you concede that much?

MR. LAMKEN: No, Your Honor. We believe that to recover on a claim --

QUESTION: You don't concede even that?

MR. LAMKEN: To recover on a claim -- no, we don't. To recover on a claim, to recover simply means to obtain relief, and on a claim means, in respect to a legal demand, and you can tell that it doesn't mean, for example, to recover money, because Congress specifically incorporated that provision into several sections that have nothing to do with the recovery of monetary benefits.

For example, it incorporated it into a provision that has to do with excluding providers from the program for the commission of certain crimes, which would be section 1320a-7. It incorporated it into provisions that

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have to do with imposition of civil money penalties, so it's clearly not a term of art related to the statute that means the recovery of monetary benefits.

It's also clear from the fact that even when Congress meant --

QUESTION: So if it doesn't, to go back to Justice Scalia for one second, I don't see any problem with sending them through 405(g) and (h). Fine, do it. But I don't see any language in 405(g) and (h) that says you can go that route only if you first refuse to comply with the reg.

I mean, we could send him through 405(g)-(h) reinforcement. We could do that. You would have complied with the language. Most of it would be a waste of time, but --

MR. LAMKEN: The language, Justice Breyer, appears in 1395cc(h).

QUESTION: cc(h).

MR. LAMKEN: And that's going to be on page 14, 15 --

QUESTION: Yes, I have it in front of me. I have it in front of me.

MR. LAMKEN: Okay. And that language basically establishes when providers are entitled to review, and that -- it states that the provider is entitled to review.

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If the Secretary determines that it's not a provider of services, which means that it doesn't comply with the health and safety requirements, or there's a determination described in subsection (2) of the section --

QUESTION: Yes.

MR. LAMKEN: -- which are certain other determinations.

Now, what that means is, the way you can get into 405(g) is when there's a determination by the Secretary. Absent a determination by the Secretary, you can't get through 405(g), and that was precisely what happened to Freeman Ringer, the beneficiary, and he could not get through 405(g) because he couldn't afford to have the service himself, and the Secretary had a rule that barred payment for the procedure.

And he claimed that in the absence of declaratory relief, that the Secretary's payment-barring rule was invalid on procedural grounds. He could not have the surgery and could never submit a claim. This Court held, nonetheless, that his only mechanism for review of the rule was to have the surgery first, submit the claim to the Secretary, and then challenge the Secretary's refusal to pay the claim.

I should also point --

QUESTION: Mr. Lamken, may I go back to Justice

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Kennedy's question. You raised the point that you're implying -- or you're using the language of (h) as -- to include a term of art.

As I understand -- and you've said, of course, you're not, but as I understand it, you're reading that last sentence in (h) as if the words to recover were not even there. You'd come out the same way without the words recover, I think, because the statute -- the sentence would then read, shall be brought under section 1331, 1336 of title 28 on any claim arising, and you're reading it that way, as if the words recover were not -- the words to recover were not there, isn't that right?

MR. LAMKEN: No, that's not correct, for two -- well, first, as the statute was initially enacted in 1939, it was clear that to recover meant to get money, because that was the only thing at issue, was merely social security benefits.

But as incorporated into the Medicare Act, it's clear that to recover does not mean to get money, because it's incorporated into provisions like the civil money penalties provisions and the exclusion provisions that have nothing to do with recovery of monetary benefits, but --

QUESTION: That's why I think you're reading it as if the words to recover simply were not there.

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MR. LAMKEN: It means to obtain relief, but even if you had to obtain money or obtain some sort of benefit or entitlement, the court interpreted that provision in Ringer as precluding parties from slicing off individual, potential legal barriers to their recovery of money, or to recover --

QUESTION: But in Ringer also, I mean, one of the claims in Ringer, as I recall, was an individual benefit claim, so that --

MR. LAMKEN: No. Specifically --

QUESTION: No?

MR. LAMKEN: Well, for some of the other beneficiaries, perhaps. Freeman Ringer specifically disclaimed any right to demand that he get a judgment entitling him to the procedure at issue there, or payment for it. All he did was seek a declaration that the Secretary's rule prohibiting payment for that procedure was invalid, among other things on APA grounds.

QUESTION: But there was also a procedural basis for getting him the relief in connection with a claim which would fall under the natural meaning of to recover.

MR. LAMKEN: And that's precisely that same basis here under 1395cc(h).

QUESTION: Oh, I don't see the same basis here.

MR. LAMKEN: Any time there's a --

QUESTION: It's a preenforcement claim. There's -- the word to recover has got to be read out of the statute to make this particular claim fit within it.

MR. LAMKEN: Ringer sought -- brought a preenforcement claim as well, and he sought to eliminate one particular legal barrier to his potential recovery.

That's precisely what respondent attempts to do here. It is challenging the Secretary's enforcement of the requirements of participation. The Secretary cannot pay, and cannot allow its members to participate in this program, unless they meet the requirements of participation.

And so what they've done is, they've singled out the requirements of participation and said, these are potential legal barriers to our being paid and to our participating in the program, and they have attacked them preenforcement to try and eliminate those barriers. That is precisely what Freeman Ringer did with respect to the rule that prohibited payment for his procedure.

QUESTION: May I go back to another answer you gave Justice Kennedy? You mentioned that the termination remedy was reserved for quite egregious cases. Is the restriction to the egregious cases in a regulation somewhere?

MR. LAMKEN: No, Your Honor. That's simply a

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matter of administrative practice. The Secretary is for --

QUESTION: A matter of grace by the Secretary?

MR. LAMKEN: That's correct.

QUESTION: Do you think the Secretary can be reversed for abuse of discretion?

MR. LAMKEN: Yes. If the Secretary were to implement the statute in a manner that was unconstitutional, or an extreme abuse of discretion --

QUESTION: Terminating for a violation that couldn't be appealed here?

MR. LAMKEN: Yes. That would be reversible error I believe, yes.

QUESTION: Thank you, Mr. Lamken.

Mr. Anderson, we'll hear from you.

ORAL ARGUMENT OF KIMBALL R. ANDERSON

ON BEHALF OF THE RESPONDENT

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

I'd like to begin with the question that seems to be troubling the Court, and I think Justice Souter began the dialogue with the question this morning of whether it was possible for a provider to make a challenge to the regulations or the Secretary's rulemaking authority without suffering a termination, and Mr. Lamken initially

answered that question yes, and then he said, well, maybe no, and maybe it's discretionary.

I would suggest that the answer is unequivocally no under the statute. If you have your appendix before you, on page 14a and 15a of appendix A to the Secretary's brief --

QUESTION: Of the petition or the brief?

MR. ANDERSON: The petitioner's brief, Your Honor.

QUESTION: The petitioner's brief?

QUESTION: The petitioner's brief?

MR. ANDERSON: Yes, the petitioner's brief on the merits -- we see that on page 15a of the petitioner's brief on the merit, on the -- in their appendix, we see under section 1395cc(h) that this is the really only route for a provider to eventually arrive at the doorsteps of a 405(g) court. You see in the middle of that paragraph (h)(1), and to judicial review of the Secretary's final decision after such hearing as provided in -- as such hearing is provided in section 405(g).

Now, what kind of determination gets us there? We see that in the preceding sentence. There has to be a determination by the Secretary that the provider is not a provider of services -- in other words, he's not even in the class of institutions eligible to participate -- or

(2) a determination has been made --

QUESTION: You say the previous sentence. It looks like all one sentence to me. Am I wrong?

MR. ANDERSON: You're correct. There's two parts to that first sentence, though. It says, an institution or agency dissatisfied with a determination by the Secretary that it is not a provider of services, or with the determination described in section (b)(2) of this section, shall be entitled to a hearing under 405(b) and to judicial review under 405(g).

You then look over on the preceding page, which we see on page 14a of the appendix. We see that under (b)(2) the determination there specified is a determination that the Secretary has refused to renew a provider agreement, or has terminated a provider agreement for one of the reasons set forth in (2)(A), (B), or (C).

That statutory language we believe indicates clearly that for an individual provider to assert the kind of constitutional challenge here, we have to basically fall on a sword, subject ourselves to termination or extinction, let our patients be displaced, and then subject ourselves to an administrative process that --

QUESTION: Not just subject yourself to it, you have to incur it.

MR. ANDERSON: That's right. We have to incur

it.

QUESTION: It's not just that you're exposed to it. What you're saying is, there has to actually be a termination or a refusal to renew. Is that your --

MR. ANDERSON: That is our only route to a 405(g) court, which the Secretary argues is our adequate remedy, and I think we also have to look at the administrative process that the Secretary would urge we have to be channeled through.

It is the bizarre -- would be -- it's the most bizarre administrative review process, where the critical factual issues are not heard, the issues in the case are not narrowed, the adjudicator cannot hear or adjudicate your claim, and where the adjudicator has no particular expertise in your claim, and then on --

QUESTION: Mr. Anderson, on this argument, the Seventh Circuit said, well, we don't know about any of that. These regulations are hot off the press. We have no idea how they're going to be applied and interpreted.

So what you're describing is something that may be, but maybe not, and my question to you is, is there really a significant difference between the Seventh Circuit's bottom line -- that is, your vagueness challenge, your not-possible-to-administer-equally challenge -- that they wouldn't hear any of those claims

because they were not ripe.

Is the bottom line significantly different? What do you get from the Seventh Circuit decision, apart from the manual, that would be different if the Government had prevailed?

MR. ANDERSON: Well, I think the Government's position is, first of all, these kinds of constitutional claims can never be brought by a trade association, so we would get, under the Seventh Circuit's view, the benefits, the resources --

QUESTION: But your members could, and you could join your -- you could then intervene, so that's not a large --

MR. ANDERSON: Well, even the -- even our members cannot individually bring this claim, because this claim is not a claim for benefits, it's not a provider reimbursement claim, it is just a wholly untethered --

QUESTION: But how, then, does an association get the right -- I thought associational standing depended upon the right of at least one member.

MR. ANDERSON: Well, I think it depends on the fact that at least one member has been injured and has a ripe claim, and I think the Seventh Circuit said at very least our APA claim challenging the fact that the Secretary has promulgated, under the guise of a State

operations manual, a rule that --

QUESTION: But I thought one of your answers to Justice Ginsburg's question was that your members could not have -- no individual member could have brought this claim. Was I wrong in thinking that?

MR. ANDERSON: No, I'm saying that the Secretary's administrative review scheme does not allow this kind -- there's not a mechanism for us to bring this claim before the Secretary. That's why we believe we can bring it directly to the district courts under 28 U.S.C. section 1331 --

QUESTION: But that isn't responsive to -- my question is that the Seventh Circuit said, we're not going to throw you out because you sued under 1331, but we're not going to listen to your claim about vagueness, we're not going to listen to your claim predicting inconsistent application, because we don't know how these things are going to work.

MR. ANDERSON: Well, I think what the Seventh Circuit said, that the APA claim was ripe, and that our claim that the regulations effect a deprivation of rights without a proper hearing of the timing and type demanded by the Constitution may or may not be ripe, and remanded that back to the district court, if I recall, for --

QUESTION: What the Seventh Circuit said was

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exactly, an industry subject to a battery of new regulations cannot ask for an all-at-once review, but must wait until the agency has worked through the process in administrative adjudication. That sounds like most of what you're complaining about you could not bring before the court now on ripeness grounds.

MR. ANDERSON: Well, the -- here's what the court actually said. It said, to the extent the council believes that the regulations fail to provide predeprivation hearings at the time and in the form the Constitution demands, the claim may be ripe for decision.

They go on to say that they're going to leave it to the district court for the resolution of that ripeness issue, and then they go on to say that under any circumstance the APA-based objection to the adoption of the manual is within the district court's jurisdiction and should be addressed on the merits.

QUESTION: That was the only claim that they said was ripe?

MR. ANDERSON: As a matter of law, yes.

QUESTION: They didn't say -- they said may, which is what is bothering me about this. I mean, I'm not sure you have a ripe claim, and so if you don't have a ripe claim there's just no problem. You'd simply go through the regular process. Don't we have to decide that

first?

MR. ANDERSON: Well --

QUESTION: What are we supposed to do, assume that you have a ripe claim and then decide hypothetically?

MR. ANDERSON: Well, certiorari was not granted on the ripeness issue, but I think that we clearly do have a ripe claim as to the APA objection, and as to the remainder I think the Seventh Circuit is correct that it should be left to the district court to determine whether or not ripeness --

QUESTION: So if you assume it's a ripe claim, and you do have the language you just quoted at the beginning of your argument, that language seems to say, well, we're sorry, this is an antipreenforcement review statute. That's what the language does. So even if it's ripe, you've got to go suffer this penalty because that's what it says.

MR. ANDERSON: I think that's correct, but I think we're --

QUESTION: Your response to that is what?

MR. ANDERSON: Well, I think the response to that is, we're really by that issue with Bowen v. Michigan Academy, with --

QUESTION: Well, you say Bowen -- Bowen was interpreting not -- it didn't interpret (h). They said it

interprets 1395ii. What the court there said is, mutatis mutandis, and so we don't have to reach, it says, the interpretation of (g) or (h).

We have to interpret what the words mutatis mutandis meant, i.e., the equivalent language in ii, and so that's what they were interpreting there. We're not talking about ii, we're talking about cc. We're talking about something else, or (g) or (h).

MR. ANDERSON: Well, I think we're really talking about that third sentence of section 405(h). The Court in Bowen v. Michigan Academy squarely held that the Government was contending that that third section prevented resort to the ground of Federal question jurisdiction under 28 --

QUESTION: I know there's no doubt the Government was talking about that in Bowen, but the -- in Bowen, Michigan Academy, but what the Court said was, we don't have to reach an interpretation of (g) or (h), because we can deal with this by interpreting the equivalent of mutatis mutandis language in ii, and that made it applicable to the instance where, in the absence of the Court's interpretation of ii, there would be no review at all.

MR. ANDERSON: Well, I --

QUESTION: This is different, says the

Government, because you get review eventually. You just get it under a certain hardship.

MR. ANDERSON: Well, we get it only if we fall on a sword, and let's talk about what type of review we get under section 405(g). Section 405(g) courts are courts of very limited jurisdiction.

QUESTION: You're talking now about the district court?

MR. ANDERSON: Yes, I am.

QUESTION: Okay.

MR. ANDERSON: Yes, I am. Let's assume that we go through this kind of, what I call a Kafkaesque administrative proceeding, where the hearing officer won't hear or adjudicate our claim.

QUESTION: Which the Seventh Circuit said they just -- they didn't know enough about it to agree with you or not, is that right?

MR. ANDERSON: I didn't read it that way --

QUESTION: How did you read it?

MR. ANDERSON: -- Your Honor. I just read it to say that our APA claim was ripe, and that as far as the claim that the regulations provide -- fail to provide predeprivation hearings, that that would be left to the district court for further factual resolution. I think that our claim -- let's take our APA --

QUESTION: What you refer to as your APA claim, to be clear on what that was, was that the manual -- you contended that the manual required notice and comment, and there had been no notice and comment, so that was a discrete, concrete issue.

MR. ANDERSON: That's correct.

QUESTION: Unlike your prediction of how these hearings would work.

MR. ANDERSON: That's correct. There's two pieces, but let's take the APA claim for a moment, and let's say we have to channel that through the administrative exhaustion mechanism of section 405(b).

Now we're presenting a claim, an attack on the validity of the Secretary's rulemaking. We're presenting it to an adjudicator who has no expertise in the area, is barred by the Secretary's instructions from hearing or adjudicating the claim, and then, after we go through this kind of bizarre procedure, then we are before a district court, theoretically, after we've fallen on our sword and been terminated. Now we're before a district court that is vested with jurisdiction only under section 405(g).

QUESTION: But your notice and comment claim is really out of the mainstream of this kind of litigation. In other words, I mean, I don't think the Government's fear is that we're going to have a whole lot of notice and

comment claims go to the district court. It's the substantive challenges to the regulations that are the real problem, so it seems to me that perhaps one could split off the notice and comment claim from the rest of the things, and I'm sure that wouldn't please you.

MR. ANDERSON: No, it wouldn't please me, and I don't think it would be -- I don't think that it would be justified under the statutory language. I don't see any congressional intent to split off those kinds of claims, and I think that the legislative history and the statutory structure has already been reviewed --

QUESTION: But when you rely on the notice and comment claim, you're putting the administrative procedure in its least appealing light, it seems to me. I mean, certainly I thought the Seventh Circuit said we just don't know how the review procedure will go, because these things are brand new, on the substantive claims.

MR. ANDERSON: Well, let me talk about challenge to the regulations for a moment, because that seems to be a concern. The regulations that the Secretary is adopted we were challenging in part because they preclude even administrative review of significant, potentially harmful events to our members.

They preclude review of certain survey and enforcement determinations, including the issuance of

deficiencies without a remedy, they preclude any administrative review of the Government's choice of remedy, so you get -- you can get terminated, or you can get fined, or you could have State monitoring.

You have no latitude or permission by the Secretary to challenge the choice of remedy, and there is no administrative review regarding the determinations regarding the level of noncompliance. We say that these regulations are beyond the Secretary's statutory authority, and are also unconstitutional.

Now let's say we are --

QUESTION: How could they be unconstitutional? I mean, your client is free to run the nursing home and give up the Federal support.

MR. ANDERSON: Well, that's an interesting constitutional question of whether the Secretary can allow us to participate and then inflict reputational injury, which I'll talk about in a moment, and other harm without a predeprivational hearing.

One of the reputational harms we allege is the fact that these determinations, which I've outlined here, and that are nonreviewable in certain circumstances unless you fall on a sword, have to be published. They stay on your record. They have to be put on a Web site. They have to be posted to the State agencies. They have to be

posted to residents and patients.

The Secretary's agents are allowed to characterize the institution as a poor performing-facility, or a deficient facility, and we have alleged that these kinds of events causes reputational injury, financial injury, which the Secretary, by her instructions to her agents, has prohibited any kind of administrative review unless you're willing to fall on the sword and suffer a termination.

QUESTION: But you suggest no limitations for your theory. Your answer to the Chief Justice's question indicates to me that if we rule in your favor the current regime of not attacking the regulations except in a disputed claim will be completely displaced. I see no limitation on your theory.

MR. ANDERSON: I think the limitation is the one -- you know, I think the scheme that I propose is the one that Congress has intended, that when you have a statutory or constitutional challenge to the Secretary's rulemaking or regulations that is completely untethered to a claim for benefits, or completely untethered to a claim for provider status, termination or nonrenewal, then those types of claims do not have to be channeled through the Secretary's administrative --

QUESTION: But if a claim is completely

untethered, what is the standing to bring it?

MR. ANDERSON: The standing is the fact that these rules and regulations that I've described are actually being enforced, and they are actually causing harm to our members.

QUESTION: Well then, that suggests that there may be -- might be someone who could bring a so-called tethered claim.

MR. ANDERSON: Yes. You tether it to a termination. You fall on -- the provider says, okay, I'm just not going to comply with this. I'm going to suffer a termination, and then I will tether it to a termination claim under section 1395cc(b).

QUESTION: But your argument is that you should bring what you call an -- you can bring what you call an untethered claim, that without having suffered any injury, kind of an advanced declaratory judgment, is that correct?

MR. ANDERSON: No. I would not agree that we could bring that without suffering any injury, and I would suggest that we have alleged in our complaint and, indeed, we submitted to our district court evidence in the form of affidavits of actual injury.

QUESTION: How does it differ from the situation of the one plaintiff in Ringer who said, I can't have post-review because I haven't got the money to get the

procedure and be denied the benefit, so I want an up-front declaratory ruling that I'm entitled to reimbursement?

MR. ANDERSON: I think the answer is that Ringer itself and its progeny has characterized that case as one that is at bottom a claim for benefits, so there you had a claim that was not, as I said, totally untethered from an individual claim for benefits.

QUESTION: Do you have any client --

MR. ANDERSON: This is the --

QUESTION: Don't you have any -- what I don't understand as a practical matter is, there must be somebody, in all the clients that you have, that could violate some minor provision of this thing and incur a fine of $2.50 and make all the claims that you want to make in the context of litigating the legality of that fine. Why can't you do that?

MR. ANDERSON: Well, for the reason I attempted to address at the outset, which is, civil monetary penalties are not reviewable by a section 405(g) court. To get to a section 405(g) court -- I'm using that to refer to the judicial review described in section 405(g) of the Social Security Act. You only get there, for a provider, through section 1395cc(f).

QUESTION: What I -- I thought it was 1395x. Is

there some provision -- I mean, it has three things, you know, which you can't tell what they are, on the opposite page, on page 14a, and in looking at those things it looked as if some of them might be sort of minor things you could violate, incur a fine, and get all this raised.

MR. ANDERSON: Yes, but as I read that, there have -- paragraph (2) goes hand-in-hand with (A), (B), (C). In other words, you have to have a refusal, or a renewal, or a termination after the Secretary has made one of those determinations. Do you see, Your Honor, the words, after the Secretary?

QUESTION: -- (off mike)

MR. ANDERSON: Okay.

QUESTION: -- (off mike)

MR. ANDERSON: Yes. Well, the whole thing is very dead.

QUESTION: Does the Secretary have any record of wishing to cooperate with providers for little test cases?

MR. ANDERSON: Not that I'm aware of, but you know, that's exactly what the Sixth Circuit did in the -- in its decision in Michigan, the Michigan association case that is the other half of the split that brought us here, the Michigan association case.

There, the Court candidly acknowledged that the practical difficulties that the nursing homes face is

pretty much the same catch-22 that the Supreme Court addressed in McNary v. Haitian Refugee, and they said that that really didn't trouble them. We are confident that at least one of its members will find a test case worth pursuing through which the association's constitutional and statutory claims have been heard.

I say that's ridiculous, and bad policy, that without, you know, a scintilla of evidence in the legislative history or the statute, we would arrive at a conclusion urged by the Secretary where our member -- we cannot bring these claims at all through an association, and our individual members can only bring them if we fall on our sword. We put --

QUESTION: On the question of cooperation, Salfi itself was an example of that, wasn't it, because as I understand that claim, it hadn't gone the entire administrative route, but the court said, the Secretary can waive the exhaustion part of it.

What can't be waived is going in that 405 (g) and (h) door, but they hadn't come to the end of the line before the administrator in Salfi, and yet the court said that judicial review under 405(g) and (h) would be okay if the Secretary waives going through to the end.

Isn't that correct about --

MR. ANDERSON: Well, I think --

QUESTION: -- that there was cooperation to that extent in Salfi?

MR. ANDERSON: I think for Mr. Salfi, he had come to the end in the sense that he had been finally denied the benefit he had claimed but, to be sure, Your Honor is correct that he had not --

QUESTION: She had not. It was --

MR. ANDERSON: You may be right.

QUESTION: -- Mrs. Salfi.

MR. ANDERSON: She had not completely exhausted her administrative remedies, and the court said that exhaustion could be excused. It was discretionary with the Secretary.

QUESTION: Do you have any -- I can understand you're upset about the concern that you have to be terminated from the program before you can test its legality. Is there any other concern? Is there -- I mean, what I mean by that is, you -- suppose that you could have preenforcement review, but you had to exhaust procedure before the Secretary before you got it.

That is, you had to write to the Secretary, or ask the Secretary for a hearing, or ask the Secretary to consider changing the regs, or present your objections, get a decision from the Secretary.

MR. ANDERSON: Yes --

QUESTION: Do you have any objection to those normal kind of exhaustion requirements?

MR. ANDERSON: Yes, I do have some other concerns, because the normal kind of exhaustion requirements are bizarre as applied to this situation. We -- the Secretary would have us incur the expense and time, which often takes months or years, to go through an administrative process where the hearing officer ALJ is barred from hearing our evidence, commenting on it, or adjudicating it.

And then, as I was trying to explain, if we go through that process without an adjudication, without any fact-finding, without any clarification of the issues, now we finally have the right to review under a district court --

QUESTION: What -- I get that.

MR. ANDERSON: Okay.

QUESTION: Now, what happens under a -- you happen -- in criminal cases even, you do this all the time. You say, Secretary, I don't want to comply with A, B, C, and D. The Secretary says, you have to. You say, okay, we'll make a stipulation here. We'll do it under protest. You may refuse to enter into the agreement, you see, because we're not complying with A, B, C, D.

Now, we'll agree -- we'll appeal all that,

whether you're right, you have to do it or not, and in the meantime, we'll go ahead. All right, you see -- in other words, you do it the same way like a suppression of evidence case or something.

They say, we're going to convict you, but we get to appeal the suppression of evidence. Isn't there a way of doing that, making an agreement? The answer is, you don't know.

MR. ANDERSON: I don't know, and I don't think there's any history of the Secretary being so benevolent.

I also want to comment, if I may -- you said do I have any additional concerns, and I've tried to articulate the falling on the sword, the futility of the administration of the exhaustion remedy, but I have an additional concern about the constraints that section 405(g) puts on a district court when one of these claims -- hypothetically it's now gone through months, if not years.

Now this claim arrives at the doorsteps of the district court vested with jurisdiction only under section 40 -- 405(g). That court's hands, I would suggest, are really tied. That court is sitting as basically a court of review. Section 405(g) says it may affirm, modify, or reverse the Secretary's decision.

The Secretary herself has taken the position

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that the district courts, sitting pursuant to section 405(g), have no fact-finding ability, that they are sitting literally as courts of appeal. She took that position in a case called Grant v. Shalala. It's a Third Circuit decision, and the Third Circuit sustained the Secretary's position, finding that the district courts had no fact-finding ability.

The district court then is presented with an inadequate factual record, because the ALJ couldn't hear it, and the district court, if you read 405(g) literally, can only remand to the Secretary, that as we know from this Court's decision in the Nelconyan case, its powers to remand are very limited.

It can remand only if the claimant has presented new evidence, and by count of a rule 60 burden has to demonstrate that the new evidence didn't exist and couldn't have been presented to the Secretary, and that good cause exists for not presenting it to the Secretary on the way up through the administrative process.

So I would suggest that first of all we have the falling on the sword, then we have the futility of presenting your claim to an ALJ who won't hear it or rule on it, and then you get to a court who the Secretary has persistently maintained has very limited powers to sit merely as a court of review. I suggest that that is

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absurd, to impute that intent to Congress with nary a scintilla of evidence in the legislative history --

QUESTION: But I thought the Secretary had conceded in this case that you could make your record in the district court. Am I wrong on that?

MR. ANDERSON: I haven't heard that concession from the Secretary. I think that she's certainly taken the position in other cases that the district court is constrained.

QUESTION: I'll look through the briefs again.

QUESTION: As to questions over which the Secretary has no confidence, like constitutional questions, then the district court is the first instance decider.

MR. ANDERSON: Yes, but how can the district court -- the district court is going to be constrained, because sitting as a court of review, it is not going to enjoy the benefit of a fully developed factual record that may be necessary to resolve the constitutional claim and so you have kind of a bizarre ping pong match, where the case comes up to the district court without an adequate record and the district court, trying to comply with 405(g) and this Court's decision in Nelconyan, says well, I have to remand it to the Secretary's ALJ who --

QUESTION: Not a problem.

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MR. ANDERSON: -- can't hear the claim.

QUESTION: Not a problem. We can just disagree with the Secretary that the district court can't take evidence. I mean, if this were a court of appeals, I can understand that position. But you have a district court. They're used to taking evidence.

MR. ANDERSON: You could. I'm just suggesting that the Secretary herself has blocked us at the outset, in the middle, and at the end.

QUESTION: Oh, I have no doubt that she has not been benevolent.

(Laughter.)

MR. ANDERSON: I'd like to just comment briefly, before I sit down, on one final point about whether or not Bowen v. Michigan Academy has any remaining vitality, or has lost its precedential force. The Secretary suggests that it does.

I suggest that if that's the case, I think that point's been lost on this Court, which has repeatedly cited it for the proposition that I think it stands for, that section 405(h)'s preclusive effect does not reach to collateral challenges to the validity of the Secretary's --

QUESTION: Do you think the Court would have reached that conclusion if part B determinations had been

subject to judicial review the way part --

MR. ANDERSON: Yes.

QUESTION: -- D were?

MR. ANDERSON: Yes. I think the linchpin of the decision was a straightforward statutory construction. I don't believe the linchpin was the presumptions, or creating an exception to the statute, because --

CHIEF JUSTICE REHNQUIST: Thank you. Thank you, Mr. Anderson.

MR. ANDERSON: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

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CASE NO: 98-1109

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)