

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: JUATASSA SIMS Petitioner v. KENNETH S. APFEL,  
COMMISSIONER OF SOCIAL SECURITY

CASE NO: 98-9537 *et. 2*

PLACE: Washington, D.C.

DATE: Tuesday, March 28, 2000

PAGES: 1-60

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CAPTION

CASE NO.

PLACE

DATE

PAGES

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 JUATASSA SIMS :

4 Petitioner :

5 v. : No. 98-9537

6 KENNETH S. APFEL, COMMISSIONER :

7 OF SOCIAL SECURITY :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, March 28, 2000

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States at  
13 11:10 a.m.

14 APPEARANCES:

15 SARAH H. BOHR, ESQ., Atlantic Beach, Florida; on behalf of  
16 the Petitioner.

17 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor  
18 General, Department of Justice, Washington, D.C.; on  
19 behalf of the Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	SARAH H. BOHR, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	MALCOLM L. STEWART, ESQ.	
7	On behalf of the Respondent	29
8	REBUTTAL ARGUMENT OF	
9	SARAH H. BOHR, ESQ.	
10	On behalf of the Petitioner	56
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 98-9537, Juatassa Sims v. Apfel.

5 ORAL ARGUMENT OF SARAH H. BOHR

6 ON BEHALF OF THE PETITIONER

7 MS. BOHR: Mr. Chief Justice, and may it please  
8 the Court:

9 This Court has held that Social Security  
10 proceedings are intended to be simple and informal,  
11 nonadversarial, nontechnical, and accessible even to the  
12 layman claimant. Indeed, almost half of all claimants who  
13 attend Social Security administrative hearings do not have  
14 attorney representation. This Court also noted that the  
15 Social Security Act is intended to be unusually protective  
16 of claimants.

17 Consistent with congressional intent, the Social  
18 Security Administration has promulgated and created a  
19 panoply of regulations, rules, forms, and notices which  
20 embody that simplicity, that informality, and that  
21 claimant-supportive process mandated by Congress. As  
22 conceded by the commissioner, the statute and regulations  
23 do not require that claimant specifically delineate any  
24 claims of error or specific issues when seeking review by  
25 the appeals council from an administrative law judge

1 decision.

2 QUESTION: I thought the forms contain spaces in  
3 which you're supposed to state the reason for your appeal.

4 MS. BOHR: The form in question contains three  
5 lines of space, and it states, my reasons for disagreement  
6 are.

7 QUESTION: Right.

8 MS. BOHR: It doesn't state any warning on it  
9 that you must list specific issues. There's nothing in  
10 the notice of decision that is sent to the claimant when a  
11 claim is denied that warns the claimant that if they do  
12 not delineate specific issues in their appeal they will  
13 waive that right in Federal court and, in fact,  
14 significantly, Justice Scalia, the notice of decision, the  
15 one issued in this case, contains many other warnings. It  
16 warns a claimant that if they file a new application it's  
17 not the same thing as appealing. They lose -- they may  
18 lose benefits.

19 QUESTION: Well, this claimant was represented  
20 by counsel.

21 MS. BOHR: Yes, she was.

22 QUESTION: At every stage, no? Now, the point  
23 you're making now, that there's no warning, I suppose  
24 would have some force in a case where you're dealing with  
25 a layman.

1           But where you're dealing with a lawyer who knows  
2 the usual rule in administrative cases that you have --  
3 indeed, any case, judicial or administrative, that you  
4 have to have complained about what you're appealing, and  
5 if you don't specify what it is, you abandon it. Isn't  
6 that the usual rule throughout the law?

7           MS. BOHR: Your Honor, in Social Security  
8 proceedings the scheme is different. We have set up a  
9 very -- Congress has established an informal,  
10 nonadversarial system of decisionmaking. Social  
11 Security's own regulations and rules do not require that a  
12 claimant specify issues.

13           In fact, the regulations provide that the review  
14 is plenary, meaning that all issues are before the Appeals  
15 Council unless the Appeals Council notifies the claimant  
16 that they intend to limit the issues, so the  
17 regulations --

18           QUESTION: But --

19           MS. BOHR: -- provide for a plenary review.

20           QUESTION: -- that doesn't help you I don't  
21 think, Ms. Bohr, because we're talking here about whether  
22 you have to raise it before the Appeals Council.

23           Granted, you can take anything that happened  
24 before, before the Appeals Council. We're talking about  
25 whether you can take something that you didn't take to the

1 Appeals Council to the Federal court.

2 MS. BOHR: That's correct, Mr. Chief Justice.

3 QUESTION: So why don't you have to --

4 QUESTION: Were you the counsel below --

5 MS. BOHR: Not at the Appeals Council level.

6 QUESTION: -- Ms. Bohr, at the Appeals Council  
7 level?

8 MS. BOHR: No, we were not.

9 QUESTION: Why wouldn't it be helpful to raise  
10 issues that the claimant thinks are important before the  
11 Appeals Council?

12 MS. BOHR: Well, certainly --

13 QUESTION: It just strikes me as rather odd that  
14 the claimant wouldn't want to raise them.

15 MS. BOHR: Well, certainly in this case the  
16 record does reflect that Ms. Sims' counsel raised many  
17 matters in her -- in the appeal, but --

18 QUESTION: Some, but apparently never claimed  
19 that the administrative law judge should have ordered a  
20 consultative examination. That was never raised --

21 MS. BOHR: No, it was not.

22 QUESTION: -- anywhere down the line until the  
23 district court, was it?

24 MS. BOHR: No, it was not. I think certainly it  
25 can assist the process for claims to identify issues, and



1 they do. Most claimants list some kind of issues in  
2 support of their appeal. The problem is that we have a  
3 scheme that doesn't require that. It doesn't require  
4 that.

5 QUESTION: Where does it say it doesn't? I  
6 mean, the normal hornbook administrative law is just the  
7 same as for a district court and a court of appeals. If  
8 you don't raise an issue, you lose it.

9 Now, there can be exceptions to that, but I  
10 mean, unless there's something that says there's an  
11 exception, I don't know why we'd assume there was one.

12 MS. BOHR: That is certainly a rule, and many  
13 agencies follow that rule --

14 QUESTION: No, no, it's not an agency follows  
15 it. To my knowledge, that is the uniform practice of the  
16 United States courts. You raise an issue, or you lose it,  
17 with exceptions. With exceptions.

18 MS. BOHR: But you have to look at what are the  
19 prudential considerations for the application of common  
20 law issues of exhaustion, which is what you're describing.

21 QUESTION: No, I'm just saying I never saw a  
22 case that didn't follow that rule, and then what they  
23 usually argue about is whether there's an exception, and  
24 there are many. So I just wondered what there was here  
25 that would say -- there may be many things that would take

1 you out of what I'd call the hornbook rule, or maybe I'm  
2 wrong about the hornbook rule. I'm just saying, I thought  
3 that's what it was.

4 MS. BOHR: The hornbook rule you're referring  
5 about is the -- is a rule that claimants may be required  
6 to list issues, but you have to look at the whole  
7 statutory scheme we're talking about.

8 You can't just look at these things in a vacuum,  
9 and Congress, as this Court pointed out in the McCarthy v.  
10 Madigan case and the Darby v. Cisneros case, you have to  
11 look with consistency with the actual underlying  
12 congressional intent, and any applicable statutory and  
13 regulatory scheme, in determining whether exhaustion  
14 should be required at all, and issue exhaustion is part of  
15 the doctrine of exhaustion of administrative remedies.

16 And courts have also set forth certain  
17 exceptions from that rule, and they should not be applied,  
18 though, blindly. You have to look at whether the  
19 prudential considerations are served, and the two primary  
20 ones identified in the McCarthy v. Madigan case were  
21 protection of agency autonomy and also judicial economy.  
22 Those were the two reasons why you would require someone  
23 to exhaust administrative remedies.

24 Now, in this context we submit that those  
25 purposes are simply not served, because you have an agency

1 that specifically talks about its proceedings are  
2 informal, they're nontechnical, they're -- they are  
3 claimant-supported, you have a process that doesn't advise  
4 you --

5 QUESTION: Now, why? That's exactly what I --  
6 I'm glad -- thank you for getting into this, because  
7 that's -- why does the fact that it's informal make a  
8 difference? I mean, I would have thought it's all the  
9 more reason to bring up the things, or it's at least no  
10 less of a reason, so why does that make a difference?

11 MS. BOHR: It's a combination of being informal,  
12 being simple, being nonadversarial, being --

13 QUESTION: Well, all that could say, let's bring  
14 it up.

15 MS. BOHR: -- all those factors make a  
16 difference.

17 QUESTION: We'll actually get the lawyers out of  
18 the --

19 MS. BOHR: It's a very unique process. Social  
20 Security cases are not like other agencies. We're not  
21 talking about agencies where people come to hearings and  
22 they have -- there's parties on both sides with attorneys.  
23 A Social Security hearing is very informal.

24 QUESTION: I absolutely agree with you that  
25 there is that difference. And now what my question is, is

1 why should that make a difference in terms of whether  
2 you'd have to bring it up or not?

3 MS. BOHR: Because it makes a difference in  
4 terms of how the agency announces -- the agency has, as I  
5 said earlier, a whole panoply of regulations, rules,  
6 forms, and notices, and all those --

7 QUESTION: Well, they can change that. They can  
8 change that. I mean --

9 MS. BOHR: But they haven't changed it.

10 QUESTION: Well, I know they haven't, but what  
11 you're driving us to is to say that although SSA has been  
12 very -- very liberal in saying, you don't have to mention  
13 whatever your claim is, we'll look at it, and if there's  
14 anything that's wrong we'll correct it.

15 They may well be willing to do that internally,  
16 but if we now tell them that if you adopt this approach,  
17 they are going to be able to come to the courts and  
18 reverse you for something that you didn't see, and that  
19 the claimant before you didn't bring to your attention,  
20 they're going to say, now, wait a minute. Maybe we ought  
21 to require people to set forth the reasons that they're  
22 complaining.

23 In other words, I don't think it makes sense to  
24 punish the Social Security Administration by rendering  
25 their decisions more reviewable than the decisions of

1 other agencies simply because they've decided to be more  
2 generous to the claimants. I don't see that it follows.

3 MS. BOHR: Your Honor, when you appeal a case to  
4 the Appeals Council, the -- I think it's significant that  
5 they don't advise people that you have to raise issues.  
6 You look at the Veterans Administration, which is a  
7 similar kind of agency like Social Security --

8 QUESTION: I agree that they don't have to raise  
9 issues. They don't have to raise issues. The Appeals  
10 Council is willing to consider issues that are not raised.

11 But that's quite a separate question from  
12 whether, if you don't raise it and the Appeals Council  
13 doesn't see it, you can then haul the Appeals Council into  
14 court. That's a separate question, and I don't see why it  
15 makes sense to say that because they're generous, they  
16 should be more readily suable in district court than other  
17 agencies.

18 MS. BOHR: Well, first of all, in the Social  
19 Security context, when the Appeals Council denies review,  
20 it's the ALJ decision that goes into Federal court, not  
21 the Appeals Council denial.

22 QUESTION: And if it went just to the ALJ and  
23 then directly to court, as Congress -- that has been  
24 proposed, to cut out this Appeals Council altogether. If  
25 it went from the ALJ to the court, then you would agree

1 that you would have to raise in the district court any  
2 issue in order to get it on appeal?

3 MS. BOHR: Certainly. There is a point that we  
4 concede that the informal, nonadversarial, claimant-driven  
5 process changes to a more formal setting, and we contend  
6 that the way this scheme is currently set up, that point  
7 happens in Federal court. When you file a claim in  
8 Federal court, despite the fact that we have a very simple  
9 kind of system for claimants, when you get to Federal  
10 court you have to raise all your issues.

11 QUESTION: You spend about -- the Appeals  
12 Council is the fourth rung or the third rung within the  
13 agency?

14 MS. BOHR: It is the fourth rung. You apply  
15 initially, there is a decision made, then the claimant  
16 requests reconsideration, then, if they're dissatisfied,  
17 the third step is a hearing before an administrative law  
18 judge, and then if they're denied they must go through the  
19 fourth rung, which is the Appeals Council.

20 Now, this is a huge number of claims. 115,000  
21 cases are filed there in the last fiscal year, and they  
22 have just 20 judges, and there is information we provided  
23 in our brief that there have been studies done which show  
24 that the average judge spends 15 minutes looking at a  
25 claim, they issue boiler-plate denials -- in fact, in 1995

1 they admitted that they no longer were going to even  
2 address the issues that claimants raised in their  
3 decisions.

4 So one of the main purposes of requiring people  
5 to exhaust a step is to look at -- is to help the courts.  
6 Well, how does it help the courts if they don't even tell  
7 you in their decisions why they have denied the case?

8 QUESTION: Ms. Bohr, it's also very -- it's to  
9 help the agency I think, to let them correct a mistake,  
10 and it will be much easier for them to correct it if it's  
11 called to their attention than if it's not, if they're  
12 simply bypassed and it's raised for the first time in  
13 court.

14 MS. BOHR: Certainly we do not -- Chief Justice,  
15 we certainly agree that the agency could set up a system  
16 like this if it wanted to.

17 QUESTION: Well, it has set up -- it has set up  
18 a system like this.

19 MS. BOHR: They haven't set up a system where  
20 they are requiring claimants to raise specific issues.

21 QUESTION: Well, the --

22 MS. BOHR: The regulations provide the review is  
23 plenary.

24 QUESTION: Well, but review -- but provide --  
25 review in the Appeals Council is plenary. Don't --

1 nothing here suggests that they're treating it otherwise.

2 They're not saying, as I understand it, that you  
3 must have raised an issue before you get to the Appeals  
4 Council in order to get it -- in order to bring it to the  
5 Appeals Council. What they're saying is, you have to have  
6 raised it in the Appeals Council before you can go into  
7 court.

8 MS. BOHR: Yes, that is what the agency is  
9 doing, and this is not an -- this is not something that's  
10 provided for within the regulatory scheme. It is a  
11 litigating position now that Social Security is taking in  
12 court matters is, they are raising this requirement, or  
13 this objection to claimants in Federal court to seek to  
14 bar them from raising issues when the vast majority of  
15 claims were never even notified of the need to raise the  
16 issues.

17 QUESTION: It says in the notice that they gave  
18 you, I take it, you have a right -- not you, but your  
19 client, if you do not agree with the ALJ's decision, you  
20 may file an appeal with the Appeals Council. If you do  
21 not appeal, and the council does not review the ALJ's  
22 decision on its own, you will not have a right to court  
23 review.

24 MS. BOHR: Yes.

25 QUESTION: So a lawyer receives that. Now, when



1 a lawyer receives that, I think that lawyer would know, I  
2 better appeal it if I want to go to court, and if a  
3 lawyer -- you know, had a -- a lawyer who knows the basic  
4 ground rules I think might also think, I better raise the  
5 issues.

6 MS. BOHR: Justice Breyer, that provision you're  
7 referring to does certainly advise you of the need to  
8 exhaust, and there's no dispute you have to exhaust that  
9 step. You have to go to the Appeals Council in order to  
10 get -- go into Federal court, but it doesn't advise you  
11 and give you warnings. Note in the following paragraph it  
12 says, you have a right to file a new application at any  
13 time, but filing a new application is not the same as  
14 appealing.

15 QUESTION: What --

16 MS. BOHR: You might lose benefits. It doesn't  
17 warn you about it with the Appeals Council.

18 QUESTION: What is the point of requiring you to  
19 go to the Appeals Council, as you concede they do, if you  
20 don't have to raise issues there that you later want to  
21 take to court?

22 MS. BOHR: Certainly people do raise issues, as  
23 I said, but the problem is, their own regulations don't  
24 mandate that you specify your specific issues, and when  
25 you're looking at imposing on a claimant this exhaustion

1 requirement you have to look at the prudential  
2 considerations.

3 QUESTION: So are you saying, Ms. Bohr, that if  
4 the agency were simply to adopt a rule that you must  
5 exhaust your issues before the Appeals Council in order to  
6 raise them in court, that would suffice?

7 MS. BOHR: Mr. Chief Justice, certainly we  
8 contend this is a matter for the agency and not for the  
9 court.

10 QUESTION: Well now, I asked you a rather  
11 specific question. I think it can be answered yes or no  
12 and then explain if you want to.

13 MS. BOHR: Yes, I think the agency could seek to  
14 do that. They could seek to promulgate a regulation to  
15 require issue exhaustion, but, of course, it would have to  
16 be consistent with the congressional intent I've described  
17 earlier.

18 It would have to be consistent with the intent  
19 of the Social Security Act to be protective of claimants  
20 and the like. It would have to subject to public debate  
21 about whether this is appropriate step, but at least at  
22 that point it would be subject to all the discussions that  
23 need to occur within the agency.

24 The agency has conceded that this should not  
25 apply to unrepresented claimants, for example, this

1 policy.

2 QUESTION: What does representation mean in  
3 drawing that line?

4 MS. BOHR: Well, that's an unclear question.  
5 The commissioner has not stated what does it mean to be a  
6 representative. Anyone can represent a claimant in a  
7 Social Security case.

8 QUESTION: Do you know how it works out in  
9 practice before the Social Security Administration, before  
10 the Appeals Council? What percentage of the people are  
11 represented by counsel, what percentage by lay  
12 representatives, what percentage pro se? Do we have any  
13 information about that?

14 MS. BOHR: Yes. There's some information in our  
15 brief on page 40, footnote 28 we point out that 43.6  
16 percent -- and 1998 is the last year we have statistics.  
17 43.6 percent of claimants do not have attorneys, so 50,  
18 about 56.4 have attorney representation.

19 Now, when you get down to -- the Social Security  
20 statistics are unclear. They just say, representation or  
21 attorney, or -- they don't say what a representative is.  
22 You can have your mother represent you. You -- a parent  
23 can represent a child. A neighbor can represent you. So  
24 it's rather -- and they do not keep statistics regarding a  
25 representative being someone in the business of providing

1 Social Security claimant representation, or someone who is  
2 just representing someone as a favor.

3 QUESTION: But do we know what position the  
4 agency is taking with respect to who is a representative  
5 that will be held to this rule? Is it only counsel? In  
6 other words, is the agency saying, well, for people who  
7 are represented by a parent, a best friend, we don't apply  
8 this rule?

9 MS. BOHR: Justice --

10 QUESTION: Only when they are represented by  
11 counsel, counsel meaning --

12 MS. BOHR: Justice Ginsburg, all the commission  
13 has stated in their documents is that they believe this  
14 rule should only apply to represented claimants. They do  
15 not draw the line for us, and that's certainly a question  
16 you could ask the Government, what does that mean? They  
17 only state that they agree that unrepresented people,  
18 being pro se claimants, should not have this rule  
19 enforced.

20 QUESTION: Well, I'm not sure they have to make  
21 that exception for anybody, lawyers representing or  
22 mothers representing. I mean, you do not have any basis  
23 for objecting to a decision that you've gotten and  
24 asking -- you know, saying it's wrong, and therefore  
25 reverse it, unless you have some reason why it was wrong

1 in mind.

2 I mean, you don't have to be a lawyer -- a  
3 rocket scientist or even a lawyer to know that when you're  
4 complaining about a decision you must have some reason for  
5 complaining about it. Why can't any layman grasp that  
6 simple fact, and then there's a line on the back, you  
7 know, the decision below was wrong because, you know,  
8 three lines.

9 MS. BOHR: Well, we have lodged here --

10 QUESTION: Why -- I mean, my goodness, is this  
11 really something that --

12 QUESTION: In that connection, could I ask just  
13 a factual question? Am I correct in understanding that  
14 the claimant does not have to raise the issue before the  
15 ALJ?

16 MS. BOHR: That's correct. There's nothing  
17 currently that says that the claim --

18 QUESTION: It would seem to me the most  
19 consistent system, to follow Justice Scalia's thought,  
20 would be one that -- because what's being reviewed when  
21 you get to court is the ALJ's decision.

22 MS. BOHR: And I think it's significant on that  
23 point, Justice Stevens, that in the Social Security  
24 context the ALJ actually wears three hats. This is not a  
25 typical adversarial administrative hearing.

1           In a Social Security hearing, the ALJ wears the  
2 hat of identifying the issues. That's the judge of the  
3 ALJ. The ALJ decides what the issues are. The ALJ is  
4 charged with a duty to develop the record. Where -- what  
5 other agencies require the decisionmaker to develop the  
6 file, to recontact a treating provider if the evidence is  
7 insufficient, to order examinations if the record is  
8 slight?

9           It also requires the ALJ to make a decision.  
10 It's an inquisitorial type of process. It's not a true  
11 adversarial system, so the ALJ in this system identifies  
12 the issues.

13           QUESTION: And if the ALJ commits an error that  
14 wasn't even talked about in the ALJ proceeding, if the  
15 claimant is smart enough to raise it before the Appeals  
16 Council, the ALJ can be reversed.

17           MS. BOHR: Yes, and many times I will tell you  
18 there are many instances where claimants do not raise  
19 specific claims of error and the Appeals Council sends the  
20 cases back, because they review it, and they make a  
21 decision without identifying of issues.

22           QUESTION: Where is the principal record made?  
23 Is there -- there's a record made of the ALJ's proceeding,  
24 is there?

25           MS. BOHR: Yes. At the ALJ level there's a tape

1 recording of the hearing, Justice Stevens.

2 QUESTION: But what is -- what record is made of  
3 the Appeals Council proceeding?

4 MS. BOHR: There's nothing before the Appeals  
5 Council. They say they have oral arguments. I think they  
6 had six in the last 10 years.

7 QUESTION: And yet that's where we have the  
8 procedural regularity, before the Appeals Council.

9 MS. BOHR: So there's nothing -- there's no,  
10 really, oral argument. These matters are basically  
11 handled by nonattorneys, individuals --

12 QUESTION: Let me ask you a little more detail  
13 on that, Ms. Bohr. When you want to take a case from the  
14 ALJ to the Appeals Council, you have to file some sort of  
15 piece of paper, I assume, don't you?

16 MS. BOHR: Yes, and they -- they'll take an  
17 applied request for review. They'll take the form, but if  
18 you're an attorney you don't have to even use their form.

19 QUESTION: And then, do you get a decision from  
20 the Appeals Council?

21 MS. BOHR: What you get is typically what we  
22 have here in our record. This is an actual boiler-plate  
23 decision. I do hundreds of these cases. I read records  
24 all the time. We have the decision on page 71 of --

25 QUESTION: Of what?

1 MS. BOHR: Of the joint appendix, and what you  
2 have is, this is a totally -- example of a boiler-plate  
3 denial. It's exactly as I see in hundreds of these files.  
4 This is all you ever get.

5 You have a recitation of the regulation, 404-  
6 970, of the basis they can review, and you have this  
7 sentence: The appeals Council has concluded that there is  
8 no basis under the above regulations for granting your  
9 request for review. Accordingly, your request is denied,  
10 and the ALJ's decision stands as the decision.

11 QUESTION: Well, okay -- now, what if the  
12 Appeals Council grants your -- grants you review, and  
13 rules in your favor? Obviously they don't send this out.

14 MS. BOHR: No, if they grant review, which is a  
15 very small percentage of cases, then the system is  
16 different. Then they do actually issue decisions, and  
17 then the decision looks more like an ALJ decision. It  
18 reads like an ALJ decision, and that becomes a decision  
19 that's appealed in the Federal court. When they --

20 QUESTION: So this is like --

21 MS. BOHR: This is not a decision, it's an  
22 action. It's not even a decision.

23 QUESTION: This is like certiorari denied.

24 MS. BOHR: Yes. It's an action, they deny it,  
25 and then you go into Federal court on the --



1 QUESTION: If the certiorari -- if there's been  
2 a denial, can you go back to the Appeals Council and ask  
3 them to reconsider, or raise any new points? Is there --

4 MS. BOHR: There is a -- the Social Security  
5 regulations have a reopening provision, and any claimant  
6 can seek reopening at the last level they have been at.  
7 If the last level was the Appeals Council, they can ask  
8 the Appeals Council to reopen the case, based on new  
9 evidence, for example. That does happen. Claimants have  
10 new evidence, they can ask the Appeals Council to consider  
11 the new evidence, and they can ask the Appeals Council to  
12 extend the time to file --

13 QUESTION: What's the time frame?

14 MS. BOHR: I believe it's 4 years for -- to ask  
15 for reopening if you're a Social Security claim --

16 QUESTION: Well, can you ask for reopening after  
17 it's gone to the district court?

18 MS. BOHR: That doesn't really happen. I mean,  
19 typically what happens is that the Appeals Council is so  
20 backlogged, quite honestly, what happens is, an attorney  
21 writes a brief to the Appeals Council, they get this form  
22 letter back, and there's no reference of their brief, so  
23 they write to the Appeals Council and they say, consider  
24 my brief, and they'll reopen it to consider the arguments  
25 that were up there but they never found, and then they'll

1 write a decision with those arguments addressed.

2 QUESTION: Well, if the attorney is prepared to  
3 go to district court at that point, having received a --  
4 an unfavorable ruling, what would be wrong with just  
5 saying he has to exhaust by asking the Appeals Council to  
6 raise any specific thing that's been left out?

7 MS. BOHR: The problem is that -- I believe what  
8 you're asking, then, if you've been denied review and they  
9 haven't given any reasons, you want them to go back and  
10 readdress the reasons?

11 QUESTION: I'm saying, assuming we think there's  
12 an exhaustion rule, since there's already a 4-year period  
13 to ask the agency to relook at it, the attorney, before he  
14 goes to the district court, says, well, I want to give the  
15 Appeals Council first crack at this, so he just reopens  
16 and says, I want you to consider A, B, and C, which you  
17 might not have considered earlier in my three-line letter.

18 MS. BOHR: Well, Your Honor, reopenings actually  
19 are quite difficult to get. I mean, they don't happen  
20 that often, and the only reason I've ever seen the Appeals  
21 Council reopen is to consider something that was submitted  
22 and was overlooked when they denied the review, and  
23 they'll go back and reopen it to pull that -- basically to  
24 include that they have now looked at this argument, or  
25 this new evidence that the claimant submitted to the

1 Appeals Council.

2 QUESTION: So the Appeals Council already has an  
3 exhaustion concept about his own reopening, doesn't it,  
4 based on what you've just described?

5 MS. BOHR: They will -- if you've submitted  
6 something to the Appeals Council it needs to be a part of  
7 the record, because if you're going into Federal court --

8 QUESTION: Well, that's --

9 MS. BOHR: -- the record is created from the  
10 documents that were the ALJ hearing, the transcript of the  
11 hearing, which is --

12 QUESTION: So now it sounds, as I said, that  
13 there is an exhaustion concept that the Appeals Council  
14 itself applies, at least for reopening, based on what  
15 you've just said.

16 MS. BOHR: Justice Kennedy, I guess what I --  
17 I'm a little confused about your question. There -- I'm  
18 talking about a case where someone has appealed timely,  
19 and the information somehow didn't get to the file.

20 QUESTION: Well, you told me that there's no  
21 reopening unless they've overlooked something that you  
22 have raised, and I said, that sounds to me like exhaustion  
23 in the present system that the Appeals Council already  
24 follows.

25 MS. BOHR: No, that's not exactly what I meant

1 to say. There are specific requirements in the  
2 regulations in general for reopening. They can be  
3 reopening for new -- new evidence is the most common  
4 reason people seek reopening. If there's new evidence in  
5 their file, or there's been a mistake, it's obvious on the  
6 record, like someone's earnings records were not accurate,  
7 and they were denied benefits because they weren't sure,  
8 they can seek reopening to prove there was an error, those  
9 kinds of reasons.

10 But this is not -- to the Appeals Council, the  
11 point is that you have to have a complete record to go  
12 into Federal court, and in my experience, when things are  
13 overlooked, it just -- all it does is, they then issued  
14 the same letter I've just stated, stating we considered  
15 your brief dated such-and-such, and then that is what  
16 occurs.

17 I think it's important to point out that Social  
18 Security proceedings are different from other  
19 administrative agencies, and the other agencies that have  
20 been described by the Government, they actually have  
21 statutes and regulations that require issue exhaustion,  
22 and here we have a system where not only do the rules and  
23 regulations not require, but we submit that the agency  
24 actually misleads claimants and discourages them from  
25 specifying the very issues they wish to raise, and that's

1 a very important point.

2 QUESTION: Do you think it's up to the agency  
3 what rules of exhaustion the courts apply? I mean, you  
4 know -- or is it up to the courts?

5 MS. BOHR: The -- in fact --

6 QUESTION: Can an agency --

7 MS. BOHR: -- most agencies have regulations.

8 The ICC, the EPA, the Master -- the Merit Systems

9 Protection Board --

10 QUESTION: I know, but suppose -- the ICC's  
11 gone, happily, but let's pick one of the other agencies.  
12 Suppose some other agency adopts a rule and says, we think  
13 that courts really need not require that issues be  
14 presented to us before courts decide them, and hence we  
15 advise everybody who practices before us that you need not  
16 raise issues before us first. You can go to district  
17 court, or to the court of appeals, regardless of whether  
18 the issue was raised before us. Do you think the courts  
19 would be bound by that?

20 MS. BOHR: I think, Your Honor, you have to look  
21 at the prudential consideration. This is what we're  
22 looking at. When the agency does not have a requirement,  
23 or perhaps has a requirement that doesn't require issue  
24 exhaustion, as you've just described, Justice Scalia --

25 QUESTION: Right. That's what I'm asking.

1 MS. BOHR: You have to look at the prudential  
2 considerations.

3 QUESTION: Well --

4 MS. BOHR: It doesn't make sense to --

5 QUESTION: -- what does it tell you?

6 MS. BOHR: -- propose an issue exhaustion.

7 QUESTION: I think -- I look at the prudential  
8 considerations, and what I say is, it's none of the  
9 agency's business.

10 MS. BOHR: But in this case --

11 QUESTION: That whether -- you know, what we  
12 require in order to bring a case before the courts is up  
13 to the courts, not up to the agency.

14 MS. BOHR: But according to the McCarthy v.  
15 Madigan case, you have to look at this matter not just as  
16 a global rule, but what makes sense given the  
17 congressional intent, and given the agency's own rules and  
18 regulations and policies, and in this particular case,  
19 when you look at that, and you look at those  
20 considerations, their -- the act, and the emphasis on an  
21 informality and nonadversarial system, the fact that the  
22 review is plenary by regulation before the Appeals  
23 Council, none of the prudential considerations for the  
24 application of issue exhaustion apply in this case.

25 It's simply not consistent. It's not going to

1 promote the agency autonomy when the agency provides  
2 itself that all issues are reviewed, and that the system  
3 is intended to be claimant-friendly.

4 I'd like to reserve my remaining time.

5 QUESTION: Very well, Ms. Bohr.

6 Mr. Stewart, we'll hear from you.

7 ORAL ARGUMENT OF MALCOLM L. STEWART

8 ON BEHALF OF THE RESPONDENT

9 MR. STEWART: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 The requirement that a claimant exhaust  
12 administrative remedies, and the proposition that we  
13 espouse that particular issues not raised at the Appeals  
14 Council should ordinarily be deemed waived, are  
15 technically distinct, but they serve similar purposes.

16 Both requirements reflect a recognition that  
17 judicial review of Federal agency action imposes  
18 significant costs on both the executive branch and the  
19 Federal courts, and those costs should not be imposed  
20 unless it's clearly necessary, and in particular, courts  
21 should not intrude upon agency processes until the agency  
22 has had a chance to take its best shot at solving the  
23 problem internally.

24 QUESTION: But counsel for the other side says  
25 the agency doesn't want its best shot. The agency itself

1 doesn't care.

2 MR. STEWART: I don't think that's an accurate  
3 characterization of agency practice, and I think perhaps  
4 it's helpful to the Court to look at the regulatory  
5 provision that was being discussed. It's at appendix page  
6 1 of the yellow brief, the petitioner's reply, and the  
7 C.F.R. cite is 20 C.F.R. 404.970.

8 And what the regulation says, it says, cases the  
9 Appeals Council will review, the Appeals Council will  
10 review a case if, and then it lists various criteria which  
11 correspond pretty closely to the normal standards for  
12 appellate review or of judicial review of agency action,  
13 and I think our interpretation of that regulation is best  
14 clarified by contrasting it with this Court's certiorari  
15 practice.

16 That is, it's often said that the Supreme Court  
17 is not a court of error. It happens frequently, I would  
18 imagine, that cases are brought before the Court on  
19 certiorari petitions, and even though a majority of the  
20 Justices, or perhaps even all the Justices, believe that  
21 the case was incorrectly decided below, the Court denies  
22 certiorari because the issue raises no -- the case raises  
23 no legal issue of continuing importance.

24 This regulation makes clear that that's not the  
25 way the Appeals Council approaches its business. If --



1 QUESTION: But Mr. Stewart, the agency itself  
2 has determined that the Appeals Council is not going to be  
3 used in a certain number of cases, isn't that so?

4 MR. STEWART: The agency is currently conducting  
5 an experiment in which, in selected States, we will  
6 dispense with the requirement that the claimant seek  
7 review in the Appeals Council as a prerequisite to seeking  
8 judicial review, and one of the purposes of that  
9 experiment is to determine whether the elimination of that  
10 stage of administrative review has the effect of  
11 increasing the rate at which disappointed claimants file  
12 suit in court.

13 QUESTION: Is this --

14 QUESTION: How long has that been going on, and  
15 how large is this experiment of displacing the Appeals  
16 Council?

17 MR. STEWART: I believe it's 10 States, and I  
18 believe the experiment has been going on since sometime in  
19 1997, and it was originally characterized as a 3-year  
20 experiment. My understanding is that at least the data  
21 collection phase is drawing to a close, although there may  
22 be an evaluation.

23 QUESTION: But now --

24 QUESTION: Is the experiment -- is it directed  
25 to eliminate the requirement of going to the Appeals

1 Council at all, or just to eliminating the requirement  
2 that you raise issues before the Appeals Council?

3 MR. STEWART: It would be directed to whether  
4 the requirement of going to the Appeals Council at all  
5 should be eliminated. Again --

6 QUESTION: May I ask, on the experiment, just  
7 to -- in that experiment, must they raise the issues  
8 before the ALJ as a predicate to raising them in court?

9 MR. STEWART: I mean, it varies a lot depending  
10 on the sort of issue you've raised, you want to raise. In  
11 Richardson v. Piralis, for instance, this Court recognized  
12 that where a particular claim is capable of being raised  
13 before the ALJ, a claimant may be barred from raising it  
14 in Court thereafter, but --

15 QUESTION: Well, I'm not asking what we said in  
16 Richard. What are they doing in the experiments?

17 MR. STEWART: The experiment doesn't change the  
18 ongoing rules in that respect.

19 QUESTION: There's no exhaustion requirement  
20 before the ALJ.

21 MR. STEWART: I think it would be more accurate  
22 to say that the great majority of claims that we  
23 ultimately see in court are claims of a sort that really  
24 could not feasibly have been presented to the ALJ, because  
25 they were claims to the effect --

1 QUESTION: This is -- I don't understand this.  
2 I may be missing something fundamental. I thought the  
3 rule was you do have to raise your claims before the ALJ.

4 MR. STEWART: I think --

5 QUESTION: Unless you fall within some kind of  
6 exception. For example, you're making a claim on an  
7 interpretation of law that the ALJ wouldn't have the power  
8 to resolve.

9 MR. STEWART: Well, I think a lot of the claims  
10 that we get in court are claims to the effect that the ALJ  
11 mislaid the evidence, the ALJ failed to provide a  
12 sufficient explanation for his ruling on a --

13 QUESTION: Obviously you can't raise a claim  
14 before the ALJ that the ALJ made a mistake, but you have  
15 to raise the claim before the ALJ that the evidence  
16 entitles me to a victory, and then you say he made a  
17 mistake, because he thought it entitled me to a defeat.

18 MR. STEWART: I think that's right, and I think  
19 there are cases -- and in fact the district court did  
20 something similar in this very case. That is, one of the  
21 claims the petitioner raised in the district court was  
22 that the ALJ had posed a defective hypothetical to the  
23 vocational expert.

24 QUESTION: The basic rule -- I mean, I've  
25 seen -- it seems to me from my own experience, which might

1 not be typical, is there are thousands and thousands of  
2 claims where people come into Federal court, and what they  
3 say, basically, is I did have a bad back, I did have in  
4 combination with my physical, other physical disabilities  
5 and mental, sometimes mental problems, sufficient to  
6 overcome the grid, and they should have done it on the  
7 grid, or they should have done it in some other way,  
8 hundreds of cases like that.

9 Now, I thought -- or thousands, and I thought in  
10 all of those cases the basic claim of evidence and so  
11 forth had to be raised before the ALJ.

12 MR. STEWART: I think it is correct that if the  
13 claim was susceptible of being raised before the ALJ, it  
14 should be raised before the ALJ or it will be deemed  
15 waived. The only point I'm making is, in our experience  
16 we see a very substantial number of claims that couldn't  
17 feasibly have been raised before the ALJ because they are  
18 in terms a tax on what the ALJ --

19 QUESTION: You're, of course, telling us  
20 something dramatically different from what your opponent  
21 said. I -- maybe you're right. You certainly both know a  
22 lot more about it than I do. But she told us in response  
23 to a specific question by me that in the Appeals Council  
24 there was no exhaustion requirement whatsoever, she could  
25 raise anything she wanted to, and you're saying that's

1 wrong.

2 MR. STEWART: I -- no, I don't doubt that she  
3 can raise it before the Appeals Council.

4 QUESTION: There's no waiver in the Appeals  
5 Council?

6 MR. STEWART: I've never seen an Appeals --

7 QUESTION: All right. So suppose you have issue  
8 A, that was not raised before the ALJ, but was raised  
9 before the Appeals Council. Can that issue be raised in  
10 the district court, in your view?

11 MR. STEWART: Not if the Appeals Council does  
12 not discuss it. If the Appeals --

13 QUESTION: Say the Appeals Council does discuss  
14 it.

15 MR. STEWART: If the Appeals Council discusses  
16 it, it's similar, we would submit, to the pressed-or-  
17 passed-upon-below rule that this Court invokes. That is,  
18 on review of a State supreme court, even if a party --

19 QUESTION: So there's no waiver rule applied to  
20 the ALJ. The waiver rule applies only at the Appeals  
21 Council level and, as I understand it, only in some cases,  
22 not all?

23 MR. STEWART: I think there is -- no, I think it  
24 is consistent with the pressed-or-passed-on-below rule.  
25 The basic waiver rule is, if you don't -- if it was

1 capable of being raised before the Appeals Council, and  
2 you don't raise it there, then you're waived from raising  
3 it after that, but I think, consistent with this Court's  
4 pressed-or-passed-upon-below jurisprudence, even if the  
5 claim was not pressed below, if it was passed upon by the  
6 Appeals Council --

7 QUESTION: Let me ask another question. Does it  
8 make a difference whether the claimant was represented or  
9 not?

10 MR. STEWART: We -- our -- SSA's policy has been  
11 to invoke the administrative default principle only with  
12 respect to claimants who were represented before the  
13 Appeals Council.

14 QUESTION: And represented by whom?

15 MR. STEWART: Represented either by an attorney  
16 or by a nonattorney.

17 QUESTION: By anyone.

18 MR. STEWART: The large majority of people who  
19 are represented are represented by attorneys, and this, in  
20 order to decide this case, the Court need decide nothing  
21 more than that when there was an attorney representing the  
22 claimant --

23 QUESTION: Let me ask just one last question,  
24 and I'll leave you alone. Why don't they spell out a  
25 regulation spelling all this out so everybody knows

1 exactly what the rules are?

2 MR. STEWART: Well, I think part of it is  
3 perhaps suggested by a question that Justice Scalia asked,  
4 that there is something, perhaps not improper, but  
5 inherently problematic about an agency promulgating a  
6 regulation that purports to tell district courts how  
7 they're supposed to conduct their review. The agency can  
8 have a position on --

9 QUESTION: Not tell district courts,  
10 Mr. Stewart, but lots of agencies have appeal  
11 instructions. At every stage, they say, if you want to  
12 appeal, this is what you must do, and spell out the  
13 details, not directed at all to what the district court is  
14 going to find later, but just the audience for these  
15 instructions of the people who are governed by the system,  
16 and surely there are agencies -- I would imagine the  
17 Department of Justice encourages agencies to do that, to  
18 clarify for the people the steps they must take in order  
19 to appeal.

20 MR. STEWART: Well, I think you're right that  
21 there are agencies who have perhaps more precise  
22 regulations as to what the request for an administrative  
23 appeal is supposed to look like. My point was that none  
24 of the regulations that are cited by the petitioner, and  
25 no regulation that I'm aware of, purports to describe what

1 the consequences will be on judicial review of the  
2 failure --

3 QUESTION: Yes, but it's so odd that the agency  
4 that wants to take the position that the issues should be  
5 at least mentioned in writing the Appeals Council seeking  
6 review -- I mean, it could do that without specifying what  
7 happens at the district court level -- and say, as a  
8 claimant, you should set out the issues that you want the  
9 council to review, otherwise it won't review them.

10 MR. STEWART: I mean --

11 QUESTION: I mean, that could be done, couldn't  
12 it?

13 MR. STEWART: I --

14 QUESTION: And the agency could say, and we have  
15 a different rule if you're not represented. But to have  
16 this vague understanding is quite peculiar.

17 MR. STEWART: It could be done by regulation.  
18 As we pointed out in our brief in opposition, the agency's  
19 current intention, again, if the Court holds that it is  
20 entitled to invoke administrative default principles,  
21 would be to revise the forms that are provided to  
22 claimant's representatives in order to alert them to the  
23 prospect that issues not --

24 QUESTION: Why can't you -- in the form that you  
25 have, it says, I request that the Appeals Council review



1 the administrative law judge's action on the above claim  
2 because. Now, why couldn't you just put, parenthesis,  
3 please list all your reasons, for if you don't, you may  
4 find -- you may find -- that you can't raise them later in  
5 a court review?

6 MR. STEWART: I don't doubt that that could have  
7 been done, and I --

8 QUESTION: And moreover on the next page, not  
9 on -- they didn't do that, but the next page it happens to  
10 say, we estimate it will take you about 10 minutes to  
11 complete this form, so I imagine that somebody reading  
12 that might think, gee, I don't -- I have a million reasons  
13 why the ALJ was wrong. Minimum, my lawyer just says list  
14 the top five, but I certainly can't do it in 5 minutes.

15 MR. STEWART: Well, I think --

16 QUESTION: 10 minutes.

17 MR. STEWART: I think the 10 minutes is more the  
18 ministerial act of actually filling out the form, of  
19 writing the words down. It clearly wouldn't encompass the  
20 stage of reading and assimilating the ALJ's decision,  
21 deciding whether an appeal is worth taking, and then  
22 deciding what issues should be raised.

23 But I think a couple of points I would make,  
24 there's no question that the agency could have stated  
25 these potential consequences more clearly, but I think the

1 questions for this Court are, first, is the administrative  
2 default rule a good rule going forward and, second, if  
3 it's a good rule going forward, is there any equitable  
4 basis for not applying the rule to that -- this case?

5 QUESTION: Well --

6 QUESTION: Well, let me ask this. Is it true  
7 that the Appeals Council reviews the whole record for any  
8 conceivable error, whether or not it's been listed by the  
9 claimant?

10 MR. STEWART: I think it's accurate to say that  
11 the Appeals Council, within the time constraints, which  
12 are very substantial, will look beyond the particular  
13 claims of error that claimant's --

14 QUESTION: So a claimant could submit an appeal  
15 without specifying any grounds, and theoretically the  
16 Appeals Council will look at the whole record.

17 MR. STEWART: Well, theoretically the Appeals  
18 Council will look at the record to the extent that time  
19 permits, but I --

20 QUESTION: No, but Mr. Stewart, doesn't the  
21 Appeals -- don't the regs in effect warrant that the  
22 Appeals Council will look at everything? I'm not  
23 suggesting this is dispositive. I'm looking on the reg on  
24 page 8 of the appendix of the blue brief, 404-976.

25 The Appeals Council may limit the issues it

1 considers if it notifies you and the other parties of the  
2 issues it will review, which suggests to me that unless  
3 the Appeals Council negates issues, it is, in fact,  
4 warranting that it will look at everything, so that when  
5 you come to apply the pressed-or-passed-upon rule, it's  
6 fair to say, well, they passed upon absolutely everything  
7 that they didn't specifically exclude.

8 MR. STEWART: I think the limitation of issues  
9 regulation is addressed more specifically to the class of  
10 cases in which the Appeals Council grants review but then  
11 requests further submissions by the parties, much as this  
12 Court might grant certiorari and then request --

13 QUESTION: How do I know that? I certainly  
14 don't know my way through these regs.

15 MR. STEWART: I guess the best indication I  
16 would have is that not every regulation is reprinted here,  
17 and if you look in the Code of Federal Regulations and  
18 view them sequentially, this comes after the regulation  
19 that deals with the circumstances under which the Appeals  
20 Council will grant review.

21 QUESTION: It says, it is entitled, that  
22 section, Procedures Before Appeals Council on Review.

23 MR. STEWART: On Review, that's correct.

24 QUESTION: So it's obviously referring to what  
25 happens after review has been granted and review is being

1 conducted.

2 MR. STEWART: That's correct.

3 QUESTION: So --

4 QUESTION: Before -- during the review, at least  
5 the Eighth Circuit reported, and was this inaccurate, the  
6 Appeals Council routinely considers arguments not  
7 specifically raised by the claimants before it, a product  
8 of its duty to review an ALJ's decision in an informal,  
9 nonadversary manner.

10 MR. STEWART: I guess I -- we would disagree  
11 with the suggestion that it is -- that that duty is  
12 imposed by regulation, or that it in any way follows from  
13 the duty to conduct review.

14 QUESTION: But if it does, isn't it somewhat  
15 deceptive for the -- if this is routine, as the Eighth  
16 Circuit thought it was, and then claimant comes along, or  
17 her coworkers have told her, well, that's how they handle  
18 it --

19 MR. STEWART: I mean, I --

20 QUESTION: -- and then the agency says no, not  
21 for you?

22 MR. STEWART: I think in a sense the notion that  
23 the claimant or the attorney would have that conception of  
24 the Appeals Council process is really inconsistent with  
25 the basic premise of hiring an attorney to represent you.

1           That is, Ms. Sims retained counsel, presumably  
2 contemplated that he would be paid in the event that the  
3 outcome was successful, and Mr. Parvin, who was the  
4 attorney at that time, accepted the representation on that  
5 understanding. It would have made --

6           QUESTION: So we had -- this business about  
7 distinguishing between represented and unrepresented  
8 people, that's a matter of grace within the agency now?  
9 They have no legislation and no regulation that spells  
10 that out.

11           MR. STEWART: That's correct, and all of this  
12 goes to agency practice in arguing before the courts.  
13 That is, even as to unrepresented claimants the final  
14 determination would be made to the court as to whether  
15 claims not raised before the Appeals Council would be  
16 waived. The Social Security Administration would simply  
17 be making clear its view as to what would be --

18           QUESTION: You --

19           MR. STEWART: -- most conducive to the fair  
20 operation of the system, but if I could return to this  
21 point just for a second about representation by an  
22 attorney, it would make no sense for a claimant to hire an  
23 attorney, to agree to pay him a portion of any recovery,  
24 and for the attorney to accept that representation  
25 agreement, if the supposition was that the Appeals Council

1 was to perform precisely the same mode of review no matter  
2 what the content of the challenge was.

3 The whole point of --

4 QUESTION: Oh, I don't think that follows at  
5 all. It seems to me an advocate can perform a useful  
6 function as an advocate even though the same issues would  
7 be considered by the judge in any event.

8 MR. STEWART: Well, that's really precisely our  
9 point, that the fact that the Social Security  
10 Administration will typically go beyond the claims raised  
11 in the request for review and will look at other parts of  
12 the record to determine whether there was an error doesn't  
13 vitiate the fact that the Appeals Council is assisted  
14 enormously by submissions that draw its attention.

15 QUESTION: May I ask if possibly a part of the  
16 motivation for treating claimants represented by lawyers  
17 less favorably than those on their own is to discourage  
18 lawyers from appearing? Because if I remember correctly,  
19 years ago there was a fee limit on what the lawyers could  
20 collect, wasn't there?

21 MR. STEWART: Well, the --

22 QUESTION: Is that still in effect?

23 MR. STEWART: The fee -- there is a fee limit on  
24 what lawyers can collect for representation of claimants  
25 before the agency.

1 QUESTION: What is that limit?

2 MR. STEWART: I believe that it's typically  
3 \$4,000 or a quarter of the past-due benefits.

4 QUESTION: I see.

5 QUESTION: It used to be \$10 when I practiced.

6 (Laughter.)

7 QUESTION: And you couldn't get a percentage,  
8 either.

9 QUESTION: I asked -- I

10 MR. STEWART: But the fee for the administrative  
11 process is not paid by the agency. The agency monitors  
12 the system and must pass on fee requests, but the fee is  
13 paid by the claimant, so the agency doesn't have a  
14 financial incentive to reduce the extent of lawyer  
15 representation. Now --

16 QUESTION: I assume that because you're here --

17 QUESTION: He does have an incentive not to have  
18 a lawyer, because you're better off without a lawyer when  
19 you get to court.

20 MR. STEWART: Well, I think the scheme is  
21 certainly such that if a claimant believed that the  
22 Appeals Council would provide precisely the same mode of  
23 review regardless of the content of the request, then  
24 you're correct, the claimant would have no incentive to  
25 retain a lawyer.

1 I think the incentive is that people understand  
2 that's not the way the system operates, that even though  
3 the Appeals Council will look beyond the four corners of  
4 the request for review, it is still much more likely to  
5 act favorably if the request for review precisely  
6 identifies the purported errors.

7 QUESTION: What percentage of cases do they in  
8 fact review? Do you have any idea?

9 MR. STEWART: The -- in the past fiscal year  
10 they granted review in approximately 24 percent of the  
11 cases. Around 2 percent there was an outright reversal,  
12 an award of benefits, and in the other 22 percent the  
13 cases were remanded to the ALJ.

14 But just to give you an idea of the significance  
15 of that figure, the total number of cases in which a  
16 wholly or partially favorable decision was issued was over  
17 20,000 cases, and the number of new SSI and disability  
18 insurance cases that were filed in the Federal district  
19 court during the equivalent period was a little over  
20 13,000 cases, still --

21 QUESTION: I assume that because you're here we  
22 can presume that the -- this rule would be helpful to the  
23 agency? I mean, if they have 140,000 appeals a year, it  
24 seems to me that maybe some of these reviewing officials  
25 have said, you know, I don't want any more papers. I



1 don't want elaborate attorney presentations, or --

2 MR. STEWART: I think --

3 QUESTION: How am I to assess that? Is that  
4 something I can just guess?

5 MR. STEWART: I mean, I think you are correct in  
6 saying the fact that we are here defending this  
7 proposition indicates that the agency has concluded that  
8 on the whole, the benefits of this rule outweigh the  
9 costs.

10 QUESTION: All right. Now --

11 MR. STEWART: It may be that in some instances  
12 this will cause the filing of over-long requests for  
13 review in the Appeals Council, but on the whole, we think  
14 that if claimants more precisely identified the weaknesses  
15 in the ALJ's decision, that the agency's mission will be  
16 furthered.

17 QUESTION: You indicated toward the outset of  
18 your remarks that there are some issues that the district  
19 court will hear that the ALJ could not here.

20 MR. STEWART: Well --

21 QUESTION: Can you give me an example?

22 MR. STEWART: I guess there are a couple of  
23 different permutations of that. One would be, if the  
24 claim was the ALJ's opinion reflected an erroneous legal  
25 premise, or the ALJ in his opinion -- and this was the

1 primary claim made here -- the ALJ in his opinion ignored  
2 much of the documentary evidence that I had submitted  
3 without good reason, that is a claim that by its nature  
4 couldn't be presented to the ALJ because you don't know  
5 until the ALJ issues its ruling what weight it's attached  
6 to particular evidence.

7 QUESTION: Well, of course, that's always true  
8 with --

9 MR. STEWART: Right.

10 QUESTION: -- a court proceeding. You don't  
11 know what the error is until the decision comes down.

12 MR. STEWART: That's correct. The only point  
13 I'm trying to make is that probably a -- more Social  
14 Security cases than cases generally turn on questions of  
15 assessment of the evidence and less on questions of  
16 abstract principles of law.

17 QUESTION: I thought as far as exhaustion is  
18 concerned nobody's ever -- I mean, the point you just made  
19 has nothing to do with exhaustion. As Justice Kennedy  
20 just said, in a district court, we look to see whether he  
21 presented the basic arguments pro and con in respect to  
22 the district judge. We don't -- the fact that we couldn't  
23 know what the district judge's decision would be at the  
24 time has nothing to do with the issue.

25 MR. STEWART: No, the --

1           QUESTION: The kind of thing I think you would  
2 say normally you don't have to present to the ALJ, is a  
3 claim that, for example, this regulation that you're  
4 following is contrary to the statute, or the -- a statute  
5 is contrary to the Constitution, something that there  
6 would be a principle within the agency that he's not  
7 supposed to make that decision. That's my understanding,  
8 so --

9           MR. STEWART: That's absolutely correct, and  
10 that would be true of the Appeals Council as well, because  
11 the Appeals Council is not a policy-making body. Its duty  
12 is to apply established SSA policy to individual cases,  
13 and so a claim, for instance, that the regulation was  
14 violative of a statute, or the statute was violative of  
15 the Constitution, couldn't be presented either to the ALJ  
16 or the Appeals Council.

17           QUESTION: I have one other question. In normal  
18 exhaustion principles, where there is an agency exhaustion  
19 requirement, and there's a failure to exhaust, and you're  
20 in the district court reviewing the agency's action, or  
21 the court of appeals reviewing the agency action, if  
22 there's a failure to exhaust, does the Article III court  
23 then have the discretion to send it back so that you have  
24 the opportunity to exhaust, or is there always a waiver,  
25 or is there --

1 MR. STEWART: I mean --

2 QUESTION: -- a great deal written about this?

3 MR. STEWART: There's not a great deal written  
4 about this, although the bulk of the cases, or really all  
5 of the court of appeal cases that I have seen that have  
6 applied the rule that claims not raised before the agency  
7 will thereafter be deemed waived, have simply ignored or  
8 dismissed the claim once it was raised.

9 That is, presumably if you had a good reason for  
10 not raising the claim before the agency, the court would  
11 then consider it on the merits, but if you didn't have a  
12 good reason for not raising it, the court typically  
13 wouldn't remand to the agency to give you a second shot.

14 QUESTION: But suppose you had a good reason. I  
15 mean, I thought there was an awful lot of discretion in  
16 this area, such that it's exactly the same as when a case  
17 comes up to a court of appeals from the district court.  
18 Maybe there's a reason why she didn't raise it, in which  
19 case you could send it back, or maybe even excuse it.

20 And here, where she's pushing -- your opponent  
21 is pushing the following reason. Go read the forms and  
22 read the 10 minutes and so forth, and note the nature of  
23 the Appeals Council, and a lawyer might reasonably think I  
24 don't have to. There wasn't good notice about what I was  
25 supposed to do.

1 MR. STEWART: I mean, I think certainly it is  
2 entirely appropriate for the court to entertain the  
3 question, was there a good reason for not raising this  
4 before the agency, but I think here, the question would  
5 have to be answered in the negative, because on top of  
6 everything else, not only was the claimant represented by  
7 counsel, but there was a published opinion within the  
8 Fifth Circuit some 18 months previously that had said in  
9 the clearest possible language, issues not raised before  
10 the Appeals Council, absent extraordinary circumstances,  
11 can't be raised in court.

12 So I think perhaps for that reason the  
13 petitioner didn't attempt to argue in the court of appeals  
14 that yes, there would ordinarily be a waiver principle,  
15 but it was inapplicable here for good cause. Rather, the  
16 petitioner argued that there was not properly --

17 QUESTION: Well, but you have the same scenario  
18 in the Seventh Circuit, and when it reached the Seventh  
19 Circuit they overruled their previous cases, unanimously,  
20 en banc.

21 MR. STEWART: They overruled them, but they  
22 certainly didn't -- I don't think they could reasonably  
23 have overruled them on the ground that there was a lack of  
24 notice. If the --

25 QUESTION: No. They just thought the whole rule

1 was not authorized by any regulation or anything else, and  
2 it didn't make any sense. That's basically what they  
3 said.

4 MR. STEWART: They thought it was inconsistent  
5 with the -- I mean, they made an argument much like  
6 petitioner is making --

7 QUESTION: Right.

8 MR. STEWART: -- that it was inconsistent with  
9 the manner in which the Appeals Council operates.

10 QUESTION: And also, from the experience in the  
11 courts, that is, in a number of these cases there are  
12 hassles in the district court about whether you in fact  
13 raised the issue, because you've got only these three  
14 lines on the form.

15 In fact, in this very case, wasn't one of the  
16 issues the Fifth Circuit said hadn't been raised debated  
17 between the parties as to whether it was raised or not  
18 raised?

19 MR. STEWART: That's correct, and I think you  
20 are correct that that is an inevitable cost of default  
21 rules in any context, whether it be administrative  
22 default, default issues that are not -- issues not raised  
23 before the district court are waived on appeal, habeas,  
24 there are a lot of situations in which in particular cases  
25 the inquiry into whether a particular claim was in fact

1 preserved may be more complicated than an inquiry into the  
2 merits of the claim.

3 QUESTION: Yes, and in fact didn't it happen  
4 in -- well, both the Eighth Circuit and the Seventh  
5 Circuit case said in the end the claimant lost on the  
6 merits, and the court thought it was not worthwhile  
7 hassling over whether it was waived or not, since it had  
8 no merit in any event.

9 MR. STEWART: I agree that that is a possible  
10 outcome, but I think when we argue for administrative  
11 default in these cases our purpose is not to get the  
12 individual claim kicked out of court. Our hope is that  
13 once these principles become established, claimants and  
14 their representatives will realize that in order to  
15 preserve claims for judicial review they must be raised  
16 before the agency, and the Appeals Council will be given a  
17 better opportunity to fix mistakes in a way that avoids  
18 the need for --

19 QUESTION: But you may get rid of the Appeals  
20 Council altogether, because there must be some -- well,  
21 you set up the experiment and 10 States don't have it.

22 Is there also any consideration in the agency  
23 about revising the form so that people will know what  
24 they're expected to do?

25 MR. STEWART: Definitely the agency has

1 committed to revising the form, pending the determination  
2 by this court. Obviously, if this Court held that the  
3 agency was not entitled to invoke administrative default  
4 principles, notice or no notice, we wouldn't be advising  
5 claimants that the administrative default rule might  
6 apply.

7 But if the Court holds that this is a  
8 permissible rule in Social Security cases, the agency has  
9 committed to revising the form in order to make --

10 QUESTION: Committed to whom?

11 MR. STEWART: The form that would be sent to --

12 QUESTION: No, I mean, this agency says -- this  
13 Court says, agency, just do what you're doing. Why would  
14 the agency be motivated to change?

15 MR. STEWART: I think it is partly in order to  
16 avoid claims being kicked out unnecessarily, or perhaps a  
17 better answer would be, the agency as well as the courts  
18 benefit if claims are made clear to the Appeals Council,  
19 that the Appeals Council is given the best possible  
20 opportunity to fix mistakes.

21 QUESTION: Then there's no reason to wait on the  
22 court to make that decision.

23 MR. STEWART: The only reason to wait on the  
24 Court is that, if we started up the machinery for printing  
25 hundreds of thousands of new forms that said, if you don't



1 raise these claims they may be barred in court, and then  
2 the Court 3 months later came out with a decision that  
3 said, we find this sort of rule to be fundamentally  
4 inconsistent with the nature of the Appeals Council and  
5 therefore it's impermissible, questions of notice to one  
6 side, the agency obviously couldn't advise claimants that  
7 they might be subject to a consequence that the Court had  
8 just said they wouldn't be subject to.

9 QUESTION: Mr. Stewart, one question. Are the  
10 members of the Appeals Council lawyers?

11 MR. STEWART: I believe some are lawyers and  
12 some are not lawyers.

13 QUESTION: I hope that in this experiment that  
14 they're doing they take into account not only whether more  
15 district court cases are filed without the appeal, but  
16 also whether uniformity is produced by having all of these  
17 appeals go -- not get dumped right into Federal court.

18 I always thought the whole advantage of an  
19 administrative agency was to assure uniformity of  
20 decisionmaking, which --

21 MR. STEWART: I think that's correct, and in a  
22 certain category of cases the Appeals Council will remand  
23 the case to the ALJ for further explanation or  
24 clarification of the opinion, and sometimes the ALJ will  
25 adhere to the unfavorable benefits determination, but will

1 offer a more persuasive explanation for that finding, and  
2 even if the case winds up in court, that effort was not  
3 wasted. It ensures that the court is reviewing what is  
4 really the commissioner's best articulation of his final  
5 decision.

6 QUESTION: Mr. Stewart on the question of  
7 uniformity, it's been said that the Appeals Council does  
8 not follow case law, that it's -- that each case is set up  
9 on its own, and they don't follow precedent.

10 MR. STEWART: I think it's something of an  
11 overstatement to say the Appeals Council doesn't follow  
12 case -- can't look at case law. The Appeals Council is  
13 bound by SSA policy, and the Appeals Council cannot use a  
14 published decision as a justification for deviating from  
15 established SSA policy. It has to wait for the policy  
16 itself to change.

17 But if there is a question that is not  
18 controlled by any specific published SSA policy, the  
19 Appeals Council can look to case law to clarify that.

20 QUESTION: Thank you, Mr. Stewart.

21 Ms. Bohr, you have 3 minutes remaining.

22 REBUTTAL ARGUMENT OF SARAH H. BOHR

23 ON BEHALF OF THE PETITIONER

24 MS. BOHR: Thank you, Mr. Chief Justice.

25 The \$10 limit you're referring to was in VA

1 cases, not in Social Security cases.

2 QUESTION: My case was a Social Security case.

3 (Laughter.)

4 MS. BOHR: What we're looking at here is, the  
5 Government is coming into Court and they're taking a  
6 litigating position, asking this Court to adopt a position  
7 that's simply not supported by their own agency, policies,  
8 procedures, and forms.

9 I think it's important that the form says it  
10 takes 10 minutes to complete. I write these briefs for a  
11 living. You cannot write an Appeals Council brief in 10  
12 minutes. 8 to 10 hours minimum. You need a record of the  
13 case, you have to ask the Appeals Council to send you the  
14 tape, the transcribing --

15 QUESTION: The Government is just thinking how  
16 long it takes them to prepare a petition for certiorari, I  
17 think.

18 (Laughter.)

19 MS. BOHR: The other thing is, we're talking  
20 about a national program. There's a need for uniformity  
21 in a national program. The Government's coming in here  
22 and they're saying, well, it shouldn't apply to people who  
23 have -- who aren't represented, so you're going to have a  
24 system where some people have one rule, other people have  
25 another rule. They're coming into court, they're

1 admitting that some issues are futile. They acknowledge  
2 that in their brief.

3 So you're going to -- so applying this rule is  
4 going to result in a huge amount of procedural litigation.  
5 Was an issue raised or not? Was someone represented or  
6 not? Was it futile to raise it? Why do we want to clog  
7 the Federal courts with procedural matters? Why can't we  
8 get to the issues and reach the issues if they're  
9 meritorious?

10 We're talking about disabled claimants who have  
11 been denied benefits, who are seeking to get benefits in  
12 Federal court.

13 QUESTION: Well, the reason that they -- is that  
14 if you allow people to avoid exhaustion in several  
15 thousand cases every year, and many more, possibly, people  
16 will then go in and go to court, and they'll just think  
17 of a whole lot of reasons that they never raised before,  
18 and the judges are busy, and magistrates are busy, and to  
19 have all these new reasons hitting them that nobody's even  
20 looked at or thought about is -- just adds to the work  
21 unnecessarily. That's the traditional reason.

22 MS. BOHR: I accept that, but if the point is  
23 that the agency itself doesn't even provide reasons, how  
24 is it helping the court --

25 QUESTION: Because they resolve problems. In

1 20,000 cases every year they resolve them, and those are  
2 20,000 cases that the courts never see.

3 MS. BOHR: And if the agency chooses to have  
4 that policy, then they should subject that kind of a  
5 policy to notice and comment. Just changing a form is not  
6 subject to public debate.

7 QUESTION: You know, it's -- it is the basic  
8 background law, and there's no need for it, but maybe  
9 their form isn't good enough in explaining it.

10 MS. BOHR: But in contrast, for example, the VA  
11 form is very detailed. It's a page-and-a-half to write  
12 your issues. There's a statement that you have to -- you  
13 do this by identifying the issues you are appealing. It's  
14 very specific, instructing claimants.

15 Here, it's a very misleading system.

16 QUESTION: Does it add anything of the nature  
17 of -- Mr. Stewart says -- it isn't -- as I understand it,  
18 it doesn't say anything about what's going to happen to  
19 you, that you'll be precluded in court, does it --

20 MS. BOHR: No, there's no --

21 QUESTION: -- on the VA form?

22 MS. BOHR: There's nothing in the form itself or  
23 in the notice of the decision to the claimant warning the  
24 claimant of the -- what would happen if the claimant fails  
25 to raise all issues.

1 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Bohr.

2 MS. BOHR: Thank you.

3 CHIEF JUSTICE REHNQUIST: The case is submitted.

4 (Whereupon, at 12:10 p.m., the case in the  
5 above-entitled matter was submitted.)

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## CERTIFICATION

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

JUATASSA SIMS Petitioner v. KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

CASE NO:        98-9537

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

Richard M. Sauter