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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: LOUIS W. SULLIVAN, SECRETARY OF HEALTH
AND HUMAN SERVICES, Petitioner V.
MARILYN FINKELSTEIN

CASE NO: 89-504

PLACE: Washington, D.C.

DATE: April 24, 1990

PAGES: 1 thru 52

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IN THE SUPREME COURT OF THE UNITED STATES

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LOUIS W. SULLIVAN, SECRETARY :
OF HEALTH AND HUMAN SERVICES, :
Petitioner :

v. : No. 89-504

MARILYN FINKELSTEIN :

- - - - -x

Washington, D.C.

Tuesday, April 24, 1990

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:07 a.m.

APPEARANCES:

DAVID L. SHAPIRO, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Petitioner.

KENNETH V. HANDAL, ESQ., New York, New York; on behalf of
the Respondent.

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1 state court decisions under Section 1257 and implicitly in
2 the review of court of appeals' decisions under the Hobbs
3 Administrative Review Act, Section 2350, as in the famous
4 Vermont Yankee decision.

5 QUESTION: Does that section require a final
6 judgment?

7 MR. SHAPIRO: Yes, it does, Your Honor, with the
8 exception of decisions granting or denying preliminary
9 injunctive relief.

10 QUESTION: Well, the -- the regular section
11 providing for appeal -- certiorari to this Court from the
12 Federal courts of appeals does not require a final --

13 MR. SHAPIRO: That's correct, Your Honor. The
14 respondent argues in answer to our argument that the court
15 under the Hobbs Administrative Review Act not only has
16 jurisdiction to review final judgments under 2350 but also
17 has general jurisdiction under 1254.

18 We believe that's clearly not so from the
19 structure and language of 2350. 2350 indeed specifically
20 adds to this Court's jurisdiction the ability to review a
21 certified question under 1254. We do not believe that 2350
22 contemplates a general authority to this Court to review a
23 judgment of a court of appeals before or after judgment.

24 What it does is it puts this Court in a
25 relationship to the court of appeals, which is the entry

1 court of the Federal system in a situation that is very
2 analogous to the ordinary relationship between a court of
3 appeals and a district court. Indeed, for this Court to
4 grant certiorari before judgment we believe would be an
5 exercise of original jurisdiction in violation of Article 3.

6 This particular case that arises before this Court
7 involves a claim for survivor's disability benefits by the
8 respondent. When that claim was finally denied at the
9 administrative level, the respondent sought judiciary review
10 in a Federal district court.

11 The Federal district court held that the Secretary
12 has made an error of law in relying solely on the listing
13 of the impairments in the Secretary's regulations. The
14 district court then decided that since there had been no
15 individualized determination of Respondent's residual
16 functional capacity to do gainful work, the matter had to
17 go back to the administrative agency for further
18 proceedings.

19 At that point, the Secretary sought review in the
20 court of appeals, and the court of appeals dismissed for
21 lack of jurisdiction. After rehearing en banc had been
22 denied by the court of appeals over three dissents, the case
23 was brought here for a review.

24 The sole question before this Court on certiorari
25 is the appealability of the district court's decision. We

1 submit, in accordance with those courts -- on the majority
2 of those courts that have reviewed on the problem below,
3 that this decision is appealable, and we believe its
4 appealability may be upheld on either of two alternative
5 grounds.

6 QUESTION: May -- may I interrupt you before you
7 go into your legal argument?

8 Do I correctly understand that under the direction
9 of the district court, the administrative law judge could
10 have made the findings that were demand -- ordered by the
11 district court and nevertheless said that the -- that under
12 the Secretary's rule, the failure to meet the -- one of the
13 listing requirements makes me deny relief, and therefore,
14 made the findings and still ruled against the claimant?

15 MR. SHAPIRO: I don't believe so, Your Honor,
16 except that --

17 QUESTION: Well what is there in the district
18 court's opinion would have precluded that?

19 MR. SHAPIRO: The district court, I believe,
20 squarely held that the -- the respondent's individual
21 residual functional capacity must be considered in order to
22 determine whether she -- whether or not she's entitled to
23 benefits.

24 QUESTION: Well --

25 MR. SHAPIRO: That is, the district court --

1 QUESTION: Well, it's clear -- it's clear, under
2 that reasoning, the district court would have reversed the
3 ALJ if that had been found. But then, why couldn't you have
4 then gone ahead and reviewed?

5 I don't see anything in the mandate or the order
6 of the district court that would have foreclosed the -- the
7 Secretary from following that course of action and thus
8 preserving his right to review.

9 MR. SHAPIRO: I think that the district court's
10 decision at order was sufficiently clear, that it might be
11 argued, although we don't rest on that branch of -- of the
12 finality doctrine. It might even be argued that such a
13 disregard of the district court's decision agreement could
14 be a contempt of the district court's findings.

15 QUESTION: Well, he didn't enter an order saying
16 you must grant review if you make the appropriate findings
17 -- grant relief if you --

18 MR. SHAPIRO: He -- well, he directed the --

19 QUESTION: He didn't say that.

20 MR. SHAPIRO: -- court to hold further
21 proceedings --

22 QUESTION: And make findings.

23 MR. SHAPIRO: Yes, with respect to the residual --

24 QUESTION: Right.

25 MR. SHAPIRO: -- functional capacity.

1 QUESTION: Right.

2 MR. SHAPIRO: I mean, I do think it would perhaps
3 have been theoretically possible, although it might have
4 subjected the agency to -- or the administrative law judge
5 to some form of contempt. It would have involved, I take
6 it, an automatic reversal by the district court --

7 QUESTION: Yes.

8 MR. SHAPIRO: -- unless -- and then a possibility
9 of review.

10 QUESTION: Correct. And then on a --

11 MR. SHAPIRO: That's true.

12 QUESTION: -- fuller record the court of appeals
13 would be able to assess the -- the --

14 MR. SHAPIRO: But the record -- the record --

15 QUESTION: -- the -- the debate over whether the
16 listings are an adequate response to the statutory
17 requirements.

18 MR. SHAPIRO: But the record would not have added
19 anything to the underlying question of whether the Secretary
20 can, under his own policy and regulations, stop with the
21 listings of the agency as it --

22 QUESTION: Well, it would have answered this
23 question, that the Secretary in some of these cases argues
24 that there is no possibility of total functional -- I don't
25 have the right phrases in my -- no possibility if you don't

1 meet the listing requirement. And this would -- you'd have
2 a specific factual determination. But whether or not there
3 are cases that the listings just don't -- don't account for.

4 MR. SHAPIRO: At the agency, I think in this case,
5 as agencies I think do in all cases, they regard themselves,
6 and I think quite properly, as governed by the terms of the
7 remand.

8 So that the agency never has contemplated the
9 possibility. To my mind, an agency has never deliberately
10 undertaken to disregard a court's remand and to say, well,
11 you told us that the listing of impairments is not enough,
12 but we still think it is so we're coming out the same way.

13 Because, after all, I suppose if it happens a
14 second time, it could happen a third time. The case goes
15 back to the district court. The district court says, well,
16 perhaps you didn't understand me, I said you must make it --

17 QUESTION: Yeah, but there would be an appeal at
18 that point because the district --

19 MR. SHAPIRO: Well, but he would -- at that point,
20 I take it, the --

21 QUESTION: The district court would then say, the
22 findings having been made, you now must enter judgment
23 allowing the claim.

24 MR. SHAPIRO: Oh, if the findings --

25 QUESTION: And then -- then there would be an

1 appeal directly to the court of appeals.

2 MR. SHAPIRO: Yes.

3 QUESTION: So, the first case in which the
4 findings were favorable to the claimant, would -- would do
5 it. There may never be such a case.

6 Now, your basic position on the merits is those
7 cases will never arise. But you're never going to let the
8 facts be found --

9 MR. SHAPIRO: Yes, indeed, there are --

10 QUESTION: -- to determine whether they will rise.

11 MR. SHAPIRO: There are two problems, Your Honor,
12 I believe, with that approach.

13 The first problem is that administrative agencies
14 do, and I think properly do, regard themselves as bound by
15 the mandate --

16 QUESTION: Well, I understand that argument. But
17 the mandate, that -- that --

18 MR. SHAPIRO: But the -- but the second point, it
19 seems to me is that that whole process would add nothing to
20 the consideration of --

21 QUESTION: Well, it will -- it will answer the
22 question whether there is the possibility of such a
23 hypothetical ever really existing. Because the Secretary's
24 position is there really aren't any such cases, so if we
25 send it back we're going to win on the facts anyway. That's

1 your basic legal position on the merits as I understand it.

2 MR. SHAPIRO: Yes, it is.

3 QUESTION: But your -- but your position on the
4 law is that, well, we don't have -- we don't have to put
5 that to a factual test.

6 MR. SHAPIRO: Well, I -- our position is that it
7 really is an inappropriate relationship between an
8 administrative agency and a court for the administrative
9 agency in effect to be required to disregard the remand in
10 order to --

11 QUESTION: No, merely to be required to do exactly
12 what the remand ordered, namely make some findings of fact.
13 That's the only thing the remand order really required.

14 MR. SHAPIRO: But it was clearly remanded for
15 further proceedings consistent with the opinion of the
16 court. And the court said it is not adequate to rely on
17 the listing of impairments.

18 QUESTION: It doesn't say for the proceedings
19 consistent -- it says for remands for further proceedings.
20 He's directed to make this particular inquiry and these
21 findings. That's all the order requires.

22 MR. SHAPIRO: I think the agency has properly
23 understood that it was proceedings consistent with the
24 opinion of the court.

25 QUESTION: Well, Mr. Shapiro, I take it that if

1 -- that if -- if the -- your position is that if the case
2 goes back, it's very likely that the -- and the agency lives
3 up to the remand order, that there will be a -- the -- the
4 benefits will be granted.

5 MR. SHAPIRO: That's a distinct possibility, Your
6 Honor. Yes, sir.

7 QUESTION: Well, let's assume that the Secretary,
8 following the remand order, grants -- there's benefits
9 granted. That's the end of the case, isn't it?

10 MR. SHAPIRO: That's our position. Yes, sir.

11 QUESTION: And you can never get -- you can never
12 have it reviewed then?

13 MR. SHAPIRO: That's right, Your Honor. That --
14 that has been our position consistently. And, indeed, that
15 is not a position that the Third Circuit questioned at all.

16 The Third Circuit was following a line a little
17 bit like that of Justice Stevens, although not quite. I
18 think the Third Circuit said that what might happen is that
19 the claimant would lose on remand because she would be found
20 to have residual functional capacity. She might then go to
21 court and win and at that point the Secretary could appeal.

22 But I think the Third Circuit assumed, as we have
23 argued, that if the case goes back on remand and findings
24 are made in her favor with respect to her residual
25 functional capacity, then the Secretary is not in a position

1 to return to court for judicial review.

2 QUESTION: Mr. Shapiro --

3 MR. SHAPIRO: And the thing I think -- excuse me
4 -- just -- Justice Stevens, your question assumes that the
5 -- an agency would have to regard any findings with respect
6 to her residual functional capacity as irrelevant to the
7 outcome. In order to --

8 QUESTION: Which is your legal position?

9 MR. SHAPIRO: It is our legal position.

10 QUESTION: They say that you only look at the
11 listing.

12 MR. SHAPIRO: But it is not a legal --

13 QUESTION: That's what -- all the -- all the
14 Secretary would have to do is adhere to the legal position
15 that he maintains on the merits.

16 MR. SHAPIRO: We believe he is not free to do that
17 on remand --

18 QUESTION: Well, that's --

19 MR. SHAPIRO: -- until and unless --

20 QUESTION: That's what, you know --

21 MR. SHAPIRO: -- the district court's decision --

22 QUESTION: That depends on how one reads the
23 district court's language.

24 QUESTION: Mr. Shapiro, does the Secretary have
25 a statutory right of appeal to the district court from a

1 decision of an agent -- of the agency board or ALJ awarding
2 benefits?

3 MR. SHAPIRO: No, Your Honor. We believe it's
4 clear under Section 405(g) that only the claimant who is
5 denied benefits in whole or in part, may seek review. The
6 first sentence of Section 405(g) says, any individual after
7 any final decision of the Secretary, and so on, may seek
8 judicial review of the action.

9 There is nothing in the statute that authorizes
10 the Secretary to seek review from a decision in favor of
11 the claimant and --

12 QUESTION: Mr. Shapiro, you've said you've been
13 consistent here. Is it -- is it the government's position
14 that if the claimant had lost before the district court --
15 if the district court had agreed with the Secretary -- the
16 claimant would have been able to take an appeal immediately?

17 MR. SHAPIRO: Your Honor, on one branch of our
18 argument -- that is, on one theory on which we support
19 appealability -- the claimant would not have been able to
20 appeal.

21 QUESTION: Well, pick the branch. I mean what's
22 -- what's the government's position? Can the claimant
23 appeal or can the claimant not appeal?

24 MR. SHAPIRO: With respect to the narrower
25 argument we're making based on Cohen against Beneficial

1 Loan, the claimant could not appeal because there is no
2 doubt that down the line an adverse decision against the
3 claimant would be --

4 QUESTION: Well, but you say -- you say this is
5 a final judgment for -- for purposes of appealability
6 anyway.

7 So, what's the government's real position? Can
8 the claimant appeal or not?

9 MR. SHAPIRO: If the Court agrees with our
10 argument that this is a final judgment in the fullest sense
11 of the word that a claimant -- a claimant can appeal from
12 an adverse decision of law underlying that judgment.

13 QUESTION: And has the government acted contrary
14 to that position?

15 MR. SHAPIRO: The government, as we -- as we
16 concede in brief, has not always taken that position, Your
17 Honor.

18 QUESTION: And -- and I take it that -- that
19 answer applies to the circumstances in this case, so that
20 if we accepted your argument on finality, she did lose in
21 this case because --

22 MR. SHAPIRO: Yes.

23 QUESTION: -- she was confined to the listed
24 impairments.

25 MR. SHAPIRO: Yes.

1 QUESTION: So she could have appealed in this
2 case.

3 MR. SHAPIRO: She could have appealed the
4 determination that she was unable to show that she had a
5 listed impairment. That was the determination that was
6 adverse to her.

7 Just to clarify, Justice Scalia, if I may, my
8 answer to your question, we are making two alternative
9 arguments. Under one of them, the Fullers' argument about
10 finality, if that is accepted, we believe she could appeal
11 from an adverse determination.

12 QUESTION: Mr. Shapiro, is it possible that the
13 statutes could be construed here to provide that the
14 district court retains jurisdiction at the conclusion of
15 the remand so that the government would be able to file a
16 motion for reconsideration on the point that it's interested
17 in at the conclusion of the remand with the district court?

18 MR. SHAPIRO: Your Honor, we believe that that is
19 a tenable construction of the statute, but one which we
20 believe is quite strained and involves a very forced and,
21 we think, unnatural reading of the statute.

22 QUESTION: Well, it might be somewhat consistent
23 with Sullivan against Hudson, though.

24 MR. SHAPIRO: With respect to Sullivan against
25 Hudson, Your Honor, which is relied thereon very heavily by

1 the respondent, we believe that case has to be understood
2 as a case which is quite clearly directed to the problem of
3 finality under the Equal Access to Justice Act.

4 Indeed, in Sullivan and Hudson the Court
5 specifically said that its holding with respect to the
6 definition of a civil action and with respect to the
7 definition of finality was addressed to EAJA.

8 And, indeed, EAJA contains its own definition of
9 final judgment. EAJA says a final judgment is a judgment
10 that is not subject to appeal.

11 The concept of finality under EAJA is intimately
12 tied to the concept of who is a prevailing party. And this
13 Court that has held that for EAJA purposes a claimant is not
14 a prevailing party until her claim has been fully resolved.
15 So, for that purpose the Court held that the court -- the
16 district court does retain jurisdiction, that the judgment
17 is not truly final until the case has come to an end after
18 remand.

19 QUESTION: Well, in -- in your view was the Hudson
20 remand under the sixth sentence of 405(g)?

21 MR. SHAPIRO: There has been a very substantial
22 argument between the parties about whether either this case
23 or the Hudson case involved a sixth sentence remand. Our
24 view has been that this case clearly is not a sixth sentence
25 remand case whatever the remand was--

1 QUESTION: Well, what about the -- what is your
2 position as to the proper characterization of the remand in
3 the Hudson case?

4 MR. SHAPIRO: Our view was that the remand in the
5 Hudson was not a sixth sentence remand either. But our --

6 QUESTION: Well, then it was under the eighth --
7 eighth sentence?

8 MR. SHAPIRO: The remand? Well, the fourth
9 sentence says with or without remand. The fourth sentence
10 refers to the possibility of a remand.

11 But, Your Honor, it really is not critical to our
12 position, because, in the first place, we are not seeking
13 to appeal the remand order as such. And, in the second
14 place, in response to Justice O'Connor's question even a
15 sixth sentence remand, in our view, is not appealable by the
16 Secretary if the remand results in a judgment for the
17 claimant, because the seventh sentence of 405(g)
18 specifically limits review to the review that could be given
19 to an original determination.

20 And as I indicated earlier, the Secretary has no
21 authority to appeal an original determination in favor of
22 a claimant. So, even if this -- even if this case involves
23 a sixth sentence remand, we don't believe that affects the
24 ultimate outcome on the issue of finality.

25 And, as we explained in our reply brief and in our

1 original brief, we don't think it's a sixth sentence remand
2 in any event because it is not a remand either at the
3 instance of the Secretary or because there is new material
4 evidence.

5 QUESTION: Mr. Shapiro, you've been talking about
6 the -- the -- you know, the special application of -- of
7 405(g). What about under the Administrative Procedure Act
8 generally? And I gather you think this case has
9 implications across the board.

10 MR. SHAPIRO: Yes, I do.

11 QUESTION: Is there any need for a court to
12 remand? Must a district court remand?

13 I -- I -- you know, the -- the residual review
14 provision of the APA says that if there's not statutory
15 provision for review, such as exists here in 405, the action
16 for review shall be whatever other action is available. And
17 traditionally, *injunction mandamus, the declaratory
18 judgment, in the district -- in -- whatever district court
19 would normally have jurisdiction for those traditional
20 actions.

21 In such a traditional action, would the court have
22 to remand to the agency? Couldn't it just issue a mandamus
23 telling the agency head to do the thing right --

24 MR. SHAPIRO: Yes.

25 QUESTION: -- and then the matter would --

1 MR. SHAPIRO: Yes.

2 QUESTION: I always thought it was really sort of
3 -- I never knew -- when I was on the court of appeals and
4 -- and we had statutory review coming to the court of
5 appeals, I never really knew whether we should say, you
6 know, reversed and remanded or not. What if we didn't say
7 remanded, what would happen?

8 MR. SHAPIRO: I think the same proceedings would
9 follow. Indeed, we suggested in our opening brief that what
10 is now frequently done in the form of remand was
11 historically done in an action for mandamus or injunction.

12 And the fact that the -- that the disposition now
13 takes the form of a remand does not, in our view, affect the
14 finality of the judgment. Historically, it seems to be
15 remand finds its origins in the kinds of actions you're
16 describing, actions for mandamus or actions for injunctive
17 relief, that clearly come to an end. What's the --

18 QUESTION: Which -- which are still referred to
19 in the APA --

20 MR. SHAPIRO: Yes.

21 QUESTION: -- explicitly.

22 MR. SHAPIRO: Yes, Your Honor. And our position
23 is that this case -- our position we believe is buttressed
24 by 405(g). But it's also buttressed by the history of
25 judicial review of administrative actions even before the

1 APA. And it's buttressed by the APA itself.

2 We would be here, I think, making exactly the same
3 argument if this were an action under the APA and if 405(g)
4 were not there. We think 405(g) supports our position, but
5 we don't believe it's essential to that position.

6 I would like, if I may, to address some other
7 aspects of what I have described as our narrower argument
8 for appealability. That is, the argument that is based on
9 the practical considerations of finality that were first
10 articulated by this Court in Cohen against Beneficial Loan
11 and since in a series of cases, including Coopers and
12 Lybrand.

13 As I indicated at the outset, we agree with the
14 vast majority of the courts of appeal --

15 QUESTION: Is this -- is this argument, Mr.
16 Shapiro, also the one that is -- is analogous to our
17 handling of appeals from state courts in the treatment of
18 finality there, or is this an alternate to that argument?

19 MR. SHAPIRO: I believe that it, in truth, it's
20 quite analogous. That is, to take a case, for example, like
21 ASARCO, which was decided last term, or like Mercantile Bank
22 against Lagdo, which was decided some years ago, these cases
23 involved review of state court decisions in which a state
24 court had finally adjudicated some Federal question. And
25 then the state supreme court had remanded it to the lower

1 courts for further proceedings.

2 It was possible, of course, that when the case
3 came back to the state supreme court, it might reconsider
4 the Federal question it had passed on before. But the state
5 supreme court, as far as it was concerned, had disposed of
6 that Federal question. And so this Court in these cases --
7 Lagdo and these other cases -- held that for purposes of the
8 final judgment requirement of 1257 the underlying purposes
9 of finality had been met.

10 Our argument here is comparable to that and,
11 indeed, it seems to us that the Cohen doctrine is a
12 recognition of the applicability of that line of reasoning
13 in the context of court of appeals review of district court
14 decisions.

15 The particular requirements of the Cohen doctrine
16 we believe are all met here. Indeed, we don't think there
17 can be much argument about some of them. For example, we
18 think it's clear that the district court was not in its own
19 mind making a tentative decision about the error of law that
20 the Secretary had committed. The decision was, in the
21 judge's mind, a conclusive one.

22 With respect to the second Cohen criterion,
23 Respondent vigorously contests our argument that it does
24 apply -- the criterion that the decision in whose review is
25 sought be separable from the merits.

1 We think it is undoubtedly true, indeed, as it
2 was true, I think, in some other context like Mitchell and
3 Forsythe -- we think it is undoubtedly true that the error
4 of law that we believe the district court made is an error
5 that goes to the merits of the respondent's claim for
6 benefits. But the rationale of that separability
7 requirement we believe is fully met here.

8 As we understand the Court's discussion of that
9 requirement, it is designed to prevent courts of appeals
10 from interfering unduly with the ongoing process of trying
11 the case. The trial court judge has a special role to
12 fulfill, and premature consideration would interfere with
13 that role.

14 Moreover, the Court recognizes, I think, that
15 where the question is not separable from the merits, that
16 what happens in the later stages may affect the view of the
17 question for which review is now sought.

18 We believe that neither of those factors exists
19 here. In this case, the case is no longer in the trial
20 court at all; there is no problem of interfering with the
21 trial court's ongoing discretion; and, as I tried to
22 indicate an answer to Justice Stevens earlier, I think the
23 administrative agency properly views itself as bound by what
24 the district court did. So that nothing that happens on
25 remand can affect the nature of the question on which review

1 is sought.

2 QUESTION: If your view prevails, Mr. Shapiro,
3 and in some other case the government does not appeal, and
4 there is a remand and the claimant then comes back, are you
5 barred?

6 MR. SHAPIRO: Again, Your Honor, I believe that
7 depends on which branch of our argument is accepted.

8 If you accept our narrower approach that this is
9 appealable under the Cohen doctrine, then I think under this
10 Court's decisions, for example, Corey and the United States,
11 the government would have the option of reserving the point
12 for later appeal, if a fortuitous series of events made that
13 possible.

14 If the Court accepts our broader argument that
15 this is final in the truest sense -- the sense that I think
16 I was suggesting in response to Justice Scalia -- then I
17 believe that the time for appeal would have expired and the
18 only question would be whether there is issue preclusion in
19 a later action. And I suspect that there very well might
20 be.

21 QUESTION: If we -- if we accept your
22 interpretation that it's controlled simply by the language
23 of 405(g), the eighth sentence, is that the first
24 alternative of which you spoke?

25 MR. SHAPIRO: Number the 405 -- our argument based

1 on 405(g), like the argument based on general principles of
2 finality on the Administrative Procedure Act, is that the
3 proceeding for judicial review has terminated in the fullest
4 sense, that the judgment is truly final.

5 QUESTION: So -- so you would be barred if we
6 accepted that rationale?

7 MR. SHAPIRO: That's right, Your Honor.

8 I'd like, if I may, to reserve the rest of my time
9 for rebuttal.

10 QUESTION: Very well, Mr. Shapiro.

11 Mr. Handal.

12 ORAL ARGUMENT OF KENNETH V. HANDAL

13 ON BEHALF OF THE RESPONDENT

14 MR. HANDAL: Mr. Chief Justice, and may it please
15 the Court:

16 Your Honor, I want to make one thing clear here.
17 The Secretary's original theory in this case was stated in
18 his petition and in his opening brief. He asked the Court
19 to hold that a remand order under Section 405(g) was
20 appealable as a final decision.

21 In his reply brief and -- and now the Secretary
22 has -- has stated basically a new theory that he should be
23 able to appeal a legal issue that accompanies a remand order
24 in an Social Security case while the case is still within
25 the jurisdiction of the district court.

1 Not only is that idea of appealing a legal issue
2 pretty much unprecedented in -- in the Court's finality
3 jurisprudence, but, as we point out in our brief, the
4 Secretary has no need for this overall and -- and no need
5 for it in the context of this particular case.

6 And most importantly, Mr. Shapiro says that
7 Section 405(g) is not necessary to his case. The problem
8 with that is that what is being proposed to be done here
9 under Section 405(g) is totally contrary to the statutory
10 scheme that -- that is laid out there. And -- and this
11 Court last term in Sullivan v. Hudson dealt quite
12 extensively with the statutory scheme under Section 405(g).
13 And I'll get to that.

14 The -- the Secretary's new theory about appealing
15 a legal issue here, Mr. Shapiro said that -- that it is --

16 QUESTION: Is that the Cohen v. Beneficial Loan
17 theory?

18 MR. HANDAL: Well, not so much, Your Honor. As
19 the theory is set out in the reply brief and I believe that
20 what Mr. Shapiro is suggesting here is simply that he can
21 peel off the legal issue from this remand order and separate
22 this situation out -- the remand order -- into two separate
23 proceedings and thereby appeal the legal issue while the
24 remand proceedings go back to the -- to the agency. He says
25 that very clearly at page 19 of his reply brief.

1 Mr. Shapiro added that -- that the vast majority
2 of the court of appeals' decisions support the government's
3 theory here. There were -- the courts of appeals were
4 probably evenly split over the old theory that he should be
5 able to appeal the remand order.

6 There is not a court of appeals' decision cited
7 by the Secretary, and none that we can find, that supports
8 the Secretary's new theory about peeling off this legal
9 issue and -- and appealing just the legal issue. And we
10 think clearly it's contrary to this Court's decisions, and
11 we particularly note Chief Justice Rehnquist's opinion in
12 the Liberty Mutual case in 1976 which --

13 QUESTION: Well, but that --

14 MR. HANDAL: -- is cited in our brief.

15 QUESTION: -- that's entirely consistent with his
16 position that the remand order is superfluous, that's it's
17 really unnecessary, that the only judgment that the court
18 made is the legal judgment here, that that's the only thing
19 that was at issue. And the remand is -- is automatic.

20 What would happen, the Court finding this way, is
21 that the agency would automatically be seized with the case
22 once again.

23 MR. HANDAL: Your Honor, that's what -- what
24 happens under this statute and -- and -- and, first of all,
25 a reading of this district court's opinion here clearly

1 indicates, as Justice Stevens pointed out, that the district
2 court sent it back for the taking of additional evidence.
3 And -- and that's what the statutory scheme is here.

4 QUESTION: Well, suppose it hadn't? Even if it
5 hadn't, wouldn't -- wouldn't the claimant have been
6 entitled, given the ruling of law that the district court
7 had made, to have the Secretary make that finding of
8 evidence?

9 MR. HANDAL: Under -- under the new -- yes, to go
10 back.

11 QUESTION: Even without the remand?

12 MR. HANDAL: I don't see how -- oh, if -- if they
13 --

14 QUESTION: Suppose the court had just simply said
15 -- you know, reversed. You know, the Secretary's decision
16 is reversed. And it didn't say "and remanded." Wouldn't
17 -- you mean, this claimant would not be able to pursue her
18 claim before the Secretary?

19 MR. HANDAL: No, Your Honor, the court here simply
20 remanded the case. They didn't reverse anything. They sent
21 the case back to the agency for a redetermination of
22 benefits.

23 QUESTION: I understand that. Suppose instead of
24 saying remanded it had said reversed? The Secretary's
25 decision is hereby set aside.

1 MR. HANDAL: I'm not sure that would have been a
2 final judgment either unless the court had actually entered
3 final judgment. The point is --

4 QUESTION: But that's not my question. The
5 question is do you think the claimant would have had the
6 right to have further proceedings before --

7 MR. HANDAL: Certainly, Your Honor.

8 QUESTION: Of course.

9 MR. HANDAL: Yes, Your Honor.

10 QUESTION: So, the remand is really superfluous.

11 MR. HANDAL: But what the --

12 QUESTION: It's -- it's what happens anyway.

13 MR. HANDAL: But what the Secretary is claiming
14 here is that there are somehow two separable proceedings.
15 And the Secretary is suggesting that the district court in
16 this case actually affirmed the Secretary's decision on
17 whether Mrs. Finkelstein was entitled to benefits under the
18 listing of impairments.

19 And then he is suggesting that the Secretary --
20 that the district court made another ruling on the legal
21 issue and that that legal ruling is -- is -- can be taken
22 up.

23 That's just not what happened. There was only
24 one remand order here and -- and it's not superfluous in
25 the sense that we don't know what's going to happen on the

1 remand.

2 QUESTION: Mr. Handal, under your view how would
3 the government be assured of getting eventual appellate
4 review of the issue that it's interested in -- in having
5 reviewed?

6 MR. HANDAL: Your Honor, there are many ways.
7 And that is the importance of -- of Section 405(g) and of
8 the congressional scheme there.

9 QUESTION: Well, if the claimant prevails on
10 remand under the -- the new theory of the district court,
11 how can the government obtain review?

12 MR. HANDAL: Your Honor, under the statute, the
13 Secretary is actually required to go back to the district
14 court and -- and file the transcript of the proceedings on
15 remand -- after the remand proceedings before the Secretary.

16 And Your Honor recognized that in the Hudson
17 opinion. Your Honor recognized that -- that the district
18 court under this statute retains jurisdiction and -- and
19 waits for the Secretary to come back and advise the court
20 of what happened.

21 And -- and this gets to one of Justice White's
22 questions. There's -- there's -- the Secretary is then able
23 to appeal from the district court's decision and can get
24 consideration of -- of the issues from the remand.

25 QUESTION: Not -- not at the time that the

1 district court first issues its order, but after the remand
2 proceedings are completed and the -- as you say, the case
3 is then back in the district court?

4 MR. HANDAL: Yes, Your Honor.

5 QUESTION: Is there a judgment entered then?

6 MR. HANDAL: Presumably the --

7 QUESTION: No. Is there a judgment entered then
8 or not?

9 MR. HANDAL: After the remand proceedings, yes,
10 Your Honor.

11 QUESTION: In the district court?

12 MR. HANDAL: Yes, Your Honor.

13 QUESTION: Is it -- an actual judgment is filed
14 just as --

15 QUESTION: (Inaudible) Rule 58?

16 MR. HANDAL: Yes, Your Honor, and there's been no
17 judgment entered so far in this case. All the district
18 court did was enter an order of remand, and that's something
19 that happens quite often under this statute.

20 50 percent of all cases disposed of by district
21 courts under this statute are remands. And -- and last year
22 there were 5,000 remands alone. It happens all the time.

23 QUESTION: When you say there's been no order
24 entered in this case, that depends upon what you consider
25 to be the case. If you mean a judicial case, there was an

1 order entered when the court reversed the agency.

2 MR. HANDAL: Your Honor, I believe I said there --

3 QUESTION: But if you choose to look upon it as
4 this claimant's long battle to get money, then I suppose
5 you're right. There has been no order entered in the case
6 in that sense.

7 MR. HANDAL: Your Honor, I believe I said that
8 there was an order entered here. It just wasn't a final
9 order --

10 QUESTION: A final order.

11 MR. HANDAL: -- or a judgment.

12 QUESTION: Okay.

13 MR. HANDAL: Clearly there was an order entered
14 here, and --

15 QUESTION: Okay.

16 MR. HANDAL: -- and that's what often happens.

17 QUESTION: Okay. So, then just change the word
18 order to final judgment.

19 MR. HANDAL: And -- and Your Honor raises an
20 interesting point about the -- the claimant's entitlement
21 to benefits. The Secretary here is trying to make this case
22 into some test of -- of his legal theory.

23 That's not what this case is about. It's about
24 Mrs. Finkelstein trying to get her benefits. And -- and --
25 the -- the -- according to the long-standing Social Security

1 Administration policy, this district court opinion has no
2 further reach than Mrs. Finkelstein's case.

3 QUESTION: I -- I find what you say just contrary
4 to what -- what our traditional manner of handling these
5 cases has been.

6 Take a case, Abbott Laboratories v. Gardner, one
7 of the landmark cases in administrative law which involved
8 a rule making that was challenged under the Administrative
9 Procedure Act, under the residual review provision of the
10 APA. That is, it was a suit brought for declaratory and
11 injunctive relief.

12 The district court held that the FDA's rule went
13 beyond its authority. It was appealed to the Third Circuit
14 and it was appealed all the way up here. We didn't require
15 the FB -- the FDA to -- to revise its rule and then the
16 revised rule somehow to be appealed. We allowed the appeal
17 immediately. And that's standard.

18 MR. HANDAL: Your Honor --

19 QUESTION: I find it amazing to think that -- that
20 all of these rule makings as well as adjudications have to
21 go back to the agency and a revised rule or revised
22 adjudication made before there can be an appeal. It would
23 -- it would wipe off of the books an awful lot of cases that
24 -- that are already there.

25 MR. HANDAL: Your Honor, first of all, I'd note

1 that in Califano v. Sanders, this Court held that there is
2 very limited review under -- under -- under the APA for
3 Social Security cases.

4 The statute we're dealing here is a very different
5 animal, as this Court pointed out in Hudson. It's a very,
6 quote, unusual statute and we're not looking to the APA
7 here.

8 Secondly, as provided in the statute in this case,
9 Mrs. Finkelstein went to the district court seeking review
10 of her denial of benefits, and that is specifically provided
11 for under this statute. She didn't seek declaratory relief.
12 She didn't seek injunctive relief. She didn't try to
13 invalidate any regulations. And a reading of the district
14 court's opinion and the court of appeals' opinion here
15 clearly indicates that they didn't think any regulations
16 were invalidated.

17 And then I go on to my further point that under
18 SSA's policy this case has no further reach than Mrs.
19 Finkelstein's benefits. It's not going to be applied by
20 SSA anywhere else. This -- this is a very peculiar statute
21 and -- and -- it's -- it's one that allows the district
22 court to retain jurisdiction of the case.

23 QUESTION: Why -- I -- you're arguing your case
24 just on the bases of this statute and you say this statute
25 is peculiar. But why should we think that this statute is -

1 - is any different from what is applied elsewhere in -- in
2 judicial review of administrative action.

3 MR. HANDAL: I -- I --

4 QUESTION: What -- what indication is there that
5 this is special?

6 MR. HANDAL: Your Honor, the Court said that for
7 one thing in the Hudson case that is was, quote, an unusual
8 statute -- in that it took the district courts out of their
9 ordinary role as, quote, administrative overseers and made
10 them ground level participants in the administrative
11 process.

12 These cases go back and forth between the district
13 court and the agency all the time. The -- the statute is
14 -- is unusual in that in, for example, in the fourth
15 sentence it -- it gave the court the power to modify the
16 agency decision. The district court here, if it had wanted
17 to, could simply have set Mrs. Finkelstein's benefits and
18 -- and then remanded the case for payment or for
19 certification.

20 QUESTION: What's -- what's the authority for the
21 -- for that statement? I mean, to me the word "modify"
22 doesn't necessarily convey that. Are there opinions from
23 this Court saying so?

24 MR. HANDAL: Your Honor, we -- we set forth in
25 our brief a discussion of the state of the law actually in

1 1939 when this statute was passed. And the -- the cases
2 cited there indicated that when courts reviewed
3 administrative actions they were pretty much limited to
4 affirming or reversing the action, not to get really
5 involved in the rate making or the setting of rates or
6 whatever.

7 This statute, as the Court said in Hudson last
8 term, allows the district courts to really get involved in
9 the --

10 QUESTION: Well, but I'm -- I'm asking you, and
11 I thought I had already asked you, are there cases from this
12 Court saying that the word modify in that fourth sentence
13 upon which you rely would give the district court the
14 authority to simply fix Mrs. Finkelstein's benefits?

15 MR. HANDAL: Not specifically, Your Honor. No.
16 There are no such cases.

17 QUESTION: Under your view of the statute under
18 the sixth sentence, in every case of this kind the Secretary
19 would come back and file a transcript with the district
20 court?

21 MR. HANDAL: Yes, Your Honor, that's the way the
22 sixth sentence mechanism works.

23 QUESTION: Well, but you said that this case is
24 controlled by the sixth sentence. At least I thought that's
25 your position?

1 MR. HANDAL: Yes, Your Honor, it is.

2 QUESTION: And that in this case, and in every
3 case like it, even of the -- the claimant is the one that
4 prevails, the Secretary goes back into the district court
5 and files a transcript?

6 MR. HANDAL: That's what is contemplated by the
7 sixth sentence, and --

8 QUESTION: But that's not what happens, is it?

9 MR. HANDAL: Your Honor, we understand it does
10 happen in -- in a lot of cases.

11 QUESTION: Well, why would the Secretary go in
12 and file a transcript in the hundreds of cases where there's
13 a redetermination of benefits and he orders the benefits?

14 MR. HANDAL: Your Honor, in --

15 QUESTION: Unless it's something the district
16 court wants to review further.

17 MR. HANDAL: Your Honor, the parties are able to
18 ask for further review at that point. In these cases what
19 actually happens is the district court judge retains the
20 case. It's the same docket number. And -- and the parties
21 often go back to the district court and the Secretary does
22 file the transcript.

23 The Secretary has claimed in the lower courts --

24 QUESTION: Well, this -- under this sentence it
25 says "shall," so I assume it's every case.

1 MR. HANDAL: It -- it certainly does seem to
2 require that, Your Honor. And that's what the court -- this
3 Court said in the Hudson case, that it does require that.

4 QUESTION: Well, that was because in the Hudson
5 case there were further -- the court retained jurisdiction.

6 MR. HANDAL: Your Honor, we have that same
7 situation here. That the -- automatically under this
8 statute the case is sent back to the agency and the court
9 retains jurisdiction.

10 The Secretary has agreed in this case that the
11 sixth sentence does say it's appropriate for him to go back
12 to the district court after the proceedings on remand. In
13 Hudson he conceded that he -- that the district court
14 retained jurisdiction and that he was required to do that,
15 and so this Court held.

16 QUESTION: Well, Mr. Handal, does the sixth
17 sentence apply only when the Secretary makes a motion before
18 filing an answer in the district court proceeding?

19 MR. HANDAL: No, Your Honor. The -- clearly what
20 we're most concerned with here is the second part of the
21 sixth sentence which describes the remand mechanism and, as
22 the Court said in Hudson, that mechanism applies to all
23 remands, and it applied to the remand in that case.

24 The first part of the sixth sentence clearly where
25 it says, "and it may at anytime order additional evidence

1 to be taken," that clearly applies to -- to all remands.
2 And as Justice Stevens said, it certainly can be read as
3 applying to this remand in this case, according to the
4 district court's opinion.

5 QUESTION: Excuse me. I understand the first part
6 of the sixth sentence to mean that the court may remand
7 without having made a decision, which is unusual. I mean,
8 usually in order for this Court, for example, to remand a
9 case we have to decide something, that there's something
10 wrong. We can't just remand because we don't want to
11 decide.

12 And I think -- isn't that what the first part of
13 the sixth sentence allows the court to do -- allows the
14 court, upon that motion of the Secretary, to allow the
15 Secretary to mend -- mend his hold, so to speak.

16 MR. HANDAL: That's correct.

17 QUESTION: If the Secretary says, you know, I'm
18 worried, I'm going to lose this case, before he files his
19 answer, he can ask the court to send it back so he can take
20 more evidence.

21 MR. HANDAL: Yes, Your Honor. That's what the
22 first part --

23 QUESTION: That's what the first part says. And
24 then the second part says, and it may at any time order --
25 order additional evidence. That, again, refers to pre-

1 judgment order, right?

2 MR. HANDAL: That's not the way that's been
3 interpreted, Your Honor. It's been interpreted to mean that
4 the Secretary -- that the district court may at any time
5 order additional evidence. And that's what it did in this
6 case.

7 QUESTION: I think in its context, following after
8 that first clause, it seems to me you -- you don't think it
9 -- it only refers to ordering additional evidence to be
10 taken before it makes its decision?

11 MR. HANDAL: No, Your Honor.

12 QUESTION: And there are provisions like that in
13 rule making review statutes as well. It's quite a common
14 provision.

15 MR. HANDAL: Perhaps, Your Honor. But the way
16 this statute has been interpreted, the second clause of that
17 sentence refers to at any time ordering additional evidence
18 to be taken.

19 In fact, Justice Blackmun, 20 years ago, in an
20 opinion, Bohms v. Gardner on the Eighth Circuit, described
21 all the different ways in which a district court might
22 remand under that second clause.

23 I'm not sure that that's so important. I think
24 that the -- the important thing here, though, is -- is the
25 -- the mechanism that comes after the semicolon in this

1 sentence that indicates that the parties shall -- that the
2 district court shall retain jurisdiction.

3 QUESTION: But why -- if -- if it applies even to
4 post-judgment remand, why -- why is there that condition
5 that says only upon a showing that there is new evidence
6 which is material and that there is good cause for the
7 failure to proceed?

8 MR. HANDAL: Your Honor, as far as applying to
9 post-judgment remands, I think Your Honor means remands
10 after the claimant has answered.

11 QUESTION: No, I mean after the court has found
12 that the agency is wrong and it then remands. It says, the
13 Secretary should -- should have allowed an individualized
14 determination. We, therefore, reverse the Secretary's
15 decision and remand. At that point, does clause -- does
16 sentence six apply in your view?

17 MR. HANDAL: Yes, Your Honor. Although the courts
18 don't ordinarily reverse. They simply remand the case, and
19 that's what happened here.

20 In response to something that Justice White asked
21 which is -- is about how -- how the Secretary could get
22 appeal of the substantive issue in this case, I wanted to
23 mention that the Secretary does have a number of ways in
24 this case to get this issue considered.

25 What could happen is that after the proceedings

1 on remand, the claimant may not be satisfied with -- with
2 what happened at the remand proceedings and the claimant
3 can return to the district court. The district court could
4 then enter a final judgment, and the Secretary may be able
5 to -- it can then appeal all of the issues, including the
6 issues from the remand order.

7 That's precisely what happened in the Second
8 Circuit in October in Kier v. Sullivan when the Secretary
9 had this specific issue that he's concerned about here
10 decided after a final decision.

11 QUESTION: Yes, but, Mr. Handal, supposing, as
12 your opponent argues, that the -- they make the additional
13 findings in the ALJ decides there's total functional
14 impairment or whatever the phrase -- the lack of ability to
15 engage in gainful employment and so forth -- and gives the
16 claimant the money she's finding, can the government then
17 get review?

18 MR. HANDAL: Yes, Your Honor, that's -- that's
19 the mechanism that I described earlier whereby the
20 Secretary, under the statute, is -- is required -- if not
21 required, the Secretary agrees that it's is appropriate --
22 that he then go back to the district court, file the
23 transcript of the proceedings. A judgment could be entered,
24 and then the --

25 QUESTION: On what authority does he have to go

1 back to the district court if he has ruled in favor of the
2 claimant?

3 MR. HANDAL: The statute requires him to go back
4 to the district court, Your Honor. It does, as I believe
5 Justice O'Connor pointed out, say shall go back to the
6 district court. In any event, the Secretary admits that he
7 does in fact go back to the district court.

8 QUESTION: You're talking about sentence six in
9 405(g), are you?

10 MR. HANDAL: Yes, Your Honor.

11 QUESTION: But supposing -- supposing it was a
12 remand under four. You then definitely couldn't go back?
13 Is that right?

14 MR. HANDAL: Your Honor, this whole idea of
15 whether there is a remand under sentence six or sentence
16 four is -- is a phony issue. It was an issue that the
17 Secretary came up with when he was saying that he wanted to
18 appeal from the remand order. He -- he interpreted the
19 statute as though there were remands under sentence six and
20 remands under sentence four. There aren't.

21 QUESTION: Well, let me just change the facts very
22 slightly and see what your answer is.

23 Supposing the district judge -- and I -- it's a
24 little ambiguous to me -- had not said take additional
25 evidence. The district judge simply had said, make a

1 factual finding on this particular issue that I regard as
2 critical as a matter of law on the basis of the evidence
3 already in the record, and that was done. Would the
4 Secretary then have power to review?

5 Could that -- the sixth -- sixth clearly would not
6 apply then. Six only applies when you take more evidence.
7 Is that not right?

8 MR. HANDAL: Your Honor, the -- the -- it talks
9 about the taking of additional evidence. I think the
10 mechanism in the second clause of the sixth sentence would
11 clearly apply. The Secretary would then, after the
12 proceedings on remand, be able to go back to the district
13 court, as would the claimant.

14 QUESTION: (Inaudible).

15 MR. HANDAL: Yes, Your Honor.

16 QUESTION: No -- no provision for, in Justice
17 Stevens' example, no new evidence.

18 MR. HANDAL: Your Honor, the district courts have
19 -- have authority to remand aside from this statute. This
20 statute doesn't really give them power --

21 QUESTION: I know it can remand.

22 MR. HANDAL: And -- and --

23 QUESTION: But that's exactly my question. Is if
24 the power to remand is exercised without supplementing it
25 with an order to take additional evidence, just remand and

1 make a finding on issue X.

2 MR. HANDAL: Yes, sir.

3 QUESTION: And after you make the finding, enter
4 an appropriate judgment. And then the finding is made and
5 the judgment -- the appropriate judgment is the claimant
6 shall -- shall get her money.

7 MR. HANDAL: We think that the second clause of
8 the sixth sentence would apply.

9 QUESTION: Why?

10 MR. HANDAL: Excuse me?

11 QUESTION: Why?

12 MR. HANDAL: Your Honor, it says -- there is a
13 semicolon and then it says, "and after the case is
14 remanded." We -- we think, and the court has indicated,
15 that it applies to all remands.

16 QUESTION: But it's talking about the case.

17 QUESTION: And as Secretary shall after the case
18 is remanded. It sounds like it is very much a continuation
19 after the semicolon of the language in the first part of the
20 sixth.

21 MR. HANDAL: Your Honor, we -- we don't think the
22 first part of the sentence is exhaustive as to all the
23 reasons that a court might remand.

24 QUESTION: Well, but that may be so. But surely
25 the second part of the sentence, picking up after the

1 semicolon, is dealing with the same material as the first
2 unless there is some clear indication otherwise, isn't it?

3 MR. HANDAL: Perhaps, Your Honor, but I don't see
4 that it makes any difference. Clearly that remand is still
5 governed by this same mechanism. In -- in Hudson for
6 example --

7 QUESTION: Well, you keep saying that, but --

8 QUESTION: You say that but the sentence simply
9 doesn't support you.

10 MR. HANDAL: Your Honor, there's -- there's no
11 other place that a district court could remand under this
12 statute but under authority of the sixth sentence.

13 In -- in Hudson, that case --

14 QUESTION: Well, what about four? With or without
15 -- it says with or without remanding.

16 MR. HANDAL: Your Honor, that sentence clearly
17 doesn't give the -- the district court the power to remand.

18 QUESTION: It says, the court shall have power to
19 enter upon the pleadings and transcript or the record a
20 judgment affirming, modifying, or reversing the decision of
21 the Secretary with or without remanding the cause for
22 rehearing.

23 You say that doesn't give the court the power to
24 remand?

25 MR. HANDAL: No, Your Honor, and I'm not sure it

1 matters in these cases.

2 QUESTION: But, you know, you're making some very
3 technical arguments and the Solicitor General is making some
4 very technical -- but it turns out that when you're pressed
5 on the arguments and -- you offer a very literal
6 interpretation until it doesn't support you. And then all
7 of a sudden, it doesn't make any difference. You know, it
8 could be done this way or that way.

9 MR. HANDAL: Your Honor, what the -- the fourth
10 sentence of this statute does is it gives the district
11 courts the power to enter a judgment. There was no judgment
12 entered here. The court simply remanded.

13 And in -- what the Solicitor General is suggesting
14 is that the fourth sentence applies to legal error remands
15 and the sixth sentence applies to fact remands.

16 It doesn't matter. The point is that the -- the
17 mechanism in -- in sentence six for the district court
18 retaining jurisdiction applies to all remands. And in
19 Hudson the -- what the -- in Hudson --

20 QUESTION: (Inaudible).

21 MR. HANDAL: In Hudson, Your Honor. That's what
22 the court said. And in Hudson the court was dealing --

23 QUESTION: Did it say that this applies to all
24 remands?

25 MR. HANDAL: Yes, Your Honor. In -- in Hudson it

1 said --

2 QUESTION: It said sentence six governed all
3 remands?

4 MR. HANDAL: Basically, Your Honor. Yes, sir.

5 QUESTION: Well, when you say basically--

6 MR. HANDAL: Yes, sir.

7 QUESTION: -- what does that mean?

8 MR. HANDAL: Yes, Your Honor, that's what the
9 court said.

10 QUESTION: Did it say that in haec verba?

11 MR. HANDAL: I'd have to look back at the opinion,
12 Your Honor. In sentence six --

13 QUESTION: Do you have a page cite for that?

14 QUESTION: We have a few copies of the U.S.
15 reports up here.

16 QUESTION: Let us have that later. Go ahead.

17 MR. HANDAL: Yes, Your Honor. Your Honor, in --
18 in -- also in the Hudson case, it was an improper
19 application of the vocational guidelines. That's why the
20 case was remanded in that case, and the court indicated that
21 the remand mechanism applied to that case.

22 Just two other points, Your Honor. On the
23 collateral order doctrine, it's interesting that the
24 Secretary refers to Cohen rather than this Court's decision
25 in 1978 in Coopers and Lybrand and the decisions since that

1 which have seriously narrowed the application of that
2 doctrine. We don't think that at least two of the
3 requirements there are met.

4 And -- and the -- we think that this is not an
5 important issue in the context of important issues as this
6 Court has determined that. This issue is not completely
7 separate from the merits. It's just a purely legal issue
8 apart from Mrs. Finkelstein's benefits.

9 And also for the reasons we've pointed out, this
10 district court order is not effectively unreviewable later
11 on. The Secretary can appeal it. The Claimant can appeal
12 it. And the Secretary in the last six months has gotten
13 consideration and decision of the First Circuit and the
14 Second Circuit on the substantive issue he purported to
15 appeal here. And he's gotten consideration in the Fourth
16 and the Tenth Circuits.

17 Your Honor, if I may, --

18 QUESTION: Surely.

19 MR. HANDAL: -- that language is at page 2255 and
20 the court said -- quote -- "as in this case, there will
21 often be no final judgment in a claimant's civil action for
22 judicial review until the administrative proceedings on
23 remand are complete."

24 The court cites a Fourth Circuit decision in 1983
25 and then quotes from it that the procedures set forth in 42

1 U.S.C., Section 405(g), contemplates additional action both
2 by the Secretary and a district court before a civil action
3 is concluded following a remand.

4 The Secretary concedes that a remand order from
5 a district court to the agency is not a final determination
6 of the civil action and that the district court retains
7 jurisdiction to review any determination rendered on remand.
8 And that's in the words of the sixth sentence.

9 QUESTION: Thank you, Mr. Handal.

10 Mr. Shapiro, you have two minutes remaining.

11 REBUTTAL ARGUMENT OF DAVID L. SHAPIRO

12 ON BEHALF OF THE PETITIONER

13 MR. SHAPIRO: Thank you, Mr. Chief Justice.

14 The respondent, we submit, is grossly overreading
15 the Hudson decision and in doing so is making an argument
16 that would allow the EAJA tail to wag a very large dog, is
17 doing so in a way which we submit is flatly inconsistent
18 with the language in Section 405(g) and is not in the
19 interest of claimants at all.

20 The Secretary's position is that if a decision is
21 rendered for the claimant on remand, it is necessary to file
22 the necessary -- the papers in court in order that a
23 determination of fees may be made under EAJA. The Secretary
24 believes that there is no right on his part to obtain
25 judicial review of a decision --

1 QUESTION: In every case where there's been a
2 remand, must the Secretary file something in the -- in the
3 district court?

4 MR. SHAPIRO: Under 405(g), Your Honor, we believe
5 that only in those cases covered by sixth sentence,
6 however, --

7 QUESTION: All right. So, your answer is no, it's
8 not in every case.

9 MR. SHAPIRO: Not under 405(g). But under EAJA
10 it may be necessary where the claimant prevails in order --

11 QUESTION: Well, I understand that.

12 MR. SHAPIRO: Yes, that's right. That's right.

13 QUESTION: I understand that. But in a case
14 that's not governed by the sixth sentence, must the
15 Secretary --

16 MR. SHAPIRO: No.

17 QUESTION: -- before the case is over must the
18 Secretary file something and get a judgment of the court?

19 MR. SHAPIRO: No, Your Honor. No. We think
20 that --

21 QUESTION: Well, your opponent says that in every
22 case that is the case.

23 MR. SHAPIRO: Well, I think he's wrong.

24 (Laughter.)

25 QUESTION: Plain and simple.

1 (Laughter.)

2 MR. SHAPIRO: Not only that, but I think the
3 position he's taking is not in the interest of claimants
4 because he is suggesting a much broader ability of the
5 Secretary to obtain review of a decision in favor of the
6 claimant than the Secretary believes he has under the Act.

7 Moreover, I think it clearly is in the interest
8 of claimants to allow an appeal at this stage because if
9 the court of appeals agrees with the district court and
10 upholds the district court's decision that will establish
11 the law of the circuit. And the Secretary's acquiescence
12 policy will then be that either the Secretary will seek
13 further review in this Court or will acquiesce in the Third
14 Circuit's decision and all future decisions will be governed
15 by that holding.

16 Thank you.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Shapiro.

18 The case is submitted.

19 (Whereupon, at 11:08 a.m., the case in the above-
20 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:

No. 89-504 - LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner V. MARILYN FINKELSTEIN

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

BY *Lona M. May*

(REPORTER)