

A WAY OUT OF THE SOCIAL SECURITY JURISDICTION TANGLE*

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When Congress recently eliminated the \$10,000 amount-in-controversy requirement for federal question jurisdiction in suits against the United States, its agencies, and its officers, Congress effectively resolved, for most cases, the problem of finding subject matter jurisdiction for federal judicial review of federal administrative agency action.¹ Whatever the resolution of such distinct issues as whether there is a cause of action, whether sovereign immunity is waived, and whether administrative remedies have been exhausted,² subject matter jurisdic-

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1. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721 (1976) (amending 28 U.S.C. § 1331(a) (1976) [hereinafter Pub. L. No. 94-574]). Section 1331(a) as amended reads:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. § 1331(a) (1976).

Prior to *Califano v. Sanders*, 430 U.S. 99 (1977), the courts were divided on the question whether the Administrative Procedure Act [APA], 5 U.S.C. §§ 701-706 (1976), was an independent source of federal subject matter jurisdiction when § 1331 was unavailable because of the amount in controversy requirement and when no other jurisdictional statute was applicable. See cases cited in *Califano v. Sanders*, 430 U.S. at 104 n.4. The Supreme Court in *Sanders*, relying in part on Congress' action in eliminating the amount in controversy requirement of § 1331, held that the APA contained no grant of subject matter jurisdiction. *Id.* at 104-07.

2. In addition to specific statutes providing for judicial review of particular kinds of agency action, the APA generally provides for a cause of action in the nature of judicial review to persons

tion, at least, will be provided, if nowhere else,³ by the amended federal question jurisdiction statute, 28 U.S.C. § 1331. The applicability of section 1331, however, is specifically precluded in an important class of cases: those arising out of the Social Security Act.⁴ In such cases the Act itself often, though not always, provides jurisdiction for judicial review. When the Act does not clearly provide such jurisdiction, difficult issues arise. May Congress constitutionally deny judicial review of assertedly illegal or unconstitutional agency actions by means of statutorily precluding any cause of action for such review? If it cannot, can it achieve the same effect by limiting the subject matter jurisdiction of the federal courts? The issues are fundamental and perplexing, and the Supreme Court has repeatedly indicated that it will go out of its way to avoid them.⁵ No attempt will be made here to go where giants fear to tread. Instead, the jurisdictional statutes will be examined in an attempt, consistent with existing precedent, to interpret the statutes to maximize the furtherance of both the congressional policy of strictly

"suffering legal wrong," 5 U.S.C. § 702 (1976), because of "final agency action for which there is no other adequate remedy in a court." *Id.* § 704. The cause of action is limited, however, where "statutes preclude judicial review," *id.* § 701(a)(1) or "agency action is committed to agency discretion by law." *Id.* § 701(a)(2). See *Morris v. Gressette*, 432 U.S. 491, 500-01 (1977).

In addition to amending § 1331 to expand federal jurisdiction, Pub. L. No. 94-574 also eliminated the defense of sovereign immunity in APA suits "seeking relief other than money damages." 5 U.S.C. § 702 (1976). In many suits involving the Social Security Act, the issue of sovereign immunity remains because retroactive payment of benefits, or another equivalent of money damages, is sought. A statute specifically providing entitlement to benefits, in conjunction with a statutory grant of jurisdiction to obtain the benefits if denied, may provide a waiver of sovereign immunity, but the jurisdictional grant alone is insufficient. See *Tatum v. Mathews*, 541 F.2d 161, 165-66 (6th Cir. 1976); *Johnson v. Mathews*, 539 F.2d 1111, 1122-24 (8th Cir. 1976).

Pub. L. No. 94-574 makes clear that defenses such as failure to exhaust administrative remedies remain available to agencies:

Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702 (1976). The legislative history states that the grounds referred to in § 702(1) include, but are not limited to, the following:

(1) [E]xtraordinary relief should not be granted because of the hardship to the defendant or to the public ("balancing the equities") or because the plaintiff has an adequate remedy at law; (2) action committed to agency discretion; (3) express or implied preclusion of judicial review; (4) standing; (5) ripeness; (6) failure to exhaust administrative remedies; and (7) an exclusive alternative remedy.

S. REP. NO. 996, 94th Cong., 2d Sess. 11 (1976); H.R. REP. NO. 1656, 94th Cong., 2d Sess. 12, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6121, 6132.

3. See *Andrus v. Charleston Stone Prods. Co.*, 436 U.S. 604, 607 n.6 (1978); *Ralpho v. Bell*, 569 F.2d 607, 615 n.51 (D.C. Cir. 1977); *Doe v. Hampton*, 566 F.2d 265, 267 n.1 (D.C. Cir. 1977); *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172, 1182 n.40 (3d Cir. 1977) (and cases cited therein), *vacated on other grounds sub nom. Chrysler Corp. v. Brown*, 98 S. Ct. 1705 (1979); *Koden v. United States Dep't of Justice*, 564 F.2d 228, 232 (7th Cir. 1977); *Harary v. Blumenthal*, 555 F.2d 1113, 1115 n.1 (2d Cir. 1977); *Fitzgerald v. United States Civil Serv. Comm'n*, 554 F.2d 1186, 1188 n.1 (D.C. Cir. 1977).

4. 42 U.S.C. §§ 301-1397 (1976).

5. See *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974). See generally *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); *Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); see also *South Windsor Convalescent Home, Inc. v. Mathews*, 541 F.2d 910, 913 (2d Cir. 1976).

limiting judicial review outside of the Social Security Act and the constitutionally-based policy of permitting federal courts to resolve constitutional issues in the final instance.

JURISDICTIONAL BASES FOR JUDICIAL REVIEW FOUND IN THE SOCIAL SECURITY ACT

For cases arising under the Federal Old-Age Survivors, and Disability Insurance Benefits program [OASDI],⁶ 42 U.S.C. § 405(h) provides:

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 [now 28 U.S.C. §§ 1331-1363] to recover on any claim arising under this sub-chapter [OASDI].⁷

The Medicare Act⁸ explicitly incorporated this provision by reference.⁹ In addition, the provisions for the Supplemental Security Income Program¹⁰ appear to have incorporated this provision by reference.¹¹ Section 405(h)¹² by its terms does not preclude review where the Act itself provides for such review. In order, therefore, to determine what is precluded, a preliminary review of the parts of the Social Security Act that provide for judicial review under these three programs—and the limits found in these parts—is necessary.

Old Age, Survivors, and Disability Insurance

OASDI provides old age and survivors benefits to covered workers and their survivors, when various eligibility requirements are met and the worker has sufficient quarters of Social Security coverage.¹³ Similarly, sufficiently insured workers under the age of sixty-five are entitled to disability insurance benefits if they have filed a claim and suffer from a disability as statutorily defined.¹⁴ The Secretary is required by the Act to make findings of fact and decisions “as to the rights of any individual applying for a payment”¹⁵ under OASDI, and, if the claim-

6. 42 U.S.C. §§ 401-432 (1976).

7. *Id.* § 405(h).

8. *Id.* §§ 1395-1395pp.

9. *Id.* § 1395ii.

10. *Id.* §§ 1381-1383c.

11. *Id.* § 1383(c)(1).

12. *Id.* § 405(h).

13. *Id.* §§ 402(a), (b), 414(a), (b).

14. *Id.* § 423(a).

15. *Id.* § 405(b).

ant so requests within six months, to provide "reasonable notice and opportunity for a hearing with respect to such decision."¹⁶ In addition, the Secretary is required to provide a hearing on timely request to an employee or a survivor who is dissatisfied with the Secretary's decision to change, or refusal of a request to change, the employee's earnings records.¹⁷ The regulations accordingly provide an opportunity for hearings if an initial claim for benefits is denied or is otherwise adversely decided,¹⁸ if benefits already granted are terminated,¹⁹ if certain other decisions affecting the amount of benefits are made,²⁰ or if a proper request is made to revise earnings records.²¹ The claimant or relevant party is entitled to reconsideration of the "initial determination"²² upon request filed within sixty days of the date of mailing²³ notice of the "initial determination."²⁴ If the party is still dissatisfied with the decision after reconsideration, he can obtain an evidentiary hearing before an administrative law judge upon request filed within sixty days of the date of mailing notice of the reconsidered determination.²⁵ Within sixty days of notice of the administrative law judge's decision, review of that decision may be sought from the Appeals Council, which, in its discretion, may review the administrative law judge's decision.²⁶

42 U.S.C. § 405(g) provides that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party, . . . may obtain a review of such decision by a civil action . . . brought in the district court of the United States."²⁷ Findings of fact are sub-

16. *Id.*

17. *Id.* § 405(c)(7).

18. 20 C.F.R. § 404.905(a) (1979).

19. *Id.* § 404.905(d).

20. *Id.* § 404.905(b).

21. *Id.* § 404.905(g).

22. *Id.* § 404.909, .910.

23. *Id.* § 404.911. Prior to November 1, 1976, the request had to be filed within six months of the date of mailing of notice of the initial determination. See 41 Fed. Reg. 47,915-16 (1976).

24. 20 C.F.R. § 404.907 (1979).

25. *Id.* §§ 404.916, .918. See also 42 U.S.C. § 405(b) (1976).

26. 20 C.F.R. §§ 404.945-.947 (1979). At each stage of the administrative proceedings—initial determination, reconsideration, administrative law judge's decision, and Appeals Council decision—a decision rendered on a claim becomes the final decision of the Secretary unless further review is timely sought by the party. *Id.* §§ 404.908, .916, .940, .951. The regulations provide that such a final determination or decision provides a basis for administrative *res judicata*. *Id.* § 404.937(a). The final determination or decision, however, may be reopened up to 12 months after notice of the initial determination, *id.* § 404.957(a), or thereafter, "upon a finding of good cause for reopening" until four years after the date of the notice of the initial determination. *Id.* § 404.957(b). Moreover, a final decision may be reopened "at any time" when the determination or decision "is unfavorable, in whole or in part, to the party thereto but only for the purpose of correcting clerical error or error on the face of the evidence on which such determination or decision was based," *id.* § 404.957(c)(8), and in certain other limited circumstances. See *id.* § 404.957(c)(1)-(7), (9).

27. 42 U.S.C. § 405(g) (1976) provides:

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of

jected to substantial evidence review.²⁸

There is one other provision for judicial review under OASDI. Because of difficulties perceived by Congress in the constitutionality of taxing state and local government employees, such employees are covered by Social Security Old Age, Survivors, and Disability Insurance only through voluntary agreements between the Secretary and the relevant state (or instrumentality of more than one state).²⁹ Under such agreements the state collects employee contributions, and pays to the Secretary an amount equal to what the employees would have paid in Social Security taxes had they been directly covered.³⁰ A decision by the Department of Health, Education and Welfare [HEW], regarding the amount that a state owes under the agreement, following administrative review (without a statutory requirement for a hearing), is judicially reviewable,³¹ but only at the instance of the state (or, where applicable, an instrumentality of two or more states).³²

Supplemental Security Income

The second major program to which section 405(h) applies is the Supplemental Security Income program [SSI].³³ In October 1972, Congress repealed the categorical assistance program of federal grants to state-administered welfare assistance programs for the aged, blind, and disabled, and established SSI,³⁴ which, in effect, federalized state welfare programs for the aged, blind, and disabled. The Act requires that reasonable notice and an opportunity for a hearing be provided for "any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination" under SSI, if a request is made within sixty days after notice of the determination.³⁵ The Act also incorporates the judicial review provisions and limitations

such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. . . . As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The [district] court shall have power to enter . . . a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

28. *Id.*

29. *Id.* §§ 410(a)(7), 418(a)(1). See generally *Secretary of HEW v. Snell*, 416 F.2d 840, 841-42 (5th Cir. 1969).

30. 42 U.S.C. § 418(e)(1)(A) (1976).

31. *Id.*

32. *Id.* § 418(s), (t)(1).

33. 42 U.S.C. §§ 1381-1383c (1976).

34. Supplemental Security Income Act, Pub. L. No. 92-603, § 301, 86 Stat. 1465 (codified at 42 U.S.C. 1381-1383c (1976)).

35. 42 U.S.C. § 1383(c)(1) (1976).

found in section 405.³⁶

Medicare

The third major program to which section 405(h) applies is Medicare. Unlike under OASDI and SSI, the judicial review provisions under the Medicare Act³⁷ are specifically limited to certain kinds of administrative decisions.³⁸ While the preclusion of review and the limitation of jurisdiction of section 405(h) are incorporated generally into the Act,³⁹ the provision for judicial review is incorporated only for certain purposes.⁴⁰ To understand these limitations a brief overview of how the Medicare Act works is required.⁴¹

Enacted in 1965, as title XVIII of the Social Security Act, Federal Health Insurance for the Aged and Disabled, popularly known as Medicare, is codified at 42 U.S.C. §§ 1395-1395pp. It consists of two substantively distinct parts, one providing insurance for hospital and related post-hospital services, known as Part A,⁴² the other providing insurance for supplementary medical services, primarily physicians' services, known as Part B.⁴³

Part A. Under Part A, the hospital insurance program, persons aged sixty-five and older, and certain younger disabled persons,⁴⁴ receive essential hospital services,⁴⁵ paid for from a trust fund financed by wage taxes on employees and self-employers.⁴⁶ The hospital services are paid for directly by the government. Only a hospital or other institution that qualifies as a "provider of services" under section 1395x(u),⁴⁷ however, is eligible to receive payments under the pro-

36. 42 U.S.C. § 1383(c) (1976) provides in pertinent part:

(1) The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under . . . [SSI] with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hearing on the matter in disagreement within sixty days after notice of such determination is received. . . .

(3) The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in . . . [42 U.S.C. § 405(g) (1976)] to the same extent as the Secretary's final determinations under . . . [*Id.* § 405].

37. *Id.* §§ 1395-1395pp.

38. *See id.* §§ 1395ff, 1395ii, 1395pp(d).

39. *Id.* § 1395ii.

40. *Id.* §§ 1395ff(b), 1395pp(d).

41. The following summary is borrowed in part from the opinions of the Fifth Circuit in *Mount Sinai Hosp. v. Weinberger*, 517 F.2d 329, 334-35 (5th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *Szekely v. Florida Medical Ass'n*, 517 F.2d 345, 347-48 (5th Cir. 1975), *cert. denied*, 425 U.S. 960 (1976).

42. 42 U.S.C. §§ 1395c-1395i-2 (1976).

43. *Id.* §§ 1395j-1395w.

44. *Id.* § 1395c.

45. *Id.* §§ 1395d(a),(c),(d).

46. *See* 26 U.S.C. §§ 1401(b), 3101(b), 3111(b) (1976).

47. 42 U.S.C. § 1395x(u) (1976).

gram.⁴⁸ It can do so only after entering into an agreement with the Secretary of HEW that meets the requirements of section 1395cc(a).⁴⁹ Among other things, the participating institution must agree not to charge a Medicare beneficiary for any services received under the program,⁵⁰ but instead to look only to the government for compensation.⁵¹ Payment for services is based on the reasonable cost of such services.⁵²

Day-by-day administration of the Medicare program is handled by "fiscal intermediaries." These are private, nongovernment entities, frequently health and accident insurance companies (including Blue Cross organizations), nominated by a provider or group of providers. They enter into contracts with HEW and serve as HEW's agent for many functions, such as hospital audits, information dissemination, and fund disbursement.⁵³ Certain determinations under the Medicare Act scheme are made, at least in the first instance, by the fiscal intermediary on behalf of the Secretary of HEW.

Reimbursing a provider for services rendered to a Medicare beneficiary requires resolution, in particular cases, of two important and distinct issues: (1) Whether the services provided are covered by section 1395d and not excluded by section 1395y, and (2) whether the amount paid for the services is the "reasonable cost" under section 1395x(v).

The issues in coverage determinations are defined by sections 1395d and 1395y. Section 1395d defines the benefits covered by Medicare: In-patient hospital services, post-hospital extended care services, and post-hospital home health services, with annual day or visit limits for each.⁵⁴ Section 1395y defines exclusions from the general definition of scope of benefits in section 1395d. The most important, as a practical matter, are the exclusions from coverage of services "which are not reasonable and necessary for the diagnosis or treatment of illness or injury"⁵⁵ or which are for "custodial care."⁵⁶

On the other hand, the issues in cost determinations are defined by section 1395x(v) and the applicable regulations.⁵⁷ In determining the

48. *Id.* § 1395f(a).

49. *Id.*

50. *Id.* § 1395cc(a)(1)(A) (other than for co-insurance and deductibles provided for in *id.* § 1395cc(a)(2)(A)).

51. *Id.* § 1395f.

52. *Id.* § 1395f(b). The amount is determined pursuant to 1395x(v) and the appropriate regulations. For periods after 1972, providers may be paid the customary charges with respect to provided services, if less than the reasonable cost. *See* Pub. L. No. 92-603, § 233(f), 86 Stat. 1412 (1972); 42 C.F.R. 405.455 (1979).

53. 42 U.S.C. § 1395h(a) (1976).

54. *Id.* § 1395d(a)(1)-(3).

55. *Id.* § 1395y(a)(1).

56. *Id.* § 1395y(a)(9).

57. *See* 42 C.F.R. § 405.401-488 (1979).

reasonable cost of services, HEW not only makes allocations based on the proportion of charges made with respect to Medicare beneficiaries to all charges for hospitals services,⁵⁸ but also makes determinations as to the reasonableness of costs according to the various types of services provided to Medicare beneficiaries and the various classes of institutions or agencies that are providers.⁵⁹

Oral evidentiary hearings with regard to decisions of the Secretary in Medicare cases, and judicial review thereof, are provided by the Act only in limited circumstances. Subject to amount in controversy requirements, Medicare beneficiaries are entitled to an oral evidentiary hearing and judicial review (like that for OASDI applicants) on issues relating to their eligibility for Medicare,⁶⁰ and whether a particular service is covered.⁶¹ These coverage issues include determining the medical necessity of services⁶² but do not include the determination of reasonable cost, since the beneficiary receiving services has no interest in the amount a provider receives for furnishing services to the beneficiary.

For periods prior to October 30, 1972, provider hospitals were statutorily entitled to a similar hearing and judicial review only on issues related to whether they are qualified as providers.⁶³ The Medicare Act was amended in 1972⁶⁴ and 1974⁶⁵ to permit providers, subject to amount in controversy requirements and only for post-1972 periods, to obtain a hearing before the Provider Reimbursement Review Board [PRRB] and subsequent judicial review, if they are dissatisfied with the amount of reimbursement due for covered services (i.e., cost determinations).⁶⁶ The PRRB and any court reviewing a decision of the PRRB are, however, expressly precluded from reviewing issues regarding exclusions from coverage.⁶⁷

For periods after October 30, 1972, the hearing and review rights of providers are extended to certain coverage disputes also. The statutory scheme was modified to accommodate beneficiaries who accepted services while believing they were covered, only to find out that the services were not covered by Medicare and that they then owed the

58. *Id.* § 405.452(a).

59. 42 U.S.C. § 1395x(v)(1)(A) (1976).

60. *Id.* §§ 1395ff(b)(1)(A), (B).

61. *Id.* § 1395ff(b)(1)(C).

62. *Id.*

63. *See* Health Insurance for the Aged Act, Pub. L. No. 89-97, 79 Stat. 286, 330 (1965) (current version at 42 U.S.C. § 1395ff(c)(1976)).

64. Health Insurance for the Aged Act, Pub. L. No. 92-603, § 243(a), 86 Stat. 1420.

65. *Id.*, Pub. L. No. 93-484, § 3(a), 88 Stat. 1459.

66. 42 U.S.C. § 1395oo(a) (1976).

67. *Id.* § 1395oo(g).

hospital for the uncovered services.⁶⁸ Payment is permitted for certain uncovered services where the beneficiary could not reasonably have been expected to know that the service would not be covered.⁶⁹ In particular, where services would otherwise be precluded as medically unnecessary under section 1395y(a)(1) or as custodial under section 1395y(a)(9), and the beneficiary did not know and could not reasonably have been expected to know that the services were not covered, then payment will be made, unless the provider knew or could be expected to know that the services were not covered.⁷⁰ In the latter case, the amendment provides that the beneficiary will not have to pay for the services and will be indemnified for any payments to the provider.⁷¹ Because the provider cannot charge the beneficiary for provided services even though the services were not covered by Medicare, and an innocent beneficiary has no need to seek a hearing, the amendment provides that, after a beneficiary has waived his rights to a hearing and review, the provider is generally entitled to those hearing and review rights.⁷²

Part B. Part B of Medicare provides voluntary supplementary medical insurance. Under Part B, persons aged sixty-five and older and certain disabled persons,⁷³ are eligible to enroll to obtain benefits⁷⁴ in return for payment of monthly premiums. These premiums and contributions from the federal government go into a separate trust fund which pays for benefits, including "medical and other health services."⁷⁵

An enrolled individual who obtains a covered service can either pay for the service and request direct reimbursement⁷⁶ or assign this right of reimbursement to the person providing the service.⁷⁷ All payments are subject to a deductible amount.⁷⁸ The limitations on coverage that apply under Part A,⁷⁹ also apply under Part B.⁸⁰

For the administration of Part B, HEW is authorized to act through "carriers,"⁸¹ which are analogous to the fiscal intermediaries

68. *Id.* § 1395pp(a).

69. *Id.* § 1395pp(a)(2).

70. *Id.* § 1395pp(b).

71. *Id.*

72. *Id.* § 1395pp(d).

73. *Id.* § 1395o.

74. *Id.* § 1395p.

75. *Id.* § 1395k(a)(1) (such as physician and diagnostic services, outpatient physical therapy, ambulance, and home health services).

76. *Id.* § 1395u(b)(3)(B)(i) (80% of the reasonable charge in most cases. *Id.* § 1395l(a)).

77. *Id.* § 1395u(b)(3)(B)(ii).

78. *Id.* § 1395l(b).

79. See text & note 55 *supra*.

80. 42 U.S.C. § 1395y(a) (1976).

81. *Id.* § 1395u(a).

under Part A.⁸² Payment for most services is limited to the "reasonable charges" for the services provided.⁸³ Beneficiaries are reimbursed, or doctors holding assignments are paid, on the basis of the amounts charged, subject to the carriers' responsibility to establish appropriate reasonable amounts.⁸⁴

Hearings and review rights under Part B are more limited than under Part A. When payment on a claim is denied or the amount is in controversy, the patient has a statutory right to "an opportunity for a fair hearing by the carrier,"⁸⁵ but is provided no statutory right to judicial review.⁸⁶ Under HEW regulations, a physician who has accepted an assignment from a patient has the same right to a hearing as the patient.⁸⁷ The regulations also provide that a carrier will make an initial determination on a claim for benefits,⁸⁸ provide a separate review determination,⁸⁹ and an oral evidentiary hearing.⁹⁰ The hearing officer's decision is final, subject only to reopening provisions⁹¹ like those under OASDI.⁹²

The Act provides for judicial review under Part B only to determine whether a person is eligible to enroll or has enrolled.⁹³ As to these enrollment issues, the regulations provide the same procedures for hearing and review as are available under OASDI.⁹⁴

THE SUPREME COURT'S APPLICATION OF SECTION 405

Section 405(h), as we have seen, limits judicial review of findings and decisions and precludes jurisdiction over claims arising under Social Security, except as provided in the Act. Prior to the Supreme Court's decision in *Weinberger v. Salfi*,⁹⁵ however, the federal courts frequently had little difficulty in hearing cases that fell outside the jurisdictional grants in the Act itself. The prohibitory language of section 405(h) was generally either interpreted away,⁹⁶ or dealt with summarily

82. See text & note 53 *supra*.

83. See 42 U.S.C. § 1395f(a)(1) (1976).

84. See 42 C.F.R. §§ 405.501-544 (1978).

85. 42 U.S.C. § 1395u(b)(3)(C) (1976). The right is subject to an amount in controversy requirement for periods after October 30, 1972. Health Insurance for the Aged Act, Pub. L. No. 92-603, § 262(b), 86 Stat. 1448 (1972).

86. See 42 U.S.C. § 1395u(b)(3)(C) (1976).

87. 42 C.F.R. § 405.801(a) (1978). For periods after October 30, 1972, the right is statutory in most circumstances. 42 U.S.C. § 1395pp(d) (1976).

88. 42 C.F.R. § 405.803 (1978).

89. *Id.* § 405.810. If requested within six months.

90. *Id.* § 405.820. If requested within six months of the review determination.

91. *Id.* § 405.835.

92. See note 26 *supra*.

93. 42 U.S.C. § 1395ff(b)(1)(B) (1976).

94. 42 C.F.R. § 905 (j)(2) (1978).

95. 422 U.S. 749 (1975).

96. See *Kingsbrook Jewish Medical Center v. Richardson*, 486 F.2d 663, 666-68 (2d Cir. 1973) ("Where the Medicare Act establishes procedures for review of the Secretary's decision, a

or not at all.⁹⁷ In *Salfi* and two subsequent cases, *Mathews v. Eldridge*⁹⁸ and *Califano v. Sanders*,⁹⁹ the Supreme Court narrowly limited jurisdiction in cases arising under the Social Security Act where section 405(h) applies. As to the jurisdiction issue, the decision in each case was unexceptionable, but part of the rationale of the three cases leads to unreasonable results in other kinds of Social Security Act cases. Examination of some of these results will suggest a better way to reconcile the three cases, and others, in a manner consistent with congressional policies that the Supreme Court might have sought to further.

In *Salfi*, the Supreme Court held that the language of section 405(h) barred federal question jurisdiction under 28 U.S.C. § 1331 over a constitutional challenge to a requirement that, to be eligible for survivor benefits under OASDI, widows and stepchildren be related to a wage earner for at least nine months prior to his death.¹⁰⁰ The wife of a wage earner who died less than nine months after the marriage brought suit to challenge the duration requirement.¹⁰¹ She had previously filed a claim and sought reconsideration, but had not requested a hearing.¹⁰² The complaint asserted jurisdiction under 28 U.S.C. §§ 1331 (federal question), 1361 (federal mandamus), and 5 U.S.C. § 702 (section 10 of the Administrative Procedure Act).¹⁰³ A three-judge district court found jurisdiction under 28 U.S.C. § 1331, declared the duration-of-relation provision of the statute unconstitutional, and ordered retroactive benefits to be provided to a class of all persons disqualified by the invalidated provision.¹⁰⁴ In a six to three decision, the Supreme Court reversed, holding that the duration-of-relation provision was constitutional.¹⁰⁵

Although the issue of jurisdiction was not briefed, the Court also discussed at length the effect of section 405(h).¹⁰⁶ The Court first re-

court may not review that decision by other means. However, where the Act does not provide such procedures, section 405(h) does not preclude review.”); *Cappadora v. Celebrezze*, 356 F.2d 1, 3-5 (2d Cir. 1966) (“§ 405(h) . . . simply forbids attempts to review final decisions on the merits by any route other than § 405(g)” but permits review of other decisions, not reviewable under § 405(g)).

97. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 641 n.8 (1975); *Griffin v. Richardson*, 346 F. Supp. 1226, 1230 (D. Md.), *aff'd mem.*, 409 U.S. 1069 (1972); *Davis v. Richardson*, 342 F. Supp. 588, 593 (D. Conn.), *aff'd mem.*, 409 U.S. 1069 (1972).

98. 424 U.S. 319 (1976).

99. 430 U.S. 99 (1977).

100. 422 U.S. at 761.

101. *Id.* at 753.

102. *Id.* at 753-54.

103. *Id.* at 755. Brief for Appellant at 17 n.13, *id.*; Brief for Appellee at 42, *id.*

104. *Salfi v. Weinberger*, 373 F. Supp. 961, 963, 966 (N.D. Cal. 1974), *rev'd*, 422 U.S. 749 (1975).

105. 422 U.S. at 785.

106. *Id.* at 756-62. In the Supreme Court, the Government did not argue that § 405(h) barred the action entirely, although it had done so in the district court. See *Salfi v. Weinberger*, 373 F.

jected the district court's reading of section 405(h) as merely a codification of the doctrine of exhaustion of administrative remedies.¹⁰⁷ The Court noted that the language of the third sentence is "sweeping and direct and . . . states that *no* action shall be brought under § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted."¹⁰⁸ Distinguishing *Johnson v. Robison*,¹⁰⁹ the Court also rejected the argument that the claim arose not under the Social Security Act, as precluded by section 405(h), but under the Constitution.¹¹⁰ In *Robison*, the statute at issue, 38 U.S.C. § 211(a), precluded jurisdiction only as to review of "decisions of the [Veterans'] Administrator," but did not preclude jurisdiction to review statutory requirements.¹¹¹ Thus, 38 U.S.C. § 211(a) is unlike section 405(h), which by the terms of its third sentence precludes jurisdiction over any action seeking to recover on any Social Security claim.¹¹² The Court also reasoned that, in *Robison*, it had sought to avoid a statutory construction that would have precluded constitutional challenges to statutory limitations, whereas the Social Security Act itself provides a jurisdictional route under section 405(g) through which claims such as the plaintiff's in *Salfi* could be reviewed.¹¹³

Next the Court determined that the requirements of section 405(g) had in fact been met by the named plaintiff.¹¹⁴ The requirements that the civil action under section 405(g) be filed within sixty days of the final administrative decision in a particular district court were deemed waivable as mere statute of limitation and venue requirements.¹¹⁵ Section 405(g)'s requirement of a "final decision of the Secretary made after a hearing," was, however, deemed "central to the requisite grant

Supp. 961, 964 (N.D. Cal. 1974), *rev'd*, 422 U.S. 749 (1975). The Government did argue, however, that sovereign immunity barred an award of retroactive benefits, Brief for Appellants at 16-19, and in the course of that argument referred to § 405(h). *Id.* at 17 n.19. Because the Court reversed on the merits, it did not reach the sovereign immunity issue. 422 U.S. at 756.

107. 422 U.S. at 757. Since exhaustion would be fruitless under the circumstances the district court had held that section 405(h) would not bar this suit.

108. *Id.* (emphasis in original). Also, since the first two sentences are sufficient to require administrative exhaustion, the Court reasoned that a limited reading of the third sentence would render it superfluous. *Id.* at 757-58. In a footnote, the Court rejected any argument that without the third sentence, the second sentence, which precludes review of secretarial findings or decisions, would not assure exhaustion where a district court complaint is filed before an administrative claim is decided. *Id.* at 758 n.6. The Court noted that an application was a statutory prerequisite to eligibility for benefits, and that once filed, even a nonfinal denial "is still a 'decision of the Secretary' which, by virtue of the second sentence of § 405(h), may not be reviewed save pursuant to § 405(g)." *Id.*

109. 415 U.S. 361 (1974).

110. 422 U.S. at 760-62.

111. *See* 415 U.S. at 367-68.

112. *See* 422 U.S. at 762.

113. *Id.* at 762-64.

114. *Id.* at 764-65.

115. *Id.* at 763-64.

of subject-matter jurisdiction."¹¹⁶ While reaffirming that a court could not proceed in the absence of such a final decision on the grounds of futility, the Court nonetheless reasoned that the Secretary could properly conclude that full exhaustion of the administrative procedure was unnecessary, since the definition of "final decision" is "left to the Secretary to flesh out by regulation."¹¹⁷ In a similar fashion, the Court found that a prior hearing was not required if the Secretary determined that a hearing would have been useless.¹¹⁸ The Court then interpreted the Secretary's failure to raise the jurisdictional issue¹¹⁹ as a determination that he had made the appropriate determinations of finality as to the named plaintiff,¹²⁰ and the Court proceeded to decide the merits of the claims.

At the time *Salfi* was decided, initial briefs had already been submitted in *Mathews v. Eldridge*.¹²¹ The issue in *Eldridge* was whether due process required that the recipient of Social Security disability benefit payments be afforded an opportunity for an evidentiary hearing prior to the termination of such payments.¹²² The plaintiff's Social Security disability benefits were terminated when it was determined, following the opportunity for the plaintiff to provide a written response, that he was no longer disabled.¹²³ A hearing and judicial review were available to him, but during their pendency, benefits would not be paid.¹²⁴ Instead of obtaining reconsideration and then a hearing as provided by the regulations,¹²⁵ the plaintiff brought suit in district court contending that, under *Goldberg v. Kelly*,¹²⁶ his benefits could not be terminated until after the hearing.¹²⁷ The district court agreed, ordering that his benefits be reinstated pending an evidentiary hearing.¹²⁸ The court of appeals affirmed,¹²⁹ but the Supreme Court reversed on the merits.¹³⁰

In a supplemental brief filed after the *Salfi* decision was rendered,

116. *Id.* at 764.

117. *Id.* at 766-67.

118. *Id.* at 767.

119. See note 106 *supra*.

120. 422 U.S. at 767. Because there was no allegation that the class members even filed applications, much less obtained secretarial decisions, final or otherwise, the Court found that § 405(h) foreclosed jurisdiction over so much of the complaint as concerned the class. *Id.* at 764.

121. See Brief for Respondent at 11, *Mathews v. Eldridge*, 424 U.S. 319 (1976).

122. 424 U.S. 319, 323 (1976).

123. *Id.* at 324.

124. *Id.* at 323-24.

125. 20 C.F.R. §§ 405.710, .820 (1978).

126. 397 U.S. 254 (1970).

127. 424 U.S. at 325.

128. *Eldridge v. Weinberger*, 361 F. Supp. 520, 528 (W.D. Va. 1973), *aff'd per curiam*, 493 F.2d 1230 (4th Cir. 1974), *rev'd sub nom.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976).

129. *Eldridge v. Weinberger*, 493 F.2d 1230, 1231 (4th Cir. 1974), *rev'd sub nom.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976).

130. 424 U.S. at 349.

the Government relied on *Salfi* to argue that section 405(h) precluded jurisdiction.¹³¹ The Court dealt with this contention, not by concluding that section 405(h) was inapplicable, but rather by concluding that the district court had jurisdiction under section 405(g).¹³² The Court reasoned that the central jurisdictional requirement of a final decision by the Secretary after a hearing consisted of both a nonwaivable element, filing a claim, and a waivable element, a final decision after a hearing.¹³³ The Court found that the plaintiff had fulfilled the nonwaivable requirement of filing a claim,¹³⁴ and then proceeded to deal with the waivable element. The Court held that it need not always defer to the Secretary's determination of finality¹³⁵ and refused to do so for two reasons. First, unlike *Salfi*, the *Eldridge* plaintiff's constitutional challenge was "entirely collateral to his substantive claim of entitlement."¹³⁶ Second, also unlike *Salfi*, if a plaintiff were required to go through the administrative procedure, even with the possibility of retroactive benefits, his constitutional claims might be lost, since the claim rested on the very proposition that full relief could not be obtained at a post-termination hearing.¹³⁷ The Court then proceeded on the merits to hold that the plaintiff had no procedural due process right to a pretermination oral hearing.¹³⁸

The *Eldridge* Court expressly refrained from reaching the plaintiff's alternative jurisdictional argument that jurisdiction under the mandamus statute¹³⁹ or the Administrative Procedure Act [APA]¹⁴⁰

131. Petitioner's Supplemental and Reply Brief at 3-10, *Mathews v. Eldridge*, 424 U.S. 319 (1976). The brief relied not only on the third sentence, but also on the second sentence of § 405(h). *Id.* at 4, 6. The Government argued that the Secretary had determined neither that the termination decision as to Mr. Eldridge was final, nor that a hearing was unnecessary. *Id.* at 7-8. Further, "exhaustion may obviate the need for any judicial review." *Id.* at 8. The Government also made the somewhat tortured argument that a finding of no jurisdiction would not forever preclude judicial review of the constitutional issue raised by the plaintiff. If, after a hearing, the Secretary were to affirm a termination, and if on judicial review under § 405(g) a court were to reverse on the merits, the court could also, so the theory went, decide the pretermination hearing issue (although seemingly moot at that point since retroactive benefits would be provided), because the issue would be "capable of repetition." *Id.* at 8-10.

The plaintiff argued that § 405(g) provided jurisdiction as in *Salfi*, Respondent's Supplemental Brief at 6-9, *Mathews v. Eldridge*, 424 U.S. 319 (1976), and, in the alternative that 28 U.S.C. § 1361 (mandamus) and 5 U.S.C. §§ 701-706 (Administrative Procedure Act) provided jurisdiction and were not precluded by the third sentence of § 405(h). Respondent's Supplemental Brief at 9-18.

132. 424 U.S. at 328-32.

133. *Id.* at 329. The distinction was based on the *Salfi* Court's dismissal of the class claims, as to which no allegation had been made that administrative claims had even been filed, and the *Salfi* Court's acceptance of the individual claim on the basis of secretarial waiver. *Id.* See note 120 *supra*.

134. 424 U.S. at 329.

135. *Id.* at 330.

136. *Id.*

137. *Id.* at 331.

138. *Id.* at 349.

139. 28 U.S.C. § 1361 (1976).

140. 5 U.S.C. §§ 701-706 (1976).

was available, notwithstanding section 405(h) as interpreted in *Salfi*.¹⁴¹ The issue was presented with regard to the APA, however, in *Califano v. Sanders*.¹⁴² *Sanders* involved a Social Security disability claimant who, after a hearing, had been finally denied benefits in 1966.¹⁴³ In 1973, he sought reopening as provided by the regulations.¹⁴⁴ The Administrative Law Judge denied the request and refused to grant a hearing.¹⁴⁵ The claimant then brought suit under section 405(g), challenging the reopening denial.¹⁴⁶ The district court dismissed for lack of jurisdiction,¹⁴⁷ but the Seventh Circuit reversed, holding that while there was no jurisdiction under section 405(g), jurisdiction was present under the APA to review the reopening denial for abuse of discretion.¹⁴⁸ The argument that the APA provided an independent basis of jurisdiction, and was not precluded by the third sentence of § 405(h),¹⁴⁹ had often been used to find jurisdiction in Social Security Act cases—particularly in reopening cases—even after *Salfi*.¹⁵⁰

In *Sanders*, the Government argued before the Supreme Court that section 405(g) did not provide a basis for jurisdiction and that section 405(h) precluded review of the denial of reopening under any other jurisdictional basis.¹⁵¹ Alternatively, the Government argued that the APA did not contain an independent grant of subject matter jurisdiction.¹⁵² In response, both the plaintiff and an *amicus* argued that jurisdiction could be found under section 405(g) in light of *Salfi* and *Eldridge*,¹⁵³ despite the unanimous agreement of the courts of appeals to the contrary.¹⁵⁴ The Supreme Court found that the APA was not an independent basis of jurisdiction,¹⁵⁵ and that section 405(g) was inapplicable.¹⁵⁶ Having found no basis for jurisdiction, the Court reversed and did not reach the Government's section 405(h) preclusion argument.¹⁵⁷

141. 424 U.S. at 332 n.12.

142. 430 U.S. 99 (1977).

143. *Id.* at 102.

144. *Id.* See note 26 *supra*.

145. 430 U.S. at 103.

146. *Id.*

147. *See id.*

148. *Sanders v. Weinberger*, 522 F.2d 1167, 1171 (7th Cir. 1975), *rev'd sub nom.*, *Califano v. Sanders*, 430 U.S. 99 (1977).

149. This argument is predicated on the fact that the APA is found in title 5 rather than title 28.

150. *See Adams Nursing Home, Inc. v. Mathews*, 548 F.2d 1077, 1079-80 n.6 (1st Cir. 1977); *Gallo v. Mathews*, 538 F.2d 1148, 1150-51 (5th Cir. 1976); *LeJeune v. Mathews*, 526 F.2d 950, 952-53 (5th Cir. 1976); *Ortego v. Weinberger*, 516 F.2d 1005, 1007 (5th Cir. 1975).

151. Brief for Petitioner, at 10-23, *Califano v. Sanders*, 430 U.S. 99 (1977).

152. *Id.* at 23-41.

153. Brief for Respondent at 13-14, 18-20; Brief for Amicus at 5-20.

154. *See cases cited in Califano v. Sanders*, 430 U.S. 99, 107 n.8 (1977).

155. *Id.* at 104-07.

156. *Id.* at 107-09.

157. *Id.* at 109. In a concurring opinion, joined by the Chief Justice, Mr. Justice Stewart

In finding no jurisdiction under section 405(g), the Court noted that while that section requires a "final decision of the Secretary made after a hearing,"¹⁵⁸ a petition to reopen a prior final decision may be denied without a hearing, and indeed even if a hearing is granted, that hearing is afforded by regulation and not by the Act.¹⁵⁹ Moreover, a finding of jurisdiction would frustrate the congressional purpose behind the sixty-day time limit on judicial review found in section 405(g).¹⁶⁰ The Supreme Court expressly rejected plaintiff's contention that *Salfi* and *Eldridge* permitted a broader interpretation of section 405(g).¹⁶¹ While conceding that in those cases jurisdiction was found despite the absence of a prior section 405(b) hearing, the cases were distinguished on the ground that they involved constitutional challenges.¹⁶²

In view of the judiciary's position within our constitutional scheme as final adjudicator of constitutional rights and duties, it may be presumed that Congress will not lightly take the step of precluding jurisdiction over claims involving direct government violations of the Constitution. On the other hand, where statutory rights and duties are involved, Congress has the final say. It is, therefore, much more likely that when Congress precluded jurisdiction to review actions of an agency for failure to comply with a statute—and *a fortiori* for failure to comply with its own regulations—it meant what it said. The preclusion

accepted the preclusion argument, reasoning that the second sentence of § 405(h), which, except as provided by the act, precludes review of secretarial findings and decisions, applied regardless of which jurisdictional basis was asserted. *Id.* at 109-11. This conclusion is not required by the reasoning of *Salfi*, which explains that the second sentence of § 405(h) serves as a codification of the equitable requirement of exhaustion of remedies. The conclusion, however, is consistent with the *Salfi* reasoning. See *Califano v. Sanders*, 430 U.S. at 111 n. (Stewart, J., concurring). The *Salfi* complaint had alleged jurisdictional bases other than 28 U.S.C. § 1331, see *id.* at 110, and at one point the *Salfi* opinion had stated that sources of jurisdiction other than § 405(g) were foreclosed by § 405(h). See *id.* at 110-11 (quoting *Weinberger v. Salfi*, 422 U.S. at 764). The fact that the majority in *Sanders* refrained from using this "shorter route" to the conclusion of no jurisdiction, however, might indicate a reluctance to interpret the jurisdiction withdrawing effect of § 405(h) so broadly. On the other hand, the Court might have wished, for other reasons, to decide the APA jurisdiction question once and for all. See K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* vi (Supp. 1976) (criticizing the Court for never having decided the APA jurisdiction question).

158. 430 U.S. at 108.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 108-09. The Court stated that

a decision denying § [405(g)] jurisdiction in *Salfi* or *Eldridge* would effectively have closed the federal forum to the adjudication of colorable constitutional claims. Thus those cases merely adhered to the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the "extraordinary" step of foreclosing jurisdiction unless Congress' intent to do so is manifested by "clear and convincing" evidence.

This is not one of those rare instances where the Secretary's denial of a petition to reopen is challenged on constitutional grounds.

Id. at 109. (citations omitted).

of judicial review, in effect, legislates that Congress will be satisfied with actions of the agency, notwithstanding other statutory provisions. Of course, if Congress is dissatisfied, it can amend the Act either to change substantive provisions or to provide for judicial review. Thus, it made sense for the Supreme Court to draw a distinction in determining whether Congress has precluded jurisdiction for judicial review on the basis of whether constitutional issues are involved.

PROBLEMS WITH THE *SALFI-ELDRIDGE-SANDERS* LINE

Under *Salfi*, *Eldridge*, and *Sanders*, then, jurisdiction in the district court over any suit arising out of a Social Security Act title to which section 405(h) applies is precluded, unless a jurisdictional grant contained in the Act either applies by its terms or can be loosely interpreted when a constitutional issue is raised. This set of criteria works well in the context of the three cases decided by the Court, and in certain similar kinds of cases,¹⁶³ but in light of the policies the Court ap-

163. See *Mathews v. Diaz*, 426 U.S. 67, 72-77 (1976). *Diaz* was a due process-equal protection challenge to a Medicare Part B statutory provision, 42 U.S.C. § 1395o(2) (1976), denying eligibility to aliens unless they have been admitted for permanent residence and also have resided in the country for at least five years. 426 U.S. at 69. The Medicare Act incorporates § 405(g) for the purpose of determining eligibility for Part B benefits. 42 U.S.C. § 1395ff(b)(1)(B) (1976). In other respects, the case was procedurally very similar to *Salfi*, except that the Secretary challenged jurisdiction over one plaintiff whose application had not been filed prior to suit, and once filed had not even preliminarily been denied. 426 U.S. at 72. The Court, however, interpreted the Secretary's stipulation "that no facts were in dispute, that the case was ripe for disposition by summary judgment, and that the only issue . . . was the constitutionality of the statute . . . as tantamount to a decision denying the application and as a waiver of the exhaustion requirements." *Id.* at 76-77. The Court, as in *Salfi*, found jurisdiction over the named individuals, but found against them on the merits. *Id.* at 77, 87.

A series of cases procedurally very similar to *Eldridge* arose from the replacement of state-administered federal assistance to the aged, blind, and disabled by SSI. See text & notes 33-36 *supra*. The SSI statute "grandfathered" persons eligible for the state programs into the SSI program unless they did not receive the state aid until the last six months of 1973. See 42 U.S.C. § 1382c(a)(3)(E) (1976). For persons in the latter category, "presumptive" disability benefits were paid pending an SSI eligibility determination, but once such an eligibility determination was made, benefits were cut off pending a hearing. *Id.* § 1383(c). In many states, such persons brought suit challenging the constitutionality under *Goldberg v. Kelly*, 397 U.S. 254 (1970), of the discontinuance of benefits pending a hearing. See, e.g., *DeLao v. Califano*, 560 F.2d 1384, 1388 (9th Cir. 1977); *Tatum v. Mathews*, 541 F.2d 161, 163-64 (6th Cir. 1976); *Johnson v. Mathews*, 539 F.2d 1111, 1116-17 (8th Cir. 1976). These cases were jurisdictionally very similar to *Eldridge*: An ultimate hearing on eligibility was available under § 405(g), see 42 U.S.C. § 1383(c)(3) (1976), claims had been filed, the constitutional challenge was collateral to the substantive claim of entitlement and by its very nature would be lost if the plaintiffs were required first to complete the administrative procedure. The courts accordingly had little difficulty finding jurisdiction under the *Eldridge* rationale.

Cases involving the constitutionality of recouping overpayments of Social Security benefits, by reducing later payments to which the beneficiary is entitled, but without a prerecouplement hearing to determine whether the beneficiary is entitled to a waiver, also fit the *Eldridge* jurisdictional mold. *Mattern v. Mathews*, 582 F.2d 248, 252-53 (3d Cir. 1978); *Elliott v. Weinberger*, 564 F.2d 1219, 1225-28, 1225 n.8a (9th Cir. 1977), *aff'd on other grounds sub nom.* *Califano v. Yamasaki*, 99 S. Ct. 2545 (1979). Again, claims were filed and the constitutional challenge was collateral to a substantive claim of entitlement itself reviewable under § 405(g), which by its very nature would be lost if the plaintiffs were required first to complete the administrative procedure. See also *Town Court Nursing Center v. Beal*, 586 F.2d 266, 274-75 (3d Cir. 1978).

parently sought to advance, the set of criteria is either overinclusive or underinclusive in a number of other kinds of Social Security Act cases. Application of the criteria may result, for instance, in the time and exhaustion limits of the Act being circumvented on the one hand, and in the unavailability of the district courts to hear proper constitutional due process challenges on the other. Moreover, this reasoning encourages lower courts to distort the meaning of statutory jurisdictional requirements, such as those in section 405(g), beyond all recognition in order to find jurisdiction in some cases.

Cases That Might Be Heard But Should Not Be

First, by its dictum regarding challenges on constitutional grounds in *Sanders*, the Supreme Court invited persons bringing suit under the Social Security Act to couch their claims in constitutional terms in order to assert jurisdiction under section 405(g). The *Sanders* opinion reasoned that denying section 405(g) jurisdiction in *Salfi* or *Eldridge* would "effectively have closed the federal forum to the adjudication of colorable constitutional claims."¹⁶⁴ *Salfi* did not interpret section 405(g) in nearly the kind of loose manner used in *Eldridge*. A holding of no jurisdiction in *Salfi* would have closed the federal forum to Mrs. Salfi, but would not have closed the federal forum forever to the issue she sought to raise. The *Salfi* Court clearly contemplated that once the full administrative procedure had been exhausted, the constitutional issue could have been presented to a court under section 405(g), even if jurisdiction had not been found in *Salfi* itself.¹⁶⁵ In *Eldridge*, however, a finding of no jurisdiction would have precluded anybody from even obtaining a federal court adjudication of Mr. Eldridge's constitutional claim. The Court accordingly interpreted section 405(g) very loosely in *Eldridge*. By lumping the two situations together in *Sanders*, the Court implied that the mere presence of a constitutional issue as in *Salfi*, even if that issue could be adjudicated in a federal court if properly brought in another case, would justify the much looser interpretation of section 405(g) found in *Eldridge* and necessitated there by the fact that denial of jurisdiction would have closed the federal forum to the adjudication of the constitutional claim in any case. This interpretation is supported by the negative implication in *Sanders* that there would be jurisdiction under section 405(g) "where the Secretary's denial of a petition to reopen is challenged on constitutional grounds."¹⁶⁶ If this is so, then a Social Security disability claimant, in an attempt to reopen a benefit

164. 430 U.S. at 109.

165. See 422 U.S. at 762.

166. 430 U.S. at 109.

claim denied in the distant past could assert that the original denial was based on an unconstitutional statute or regulation. Denying jurisdiction in such a case would present no constitutional problem since the claimant could have raised the constitutional issue at the time of the initial claim; granting jurisdiction would frustrate the statutory purpose recognized in *Sanders*—forestalling belated litigation of old eligibility claims.¹⁶⁷

While courts might have little trouble disposing of such a case where a constitutional issue could have been decided in the context of the initial claim, they might find it more difficult to dispose of challenges to HEW actions on the reopening claim itself, if the challenge were couched in constitutional terms. Virtually any claim against the government can be expressed in constitutional terms,¹⁶⁸ particularly in the Social Security context, where questions of whether proper procedures or proper entitlement standards were applied, generally involve resort to regulations. The argument in either case can be cast in terms of the Secretary's failure to follow his own regulations. Such a failure is then arguably a violation of due process.¹⁶⁹

Unless the "constitutional issue" exception to the strict requirements for jurisdiction under section 405(g) is limited somehow, courts unsympathetic with the jurisdictional limitations of section 405 will have little difficulty permitting review contrary to the statutory policy of rendering claims final. For instance, a court could find that the Secretary violated due process by failing to conform properly to his regulations dealing with reopening.¹⁷⁰ While jurisdiction in such a case should not be permitted, there are obviously some kinds of reopening claims that should be reviewed judicially, such as where the Secretary refused to reopen on racial grounds.

These considerations suggest, first, that jurisdiction over reopening denials should be found only when constitutional issues are raised, and then only if the constitutional issue could not have been raised by re-

167. *Id.* at 108.

168. *Cf.* *Paul v. Davis*, 424 U.S. 693, 698-99 (1976) (argument that a person arrested by law enforcement officers has claim against officers under 42 U.S.C. § 1983 would lead to a conclusion that any person injured by state official has claim under fourteenth amendment).

169. *See* *Bluth v. Laird*, 435 F.2d 1065, 1071 (4th Cir. 1970). An example of this kind of phenomenon in the Medicare context is found in *Dr. John T. MacDonald Foundation, Inc. v. Mathews*, 534 F.2d 633 (5th Cir. 1977), *vacated*, 571 F.2d 328 (5th Cir.), *cert. denied*, 99 S. Ct. 250 (1978). *MacDonald* involved a provider challenge to the Secretary's application of his own regulation in determining reimbursement of reasonable costs. *Id.* at 634. In holding for the provider, the original panel even suggested that the Secretary could simply change his regulations in order to achieve his desired result in the future. *Id.* at 639. By the time the case was reheard and the jurisdictional difficulties were more apparently dispositive; the plaintiff was asserting that the Secretary's actions in determining reasonable costs for reimbursement constituted an unconstitutional denial of substantive due process. *Dr. John T. MacDonald Foundation, Inc. v. Califano*, 571 F.2d 328, 329-30 (5th Cir.), *cert. denied*, 99 S. Ct. 250 (1978).

170. *See* note 26 *supra*.

view of the original claim. This limitation avoids the possibility of review where a reopening claimant challenges a reopening denial on grounds that would have applied to the original claim, while permitting review of constitutional issues relating to the reopening procedure itself. Second, the considerations suggest that, as a matter of statutory construction, "constitutional issues" for these purposes should not include questions as to whether the Secretary properly followed the Act or his regulations, as long as the action would have been constitutional if properly authorized by the Act or his regulations. Unless the exception for constitutional claims is limited in this manner, it will eventually engulf the rule and every manner of challenge for violation of statutes or regulations will be heard, despite a specific preclusion of jurisdiction. Such a result would render the preclusion of jurisdiction virtually meaningless.

Similar reasoning was used recently by the Supreme Court in interpreting another statute granting district court jurisdiction. In *Chapman v. Houston Welfare Rights Organization*,¹⁷¹ the Court held that the grant in 28 U.S.C. § 1343(3) of federal jurisdiction over civil actions to redress the deprivation under color of state law "of any rights, privileges, or immunities secured by the Constitution of the United States" did not extend to actions involving rights secured solely by the supremacy clause of the Constitution.¹⁷² The Court relied on *Swift & Co. v. Wickham*,¹⁷³ which similarly held that language in 28 U.S.C. § 2281 providing for jurisdiction of three-judge courts over suits for injunctions against the enforcement of state statutes "upon the ground of the unconstitutionality of such statute" was not intended to include challenges to state statutes based upon the supremacy clause: "Since all federal actions to enjoin a state enactment rest ultimately on the Supremacy Clause, the words 'upon the ground of the unconstitutionality of such statute' would appear to be superfluous unless they are read to exclude some types of such injunctive suits."¹⁷⁴

The *Chapman* Court reasoned, by analogy, that "the entire reference in § 1343(3) to rights secured by an act of Congress would be unnecessary if the earlier reference to constitutional claims embraced those resting solely on the Supremacy Clause."¹⁷⁵ The Court accordingly concluded that "it would make little sense for Congress to have drafted the statute as it did if it had intended to confer jurisdiction over

171. 99 S. Ct. 1905 (1979).

172. *Id.* at 1911.

173. 382 U.S. 111 (1965).

174. *Id.* at 126 (footnotes omitted).

175. 99 S. Ct. at 1914.

every conceivable federal claim against a state agent.”¹⁷⁶

It would similarly make little sense for Congress to have drafted the Social Security Act to preclude jurisdiction in nonconstitutional claim cases, but not in constitutional claim cases, if it meant to include within the latter category virtually all Social Security Act cases. Yet that is the result if the category of constitutional claim cases includes all cases in which agency actions are challenged only for a failure to follow statutes or regulations, as opposed to the Constitution itself. It is therefore evident that the “constitutional issues” exception to the strict requirements for jurisdiction in Social Security Act cases, as a matter of statutory construction, should not extend to review of whether the Secretary properly followed the Act or his regulations, as long as the action if so authorized would have been constitutional.

For instance, review should not be permitted of a reopening denial where a claimant asserted that he had new and material evidence or where it is asserted that there was an error as to the first determination on the face of the evidence, even though the regulations define such circumstances as “good cause” for reopening.¹⁷⁷ In addition, review should not be permitted if the constitutionality of the procedures used in the first determination is challenged on application for reopening, since those constitutional issues could have been raised on judicial review of the first denial. On the other hand, a constitutional violation such as a denial of reopening on the basis of sex, or on the basis of a reopening regulation which itself is unconstitutional, should be reviewable.

The limitation of the “constitutional issues” exception in reopening cases to issues that could not have been raised by the initial claim, and to issues other than those involving whether the Secretary properly followed the Act or regulations, would be consistent with *Sanders*. In that case, the Court characterized as “rare” those instances where the Secretary’s denial of a petition to reopen may be challenged on constitutional grounds.¹⁷⁸ This standard would also effectively implement the policy implemented in *Salfi* of precluding court review even of constitutional issues when a means of raising the issues through the administrative process was available.¹⁷⁹

Cases That Cannot Be Heard In The District Court But Should Be

On the other hand, there are numerous cases, arising primarily

176. *Id.*

177. 20 C.F.R. §§ 404.957(b), .958 (1978).

178. 430 U.S. at 109.

179. 422 U.S. at 762.

under the Medicare Act, in which constitutional due process and equal protection issues are raised, but where there is no basis for district court jurisdiction to review such cases, even under an *Eldridge* analysis. The reason is that the *Eldridge* analysis relies on the availability at some point of jurisdiction under section 405(g): *Eldridge* permitted jurisdiction over a constitutional claim collateral to a substantive claim of entitlement which itself was ultimately reviewable under section 405(g).¹⁸⁰ Apart from the policy reasons for finding jurisdiction, the means for finding jurisdiction was an analysis that a final administrative decision had been made, and that it was reviewable under section 405(g).¹⁸¹ This analysis is impossible in certain other kinds of cases. The Medicare Act, for instance, incorporates section 405(g) only for limited purposes.¹⁸² Among the Medicare cases where the Act simply provides no basis for judicial review are all claims by provider hospitals for pre-1972 periods,¹⁸³ all claims under Part B except those dealing with whether the plaintiff is eligible to enroll or has enrolled,¹⁸⁴ and all beneficiary claims for less than the jurisdictional amount.¹⁸⁵ Even under OASDI there are circumstances where it is impossible for section 405(g) to be construed as applicable, such as where it is not the beneficiary who is suing, or where the subject of the challenge cannot in any sense be called a decision, as where the challenge is made to assertedly illegal hearing delays. In particular, courts have struggled with the issue of whether there is jurisdiction in light of section 405(g), as interpreted by *Salfi*, *Eldridge*, and *Sanders*, in the following kinds of cases:

- (1) Due process challenges by provider hospitals to administrative reimbursement procedures;¹⁸⁶
- (2) provider challenges to the constitutionality of regulations dealing with the amount of reimbursement under Part A;¹⁸⁷

180. 424 U.S. at 332.

181. *Id.* at 330-31.

182. See 42 U.S.C. §§ 1395ff, 1395pp(d) (1976); text & notes 60-94 *supra*.

183. See text & note 63 *supra*.

184. 42 U.S.C. § 1395ff(b)(1)(B) (1976).

185. *Id.* § 1395ff(b) (2).

186. See, e.g., *Alabama Hosp. Ass'n v. Califano*, 587 F.2d 762, 763 (5th Cir. 1979) (challenge to failure to hold hearings in connection with recoupment of funds for uncovered services under Part A); *Trinity Memorial Hosp. v. Associated Hosp. Serv., Inc.*, 570 F.2d 660, 664-65 (7th Cir. 1977) (whether provider hearings on reasonable cost disputes under Part A failed to satisfy due process requirements because employees of the fiscal intermediary sat on the appeals committee); *St. Louis Univ. v. Blue Cross Hosp. Serv.*, 537 F.2d 283, 291-92 (8th Cir.), *cert. denied*, 429 U.S. 977 (1976); *Overlook Nursing Home, Inc. v. United States*, 556 F.2d 500, 502-504 (Ct. Cl. 1977); *Whitecliff, Inc. v. United States*, 536 F.2d 347, 352-53 (Ct. Cl. 1976), *cert. denied*, 430 U.S. 969 (1977).

187. See, e.g., *Adams Nursing Home, Inc. v. Mathews*, 548 F.2d 1077, 1078-80 (1st Cir. 1977) (due process challenge to regulation providing for recapture of the difference between accelerated and straight line depreciation of assets used to serve Medicare patients when providers using the accelerated method left the program); *Springdale Convalescent Center v. Mathews*, 545 F.2d 943, 947-51 (5th Cir. 1977); *Hazelwood Chronic and Convalescent Center v. Mathews*, 543 F.2d 703

(3) provider challenges to the statutory validity of Medicare regulations or to acts of the Secretary under the Medicare Act;¹⁸⁸

(4) provider challenges to acts of the Secretary as inconsistent with his own regulations or otherwise incorrect;¹⁸⁹

(5) physician challenges to regulations governing providers under Part A,¹⁹⁰ to regulations governing reimbursement of physicians under Part B,¹⁹¹ or to particular acts of the Secretary;¹⁹²

(6) challenges to delays in the provision of hearings under OASDI and SSI, based on the Act, the APA, and the Constitution;¹⁹³ and

(7) statutorily based challenged by unions, local governments, or taxpayers to the continuance of an agreement applying OASDI to local government employees.¹⁹⁴

In some of these cases, a holding of no jurisdiction to review is reasonable because of the availability, as in *Saffi*, of another means of obtaining judicial review of the same issues following initial resort to the agency. Of course, the alternate route might be relatively burdensome, but this is an insufficient reason to allow it to be avoided. For

(9th Cir. 1976), *vacated*, 430 U.S. 952 (1977); *South Windsor Convalescent Home, Inc. v. Mathews*, 541 F.2d 910, 913-14 (2d Cir. 1976).

188. *See, e.g.*, *Humana, Inc. v. Califano*, 590 F.2d 1070, 1078-79 (D.C. Cir. 1978) (provider challenge to reasonable cost regulation as invalidly promulgated under the APA, as contrary to the Medicare Act, and as a violation of due process); *Association of Am. Medical Colleges v. Califano*, 569 F.2d 101, 106-08 (D.C. Cir. 1977) (challenge to reasonable cost regulation as inconsistent with the Medicare Act); *Mount Sinai Hosp., Inc. v. Weinberger*, 517 F.2d 329, 336-67 (5th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976) (challenge to HEW's right to recoup payments for uncovered services); *St. Elizabeth Hosp. v. United States*, 558 F.2d 8, 11-12 (Ct. Cl. 1977) (challenge to rule for failure to comply with APA requirements).

189. *See, e.g.*, *Hospital San Jorge, Inc. v. Secretary of HEW*, 598 F.2d 684 (1st Cir. 1979); *Trinity Memorial Hosp., Inc. v. Associated Hosp. Serv., Inc.*, 570 F.2d 660 (7th Cir. 1977); *Dr. John T. MacDonald Foundation, Inc. v. Mathews*, 534 F.2d 633, 634-35 (5th Cir. 1976), *vacated*, 571 F.2d 328 (5th Cir.), *cert. denied*, 99 S. Ct. 250 (1978); *Overlook Nursing Home, Inc. v. United States*, 556 F.2d 500, 504-06 (Ct. Cl. 1977); *Gosman v. United States*, 573 F.2d 31, 34 (Ct. Cl. 1978).

190. *See, e.g.*, *American Ass'n of Councils of Medical Staffs of Private Hosps., Inc. v. Califano*, 575 F.2d 1367, 1370-71 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 1018 (1979).

191. *See, e.g.*, *Pushkin v. Califano*, 600 F.2d 486 (5th Cir. 1979) (optometrists' challenge to exclusion of optometric services from Part B coverage); *St. Louis Univ. v. Blue Cross Hosp. Serv.*, 537 F.2d 283, 290 (8th Cir.), *cert. denied*, 429 U.S. 977 (1976) (challenge to regulations concerning compensation for physician's services under Part B as contrary to the statutory requirement of reimbursement of "reasonable charges" under § 1395f); *Gallo v. Mathews*, 534 F.2d 1137, 1139-40 (5th Cir. 1976) (challenge to HEW's right to recoup payments for uncovered services); *Szekely v. Florida Medical Ass'n*, 517 F.2d 345, 348-49 (5th Cir. 1975).

192. *See, e.g.*, *Cervoni v. Secretary of HEW*, 581 F.2d 1010, 1015-16 (1st Cir. 1978) (physician sought reimbursement under Part B rather than Part A).

193. *See, e.g.*, *Wright v. Califano*, 587 F.2d 345, 348-49 (7th Cir. 1978); *Blankenship v. Secretary of HEW*, 587 F.2d 329, 332 (6th Cir. 1978); *Casewell v. Califano*, 583 F.2d 9, 13-14 (1st Cir. 1978); *Barnett v. Califano*, 580 F.2d 28, 29 (2d Cir. 1978); *White v. Mathews*, 559 F.2d 852, 856 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

194. *See, e.g.*, *Lowther v. Montgomery County*, 561 F.2d 1120, 1121-22 (4th Cir. 1977), *cert. denied*, 435 U.S. 994 (1978); *Baker v. Mathews*, 538 F.2d 855, 856 (9th Cir. 1976), *cert. denied*, 434 U.S. 835 (1977). *See also* *RoAne v. Mathews*, 538 F.2d 852, 854 (9th Cir. 1976).

instance, in *Association of American Medical Colleges v. Califano*,¹⁹⁵ an association of providers challenged as contrary to the Medicare Act¹⁹⁶ the substance of HEW regulations fixing limits on reimbursement of costs incurred by providers.¹⁹⁷ Following *Salfi* and *Sanders*, and distinguishing *Eldridge*, the District of Columbia Circuit held that the district court had no jurisdiction.¹⁹⁸ The court relied on the availability of a PRRB hearing and subsequent judicial review,¹⁹⁹ despite the fact that such hearings can occur only after the services have been rendered.²⁰⁰

On the other hand, Congress probably did not intend to preclude district court review in many of these cases which present clear constitutional due process issues. For instance, in *Alabama Hospital Association v. Califano*,²⁰¹ a group of provider hospitals, from whom overpayments for pre-1972 services had been recouped by HEW, contended that they were constitutionally entitled to a hearing at some point during or after the recoupment process.²⁰² The claim appears to meet the *Eldridge* requirement of being a colorable constitutional claim which is at no point otherwise meaningfully reviewable in court. Nevertheless, since the merits of the providers' various claims are not judicially reviewable under section 405(g) or a comparable provision, the actual *Eldridge* analysis of finding a final decision on the collateral constitutional claim under section 405(g) is impossible. The district court was therefore precluded by the *Salfi-Eldridge-Sanders* line from deciding a clear constitutional due process issue.²⁰³

A similar problem has arisen in suits challenging as violative of due process the presence of fiscal intermediaries' representatives on hearing panels determining reasonable cost issues for pre-1972 periods.²⁰⁴

It is also difficult to apply the *Salfi-Eldridge-Sanders* line to certain cases outside of the Medicare Act. For instance, several cases have challenged the great delays by HEW in providing statutorily mandated hearings for persons claiming disability or SSI benefits.²⁰⁵ To the extent that these cases are based upon the Constitution, they meet the *Eldridge* requirements of raising a colorable constitutional claim that is

195. 569 F.2d 101 (D.C. Cir. 1977).

196. 42 U.S.C. § 1395x(v)(1)(A) (1976).

197. 569 F.2d at 103.

198. *Id.* at 108.

199. *Id.* at 110. See text & note 66 *supra*.

200. 42 U.S.C. § 1395oo(a)(1)(A) (1976).

201. 587 F.2d 762 (5th Cir. 1979).

202. *Id.* at 763.

203. *Id.* The Fifth Circuit transferred the case to the Court of Claims. *Id.* at 764. As to the propriety of this action, see text accompanying notes 230-73 *infra*.

204. See cases cited in note 186 *supra*.

205. See cases cited in note 193 *supra*.

not otherwise open to meaningful judicial review. Yet *Eldridge*, by its terms, is inapplicable since it rests on the assumption that the Secretary has made a final decision on an issue that is collateral to a judicially reviewable issue under section 405(g). Here the issue is indeed collateral to a judicially reviewable one, but in no meaningful sense has the Secretary made a "decision" when all there has been is a delay. The holdings of *Salfi*, *Eldridge*, and *Sanders* thus would preclude jurisdiction.²⁰⁶

HOW THE LOWER COURTS HAVE AVOIDED THE RIGOR OF THE SUPREME COURT DECISIONS

In the types of cases just described, courts have strained to avoid holding that certain constitutional due process issues are unreviewable in the federal courts. The simplest way has been to assume jurisdiction and to hold for the government. In effect, the First Circuit opted for this course in *Cervoni v. Secretary of HEW*.²⁰⁷ Dr. Cervoni was a hospital based physician who sought reimbursement under Part B of the Medicare Act, for physicians' services, rather than under Part A, for hospital services.²⁰⁸ The court found that there was no jurisdiction under the Medicare Act, and that section 405(h) precluded jurisdiction under 28 U.S.C. § 1331, unless, perhaps, a colorable constitutional claim was raised.²⁰⁹ Then, without deciding "whether § 405(h) should be read as a bar to constitutional claims involving due process in the instant case,"²¹⁰ the court simply held that no constitutional issue was raised, on the ground that Dr. Cervoni had no property interest in reimbursement under Part B rather than Part A.²¹¹

The Supreme Court's attitude toward assuming jurisdiction in order to hold for the government in Social Security Act cases has been ambivalent. In *Norton v. Mathews*,²¹² the Supreme Court assumed jurisdiction to affirm a decision on a constitutional issue in favor of the government, where the government had challenged the jurisdiction of the three-judge court and thus the jurisdiction of the Supreme Court.²¹³ The Court relied on the fact that it had decided the constitutional issue on the merits in favor of the government in a companion case over

206. *But see* Blankenship v. Secretary of HEW, 587 F.2d 329, 332 (6th Cir. 1978); Wright v. Califano, 587 F.2d 345, 348-50 (7th Cir. 1978); Caswell v. Califano, 583 F.2d 9, 13-15 (1st Cir. 1978).

207. 581 F.2d 1010 (1st Cir. 1978). *See also* Hospital San Jorge, Inc., v. Secretary of HEW, 598 F.2d 684 (1st Cir. 1979).

208. 581 F.2d at 1011.

209. *Id.* at 1017.

210. *Id.*

211. *Id.* at 1019.

212. 427 U.S. 524 (1976).

213. *Id.* at 532-33.

which it clearly had jurisdiction.²¹⁴ But on a claimant's petition for certiorari in *Hazelwood Chronic & Convalescent Hospital, Inc. v. Califano*,²¹⁵ the Court vacated a judgment of the court of appeals in favor of the government on the merits of a constitutional issue and remanded for reconsideration of the lower court's jurisdiction under *Sanders*.²¹⁶

Whatever the value of assuming jurisdiction in order to hold in favor of the government on the merits in particular cases, it is jurisprudentially unsound as a general practice.²¹⁷ Analytically, of course, assuming jurisdiction for this purpose puts the cart before the horse. While such inverted analysis might promote judicial economy in many cases, as a general approach to avoiding a jurisdictional conundrum, it results in an unfair tilt in favor of the government. The effect is that, in certain cases, the courts have jurisdiction only to hold for the government. Assuming jurisdiction is especially inappropriate where the issue on the merits is complex or difficult.²¹⁸ A general solution to the problem of no jurisdiction for certain Social Security Act constitutional cases can therefore not be found in a series of ad hoc decisions in favor of the government on the merits.

A second means of avoiding section 405(h) has been to rely on the Mandamus and Venue Act,²¹⁹ which provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."²²⁰ Thus, in suits challenging the recoupment of Social Security overpayments without a prerecoupment hearing, the Ninth Circuit has relied on 28 U.S.C. § 1361,²²¹ as the Second Circuit has in suits challenging delays in the provision of hearings.²²² While the Supreme Court has not yet resolved the issue,²²³ it appears clear that jurisdiction under 28 U.S.C. § 1361 is precluded by the third sentence of section 405(h). There is no reason to treat 28 U.S.C. § 1361 in a different manner than 28 U.S.C. § 1331, since the third sentence of section 405(h) precludes actions

214. *Id.*

215. 430 U.S. 952 (1977).

216. *Id.* at 952.

217. See generally Comment, *Assuming Jurisdiction Arguendo: The Rationale and Limits of Hypothetical Jurisdiction*, 127 U. PA. L. REV. 712 (1979).

218. See *id.* at 741-42, 748-54.

219. 28 U.S.C. § 1361 (1976).

220. *Id.*

221. See *Elliott v. Weinberger*, 564 F.2d 1219, 1225-28 (9th Cir. 1977), *aff'd on other grounds sub nom. Califano v. Yamasaki*, 99 S. Ct. 2545 (1979).

222. See *White v. Mathews*, 559 F.2d 852, 855-56 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

223. See *Califano v. Yamasaki*, 99 S. Ct. 2545 (1979); *Norton v. Mathews*, 427 U.S. 524, 529-30 (1976); *Mathews v. Eldridge*, 424 U.S. 319, 332 n.12 (1976).

“brought under [section 41] of title 28 to recover on any claim arising under this subchapter.”²²⁴ As the Supreme Court stated in *Salafi*, “At the time § 405(h) was enacted . . . § 41 contained all of [title 28’s] grants of jurisdiction to United States district courts, save for several special-purpose jurisdictional grants. . . .”²²⁵

The District of Columbia Circuit has accepted this reasoning, but has limited it to cases in which other statutory procedures authorize review of the particular action.²²⁶ While it may be proper to interpret jurisdictional preclusion language more loosely when there are no other means to review a colorable constitutional claim, it is stretching statutory interpretation to the breaking point to contend that the term “section 41 of title 28” both does and does not incorporate 28 U.S.C. § 1361, depending upon whether, in a particular case, there is an alternative means of review. There is no rational way to interpret the words both ways. Such a conclusion is result oriented and bears no relation to the theoretical basis for construing jurisdictional language more loosely in some constitutional cases—the intent of Congress. It follows, then, that 28 U.S.C. § 1361 is either precluded by section 405(h) or it is not. Since the holding of *Salafi* and the effect of the third sentence of section 405(h) would be largely eviscerated by a holding that section 1361 is not precluded, the required conclusion is that it is precluded.

The third sentence of section 405(h) would be largely eviscerated because, although the federal courts have long stated that mandamus is an extraordinary remedy, “to be employed only under exceptional circumstances,”²²⁷ the courts have been increasingly willing to apply mandamus to a federal official where the allegation is simply that the official has a nondiscretionary duty. Thus, the Third Circuit reasoned:

The complexity and novelty of the issues *on the merits* . . . do not necessarily deprive the federal courts of mandamus jurisdiction. A determination with respect to jurisdiction involves a threshold inquiry into whether the plaintiff has alleged a cause of action under the particular jurisdictional statute. Here, plaintiff alleges that the due process clause imposes an obligation on the Secretary to provide

224. 42 U.S.C. § 405(h) (1976).

225. 422 U.S. at 756 n.3. In the 1948 recodification of title 28, a new chapter 85 was created to contain the jurisdictional grants to the district courts. Pursuant to the 1948 amendments, chapter 85 contained new sections 1331 through 1359 of title 28, which were formerly found in substance in the old § 41. In 1948, the mandamus statute was not included in chapter 85 because it had not been enacted yet. Chapter 85 of title 28 was amended in 1962 to include the mandamus statute. Since 28 U.S.C. § 1361 merely constituted an addition to the list of bases for district court jurisdiction which are found in title 28 and precluded *in toto* by § 405(h), it follows, as a matter of statutory construction, that jurisdiction under 28 U.S.C. § 1361 is precluded as well by the third sentence of § 405(h).

226. *See* Association of Am. Medical Colleges v. Califano, 569 F.2d 101, 112 (D.C. Cir. 1977).

227. *Id.* at 110 n.80; *Cervoni v. Secretary of HEW*, 581 F.2d 1010, 1019-20 (1st Cir. 1978) (collecting cases); *Oretego v. Weinberger*, 516 F.2d 1005, 1011 (5th Cir. 1975) (collecting cases).

her with an oral hearing before adjusting her benefits. Thus, the duty alleged involves no element of discretion or room for judgment on the part of the Secretary, and if we agree with plaintiff's contention on the merits, the result will be to place the Secretary under a binding, nondiscretionary duty to provide a precoupment oral hearing. Furthermore, the fact that the existence of the duty may become absolutely clear only after an interpretation of the due process clause and a consideration of the merits of the case does not deprive us of mandamus jurisdiction. Acceptance of the Secretary's reasoning would lead to an oddly circular result—if mandamus jurisdiction were unavailable because, prior to ruling on the merits, the Secretary's duty is not clear, then a court would never have jurisdiction to determine *whether* his duty was clear in the first place.²²⁸

Since many, if not most, Social Security Act claims can be couched in terms of a failure on the part of HEW to comply with its regulations, the Act, or the Constitution, and since compliance by the Secretary with his own regulations, as with the Act and the Constitution, is a nondiscretionary duty,²²⁹ all manner of claims would have to be heard under 28 U.S.C. § 1361, without the preclusive effect of the third sentence of section 405(h). For instance, a claimant might assert that the Secretary has denied disability benefits although he or she is assertedly disabled under the Act and the regulations. If, as the Third Circuit opinion would indicate, a determination on the merits is appropriate under 28 U.S.C. § 1361 to determine if in fact the Secretary has a duty to award benefits, then allowance of jurisdiction under 28 U.S.C. § 1361 would permit jurisdiction in precisely the kind of case that section 405(h) was most likely intended to preclude; that is, cases involving the application of statutes or regulations to a particular set of facts, where no judicial review is expressly provided. Since this cannot have been the intent of Congress, it follows that jurisdiction under the Mandamus and Venue Act is, like all other grants of district court jurisdiction in title 28, precluded by the third sentence of section 405(h).

A third method of avoiding the preclusive effect of section 405(h) in Medicare provider suits has been to find jurisdiction under 28 U.S.C. § 1491 in the Court of Claims. This route was suggested by the Second Circuit²³⁰ and has been adopted by the Court of Claims in numerous Medicare provider reimbursement disputes.²³¹ The Fifth Circuit has

228. *Mattern v. Weinberger*, 519 F.2d 150, 156-57 (3d Cir. 1975), *vacated sub nom. Mathews v. Mattern*, 425 U.S. 987 (1976). See *Frost v. Weinberger*, 515 F.2d 57, 62 (2d Cir. 1975), *cert. denied*, 424 U.S. 958 (1976). See generally French, *The Frontiers of the Federal Mandamus Statute*, 21 VILL. L. REV. 637 (1974).

229. See *United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (collecting cases).

230. *South Windsor Convalescent Home, Inc. v. Mathews*, 541 F.2d 910, 914 (2d Cir. 1976).

231. *Appalachian Regional Hosps., Inc. v. United States*, 576 F.2d 858, 861-64 (Ct. Cl. 1978); *Gosman v. United States*, 573 F.2d 31, 34 (Ct. Cl. 1978); *Summit Nursing Home, Inc. v. United States*, 572 F.2d 737, 741 (Ct. Cl. 1978); *Ulman v. United States*, 558 F.2d 1, 3 (Ct. Cl. 1977); *St.*

transferred two such cases directly to the Court of Claims, although it sounds less than completely convinced that the Court of Claims has such jurisdiction.²³² Such an escape route, however, fails to withstand scrutiny.

The Court of Claims laid out its rationale for asserting jurisdiction in provider suits in *Whitecliff, Inc. v. United States*.²³³ Whitecliff, a Medicare provider, had instituted a work measurement program which purportedly revealed that its actual Medicare costs for 1967 through 1970 exceeded the reimbursement received from HEW.²³⁴ After a hearing, a Provider Appeals Committee [PAC]²³⁵ denied the claim. Whitecliff then brought suit in the Court of Claims, challenging the decision on the merits as inconsistent with the Medicare Act, and challenging the composition of the PAC as inconsistent with constitutional due process.²³⁶ The Court of Claims held that it had jurisdiction to exercise judicial review "at least for compliance with the Constitution and the governing statute."²³⁷ The court rather cavalierly assumed that the Supreme Court would not "extend the *Saffi* interpretation of Section 405(h) to Medicare cases, where the consequences would be so dramatically different."²³⁸

The conclusion that section 405(h) would not preclude Court of Claims jurisdiction is otherwise supportable, however, on the theory that the second sentence of section 405(h) does not preclude jurisdiction but rather codifies the equitable requirement of exhaustion of administrative remedies²³⁹ and that the third sentence of section 405(h) precludes only district court jurisdiction. The statutory grant of Court of Claims jurisdiction, 28 U.S.C. § 1491, has never been part of "section 41 of Title 28."²⁴⁰ The difficulty with Court of Claims jurisdiction over Medicare provider reimbursement disputes thus does not at least directly arise from section 405(h).

The Court of Claims, however, does not have a valid statutory ba-

Elizabeth Hosp. v. United States, 558 F.2d 8, 11 (Ct. Cl. 1977); *Overlook Nursing Home, Inc. v. United States*, 556 F.2d 500, 502 (Ct. Cl. 1977); *Whitecliff, Inc. v. United States*, 536 F.2d 347, 351 (Ct. Cl. 1976), *cert. denied*, 430 U.S. 969 (1977).

232. *Alabama Hosp. Ass'n v. Califano*, 587 F.2d 762, 763 (5th Cir. 1979); *Dr. John T. Macdonald Foundation, Inc. v. Califano*, 571 F.2d 328, 332 (5th Cir.), *cert. denied*, 99 S. Ct. 250 (1978). See also *Pushkin v. Califano*, 600 F.2d 486 (5th Cir. 1979); *American Ass'n of Councils of Medical Staffs of Private Hosps., Inc. v. Califano*, 575 F.2d 1367, 1372-73 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 1018 (1979).

233. 536 F.2d 347 (Ct. Cl. 1976), *cert. denied*, 430 U.S. 969 (1977).

234. *Id.* at 349.

235. Such committees were provided by regulation for periods prior to 1972. For later periods, the statutory Provider Reimbursement Review Board scheme was applicable. See text & notes 63-67 *supra*.

236. 536 F.2d at 349.

237. *Id.*

238. *Id.* at 351.

239. See note 157 *supra*.

240. See text & notes 224-25 *supra*.

sis for exercising jurisdiction over most of these disputes in the first place. In this regard the *Whitecliff* court merely stated: "In this court, 28 U.S.C. § 1491 (the Tucker Act) is the pertinent jurisdictional provision both because of plaintiff's contract with the Government and also because the Medicare legislation, fairly read, mandates appropriate payment to providers."²⁴¹

The "contract with the Government," however, is not the legal basis for the Secretary's obligation to reimburse providers. In order to become eligible to participate in the Medicare program as a qualified provider of Medicare services, the Medicare Act specifically requires that a medical facility file "an agreement" that it will not charge Medicare beneficiaries more than prescribed amounts.²⁴² If the "agreement" satisfies the Act and the facility meets the other conditions of eligibility, it becomes a qualified Medicare provider and is thereafter entitled by statute to compensation for services provided to Medicare beneficiaries.²⁴³ While the Secretary's legal obligation to reimburse the provider derives solely from section 1395g, the amount of reimbursement is determined pursuant to section 1395x(v)(1), which specifically delegates to the Secretary the authority to define the "reasonable cost" of provider services.²⁴⁴

Provider reimbursement suits are therefore not "founded . . . upon an express or implied contract with the United States"²⁴⁵ within the meaning of the Tucker Act, because the Secretary's legal obligation to reimburse the provider results solely from the Medicare statute.²⁴⁶ The agreement submitted by providers, which the statute requires, is not a contract. It does not constitute a meeting of the minds or an exchange of consideration since the Secretary is required by the Act, and not by the agreement, to reimburse the provider. The agreement does not even purport to obligate the Secretary to reimburse the provider. Instead, it is a statutorily required statement that requirements

241. 536 F.2d at 351 (citation omitted). 28 U.S.C. § 1491 (1976) provides in part:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . . In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

242. 42 U.S.C. § 1395cc(a) (1976).

243. *Id.* § 1395g(a).

244. *Id.* § 1395f(b). For post-1972 periods, the amount of reimbursement may be the "customary charges" if less, *id.* § 1395f(b)(1), and in the case of certain services provided for free, the Secretary may determine by regulation items for reimbursement which "will provide fair compensation." *Id.* § 1395f(b)(2). Moreover, to the extent a provider's claim is based on a beneficiary's entitlement, that also is determined by the Secretary in accordance with his regulations. *Id.* § 1395ff(a).

245. 28 U.S.C. § 1491 (1976).

246. 42 U.S.C. § 1395g(a) (1976).

for participation in the program will be adhered to.²⁴⁷ Since there exists no express or implied contract with the government, jurisdiction in the Court of Claims must be based, if at all, upon an entitlement meeting the strict requirements for a noncontractual claim under the Tucker Act.

In order for the Court of Claims to have jurisdiction over noncontractual claims in which the plaintiff asserts that money due has not been paid, "the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum."²⁴⁸ In *United States v. Testan*,²⁴⁹ the Supreme Court made clear that Court of Claims jurisdiction was so limited.

In *Testan*, two federal government employees claimed that, under the Classification Act,²⁵⁰ they were entitled to be classified one grade higher.²⁵¹ The Civil Service Commission denied reclassification, and the employees brought suit in the Court of Claims seeking an order directing reclassification and backpay.²⁵² The Court of Claims granted relief by ordering the Commission to reconsider its decision, and indicated that if the Commission were to determine that it had made an erroneous classification, that determination "could create a legal right which we could then enforce by a money judgment."²⁵³ The Supreme Court reversed.²⁵⁴ It held that the Tucker Act, alone, was insufficient to support the court's action; an additional substantive right to money damages must be found.²⁵⁵ The Court failed to find this substantive right in the Classification Act, even though that Act provided an asserted legal right to reclassification, because the Act nowhere provided for entitlement to backpay (a certain sum).²⁵⁶ Proper relief would require resort to mandamus under 28 U.S.C. § 1361 in a district court.²⁵⁷

A similar analysis applies in the provider reimbursement suits that have been brought in or transferred to the Court of Claims. Many of these suits challenge, on constitutional or statutory grounds, the proce-

247. Compare the use of the term "agreement" in § 1395cc with the use of the term "contract" in the provision in Part B for the Secretary to enter into "contracts" with carriers to administer Part B. *Id.* § 1395u(a). "Contracts with carriers" to administer Part B are exempt from competitive bidding. *Id.* § 1395u(b)(1). The absence of such language with respect to provider agreements further indicates the noncontractual nature of such agreements.

248. *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967). See *Sanders v. United States*, 594 F.2d 804, 809 (Ct. Cl. 1979).

249. 424 U.S. 392 (1976).

250. 5 U.S.C. §§ 5101-5115 (1976).

251. 424 U.S. at 393.

252. *Id.*

253. *Testan v. United States*, 499 F.2d 690, 691 (Ct. Cl. 1974), *rev'd*, 424 U.S. 392 (1976).

254. 424 U.S. at 407.

255. *Id.* at 397-98.

256. *Id.* at 399-400.

257. *Id.* at 399-403.

dures used by the Secretary in determining reimbursement.²⁵⁸ Indeed, the Seventh Circuit has anomalously held that the Court of Claims has jurisdiction only in such inadequate procedure cases.²⁵⁹ It is impossible to conclude that the Court of Claims has jurisdiction to decide these issues, since a decision in favor of a plaintiff can only result in further procedures; there would be no automatic payment. Any relief would thus clearly be of the mandamus type, which, as the Supreme Court has repeatedly held, the Court of Claims has no jurisdiction to grant.²⁶⁰ A legal right to different procedures in determining Medicare reimbursement, like the asserted legal right to reclassification in *Testan*, is not the same as a right to "actual, presently due money damages."²⁶¹ The Court of Claims accordingly has no jurisdiction in such cases.

It is also doubtful whether the Court of Claims has jurisdiction in other provider reimbursement cases. In suits challenging the Secretary's regulations determining the amount of reimbursement,²⁶² if the regulations are ultimately held to be inconsistent with the statute or the Constitution, the proper remedy, rather than awarding money damages, would be mandamus-type relief to invalidate the present regulations and, perhaps, to compel the Secretary to issue new regulations.²⁶³ Again, such relief cannot be awarded by the Court of Claims.²⁶⁴

This leaves those cases in which a provider simply challenges the Secretary's application of his regulations to the facts of a particular case.²⁶⁵ Even in these cases, the Act does not require payment until the Secretary has determined the proper amount to be paid under his regulations. Section 1395g provides that "[t]he Secretary shall periodically determine the amount which should be paid under this part to each provider of services with respect to the services furnished by it."²⁶⁶ Since there is no statutory entitlement to reimbursement prior to a HEW determination, the most a court could do, then, is order the Secretary to make a redetermination. Again, *Testan* would preclude Court of Claims jurisdiction.

Of course section 1395g could be loosely read to require payment of sums properly determined under the Secretary's regulations, and thus read as a mandate to pay a certain sum. There is no constitutional

258. See cases cited note 186 *supra*.

259. *Trinity Memorial Hosp., Inc. v. Associated Hosp. Serv., Inc.*, 570 F.2d 660, 667 (7th Cir. 1977).

260. *United States v. Testan*, 424 U.S. 392, 397-98 (1976); *United States v. King*, 395 U.S. 1, 2-3 (1969).

261. 424 U.S. at 398.

262. See cases cited notes 187-88 *supra*.

263. *Kingsbrook Jewish Medical Center v. Richardson*, 486 F.2d 663, 670 (2d. Cir. 1973).

264. *United States v. Testan*, 424 U.S. 392, 407 (1976).

265. See cases cited note 189 *supra*.

266. 42 U.S.C. § 1395g(a) (1976).

impetus for such a construction, however, in cases simply involving the application of regulations to particular fact situations.²⁶⁷ Moreover, the intent of Congress, as expressed in the second sentence of section 405(h), militates against such a construction. While that sentence may not be a jurisdictional preclusion,²⁶⁸ the words “[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided”²⁶⁹ at least indicate that Congress did not intend, by section 1395g, to waive sovereign immunity so as to permit Court of Claims review of ordinary reimbursement decisions of the Secretary, since the Social Security Act nowhere provides for review of any secretarial decisions in the Court of Claims.

In any event, Court of Claims jurisdiction is an unsuitable solution to the problem of lack of jurisdiction in provider reimbursement disputes involving constitutional issues. First, Court of Claims jurisdiction is burdensome on plaintiffs located far from Washington, D.C. Second, Court of Claims jurisdiction is an overbroad solution, permitting Court of Claims jurisdiction not only in constitutional cases, but also in ordinary reimbursement disputes.²⁷⁰ Third, Congress has never indicated that the Court of Claims would have a role in the Medicare judicial review scheme. Instead, it has always placed review of secretarial decisions under the Social Security Act in the district courts.²⁷¹ In particular, to the extent the Act does provide for judicial review of decisions involving providers, such review has been in the district court.²⁷² It would therefore be anomalous to assume that whenever Congress did not provide for jurisdiction to review secretarial decisions, it meant by silence to put such review in the Court of Claims. Finally, in the class of cases for which the section 405(h) preclusion of review poses the greatest difficulty—cases involving the constitutionality of HEW procedures—the Court of Claims is a singularly ill-suited forum. The purpose of the Court of Claims is to award money; it was not intended to have the function of directing the reform of unconstitutional procedures. The court, accordingly, has no injunctive powers with which to do so.²⁷³ Consequently, Court of Claims jurisdiction is not the answer to section 405(h) preclusion of colorable constitutional claims brought by Medicare providers.

267. See cases cited note 189 *supra*.

268. See note 157 *supra*.

269. 42 U.S.C. § 405(h) (1976).

270. See note 189 *supra*.

271. See text & notes 27, 36, 60-72 *supra*.

272. Thus, review of any determination of whether a facility is entitled to provider status has always been reviewable in the district court, 42 U.S.C. § 1395ff(c) (1976) and the 1972 amendment providing for a PRRB applicable to post-1972 periods, provides for review of the PRRB in the district court. *Id.* §§ 1395oo(f), 1395pp(d).

273. See *United States v. King*, 395 U.S. 1, 5 (1969).

A PROPOSED SOLUTION

Since neither mandamus nor Court of Claims jurisdiction effectively solves the problems with the *Salfi-Eldridge-Sanders* line, another solution, based upon statutory interpretation, is desirable. Most of the difficulties with the line would be eliminated, and the important jurisdiction-precluding effects of section 405(h) maintained, if the words "any claim arising under this subchapter" in the third sentence of section 405(h) were interpreted not to include colorable constitutional claims that could not have been reviewed previously by a court and that cannot subsequently be reviewed meaningfully by a court under the Act.²⁷⁴ For the reasons discussed earlier,²⁷⁵ "colorable constitutional claims" for the purposes of this particular statutory interpretation would not include claims that the Secretary failed to follow his regulations or the Act.

Although it is true that the Supreme Court in *Salfi* rejected a narrow interpretation of the words "any claim arising under [title II of the Social Security Act],"²⁷⁶ in *Salfi* the contested constitutional issue could have been raised administratively and reviewed judicially under the Act.²⁷⁷ Under the proposed interpretation, a colorable constitutional claim would "arise under" the Social Security Act unless the Act provides no means for review of such a claim. It makes more sense to say that a constitutional claim arises under the Social Security Act if the Act provides a means for the constitutional issue to be decided than in cases where there is no such provision. While this interpretation might not be intuitively obvious, it is certainly less strained than the *Eldridge* Court's interpretation of the words "final decision" and "after a hearing" in section 405(g).²⁷⁸ Indeed, the proposed interpretation of section 405(h) does exactly what *Eldridge* did: interpret statutory language to provide jurisdiction to review constitutional issues that would otherwise be unreviewable in the district courts. By slightly limiting the in-

274. The interpretation would be inapplicable where a constitutional issue could have been raised in a particular case were it not for the failure of a claim to exceed the jurisdictional amount requirements of § 1395ff(b)(2) (\$1000 for beneficiaries seeking Part A benefits) or § 1395oo(a)(2), (b) (\$10,000 for individual provider cost appeals for post-1972 periods, \$50,000 for group provider cost appeals for post 1972-periods). Congress obviously intended to preclude jurisdiction in those cases where a specific jurisdictional amount is relevant and unmet. Since a constitutional issue raised in a case where the jurisdictional amount is not met could subsequently be raised in a case where the amount is met, there is far less constitutional difficulty with precluding the claim.

Of course, where a constitutional challenge is made to the jurisdictional amount limit itself, the foregoing consideration does not apply, since there is no way that a claimant who meets the jurisdictional amount can have standing to challenge the jurisdictional amount requirement. In such a case, § 405(h) should not be read to preclude jurisdiction of the constitutional claim. See *Gray Panthers v. Califano*, 466 F. Supp. 1317, 1322-26 (D.D.C. 1979).

275. See text & notes 168-78 *supra*.

276. 422 U.S. at 760. See text & note 110 *supra*.

277. See text & notes 114-20 *supra*.

278. See text & note 133 *supra*.

terpretation of the section 405(h) preclusion, rather than loosening the interpretation of the jurisdictional grant, the proposed interpretation would alleviate the problem of the preclusion of jurisdiction over constitutional claims in some additional cases not before the Court in *Eldridge*, cases in which section 405(g) is simply unavailable.²⁷⁹

The Eighth Circuit arrived at a very similar conclusion in *St. Louis University v. Blue Cross Hospital Service*.²⁸⁰ In that case, a hospital challenged the Secretary's refusal to pay full "reasonable charges," under Part B, for the component of radiology services representing radiologists' services.²⁸¹ Because the hospital, prior to the enactment of the Medicare Act, had not set forth physician's services separately in its billing, the Secretary, acting through the carrier, limited reimbursement to the pro rata portion of the salary paid by the hospital to all its radiologists.²⁸² Because a pre-1972 period was involved, the administrative hearing was provided by a Provider Appeals Committee.²⁸³ When the hospital lost the appeal before the PAC, it brought suit on three grounds: The decision on the merits violated the Act and regulations; the makeup of the PAC violated constitutional due process; and constitutional equal protection rights were violated because HEW processed essentially identical claims of other providers differently.²⁸⁴ The Eighth Circuit held that the carrier's decision was unreviewable because of section 405(h), and did not reach the equal protection claim.²⁸⁵ The court did decide the due process claim,²⁸⁶ on the theory that section 405(h) did not preclude jurisdiction because the claim did not "arise under" the Social Security Act. The Eighth Circuit distinguished *Salfi*, where a constitutional challenge was held to arise under the Social Security Act, on the ground that the Social Security Act itself provided jurisdiction for the constitutional challenges raised in *Salfi*.

In the present case, the due process claim has as its primary goal obtaining a constitutionally adequate hearing. Allowing such a hearing will not necessarily affect the [provider's] entitlement to reimbursement or the amount allowed. Secondly, and more importantly, the Medicare Act does not provide the [provider] an adequate alter-

279. See text & notes 132-36 *supra*.

280. 537 F.2d 283 (8th Cir.), *cert. denied*, 429 U.S. 977 (1976).

281. *Id.* at 287.

282. *Id.* at 286-87.

283. See note 235 *supra*.

284. 537 F.2d at 287.

285. *Id.* at 289-91, 293-94.

286. The court held that the makeup of the PAC was constitutional despite the fact that a majority of the members were employees of the hospital's fiscal intermediary, as long as the Secretary would review the decision before it became final to determine contentions concerning the proper interpretation of the Medicare Act and regulations. *Id.* at 293. The court accordingly remanded the case for such a final review.

native means of obtaining judicial review of its due process claim.²⁸⁷

Bolstering its argument, the court of appeals noted that if section 405(h) were read wholly to preclude adjudication of the provider's claim, "it would raise serious constitutional problems which might impair the force and effect of the Medicare Act."²⁸⁸

St. Louis University was decided two weeks after *Eldridge*, and the opinion obviously was largely written before the *Eldridge* decision was available. Since *Eldridge*, attempts to find jurisdiction by means of statutory interpretation of section 405 have, of course, tracked the *Eldridge* analysis by broadly interpreting section 405(g), rather than slightly narrowing section 405(h).²⁸⁹ Since an *Eldridge* analysis is simply unworkable in many situations where the same constitutional considerations are present²⁹⁰ it appears that the Eighth Circuit in *St. Louis University* was on the right track after all.

Adopting the proposed statutory analysis would not substantially lessen the preclusive effort of section 405(h) as established in *Salfi*. Because this restrictive reading of section 405(h) would permit jurisdiction only in cases where the colorable constitutional claim could not have been reviewed before, nor be meaningfully reviewed in the future, under the Act, the reading would expand jurisdiction only to cases where the *Eldridge* analysis already would provide jurisdiction and to the limited types of cases where it is impossible to construe section 405(g) as applicable.

Moreover, if this proposed analysis had been applied, no Supreme Court decision would have been decided differently. *Salfi* would be decided in the same way because the jurisdictional requirements of section 405(g) were met. Jurisdiction would have been appropriate in *Eldridge* under 28 U.S.C. § 1331 because section 405(h) would not have applied, since the plaintiff's colorable constitutional claim could never be meaningfully reviewed under the Act.²⁹¹ Such an analysis would avoid the strained reading of section 405(g) necessary in *Eldridge* to avoid section 405(h) preclusion. Moreover, the dictum in *Sanders* to the effect that OASDI reopening decisions might in certain "rare" cases be subject to review²⁹² makes more sense under the proposed analysis. If a claimant raises a constitutional claim upon reopening that could not have been presented on review of the original claim, serious distortion of section 405(g) would be necessary in order to find jurisdiction

287. *Id.* at 292.

288. *Id.*

289. See notes 163, 206 *supra*.

290. See text & notes 180-94 *supra*.

291. See 424 U.S. at 327.

292. 430 U.S. at 109.

under that provision.²⁹³ Instead, section 405(h) should be interpreted as inapplicable because such a claim does not "arise under" the Social Security Act, and jurisdiction should be available under 28 U.S.C. § 1331.

In a recent case involving the right to a hearing prior to recoupment by HEW of Social Security overpayments, the government conceded jurisdiction on the basis of *Eldridge*.²⁹⁴ Because jurisdiction was therefore founded upon section 405(g), rather than 28 U.S.C. § 1331 or 28 U.S.C. § 1361 (as it would have been under the proposed analysis), the Court was required to resolve whether section 405(g) permitted injunctive relief and whether class relief was available.²⁹⁵ While the Supreme Court decided that both types of relief were available under section 405(g),²⁹⁶ these holdings would have been unnecessary if the Supreme Court had simply found that section 405(h) was inapplicable under the proposed analysis. The result of the case would have been the same.

The proposed analysis is not needed to reconcile previous Supreme Court cases, however, but rather to permit jurisdiction in those cases described above involving colorable constitutional claims as to which section 405(g) must be construed as inapplicable. Thus in claims brought by Medicare providers challenging as unconstitutional the procedures used by the Secretary for pre-1972 periods, jurisdiction would not be precluded by section 405(h) even though the Secretary's decisions on the merits are not subject to review. Such review would be in the district court where it belongs, and not in the Court of Claims, which is singularly unsuited to handle such due process claims. Also, for claims that the Secretary has violated constitutional due process in failing to provide timely disability and SSI hearings, jurisdiction would again not be precluded by section 405(h), and in order to reach this conclusion there would be no need to stretch the section 405(g) requirement of a "final decision of the Secretary" beyond recognition. In reopening claims where a colorable constitutional issue could not have been raised following the original denial, jurisdiction would be available, again despite the clear unavailability of section 405(g). Finally, in cases where a nonclaimant's constitutional rights are violated by acts of the Secretary under the Social Security Act, jurisdiction will be available despite section 405(g), assuming of course that the particular

293. See *Califano v. Sanders*, 430 U.S. 99, 107-09 (1977).

294. *Califano v. Yamasaki*, 99 S.Ct. 2545, 2558-59 (1979).

295. *Id.* at 2557-58, 2559-60.

296. *Id.*

plaintiff otherwise has standing to sue.²⁹⁷

On the other hand, persons with nonconstitutional claims, including those whose constitutional claims are only that the Secretary deviated from his regulations, would in any case be unable to obtain jurisdiction over OASDI, SSI, or Medicare-related claims outside of the Social Security Act. This is consistent with the intent of section 405(h). The solution of finding that mandamus jurisdiction is not precluded by section 405(h) could, in contrast, lead to all manner of ordinary challenges to the Secretary's actions. In addition, the solution of finding jurisdiction over Medicare provider suits in the Court of Claims has already led to that court's hearing ordinary challenges to the way in which the Secretary applied his regulations to particular cases.²⁹⁸

CONCLUSION

In *Eldridge*, the Supreme Court loosely interpreted section 405(g) in order to permit federal jurisdiction over a due process claim not otherwise meaningfully reviewable. In *Sanders*, the Court indicated that it would only make such a liberal construction of section 405 where a colorable constitutional claim was present. In order to permit federal jurisdiction over other constitutional claims involving the Social Security Act not otherwise meaningfully reviewable, a preferable route to the same result in *Eldridge* would be to determine that constitutional claims never reviewable under the Act do not "arise under" the Social Security Act for the purposes of section 405(h). To prevent this exception from engulfing the rule, constitutional claims for this purpose should not include claims that only allege that the Secretary failed to follow the Act or his regulations properly.

297. See *Baker v. Mathews*, 538 F.2d 855, 856 (9th Cir. 1976), cert. denied, 434 U.S. 835 (1977).

298. See Court of Claims cases cited in note 189 *supra*.