The Procedural Impact of Weinberger v. Salfi Revisited

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The struggle to balance the federal budget has focused increased attention on what are commonly referred to as the entitlement programs. In particular, the Social Security program has become the subject of heated political debate. Leaders of both major political parties and the President have agreed that if the Social Security system is to remain solvent, changes must be made. They have been unable, however, to reach any consensus on appropriate changes. Notwithstanding this lack of consensus, one fact is clear. It is inevitable that any major changes affecting benefits or beneficiaries in the Social Security program will be challenged in the federal courts, most likely in class oriented litigation. This Article will focus on the procedural obstacles to such federal litigation. Further, as will be explored, since these obstacles are also of relevance to litigation involving the related Medicare and Supplemental Security Income Programs (S.S.I.), the impact of these obstacles on federal litigation involving these programs will also be addressed.

Class oriented federal litigation involving the Social Security, Medicare, or S.S.I. programs is likely to take the form of either: (1) constitutional challenges to provisions of the Social Security, Medicare, or S.S.I. legislation; or (2) constitutional or federal statutory challenges to the regulations promulgated to implement the legislation establishing these entitlement programs. Many of the procedural barriers to such litigation involving the Social Security programs were addressed by the United States Supreme Court in Weinberger v. Salfi. The Salfi decision, however, left many questions unanswered. This Article will first identify the questions and related procedural concerns addressed by Salfi. It will then determine whether any of these questions have been resolved. For those that have not, this Article will consider likely resolutions.

THE QUESTIONS RAISED BY *SALFI*

Salfi involved a constitutional challenge to provisions of the legislation

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1. The legislation establishing the Supplemental Security Income Program (S.S.I.), 42 U.S.C. §§ 1381-91 (1976 & Supp. IV 1980), authorizes assistance to those who are blind, disabled, or aged who meet the statutory income and resources requirements. The S.S.I. program was modeled after the Social Security program.
2. 422 U.S. 749 (1975).
3. The procedural impact of Salfi was the subject of an excellent article by Dina Lassow. See Lassow, Access to Federal Courts: The Impact of Weinberger v. Salfi, 11 CLEARINGHOUSE REV. 907 (Mar. 1978) [hereinafter cited as Lassow]. This Article revisits many of the questions addressed by Lassow, some of which now have been definitively resolved.
establishing the Social Security program which, with some exceptions, excluded a surviving spouse or stepchild from receiving Social Security benefits upon the death of a spouse or stepparent unless the marital or parental relationship had existed for at least nine months prior to the death of the wage earner. The expressed purpose of this durational relationship requirement, according to its legislative history, was to prevent the use of sham marriages to obtain Social Security benefits. A three-judge federal district court determined that the nine month requirement functioned as a conclusive presumption violative of due process because the underlying presumption of a sham marriage was not necessarily true and the claimant was not afforded an opportunity to disprove it. The Supreme Court reversed. Although a majority of the Court conceded that the requirement was both over and underinclusive, it nevertheless held that since the legislative provision did not impinge upon "important liberties cognizable under the Constitution," it was not violative of due process as long as the provision was reasonably related to the furtherance of a legitimate governmental end. The Court, finding that the required reasonable relationship was present, refused to find a due process violation.

5. 422 U.S. at 767.
7. Salfi, 422 U.S. at 781. The Salfi Court noted that § 416(c)(5) probably excluded from benefits some wives who had married "with no anticipation of shortly becoming widows" and did not exclude those who might have anticipated this but whose spouses lived longer than anticipated. Id.

The Supreme Court has recognized the legislative difficulty with making precise classifications and has tolerated categories which are underinclusive, overinclusive, or both. Underinclusive classifications omit some of those who might logically be included, thus diluting the intended legislative process. In contrast, overinclusive legislation affects individuals who would not be considered to fall within the purview of the statute's purposes. Such legislation has been accepted as a legitimate device to achieve a permissible statutory end. L. Tribe, American Constitutional Law § 16-4 (1978) [hereinafter cited as Tribe].

Professor Tribe notes that the Court has sometimes reviewed legislation which was both underinclusive and overinclusive. Id. at § 16-4 n.20. In one such case, the Court struck down the classification as being irrelevant to the legislative purpose of providing reimbursement of court transcript costs. See Rinaldi v. Yeager, 384 U.S. 305 (1966) (statute requiring repayment of transcript costs by incarcerated appellant, but not those found guilty and not incarcerated, burdened many appeals which were not frivolous while permitting other appeals which may have been frivolous).

8. 422 U.S. at 785. It was on this basis that the Court distinguished its earlier decisions in Stanley v. Illinois, 405 U.S. 645 (1972) (presumption which impacted on the right to raise children), and Cleveland Bd. of Educ. v. LaFluer, 414 U.S. 632 (1974) (presumption which impacted on the right to have children). But see infra note 13 and accompanying text.

9. 422 U.S. at 777. Salfi involved a two-pronged standard. To withstand constitutional scrutiny the means chosen by the legislature to further a legislative end must be reasonably related to furthering that end and the end itself must be a legitimate governmental objective. See, e.g., Dandridge v. Williams, 397 U.S. 471, 486-87 (1970) (state regulation which established ceiling on aid to welfare recipients regardless of family's size or need held to be rationally related to state's legitimate goals of encouraging employment and maintaining a balance between welfare families and the "working poor").

10. 422 U.S. at 781-85.
The substantive holding of *Salfi* was, of course, significant. The *Salfi* majority applied the same standard that it had utilized in *Dandridge v. Williams* to resolve an equal protection claim to the conclusive presumption/due process challenge presented by *Salfi*. Given the overlap between equal protection and conclusive presumption/due process claims, the *Salfi* Court's approach was not surprising and clearly was intentional. Read together, *Dandridge* and *Salfi* demonstrate the Supreme Court's unwillingness to seriously review legislative judgments when ruling on equal protection and conclusive presumption/due process challenges to social welfare legislation, which legislation does not impact on constitutional rights or involve "suspect" classifications. Both of these decisions illustrate that the analytical concepts of over-inclusiveness and under-inclusiveness are of minimal significance in evaluating the validity of constitutional challenges to social welfare legislation.

The importance of the *Salfi* decision is not limited to its substantive holding. The majority opinion, authored by Justice Rehnquist, specifically addressed or alluded to a number of procedural issues which are generally relevant to federal litigation involving either: (1) constitutional challenges to provisions of the Social Security, S.S.I., and Medicare legislation; or (2) constitutional or federal statutory challenges to regulations promulgated to implement this legislation. These issues include:

(a) the jurisdiction of a federal district court to entertain such challenges and the related question of the exhaustion of administrative remedies;" 
(b) the propriety of class actions; and 
(c) the availability of injunctive and other equitable forms of relief.

In addressing these concerns, the *Salfi* Court both erected procedural obstacles to federal litigation involving the Social Security, Medicare, and S.S.I. programs and left certain procedural questions unresolved.

In considering the jurisdiction of a federal district court to entertain a

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12. In most cases where it could be alleged that a statutory provision functions as a conclusive presumption, the facts will also justify alleging an equal protection violation. For example, the plaintiff could contend that the provision discriminates unjustifiably between two classes. *Salfi* is illustrative of this point.

13. *But see* Jiminez v. Weinberger, 417 U.S. 628 (1974); United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973); United States Dept. of Agriculture v. Murray, 413 U.S. 508 (1973); and Vlandis v. Kline, 412 U.S. 441 (1973) where the Supreme Court closely scrutinized the legislature's judgment even in the absence of legislation which impacted on a constitutional right or suspect classification. With the exception of *Vlandis*, these cases might be distinguished from *Dandridge* on the basis of federalism concerns. The same, however, obviously could not be said about *Salfi*.

For an attempt to objectify the *Dandridge/Salfi* standard of review, see Bice, *Rationality Analysis in Constitutional Law*, 65 Minn. L. Rev. 1 (1980). *See also* Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (recent United States Supreme Court decision discussing whether the *Dandridge* standard is a "toothless" one), reh'g denied, 450 U.S. 960 (1980).

14. The question of a court's jurisdiction focuses on the authority or power of a court to resolve a particular case. The issue of exhaustion of administrative remedies relates not to a court's absolute power to resolve a particular case, but rather, to the appropriateness of a court's exercise of that power at a particular time. 422 U.S. at 756-67.
constitutional claim, like that presented in Salfi, the Supreme Court concluded that one provision of the Social Security Act, 42 U.S.C. § 405(h), precluded federal question jurisdiction under 28 U.S.C. § 1331. The Court held, however, that another provision of the Social Security Act, 42 U.S.C § 405(g), specifically provided federal district courts with jurisdiction to resolve constitutional challenges similar to those raised by Mrs. Salfi.

The Court's conclusion regarding the availability of section 405(g) as a jurisdictional vehicle for resolving Mrs. Salfi's claim gave rise to a number of questions. First, section 405(g) authorizes federal district court review of

15. At the time Salfi was decided, § 405(h) read as follows:

(h) 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 to recover on any claim arising under this subchapter.

42 U.S.C. § 405(h) (1970) (amended 1976). Justice Rehnquist noted that when 42 U.S.C. § 405(h) was first enacted in 1939 and prior to the recodification of Title 28 in 1948, § 41 of Title 28 contained all of the significant grants of jurisdiction to federal district courts including federal question jurisdiction under § 1331. 422 U.S. at 756 n.3.

Interestingly, the third and last sentence of section 405(h) presently reads as follows: “No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of Title 28 to recover on any claims arising under this subchapter.” 42 U.S.C. § 405(h) (1976).

16. The Court rejected the following arguments of the plaintiff:

(a) Mrs. Salfi's action did not arise under the Social Security Act within the meaning of § 405(h) because it did not require the interpretation of or application of the statute to a particular set of facts, 422 U.S. at 764-65;

(b) The legislative history of § 405(h) indicated that Congress did not intend for the provision to preclude federal question jurisdiction over constitutional challenges to provisions of the Social Security legislation; rather, the legislative history, according to Mrs. Salfi, indicated that Congress enacted § 405(h) simply to preclude a claimant from filing a suit seeking benefits and premising jurisdiction on 28 U.S.C. § 1331 without first filing an application with the Secretary and exhausting the administrative remedies authorized by the legislation when a factual matter was in dispute, id. at 757-59;

(c) Mrs. Salfi's action, because it sought declaratory and injunctive relief and did not request immediate payment of a claim as part of relief, was not an action “to recover on any claim” within the meaning of § 405(h), id. at 760-61.

17. Section 405(g) reads in pertinent part:

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 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. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a hearing.


18. 422 U.S. at 764-67.
any "final decision of the Secretary made after a hearing." After Salfi, an obvious but important question was what constitutes a "final decision made after a hearing" within the meaning of section 405(g).\textsuperscript{19} Second, the language of section 405(g) seems to contemplate case-by-case adjudication.\textsuperscript{20} The question then arises whether class actions are precluded in section 405(g) litigation. Third, section 405(g) contains both a sixty-day statute of limitations and a venue requirement.\textsuperscript{21} Assuming class actions are permissible in section 405(g) litigation, it must then be determined whether these requirements limit the scope of any proposed class. Fourth, section 405(g) seems to limit a reviewing federal district court's jurisdiction to affirming, modifying, or reversing the decision of the Secretary. This apparent limitation raises doubt regarding the power of a reviewing court to issue injunctive or other equitable relief.

In addition to the above-mentioned concerns, three related procedural questions remain to be answered after Salfi. First, it is clear that the administrative and judicial review provisions of the S.S.I. legislation\textsuperscript{22} were modeled after those contained in the Social Security legislation.\textsuperscript{23} The corresponding review provisions contained in the S.S.I. legislation, however, do not expressly incorporate section 405(h).\textsuperscript{24} If 405(h) is not applicable to S.S.I. litigation, then federal question jurisdiction is not precluded for constitutional challenges to provisions of the S.S.I. legislation or constitutional or federal statutory challenges to the regulations promulgated to implement that legislation. Second, the specific holding of the Salfi Court was that section 405(h) precludes federal question jurisdiction over Social Security claims. It is uncertain, however, whether the Court also was implicitly saying that a federal district

\textsuperscript{19} The procedures followed by the Social Security Administration provide for three levels of administrative review after an initial determination on a claim for Social Security benefits has been made. First, the claimant is entitled to a reconsideration of the initial decision, 20 C.F.R. § 404.907 (1982), followed by a hearing before a presiding officer designated by the Bureau of Hearings and Appeals. Id. § 404.929. Finally, the claimant may appeal to a body known as the Appeals Council. Id. § 404.967.

\textsuperscript{20} Note the language that "any individual, after any final decision . . . made after a hearing to which he [the claimant] was a party . . . may obtain a review" and the "court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary." 42 U.S.C. § 405(g) (1970 & Supp. IV 1980) (emphasis added).

\textsuperscript{21} See supra note 17.


\textsuperscript{24} 42 U.S.C. § 1383(c)(3) reads as follows: "The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determination under section 405 of this title." 42 U.S.C. § 1383(c)(3) (1976). As Lassow points out, this language should be compared with language in the Medicare legislation. Lassow, supra note 3, at 912 n.66. See 42 U.S.C. § 1395(ii) (1976) (specifically incorporating § 405(h)).
court is precluded from exercising jurisdiction over such claims under other federal jurisdictional provisions such as the federal mandamus statute. In other words, it is unclear whether the *Salfi* Court intended section 405(g) to be the exclusive jurisdictional vehicle for resolving Social Security claims. Third, the Court’s conclusion that Mrs. Salfi’s action arose under the Social Security Act within the meaning of section 405(h), thus precluding federal question jurisdiction, largely was premised on the fact that the claimant was seeking benefits under the Act. If, however, the claim presented did not concern a question affecting eligibility or the amount of benefits, but rather, involved a constitutional challenge to the procedures by which eligibility for and the amount of benefits were determined, it could be argued that such a claim did not arise under the legislation within the meaning of section 405(h) or, further, that it was not an action to recover on any claim within the meaning of Section 405(h). Hence, federal question jurisdiction over such claims would not be precluded. These three issues then also remained to be resolved after *Salfi*. The practical importance of each, of course, depends on the nature of the problems that are likely to arise in the course of premising jurisdiction for claims like Mrs. Salfi’s on section 405(g).

**ANSWERING THE QUESTIONS RAISED BY *SALFI***

**The “Final Decision Made After a Hearing” Requirement**

Federal district court review is permitted under section 405(g) only subsequent to the Secretary’s “final decisions made after a hearing.” The *Salfi* Court concluded that this statutorily mandated condition precedent to the

25. 28 U.S.C. § 1361 (1976). It generally is understood that federal mandamus jurisdiction is limited to actions seeking to compel a federal officer to perform a legal duty which is clearly required; that is, to compel a ministerial act. See *Winningham v. United States Dept. of Hous. & Urban Dev.*, 512 F.2d 617 (5th Cir. 1975).

26. The *Salfi* Court stated: But it is just as fruitless to argue that the action does not arise under the Social Security Act. For not only is it Social Security benefits which appellees seek to recover, but it is the Social Security Act which provides both the standing and the substantive basis for the presentation of their constitutional contentions. . . . To contend that such an action does not arise under the Act whose benefits are sought is to ignore both the language and the substance of the complaint and judgment.

422 U.S. at 760-61.

27. **LEVIN, FEDERAL LITIGATION; A LEGAL SERVICES PRACTICE MANUAL, 2-8 n.91 (1980) [hereinafter cited as **LEVIN**].

28. It should be emphasized at this point that not all claims under the Medicare legislation are cognizable under § 405(g). In particular, the jurisdiction of a federal district court to hear claims brought by providers of services is a complex issue and is beyond the scope of this Article. See 42 U.S.C. § 1395x(u) (1976). For an in-depth discussion of this issue, see Humana of S.C., Inc. v. Califano, 590 F.2d 1070 (D.C. Cir. 1978); Dr. John T. McDonald Found., Inc. v. Califano, 571 F.2d 328 (5th Cir.) (en banc), cert. denied, 439 U.S. 893 (1978), Trinity Memorial Hosp. v. Associated Hosp. Servs., Inc., 570 F.2d 660 (7th Cir. 1977).
exercise of section 405(g) jurisdiction could not be dispensed with based on a judicial determination that requiring the exhaustion of administrative remedies in a particular case would be futile. Rather, the Court held that it was within the sole discretion of the Secretary of the Department of Health, Education, and Welfare, the agency responsible for administering the Social Security program, to determine whether a “final decision after a hearing” had been made within the meaning of section 405(g). Taken literally, the Court’s unconditional delegation to the Secretary of this determination could result in a claimant being required to exhaust all available administrative remedies prior to seeking federal district court review despite a clear indication that to do so would be futile. Notwithstanding Salfi, it is doubtful that Congress intended this result.

Taking its cue from Salfi, the Social Security Administration promulgated regulations explicitly defining what constitutes a “final decision made after a hearing” for both the Social Security and S.S.I. programs. Essentially, the regulations require that for a decision to be deemed final within the meaning of section 405(g), a reconsideration determination must have been made by the Secretary and the parties must have agreed that the sole issue in dispute was a legal one involving the constitutionality of a statutory provision. If these conditions were satisfied, the claimant would not be required to completely exhaust his available federal administrative remedies prior to seeking federal district court review.

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29. 422 U.S. at 766.
31. The Court stated: “[T]he statutory scheme is thus one in which the Secretary may specify such requirements for exhaustion as he deems serves his own interests in effective and efficient administration.” 422 U.S. at 766.
32. Justice Brennan stated in his dissent that the Court could find no evidence that Congress had this intent. 422 U.S. at 793-94 (Brennan, J., dissenting).
33. Interestingly, the named plaintiff in Salfi only appealed through the reconsideration stage. See supra note 19. The Court nevertheless found that a “final decision made after a hearing” within the meaning of § 405(g) had transpired because the Secretary did not challenge the sufficiency of the allegations of exhaustion in Mrs Salfi’s complaint. Id. at 767. But see 422 U.S. at 801-02 (Brennan, J., dissenting).
35. The regulations were and remain applicable only when the sole issue in dispute is the constitutionality of a statutory provision. They do not come into play when the sole issue is whether regulations promulgated to implement the federal legislation are alleged to be unconstitutional or inconsistent with the federal legislation. This distinction is clearly attributable to the fact that the Secretary may repeal or amend any regulation, but he may not change congressional mandates. Compare 42 U.S.C. § 1302 (1976) (right of Secretary to make and publish rules and regulations) with 42 U.S.C. § 1304 (1976) (right to amend or repeal any provision of the Act reserved to Congress).
36. Lassow, supra note 3, at 913, points out that this expedited appeal process seemingly has been ignored.
Notwithstanding these regulations and the Court's seemingly unequivocal language in *Salfi*, the Supreme Court quickly retreated from the position that it was solely within the Secretary's discretion to determine what constituted a "final decision made after a hearing" within the meaning of section 405(g). As one commentator pointed out, the first step in this retreat was the Supreme Court's decision in *Mathews v. Eldridge*. *Eldridge* addressed whether due process required that a recipient of Social Security disability benefits be afforded an opportunity for an evidentiary hearing prior to termination of those benefits. When Mr. Eldridge was notified that his disability benefits would be terminated without an opportunity for such a hearing, he filed suit in federal district court alleging that termination would be violative of due process. Inasmuch as he did not seek a reconsideration of the termination decision or raise his constitutional claim with the Secretary prior to filing suit, the question was presented whether the plaintiff was precluded from seeking federal district court review pursuant to section 405(g) because there had been no "final decision made after a hearing." In resolving the section 405(g) jurisdictional question, the Supreme Court bifurcated the "final decision" requirement into two elements: a purely "jurisdictional" requirement which could not be waived by the Secretary or judiciary; and a second requirement which could be waived by the Secretary and, in some circumstances, by the judiciary over the objections of the Secretary.

The nonwaivable jurisdictional element required that a claim for benefits be presented to the Secretary. As the Court wrote, "[a]bsent such a claim there can be no ‘decision’ of any type. And some decision by the Secretary is clearly required by the statute." The waivable element was that any available administrative remedies had to be exhausted prior to seeking federal district court review. As to this element, the Court retreated from *Salfi* by concluding that, in some cases, a "claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." The Court found that Eldridge's claim came within this category of cases for two reasons: first, the plaintiff's constitutional challenge was collateral to any substantive claim for benefits, and

37. *Id.* at 908-09.
38. 424 U.S. 319 (1976). *Eldridge* was decided on February 24, 1976, only eight months after *Salfi*. It also is arguable that the Court's application of the final decision rule in *Salfi* indicated that the Court did not intend to give the Secretary unlimited discretion. See *supra* text accompanying note 32.
39. Although the Secretary moved to dismiss Eldridge's claim because he had failed to exhaust his available administrative remedies, 424 U.S. at 325, neither the district court opinion, 361 F. Supp. 520 (W.D. Va. 1973), nor the Fourth Circuit opinion, 493 F.2d 1230 (4th Cir. 1974), addressed any jurisdictional issue.
41. 424 U.S. at 328.
42. *Id.* The Court found that a decision unquestionably had been made by the Secretary when he decided to terminate Eldridge's benefits. *Id.* at 332.
43. See *supra* note 19.
44. 424 U.S. at 330.
second, given the nature of the claim, any decision made at a post-deprivation hearing would not be responsive to his claim.45

The decision rendered in Eldridge represented a partial retreat from the Court's conclusion in Salfi that the determination of what constitutes a "final decision" pursuant to section 405(g) was to be made solely by the Secretary. In Mathews v. Diaz,46 the Supreme Court retreated even further. In fact, Diaz can be read for the proposition that the Court implicitly authorized the judiciary not to require the exhaustion of available administrative remedies despite the Secretary's objections, if exhaustion would be futile.

Diaz involved a constitutional challenge to provisions of the Medicare legislation which limited eligibility to resident citizens over sixty-five and aliens over sixty-five who had been admitted for permanent residence and had resided in the United States for at least five years.47 Of the three named plaintiffs, two failed to meet both the five-year residency and the admission for permanent residence requirements. They had attempted to enroll in the Medicare program but had been denied for those reasons. The third named plaintiff, who satisfied the permanent residency requirement, but could not meet the five-year residency requirement, had not attempted to enroll at the time the federal district court complaint was filed because he thought to do so would be futile.48 None of the plaintiffs, then, had exhausted their available administrative remedies49 at the time the action was filed and the Secretary moved to dismiss, in part,50 for that reason. Subsequent to the filing of the Secretary's motion to dismiss, the named plaintiff who had not previously attempted to enroll, filed an application for benefits. The Secretary never made a formal decision on this application.51

The Secretary's motion to dismiss, of course, raised the question of what constitutes a "final decision" within the meaning of section 405(g). A three-judge district court ruled that jurisdiction was present under section 405(g), finding that the exhaustion of available administrative remedies was not required. The court based its decision on the fact that given the nature of the claim, requiring the claimants to exhaust their administrative remedies would have constituted an exercise in futility.52 The lower court's ruling in Diaz, however, was rendered prior to the Supreme Court's decision in Salfi.

45. Id. at 330-31. See Lassow, supra note 3, at 909. It would seem that these two considerations identified in Eldridge overlap because only where claims are collateral to substantive claims of entitlement is it likely that a decision at a later hearing would not be responsive to the claim.
47. Id. at 70.
48. Id. at 71.
49. Id. at 72.
50. The Secretary's motion to dismiss was predicated on two additional grounds. First, the plaintiffs had not alleged sufficient grounds to invoke the court's jurisdiction. In addition, they had failed to show that they were entitled to injunctive relief. Motion to Dismiss, Mathews v. Diaz, 426 U.S. 67 (1976).
51. Id. at 75.
The Supreme Court, then, in *Diaz* had to determine whether the lower court was correct in not requiring the exhaustion of administrative remedies over the objections of the Secretary in light of *Salfi*. 53

Notwithstanding the seemingly unequivocal language of *Salfi*, the Supreme Court held that the lower court had jurisdiction under section 405(g). It concluded that the nonwaivable element of the final decision requirement had been met because each of the named plaintiffs had attempted to enroll for Medicare. 54 As to the waivable element, 55 the Court held that a final decision had been made within the meaning of section 405(g) despite the Secretary's protestations to the contrary since he had conceded the absence of factual issues and that the applications had or would be denied because of the challenged statutory provisions. 56

The Court's decision in *Diaz* should eliminate any problems which might arise concerning the final decision requirement when the only issue presented is the constitutionality of a statutory provision. 57 In this situation, it should not be difficult to obtain a concession from the Secretary in the course of pretrial discovery or in a motion for summary judgment stating that there are no factual issues in dispute and that the sole issue is the constitutionality of a statutory provision. If such a concession is obtained, then although the Secretary arguably has waived the waivable element of the final decision requirement, in fact the *Salfi* standard of what constitutes a final decision has been transformed into an inquiry as to whether exhaustion of available administrative remedies would be futile.

It is important to emphasize, however, that *Diaz* did not involve a constitutional or statutory challenge to a regulation promulgated to implement the Social Security, S.S.I., or Medicare legislation. Since the Secretary has the power to repeal or amend implementing regulations when a legal challenge to these regulations is raised, it can be argued that the final decision requirement should be approached differently when legal issues arise out of these regulations than when the action involves a constitutional challenge to a statutory provision which the Secretary legally must follow. Arguably, more deference should be accorded the Secretary when the legality of regulations is at issue. This argument may seem appealing; however, there is no

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53. Given the claim in *Diaz*, it was clear the Court could not rely on *Eldridge* to uphold the lower court's exercise of jurisdiction.


55. *Id.* at 76-77. The Court's treatment of the named plaintiff for whom no formal decision had been made on his enrollment application indicated that the waivable element of the final decision requirement also included whether a formal decision had been made by the agency. This certainly was not evident from *Eldridge*.

56. In *Diaz*, the Secretary, in his motion to dismiss for failure to exhaust administrative remedies, stipulated that no facts were in dispute, that the case was ripe for disposition by summary judgment, and that the only issue before the district court was the constitutionality of the statute. 426 U.S. at 76. The Court "treat[ed] the stipulation . . . as tantamount to a decision denying the application and as a waiver of the exhaustion requirements." *Id.* at 77.

57. This would not be the case if the claimant's eligibility for benefits might be premised on reasons unrelated to the challenged statutory provision.
sound reason why in actions challenging the legality of regulations, a statement could not be obtained from the Secretary in the course of pretrial discovery or in a motion for summary judgment as to whether he plans to repeal or amend the challenged regulation. If he does not plan to do either, for purposes of the section 405(g) final decision requirement, constitutional or statutory challenges to regulations should be accorded the same treatment as constitutional challenges to statutory provisions.

This conclusion is supported by language in the *Eldridge* opinion. The Court indicated, although admittedly in dicta, that it saw no reason to distinguish between statutory challenges and regulatory challenges.16 Justice Powell, writing for the Court in *Eldridge* stated:

> The situation here is not identical to *Salfi*, for, while the Secretary had no power to amend the statute alleged to be unconstitutional in that case, he does have authority to determine the timing and content of the procedures challenged here. 42 U.S.C. § 405(a). We do not, however, regard this difference as significant. It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required even to consider such a challenge.17

This language and the fact that the administrative review process available to a claimant is not designed to result in changes to the regulations further support the notion that the final decision requirement should be applied similarly to both controverted statutory provisions and regulations.

After *Diaz*, the following could be said about the “final decision” requirement of section 405(g):

1. there is both a waivable and a nonwaivable element implicit in the final decision requirement;60
2. the nonwaivable element requires that a claim for benefits be presented to the Secretary before a decision can be deemed final;61
3. the waivable element includes whether there has been a formal decision on the claim for benefits62 and whether the administrative review process has been exhausted;63
4. if a claim for benefits has been presented, a court should conclude that a “final decision” has been made notwithstanding the

58. The Court’s comments were dicta in this context because they were made in the course of the Court’s discussion of whether the nonwaivable element of the final decision requirement had been satisfied.
60. See id. at 319, 328 (1976).
61. This does not mean, as evinced in *Eldridge*, that there must be a formal application for benefits. For a discussion of what action short of a formal application has been found to satisfy this requirement, see Lassow, supra note 3, at 913-15. See also Murillo v. Mathews, 588 F.2d 759 (9th Cir. 1978) (example of when the nonwaivable element of *Eldridge* has not been satisfied).
Secretary's objections if the Secretary concedes that there are no factual issues in dispute and the sole issue is the constitutionality of a statutory provision. Similarly, when a regulation is challenged on constitutional or statutory grounds, a final decision has been made if the Secretary concedes that there are no factual issues in dispute and he does not plan to amend or repeal the challenged regulation;

5. if a claim for benefits has been presented, a claimant will not be required to exhaust any available administrative remedies if his claim is collateral to any substantive claim of entitlement and any decision at a post-deprivation hearing would not be responsive to his claim.

Subsequent to Diaz, the Supreme Court has addressed the section 405(g) final decision requirement in only two cases, Califano v. Goldfarb, and Califano v. Yamasaki. Both decisions were consistent with the above analysis. Goldfarb involved a constitutional challenge to a provision of the Social Security legislation which barred a husband from receiving widower's benefits unless he was receiving half of his support from his wife at her death. A similar requirement was not imposed upon a wife seeking widow's benefits. The petitioner sought federal district court review after his application for benefits was denied. Admittedly, he did not exhaust his available administrative remedies. Nevertheless, the Supreme Court, noting the nature of his claim, concluded that the final decision requirement had been satisfied. The Court wrote:

Although Mr. Goldfarb did not pursue an administrative appeal of the denial of his application, appellant (the Secretary) concedes that because the denial was based on his failure to meet a clear statutory requirement, further administrative review would have been futile and the initial denial was therefore "final" for purposes of the District Court's jurisdiction to review it under § 405(g).

Goldfarb is consistent with the principle that if factual issues are not in dispute and the sole question is the constitutionality of a statutory provision over which the Secretary is powerless, then, notwithstanding Salfi, the Secretary will be unable to insist that the claimant exhaust all his available administrative remedies prior to seeking federal district court review.

Yamasaki involved a constitutional and statutory challenge to the procedures implemented by the Secretary to recover overpayments made in the course of administering the Social Security program. Unlike Salfi, Diaz, and Goldfarb, Yamasaki did not involve a constitutional challenge to a statutory

64. Diaz, 426 U.S. at 76-77.
68. 430 U.S. at 203 n.3.
69. Id.
provision. Rather, like *Eldridge*, *Yamasaki* involved a challenge to regulations adopted to implement the Social Security legislation. The crux of the complaint in *Yamasaki* was that the claimants, who had allegedly received overpayments, were entitled to an opportunity for an oral evidentiary hearing prior to any recoupment of the overpayment from their present benefits. Although the Supreme Court's discussion of the section 405(g) final decision requirement in *Yamasaki* was in the class action context, the Court's analysis is equally relevant to the final decision requirement.

In *Yamasaki*, the lower courts had certified a class to include Social Security recipients whose present benefits had or would be reduced or otherwise adjusted without an opportunity for a prior oral evidentiary hearing. The Secretary, in part, objected to any such class definition because it would include those who had not objected to recovery of any overpayment, that is, those for whom no final decision had been made within the meaning of section 405(g). The Supreme Court, in part, agreed with the Secretary's finding that the class was too broadly defined. The Court made clear, however, that a class consisting of those who, in fact, had objected to any recoupment was appropriate. Implicit in this conclusion is the notion that if a claimant has objected to the proposed recoupment, thereby satisfying the nonwaivable element of *Eldridge* by presenting a claim for benefits, then the section 405(g) final decision requirement has been satisfied and no further exhaustion of available administrative remedies is necessary. The Court did not explain why further exhaustion of administrative remedies was not required of class members. Arguably, the exhaustion of such remedies should

70. The Secretary conceded that the named plaintiffs had satisfied the requirements of § 405(g). 442 U.S. at 703.

71. In *Yamasaki*, the Supreme Court reviewed a decision of the Ninth Circuit Court of Appeals, Elliott v. Weinberger, 564 F.2d 1219 (9th Cir. 1977). Two district court actions, Elliott v. Weinberger, 371 F. Supp 960 (D. Hawaii 1974), and Buffington v. Weinberger, No. 734-73 c2 (W.D. Wash. Oct. 22, 1974), were consolidated when this case was first heard by the Ninth Circuit, Elliott v. Weinberger, Nos. 74-1611 and 74-3118 (9th Cir. 1975). The initial Ninth Circuit decision, which found that the Secretary's recoupment procedures were unconstitutional, was handed down prior to the Supreme Court decision in *Eldridge*. In *Eldridge* the Supreme Court vacated the initial Ninth Circuit judgement and remanded the case for further consideration. Elliott v. Weinberger, 425 U.S. 987 (1976). On remand, the Ninth Circuit concluded that due process required an opportunity for a prior evidentiary hearing when a claimant requested a waiver of any received overpayment, but not when he requested a reconsideration to determine whether any overpayment had been made. Elliott v. Weinberger, 564 F.2d 1219, 1230-34 (9th Cir. 1977). See infra note 72 for a discussion of the distinction between a reconsideration and a waiver request. In *Yamasaki*, the Supreme Court reached the same conclusion but did so on statutory rather than constitutional grounds. 442 U.S. 682, 695-97 (1979).

72. Such an objection could take the form of a request for a reconsideration where the claimant asserts that there has not been an overpayment, or a request for a waiver where the claimant admits that there has been an overpayment but requests that any repayment be excused. See 42 U.S.C. § 404(b) (1976) (listing specific circumstances when repayment can be excused).

be required because the claimant might prevail on the substantive merits of his claim that repayment should not be required. Moreover, because the legal claim involved a challenge to the procedures promulgated by the Secretary over which he has control, it is conceivable that the Secretary might modify or repeal these procedures. Yet, given that the nature of the claim involved whether claimants were entitled to a prior evidentiary hearing before a recoupment of benefits, it is probable that the Yamasaki Court found its holding in Eldridge dispositive. 74 Although not articulated with reference to Eldridge, the Court’s conclusion concerning the final decision requirement is consistent with the principles enunciated in Eldridge.

Federal appellate court decisions subsequent to Diaz also have been consistent with the aforementioned analysis of the section 405(g) final decision requirement. Illustrative of these decisions are the appellate court rulings in Wilson v. Edelman, 75 Ellison v. Califano, 76 and Liberty Alliance of the Blind v. Califano. 77 Wilson involved a constitutional challenge to a provision of the S.S.I. legislation which excluded individuals residing in a public institution from receiving benefits unless they were eligible for, and receiving, Medicaid benefits. Although some of the named claimants had not exhausted their available administrative remedies, the Court of Appeals for the Seventh Circuit concluded that all claimants had satisfied the final decision requirement. The Wilson court reached this conclusion, even though the Secretary never expressly stipulated that the sole issue in dispute involved the constitutionality of a statutory provision 78 and despite the fact that the Secretary had argued that the federal district court lacked jurisdiction because of the claimants’ failure to exhaust available administrative remedies. 79 The court held that the final decision requirement was satisfied because the Secretary submitted the matter for disposition on the merits by moving for summary judgment 80 and because at no time throughout the litigation had he made any specific allegation that the reason for the denial of benefits was based

74. It also could be argued that the Court did not require further exhaustion since it was clear that the Secretary was not going to change its recoupment procedures absent a judicial order. See Salfi, supra note 33; Diaz, supra note 56 and accompanying text; Goldfarb, supra note 69 and accompanying text. However, it could not be said that there were no factual issues in dispute if required to pursue his administrative remedies because the claimant still might have prevailed on his substantive claim.

75. 542 F.2d 1260 (7th Cir. 1976).
76. 546 F.2d 1162 (5th Cir. 1977).
77. 568 F.2d 333 (3d Cir. 1977).
78. 542 F.2d at 1272.
79. Id. at 1273. Although the Secretary initially filed a motion with the district court to dismiss, he did not do so specifically because of the claimant’s alleged failure to exhaust administrative remedies. Id. at 1272. This is not surprising because the complaint and the Secretary’s response were filed prior to the Supreme Court decision in Salfi. The Secretary subsequently filed a cross motion for summary judgment in the alternative to the motion to dismiss and while the parties were awaiting a decision, Salfi was decided. Id. at 1272 n.6. It was at this point that the Secretary raised the issue of failure to exhaust administrative remedies. Id. at 1273.

80. It should be noted, however, that at the time the summary judgment motion was filed, it was filed in the alternative to a motion to dismiss. Id. at 1273 n.27.
on something other than the challenged statutory provision. The Wilson opinion illustrates the willingness of a court to find that the final decision requirement is satisfied irrespective of the objections of the Secretary if a claim for benefits has been presented and the sole issue is the constitutionality of a statutory provision.

A similar conclusion with regard to the section 405(g) final decision requirement was reached in Ellison v. Califano. Ellison involved a constitutional challenge to a provision of the S.S.I. legislation which implicitly provided that in computing benefits the income of a spouse was deemed available to an eligible individual for six months after their separation if they had not been divorced. When Mr. Ellison moved out, Mrs. Ellison sought an increase in her benefits because she no longer had access to her husband's income. The statutory provision at issue, however, precluded an increase in her benefits. The Secretary moved to dismiss, based on the ground that the court lacked jurisdiction under section 405(g) because the claimant had not exhausted her available administrative remedies and, therefore, a final decision had not been made. In fact, Mrs. Ellison had not even requested a reconsideration prior to filing suit. The court, nevertheless, held that the section 405(g) final decision requirement had been satisfied even though the Secretary had not specifically conceded that a final decision had been made. The court reached this conclusion because the record clearly indicated that the Secretary knew the sole issue in the case was the constitutionality of a statutory provision. Ellison is consistent with Wilson in illustrating the willingness of courts to find that the final decision requirement has been satisfied, prior to the exhaustion of all available administrative remedies, when it is clear that the sole issue in dispute is the constitutionality of a statutory provision.

Liberty Alliance of the Blind v. Califano differs from Wilson and Ellison in that it did not involve a constitutional challenge to a statutory provision. Rather, it involved a statutory challenge to the procedures utilized by the Secretary to calculate the amount of S.S.I. benefits to which blind recipients

81. Id. at 1273.
82. The Seventh Circuit stated:
Mindful of Salfi's wisdom in imposing a safeguard against judicial review of unnecessary constitutional issues, we recognize the importance of affording the Secretary a full and adequate opportunity to satisfy himself that "the only issue . . . is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act." Salfi did not, however, intend to permit the Secretary to object to section 405(g)'s exhaustion requirement purely for the purpose of defeating jurisdiction.
542 F.2d at 1273 (citations omitted).
83. 546 F.2d 1162 (5th Cir. 1977).
84. Id. at 1163 n.1 (citing 42 U.S.C. § 1382c(b) (1976)).
85. Id. at 1163.
86. Id. at 1164-65.
87. 568 F.2d 333 (3d Cir. 1977).
were entitled. It was alleged in *Liberty Alliance* that these procedures were inconsistent with the S.S.I. enabling legislation. A class action was brought by ten blind recipients and by an organization whose aim was to improve the economic and social status of the blind. Only one named plaintiff, however, had exhausted his available administrative remedies. As a result, the Secretary's motion to dismiss the claims of the nine remaining named plaintiffs was granted by the federal district court because a final decision had not been made within the meaning of section 405(g). The court also denied a motion for class certification concluding that the unnamed class members could not satisfy the final decision requirement. The Court of Appeals for the Third Circuit reversed. It reasoned, in part, that *Diaz* was controlling because the sole issue in dispute was legal rather than factual. Thus, the court held that a final decision had been made within the meaning of section 405(g), as applied to the S.S.I. program, notwithstanding the objections of the Secretary. In this context, the *Liberty Alliance* court did not distinguish between the application of the final decision requirement in cases involving statutory challenges and those involving constitutional challenges. As the court wrote, "'[the] test for exhaustion of a statutory issue in an individual case . . . should be whether the Secretary has taken a final position on that issue.'" Emphasizing that the action was filed after eighteen months of negotiations had not resolved the dispute, the court concluded that it was clear that the Secretary had taken a final position on the question presented.

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88. The court noted that the filing of a motion for summary judgment by the Secretary suggested that the case was appropriate for judicial resolution. *Id.* at 346.

89. *Id.*

90. *Id.* at 344.

91. Significantly, the appellate court in *Liberty Alliance* also ruled that further exhaustion of administrative remedies was not required because the case was governed by *Eldridge*, which held that the "claimant's interest in having the particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." *568 F.2d* at 345 (quoting *Eldridge*, *424 U.S.* 319, 330 (1976)). The *Liberty Alliance* court reached this conclusion because of the nature of S.S.I. benefits which, unlike Social Security benefits, are contingent upon a demonstration of need. Because these S.S.I. benefits are based upon need, the court believed that the claimant could not be made whole even if he prevailed at a post-deprivation hearing. The logic of this argument finds some support in *Eldridge*. See *424 U.S.* at 331-32. See also *Caswell v. Califano*, *583 F.2d* 9, 14 (1st Cir. 1978) (exhaustion requirements met by plaintiff seeking end to delays in scheduling administrative hearings because "statutory and constitutional claims were collateral . . . [and] effective relief [could not be] obtained by awaiting the final determination"); *Mattern v. Mathews*, *582 F.2d* 248, 253 (3d Cir. 1978) (exhaustion requirement met in challenge to recoupment procedure in accordance with *Eldridge* standards because claim to hearing was collateral to substantive claim for benefits and plaintiff made colorable showing of irreparable harm during interim reduction of benefits), *cert. denied*, *443 U.S.* 912 (1974).

However, it is unlikely that the Supreme Court could accept this rationale because, taken literally, exhaustion of administrative remedies might always be excused in S.S.I. cases. It is true that in *Eldridge*, in explaining why exhaustion of administrative remedies would be excused, the Court emphasized that because of Eldridge's "'physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments.'" *424 U.S.* at 331. The primary rationale for the *Eldridge*
in *Wilson* and *Ellison*, represents another illustration of a federal appellate court's willingness to temper strict application of the section 405(g) final decision requirement.

After a review of *Ellison* and *Liberty Alliance*, one commentator suggested that the final decision requirement should not pose an insurmountable barrier to claimants litigating Social Security, S.S.I., or Medicare claims. Given the reported judicial decisions subsequent to *Diaz*, there is no reason to disagree with this conclusion.

The final decision requirement has not been strictly enforced in cases involving procedural challenges, as the following cases illustrate. In *Caswell v. Califano*, 583 F.2d 9 (1st Cir. 1978), the plaintiff instituted a statutory challenge to the processing delay at the hearing stage of requests for Social Security disability benefits. The *Caswell* court found that *Eldridge* precluded any argument that all administrative remedies had to be exhausted. The *Caswell* opinion noted the irony of arguing that the delay under challenge also would constitute a barrier to jurisdiction under § 405(g). *Id.* at 14. Similarly, in *Wright v. Califano*, 587 F.2d 345 (7th Cir. 1978), the court confronted a constitutional and statutory challenge to the delay in processing at the hearing and appeals council stage of requests for Social Security old age and survivor's benefits. The *Wright* court found that, based on *Eldridge*, dispensing with the requirement that claimants had to exhaust all available administrative remedies in both constitutional and statutory challenges was justified. *Id.* at 349.

In *Mattern v. Mathews*, 582 F.2d 248 (3d Cir. 1978), *cert. denied*, 443 U.S. 912 (1979), the Third Circuit addressed the same issue presented in *Yamasaki*: whether claimants were entitled to an oral evidentiary hearing prior to recouping an overpayment of their benefits. The *Mattern* court concluded that exhaustion was not required in light of *Eldridge* and *Liberty Alliance*. *Id.* at 253. Consonant with *Liberty Alliance*, the court indicated, in part, that *Eldridge* was controlling because the claimants could not be made whole by an award of retroactive benefits because of their immediate need for Social Security benefits. See supra note 91. *Mattern*, however, unlike *Liberty Alliance*, involved a claim which was collateral to a substantive claim of entitlement. 582 F.2d at 253.

*De Lao v. Califano*, 560 F.2d 1384 (9th Cir. 1977), *Tatum v. Mathews*, 541 F.2d 161 (6th Cir. 1976), and *Johnson v. Mathews*, 539 F.2d 1111 (8th Cir. 1976) involved constitutional challenges to the practice of terminating without prior evidentiary hearing the benefits of those S.S.I. disability recipients who had been initially grandfathered into the S.S.I. program when it was begun on January 1, 1974. In each, the appellate courts found the constitutional claim to be collateral to a substantive claim for benefits and that *Eldridge* was controlling.

In *Himmler v. Califano*, 611 F.2d 137 (6th Cir. 1979), the Sixth Circuit confronted a constitutional and statutory challenge to the Secretary's practice of failing to provide an opportunity for a prior hearing before a fiscal intermediary rejected compensation claims of Medicare
Class Actions

In General

The right to challenge provisions of the Social Security, S.S.I., or Medicare legislation or regulations enacted to implement such legislation in a class action is important for a variety of reasons. First, class certification may be a means of avoiding potential mootness problems. Second, the class action vehicle may be the most expeditious way to provide the broadest possible relief to those affected by the challenged action. Third, because some doubt exists as to whether the Social Security Administration will change its policies in response to judicial decisions ruling on individual claims if those decisions are not rendered by the Supreme Court, repetitive litigation may be required absent class actions. Fourth, because the impact of a suit and the extent of relief are relevant considerations in assessing attorney's fees, if a suit is successfully maintained as a class action, the amount of attorney's fees to which the claimant is entitled should be increased.

There are, of course, certain disadvantages in class action litigation. First, a court might be hesitant to grant the requested relief because of the wide impact of any ruling. Second, any action brought as a class action will invariably give rise to a number of procedural questions which are likely to delay a ruling on the merits. Despite these drawbacks, the advantages

expenses incurred by eligible Medicare recipients. These expenses had been certified as necessary by the beneficiary's physician and the hospital's utilization review committee. The court found Eldridge to be controlling. Id. at 147.

94. See, e.g., United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) (appeal of a denial of class certification can be taken even after named plaintiff's substantive claim has become moot); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) (respondent's continued economic interest in class certification sufficient to allow appeal of adverse ruling on class certification); Franks v. Bowman, 424 U.S. 747 (1976) (class action not moot where named plaintiff no longer has personal stake in controversy, provided unnamed class members retain sufficient personal stake in the controversy to ensure existence of adversary relationship and named plaintiff will fairly and adequately represent the class).

95. Such relief may take the form of an award of retroactive benefits to class members, or notice to class members that the challenged action was unlawful. Note, however, that the doctrine of sovereign immunity may cause problems with regard to this type of relief. Lassow, supra note 3, at 916-17.

96. Lassow, supra note 3, at 915, suggests that this is the policy of the Social Security Administration. See also Yamasaki, 442 U.S. at 699 (Secretary indicated that he would appeal adverse decisions or abide by them within the jurisdiction of the courts rendering them).


98. The tactical considerations impacting on the decision of whether to bring an action as a class action are discussed fully in Levin, supra note 27, at 3-27 to 3-29.

99. A court especially may be hesitant where an attempt is made to certify a nationwide class. See supra text accompanying notes 108-21.
accruing from class actions clearly make the class action a significant device in federal litigation involving challenges to the provisions of the Social Security, S.S.I., and Medicare legislation, and to the regulations implementing the legislation.

After Salfi, some commentators believed that the Court's decision cast serious doubt on the availability of class actions in section 405(g) litigation. The action in Salfi was brought and successfully maintained as a class action in the trial court. In addressing the jurisdictional requirements under section 405(g), however, the Supreme Court said that the class allegations were deficient because there were no allegations that each class member had met the final decision requirement. Although this conclusion did not necessarily mean that in all section 405(g) litigation, class actions are not permissible, the Court's categorical denial of jurisdiction over the claims of the class members in Salfi led some to believe that class actions were, in fact, precluded in all 405(g) litigation. In Diaz, however, the Supreme Court indicated that this question remained to be resolved. The Diaz Court observed that the trial court's certification of a class had been erroneous because the class included individuals who had not met the final decision requirement. However, because the Court found the challenged statutory provision to be constitutional, it specifically noted that it was unnecessary to decide whether a narrower class or subclass could have been properly certified and still been consistent with the final decision requirement.

After Salfi, the Secretary took the position that class actions were impermissible when federal district court jurisdiction was premised on section 405(g), even if class members were limited to those for whom a final decision had been made. In part, the Secretary relied on the language of section 405(g), asserting that Congress contemplated case-by-case adjudication. All the federal courts of appeal which addressed this issue after Salfi, however, rejected this broad contention by the Secretary. In Califano v. Yamasaki, the Supreme Court reached a similar conclusion, holding that there was no absolute barrier to class actions in section 405(g) litigation.

The Yamasaki Court essentially viewed this question as involving a determination of whether Congress clearly and unequivocally had expressed an intent to exempt actions premised on section 405(g) from the operation of Rule 23 of the Federal Rules of Civil Procedure. The Court was unwilling to attribute this intent to Congress simply from the language of section 405(g),

100. 422 U.S. 749, 755 (1975).
101. Id. at 764.
102. 426 U.S. 67, 71 n.3 (1976).
103. See supra note 20.
104. See Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978); Jones v. Califano, 576 F.2d 12 (2d Cir. 1978); Liberty Alliance of the Blind v. Califano, 568 F.2d 333 (3d Cir. 1977); Johnson v. Mathews, 539 F.2d 1111 (8th Cir. 1976); Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976).
106. 442 U.S. at 699-701. See also infra note 116.
especially in light of the judicial resources conserved through class action litigation. The Court also emphasized that many other federal jurisdictional provisions were phrased in terms of individual plaintiffs, but class relief has never been thought to be unavailable under them. The *Yamasaki* decision, therefore, definitely resolved one question raised by *Salfi* in a manner favorable to program claimants.

**Nationwide Class Litigation**

Provisions of the Social Security, S.S.I., or Medicare legislation, and regulations or procedures promulgated to implement this legislation affect individuals nationwide. As a result, the question arises whether it is proper for a court to certify a nationwide class in actions challenging such provisions, regulations, or procedures. This precise question was addressed by the Supreme Court in *Yamasaki* because in one of the two cases which were consolidated on appeal in *Yamasaki*, a trial court had essentially certified a nationwide class. The court had defined the class to include "all individuals eligible for old age and survivors' benefits whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing." It did, however, exclude from this class definition residents of Hawaii and the Eastern District of Pennsylvania because suits raising similar issues had been filed in these jurisdictions. With the exception of these areas, the certified class included all class members residing in the continental United States and Alaska.

The Secretary argued that it was inappropriate for the lower court to certify an essentially nationwide class for two reasons. First, he argued that such class definitions preclude consideration by other federal district courts of the issue posed. Second, he contended that such class definitions artificially increase the pressure on the Supreme Court's docket by requiring the immediate attention of the Court if a broad ruling unfavorable to the Secretary is rendered. Although the Supreme Court in *Yamasaki* did not minimize the importance of these considerations, it did not believe that these considerations necessitated precluding nationwide class certification in all cases. Rather, these two contentions were to be considered by a trial court in exercising its discretion with regard to the appropriate class definition. With regard to the concern of precluding other federal district courts from hear-

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107. Id. at 700.
108. In addition to the legal propriety of nationwide class certification, the same tactical considerations relevant in determining whether to bring a class action and how to define the class are equally applicable in this context. See supra note 98. In particular, a claimant should be reluctant to seek nationwide class certification by a judge whose record indicates that he may make an unfavorable ruling on the substantive claim.
109. See supra text accompanying notes 70-74.
111. Id.
112. Id. at 701-02.
113. Id.
ing the substantive issue posed, the Court noted that the trial court had been sensitive to this consideration by excluding potential class members from the Eastern District of Pennsylvania and Hawaii.\textsuperscript{114} At a minimum, a class definition which includes class members residing in judicial districts where similar litigation is pending is inappropriate. In addition, in addressing the nationwide class issue, the \textit{Yamasaki} Court emphasized that the trial court had determined that counsel was adequate to represent the interests of the class.\textsuperscript{115} Certainly, an evaluation of the adequacy of counsel should be a crucial consideration in resolving the issue of whether to certify a nationwide class. With the exception of identifying these considerations, however, \textit{Yamasaki} did not specifically delineate how a court should decide whether to certify a nationwide class. Nevertheless, there is no reason why nationwide classes should not be certified subject to the considerations outlined above and other factors traditionally considered in making a class determination.\textsuperscript{116}

There have not been any Supreme Court or federal court of appeals decisions subsequent to \textit{Yamasaki} that have directly considered certification of a nationwide class.\textsuperscript{117} The district court decisions rendered subsequent to \textit{Yamasaki}\textsuperscript{118} which have addressed this issue have paid particular attention, as suggested by \textit{Yamasaki}, to whether certification of a nationwide class will interfere with pending litigation in which the same issue is raised, and whether the requirements of Rule 23 of the Federal Rules of Civil Procedure have been satisfied. \textit{Morrell v. Harris}\textsuperscript{119} is illustrative of these decisions. \textit{Morrell} involved a constitutional challenge to the Secretary's policy of denying automatic cost of living increases to disputed S.S.I. benefits when a hearing was pending as to the amount the claimant should receive. Although the Secretary recognized that benefits had to be paid to a recipient who had

\begin{itemize}
  \item \textsuperscript{114} \textit{Id.} at 702-03.
  \item \textsuperscript{115} \textit{Id.}
  \item \textsuperscript{116} Factors traditionally considered in making class determinations include whether the claim of the representative party is typical of the claims of the class members and whether the representative party will adequately represent the interests of the class. \textit{Fed. R. Civ. P.} 23(a).
  \item \textsuperscript{117} One week after \textit{Yamasaki}, the Supreme Court alluded to the propriety of certifying a nationwide class in \textit{Califano v. Boles}, 443 U.S. 282 (1979). In \textit{Boles}, the trial court had held that a provision of the Social Security legislation which precluded a mother, who had never married the wage earner contributing to social security, from receiving mother's insurance benefits if her child was eligible for and receiving children's insurance benefits violated due process. On appeal to the Supreme Court, the Secretary argued, in part, that the lower court certification of a nationwide class was inconsistent with the final decision requirement. The Supreme Court concluded that the challenged provision was constitutional and, therefore, saw no need to address the class action issue. \textit{Id.} at 296.
  \item \textsuperscript{118} See, \textit{e.g.}, McClure v. Harris, 503 F. Supp. 409 (N.D. Cal. 1980) (certified class of beneficiaries excluded persons who were named plaintiffs or members of plaintiff class in any other actions against Secretary of H.E.W. on similar issues); Holman v. Califano, 83 F.R.D. 488 (M.D. Pa. 1979) (court certified class after determining it had jurisdiction over the claims of the class members and that the requirements of Rule 23 were satisfied).
\end{itemize}
received a notice of termination or reduction and who had made a timely request for a hearing, he refused to apply automatic cost of living increases to the amount paid pending the hearing. The court deferred certification of a nationwide class because the numerosity requirement of Rule 23(a)(1) of the Federal Rules of Civil Procedure had not been satisfied. The court indicated, however, that it saw no reason why a nationwide class could not otherwise be certified because no similar litigation was pending in other judicial districts, the Secretary's policy had nationwide application, and the other requirements of Rule 23 were satisfied.

Class Actions and the Final Decision Requirement

The interrelationship between the section 405(g) final decision requirement and class action litigation was first broached by the Supreme Court in Weinberger v. Salfi. The Salfi Court concluded that the class definition was deficient because it failed to allege that the class members had filed an application for benefits and that a final decision had been made. Implicit in this finding was the conclusion that if class actions were permitted in section 405(g) litigation, any class could include only those individuals for whom a final decision had been made. The Supreme Court's discussion of the class action question in Mathews v. Diaz led to this same conclusion. The pivotal question after Salfi and Diaz concerned the appropriate standard to be used in evaluating whether class members had satisfied the final decision requirement of section 405(g). Conceptually, there appears to be no reason why the standard used for unnamed class members should differ from the standard used for named plaintiffs. As one commentator noted, the Third Circuit Court of Appeals reached this very conclusion in Liberty Alliance, and the Supreme Court implicitly sanctioned this approach in Yamasaki.

The Secretary in Yamasaki argued that the class definition approved by the lower courts included individuals who had not satisfied the final decision requirement because certain members of the defined class had not requested either a reconsideration alleging that there had not been an overpayment or a waiver alleging that an overpayment which had been made should be excused. The Yamasaki Court agreed with the Secretary and held that the class was too broad given these omissions. The Court noted,

120. Rule 23(a)(1) provides: "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable. . . ." FED. R. CIV. P. 23(a)(1).
121. Id. at 1069 (class must be so numerous that joinder of all parties is impracticable).
122. Id. at 1068-69.
123. 422 U.S. 749, 764-65.
125. See Lassow, supra note 3, at 915.
127. 442 U.S. 682, 704 (1979). See also supra notes 72-74 and accompanying text. This con-
however, that the relief ordered\textsuperscript{128} by the Ninth Circuit Court of Appeals would benefit only those who had requested a waiver. Since requesting a waiver, by definition, involves presenting a claim for benefits, the Court concluded that the relief mandated by the Ninth Circuit was only available to those who met the final decision requirement.\textsuperscript{129} Implicit in this finding that unnamed class members who had only requested a waiver had satisfied the final decision requirement is the conclusion that the same standard should be applied to both unnamed class members and named plaintiffs in determining whether the final decision requirement had been satisfied. Essentially, the Court was stating that if \textit{Eldridge} or \textit{Diaz} obviated the requirement that the named plaintiffs exhaust any available administrative remedies, assuming a claim for benefits had been presented, then the same should be true with regard to any unnamed class members such as those awarded relief in \textit{Yamasaki}. It also should be emphasized with regard to the interrelationship between the final decision requirement and class action litigation that \textit{Yamasaki} involved a constitutional and statutory challenge to the regulations and procedures followed by the Secretary in effectuating recoupment of overpayments, procedures over which the Secretary has control. The fact that the Court did not require the exhaustion of all available administrative remedies indicates that the Court will apply the same standard regarding the final decision requirement to unnamed class members and the named plaintiff regardless of whether a regulation is challenged on constitutional or statutory grounds or whether a statutory provision is challenged on constitutional grounds.\textsuperscript{130}

After \textit{Yamasaki}, any class should be defined in terms of those individuals who have been adversely affected by a challenged statutory provision or regulation \textit{and} for whom a final decision has been made. Depending upon the nature of the claim, the fact that an individual has been adversely affected may not be sufficient to satisfy the nonwaivable element of the final decision requirement. A request that the Secretary review that adverse action may be required.\textsuperscript{131}

\textsuperscript{128} The Ninth Circuit ordered that claimants who had requested a waiver of any overpayment be provided an opportunity for a prerecoupment oral evidentiary hearing. See \textit{Elliott v. Weinberger}, 564 F.2d 1219, 1235 (9th Cir. 1977). The Court believed that those recipients who merely requested a reconsideration were not entitled to a prerecoupment oral hearing.

\textsuperscript{129} See \textit{Elliott v. Weinberger}, 564 F.2d 1219, 1235 (9th Cir. 1977).

\textsuperscript{130} See \textit{Elliott v. Weinberger}, 564 F.2d 1219, 1235 (9th Cir. 1977). The Court believed that those recipients who merely requested a reconsideration were not entitled to a prerecoupment oral hearing.

\textsuperscript{131} Note that this requirement must be fulfilled regardless of whether the suit involves a class action.
Class Action and the Statute of Limitations and Venue

Section 405(g) contains a sixty-day statute of limitations and a venue requirement. In Saifi, the Supreme Court clearly stated that both requirements will be deemed to be waived if not raised by the Secretary. If raised, however, they each pose serious problems to the maintenance of class actions. To the extent that either requirement might limit the makeup of a proposed class, the advantages of instituting a class action are minimized.

In an opinion authored by Justice Stevens when he sat on the Seventh Circuit Court of Appeals, the court in Jimenez v. Weinberger concluded that the pendency of a complaint seeking class relief tolled the statute of limitations for any unnamed class members. As a result, individuals with claims similar to those advanced in pending class action litigation need not be concerned that the sixty-day statute of limitations would bar their claims if they do not seek to intervene or file a separate action. Where a final decision has been made on an individual's claim more than sixty days prior to the filing of the class action, however, it is clear that the individual cannot properly be considered part of the class if the Secretary objects to his inclusion. Although it has been suggested that it might be advisable when defining a class to avoid any reference to the sixty-day statute of limitations in the hope that the Secretary would not raise it, it is unlikely that any competent counsel for the Secretary would overlook the requirement. As one commentator correctly concluded, if the statute of limitations question is raised, any class should be defined in terms of those who have been adversely affected by the challenged statutory provision, regulation, or procedure and for whom a section 405(g) final decision has been made no earlier than sixty days prior to the filing of the class action complaint. If defined in this manner, the section 405(g) statute of limitations will not pose an insurmountable barrier to section 405(g) class action litigation.

Taken literally, section 405(g)'s venue requirement would limit class members to those individuals adversely affected by the challenged statutory provision, regulation, or procedure who reside or have their principal place of business in the district where the action is filed. Although any venue ob-

132. 422 U.S. 749, 763-64 (1975).
133. 523 F.2d 689 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976).
134. Id. at 696-97. The court also emphasized that if the motion seeking class certification was denied, the statute of limitations would continue to be tolled if that decision was appealed.
135. See, e.g., Mertz v. Harris, 497 F. Supp. 1134 (S.D. Tex. 1980) (court only had jurisdiction over class members who had received notice of denial of benefits less than sixty days prior to date action was filed); Cooper v. Califano, 81 F.R.D. 57 (E.D. Pa. 1978) (class was defined to reflect the § 405(g) statute of limitations).
136. Lassow, supra note 3, at 916 n.12.
137. Id. at 915-16.
138. See, e.g., Wright v. Califano, 603 F.2d 666, 668 n.5 (7th Cir. 1979).
139. Interestingly, although Yamasaki addressed a number of issues relating to the propriety of class actions in § 405(g) litigation, it did not address the question raised by the sixty-day statute of limitations.
jection could be waived, a strict application of the venue requirement is seemingly inconsistent with the Supreme Court’s holding in *Yamasaki* approving of nationwide classes. Although the section 405(g) venue requirement was not discussed in *Yamasaki*, it is inconceivable that the Supreme Court would have approved the certification of a nationwide class had it discerned that such an action would be improper if a venue objection was raised by the Secretary. Assuming that a class is properly defined in light of the factors delineated in *Yamasaki* and Rule 23 of the Federal Rules of Civil Procedure, and that the final decision requirement has been satisfied for each class member, the Secretary is not prejudiced if the class is defined to include those who do not literally meet the section 405(g) venue requirement. Thus, this venue requirement should not be a barrier to class definitions which include individuals who reside or have their principal place of business in a federal judicial district other than the one in which the action is filed.

**Notice to Class Members**

Most class actions challenging provisions of the Social Security, S.S.I., or Medicare legislation or the regulations or procedures promulgated thereunder will be premised on Rule 23(b)(2) of the Federal Rules of Civil Procedure. The mandatory notice requirements of Federal Rule 23(c)(2) are not applicable to (b)(2) class actions. Yet, the question has arisen whether due process requires that notice be given to section (b)(2) class members because of the potential res judicata effect of any ruling on the merits after class certification, especially if the claim for relief includes a claim for benefits wrongfully withheld. In *Elliott v. Weinberger*, a class

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140. See *supra* text accompanying notes 114-16.
141. In *Holman v. Califano*, 83 F.R.D. 488, 494 (M.D. Pa. 1979), the court rejected the Secretary’s argument that the § 405(g) venue requirement could preclude the certification of a statewide class.
142. Rule 23(b)(2) of the *Federal Rules of Civil Procedure* provides:

(b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

144. See *Air Line Steward Ass’n, Local 550 v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973) (class members with interests antagonistic to the rest of the class could exclude themselves from the class and not be bound by prior judgment affecting the class as a whole), *cert. denied*, 416 U.S. 993 (1974); *Bing v. Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973) (grant of individual relief to some members of class was res judicata and precluded such relief to those members who were entitled to it but failed to respond to notice); *Schrader v. Selective Serv. Sys. Local Bd. No. 76*, 470 F.2d 73 (7th Cir. 1972) (“absolute failure to give any indicia of notice to absent class members” precludes application of res judicata to such members), *cert. denied*, 409 U.S. 1085 (1972).
action premised on Rule 23(b)(2), the Ninth Circuit Court of Appeals concluded that, although the claimants sought the recovery of monies wrongfully withheld by the Secretary, the mandatory notice provisions of Rule 23(c)(2) were not applicable because plaintiffs' primary purpose was to enjoin the challenged practice.\textsuperscript{146} Essentially, the court concluded that a claim for benefits wrongfully withheld did not convert a section (b)(2) class action into a section (b)(3) action within the meaning of Rule 23 when the primary purpose of the action was to seek injunctive relief. The court further held that due process did not require notice in every section (b)(2) class action.\textsuperscript{147} The court believed that notice might be constitutionally mandated only if a question arises concerning whether the claims of the representative parties are typical of the claims of the class or whether the representative party will fairly and adequately represent the interests of the class.\textsuperscript{148} The net effect of the Elliott holding, which was approved implicitly by the Supreme Court in Yamasaki, is that notice to potential class members, as a general rule, should not be required in section (b)(2) class actions even when claims for the recovery of benefits wrongfully withheld are involved.

\textit{Injunctive Relief}

The question of the availability of injunctive and other equitable relief in section 405(g) litigation is significant for a variety of reasons. First, a court may be powerless to prevent irreparable injury without the authority to enter an injunctive order pending a final decision on the merits. Second, if injunctive relief is granted, the remedy of contempt is available to a claimant who believes the Secretary has not complied with a judicial order. Arguably, absent an injunctive order, if the Secretary refuses to comply with a judicial decision requiring the payment of benefits or reversing a ruling of the Secretary, a claimant must obtain an order requiring compliance before the contempt remedy is available.\textsuperscript{149} Third, given the language of Rule 23(b)(2) of the Federal Rules of Civil Procedure,\textsuperscript{150} the propriety of premising a class action on section (b)(2) may be dependent upon the availability of injunctive relief. Fourth, as one author has suggested,\textsuperscript{151} if injunctive relief is unavailable and class membership is, or can only be, defined because of the final decision requirement in terms of those who have been adversely affected by the challenged practice, then a decision invalidating the challenged practice will not inure to the benefit of those adversely affected in the future.

\textsuperscript{146} Id. at 1228.

\textsuperscript{147} Id. For a list of cases addressing this question, see id. n.13. See also Holman v. Califano, 83 F.R.D. 488 (M.D. Pa. 1979) (nature of class makes it difficult to notify class members and is not required in all 23(b)(2) class actions); Aznavorian v. Califano, 440 F. Supp. 788 (S.D. Cal. 1977) (prejudgment notice to absent class members not required), rev'd, 439 U.S. 170 (1978).

\textsuperscript{148} 564 F.2d at 1228-30.


\textsuperscript{150} See supra note 142.

\textsuperscript{151} See Lassow, supra note 3, at 916-17.
unless a method is available to ensure that the Secretary adheres to the decision.\textsuperscript{152}

The question of the availability of injunctive relief in section 405(g) litigation initially was raised in a footnote in \textit{Salfi}.\textsuperscript{113} In this footnote, the Court noted that section 405(g) only empowers a reviewing court "to affirm, modify, or reverse a decision of the Secretary."\textsuperscript{114} It contained no suggestion that a reviewing court had the authority to order injunctive relief. Because the \textit{Salfi} Court ruled against the claimant on the merits,\textsuperscript{155} however, and because the Supreme Court had direct appellate jurisdiction under 28 U.S.C. § 1252,\textsuperscript{116} the Court had no reason to address specifically the question of the availability of injunctive relief in section 405(g) litigation.\textsuperscript{157}

\textsuperscript{152} The decisions in both Cooper v. Harris, 87 F.R.D. 107 (E.D. Pa. 1980), and Cooper v. Califano, 81 F.R.D. 57 (E.D. Pa. 1978), provide examples of the problems that might arise in this context. Although the \textit{Harris} court noted that it had the power to order injunctive relief, it chose not to enjoin the future application of the challenged statutory provision. The net result was that the court's decision invalidating the challenged statutory provision did not inure to the benefit of all those adversely affected by the provision because the Secretary refused to follow the court's decision.

\textsuperscript{153} 422 U.S. 749, 763 n.8 (1975).

\textsuperscript{154} \textit{Id.} (quoting 42 U.S.C. § 405(g) (1970)).

\textsuperscript{155} See supra notes 7-9 and accompanying text.

\textsuperscript{156} 28 U.S.C. § 1252 (1976) authorizes a direct appeal from a federal district court to the Supreme Court if the district court holds an Act of Congress to be unconstitutional. The district court in \textit{Salfi} had found an Act of Congress to be unconstitutional. Thus, the Supreme Court did not have to premise its jurisdiction to hear the appeal on 28 U.S.C. § 1253 (1976), which authorizes an appeal as a matter of right from orders in injunction actions that require a three-judge district court. If Supreme Court jurisdiction was only available in \textit{Salfi} under 28 U.S.C. § 1253, then the Court necessarily would have had to resolve the question of whether injunctive relief is available in § 405(g) litigation because a three-judge federal district court only was required in an action seeking injunctive relief.

\textsuperscript{157} The issue was next presented to the Supreme Court in \textit{Norton} v. Mathews, 427 U.S. 524 (1976), in an indirect fashion. Lassow, supra note 3, at 909. \textit{Norton} involved a direct appeal to the Supreme Court of a three-judge court decision upholding in the face of a constitutional challenge a provision of the Social Security legislation. The jurisdiction of the Supreme Court to entertain the direct appeal was premised on 28 U.S.C. § 1253. This statutory provision gave the Supreme Court the authority to review decisions of properly convened three-judge district courts. However, the three-judge court in \textit{Norton} had jurisdiction only if the court had the authority to enjoin the enforcement of a federal statute because it was unconstitutional. See 28 U.S.C. § 2282 (1972) (repealed 1976). If, under § 405(g), the court lacked the authority to issue injunctive relief, then a three-judge court should not have been convened to hear Norton's claim. And, if a three-judge court should not have been convened, the Supreme Court lacked jurisdiction to hear Norton's appeal. Unlike \textit{Salfi}, the jurisdiction of the Supreme Court could not have been premised on 28 U.S.C. § 1252 because the lower court had not invalidated the challenged federal statutory provision. Implicit in any Supreme Court decision addressing the merits in \textit{Norton} would be a finding that the three-judge court was properly convened and injunctive relief was available in § 405(g) litigation. On the other hand, a decision dismissing the appeal for lack of jurisdiction would mean that injunctive relief was not available in § 405(g) litigation.

Notwithstanding the above, the Court in \textit{Norton} managed to avoid resolving the question of the availability of injunctive relief in § 405(g) litigation. It did so by relying on its decision in a companion case, Mathews v. Lucas, 427 U.S. 495 (1976). The substantive issue presented
The Supreme Court resolved this issue in Yamasaki. As he did with regard to the propriety of class actions, the Secretary argued that the language of section 405(g) did not contemplate injunctive relief. He also contended that injunctive relief was not necessary because claimants would have an adequate remedy at law if a court reversed his determination. The Court disagreed. Although it implicitly noted that the question was one of statutory construction, the Court concluded that, in the absence of a clear command from Congress to the contrary, the federal district courts possessed the power to issue injunctions in actions over which they had jurisdiction.

The Yamasaki decision also discussed the significance of the availability of injunctive relief in preventing irreparable injury and the availability of the remedy of contempt against a recalcitrant Secretary. By definitively answering the question of whether injunctive relief was available in section 405(g) actions, the Yamasaki Court resolved an important question left unanswered in Salfi.

Salfi and Challenges to the S.S.I. Legislation and Regulations and Procedures Promulgated to Implement It

The statutory judicial review provisions governing the S.S.I. program do not specifically incorporate section 405(h). For this reason it has been suggested that the Salfi decision, precluding federal question jurisdiction over

in Lucas was identical to the one posed in Norton. Because injunctive relief was not sought in Lucas, however, a three-judge court was not required to resolve the case. Id. at 502 n.6. A single district court judge in Lucas found the challenged statutory provision to be unconstitutional. Given this holding, the Supreme Court in Lucas had jurisdiction under 28 U.S.C. § 1252 to hear the Secretary's direct appeal to that court. Thus, the jurisdictional question, which was present in Norton and which impacted on the availability of injunctive relief in § 405(g) litigation, was not present in Lucas.

The Supreme Court in Lucas reversed the district court holding that the challenged statutory provision was unconstitutional. Given this holding, the Court in Norton concluded that there was no need to resolve the jurisdictional question presented by Norton's appeal. It reasoned that given its decision in Lucas, irrespective of how it ruled on the jurisdictional question, the ultimate result would be the same, that is, the claimant's constitutional challenge would be denied. The Court emphasized that if it accepted jurisdiction and entered a ruling on the merits, then in light of Lucas, it would deny Norton's claim. On the other hand, if it remanded the matter to a single district judge because it lacked jurisdiction, the district court would be bound in light of Lucas to rule against the claimant. Hence, the Court in Norton concluded that any jurisdictional ruling would have no bearing on the ultimate outcome of the case. In light of this, it chose to defer ruling on the jurisdictional question and implicitly on the question of the availability of injunctive relief in § 405(g) litigation. Norton, 427 U.S. at 531-32.

158. 442 U.S. 682 (1979). The courts of appeal which had addressed this question had concluded that injunctive relief was available in § 405(g) litigation. See Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978); In re Letourneau, 559 F.2d 892 (2d Cir. 1977); Johnson v. Mathews, 539 F.2d 1111 (8th Cir. 1976); Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976).

159. 442 U.S. at 704-05.

160. Id. at 705.

161. See supra notes 22-24 and accompanying text.
Social Security claims, is inapplicable to challenges involving provisions of the S.S.I. legislation and its implementing regulations and procedures.\textsuperscript{162} Because S.S.I. is a need rather than an insurance program, it has been argued that Congress would not have intended to require the exhaustion of available administrative remedies in S.S.I. litigation where only legal issues are in question.\textsuperscript{163} This question is important to the extent that lower courts after \textit{Salfi} might literally interpret certain language contained therein to mean that it is within the sole discretion of the Secretary to determine what constitutes a final decision within the meaning of section 405(g) in S.S.I. litigation. If only the Secretary can determine whether a final decision has been made, and section 405(g) is the exclusive jurisdictional vehicle for reviewing that final decision, then significant delays in litigating legal challenges to provisions of the S.S.I. legislation or implementing regulations may arise. In addition, as previously noted, after \textit{Salfi} the question of whether injunctive relief and class actions are available in section 405(g) litigation remained to be answered. If class actions and injunctive relief were not available, the question of the application of section 405(h) to S.S.I. litigation would acquire added significance. Given, however, the Supreme Court's treatment of the section 405(g) final decision requirement after \textit{Salfi} and its holding in \textit{Yamasaki} with regard to the availability of class actions and injunctive relief in section 405(g) litigation, the practical significance of whether section 405(h) is applicable to S.S.I. litigation is minimal. Exhaustion of administrative remedies, when solely legal issues are in dispute, should no longer be a significant issue in section 405(g) litigation; nor should class actions or injunctive relief be precluded. Consequently, the question of whether section 405(h) and \textit{Salfi} are applicable to S.S.I. litigation will only be of practical significance because of potential statute of limitations difficulties in premising jurisdiction in S.S.I. cases on section 405(g), especially in the class action context, and because of the potential problems in meeting the non-waivable element of the "final decision" requirement.

There appears to be only one decision directly holding that section 405(h) is not equally applicable to actions involving the S.S.I. and Social Security programs.\textsuperscript{164} In other actions challenging provisions of the S.S.I legislation or implementation regulations, courts have applied \textit{Salfi} and its progeny, noting that the statutory judicial review provisions of the S.S.I. legislation specifically incorporate section 405(g).\textsuperscript{165} Arguably, these decisions are

\textsuperscript{162} See Lassow, \textit{supra} note 3, at 912-13.

\textsuperscript{163} Id. at 912.

\textsuperscript{164} See Maher v. Mathews, 402 F. Supp. 1165, 1173 n.30 (D. Del. 1975). This decision did not address the question of whether § 405(h) precluded federal question jurisdiction over S.S.I. claims. Rather, the court held that mandamus jurisdiction, 28 U.S.C. § 1361 (1976), was available in S.S.I. cases notwithstanding § 405(h), and that § 405(h) precluded mandamus jurisdiction in Social Security cases.

\textsuperscript{165} See \textit{supra} note 24; Liberty Alliance of the Blind v. Califano, 568 F.2d 333, 344 (3d Cir. 1977); Wilson v. Edelman, 542 F.2d 1260, 1270-71 (7th Cir. 1976); Tatum v. Mathews, 541 F.2d 161, 164 n.2 (6th Cir. 1976); Johnson v. Mathews, 539 F.2d 1111, 1117 (8th Cir. 1976).
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not technically responsive to the contention that because S.S.I. is a need, rather than an insurance program, Congress would not have intended to require the exhaustion of available administrative remedies in S.S.I. litigation where only legal issues are in question. Nevertheless, because the S.S.I. judicial review provisions specifically incorporate section 405 and because Congress modeled these provisions after those contained in the Social Security legislation, it is unlikely that Congress would have intended for different judicial review procedures to govern claims arising under the Social Security and S.S.I. programs, notwithstanding that S.S.I. eligibility is premised upon need. Given, however, the Supreme Court's treatment of the final decision requirement subsequent to Salfi, and its holding in Yamasaki concerning class actions and injunctive relief, the resolution of this question is not of great practical significance.

Salfi and Procedural Challenges to the Manner in Which Benefits Are Determined

Section 405(h) of the Social Security legislation specifically precludes federal question jurisdiction for any action "to recover on any claim arising under this subchapter." The Supreme Court in Salfi emphasized this language in reversing the lower court's finding of jurisdiction under 28 U.S.C. § 1331. Salfi, of course, involved a challenge to a substantive statutory provision defining eligibility for Social Security benefits. If, however, a claim was presented involving a challenge to the procedures utilized in determining eligibility or the amount of benefits, it could be argued that actions of this nature are not "actions to recover on any claim" within the meaning of section 405(h) because they do not seek an order granting benefits but only an order that legally appropriate procedures be utilized. If such actions do not seek to recover benefits within the meaning of section 405(h), federal question jurisdiction over such claims should not be precluded. In addition, with regard to solely constitutional challenges to Social Security, S.S.I., or Medicare procedures, to the extent such challenges do not directly seek benefits and do not require an interpretation of those procedures, the question arises whether section 405(h) governs such actions since arguably they do not "arise under" those programs within the meaning of section 405(h).

Before addressing these issues, it should be emphasized that they are of practical significance only to the extent that Salfi poses significant obstacles to litigating such procedural claims under section 405(g). As emphasized previously, the decisions of the Supreme Court rendered subsequent to Salfi have dispensed with most of these obstacles. Problems arising from the section 405(g) statute of limitations, particularly in the class action context,

168. See Levin, supra note 27, 2-8 n.91; infra notes 183-87 and accompanying text.
and problems that may emanate from the nonwaivable element of the final decision requirement, are possible exceptions.

The argument that legal challenges to the procedures used to determine eligibility and the amount of benefits are not actions to recover on a claim within the meaning of section 405(h) finds support in *Elliott v. Weinberger*. To reiterate, *Elliott* involved a challenge to the procedures used in recouping overpayments that were made in the administration of the Social Security program. At the time *Elliott* was decided, the question of the propriety of class actions and the availability of injunctive relief in section 405(g) litigation had not been definitively resolved. Partially to avoid this issue, the Ninth Circuit held that it had jurisdiction to hear the claim presented based on the federal mandamus statute, 28 U.S.C. § 1361. Nevertheless, before reaching this conclusion, the court necessarily had to resolve the question of whether federal mandamus jurisdiction (as contrasted with federal question jurisdiction) was precluded by section 405(h). In concluding that *Salfi* and section 405(h) did not preclude such jurisdiction, the appellate court distinguished between challenges to substantive provisions and procedural claims. The court wrote:

Nor are the present suits precluded by 42 U.S.C. § 405(h) which controls judicial actions to recover benefits. *Weinberger v. Salfi* interprets § 405(h) to require that claims for benefits be asserted only through 42 U.S.C. § 405(g). The instant suits are quite different. They assert a constitutional right to due process notice and hearing when alleged overpayments are recouped. *They are not claims for benefits*. Nor would granting the relief sought result in an entitlement to benefits. The distinction between due process questions divorced from a claim for benefits and questions related to the merits of a benefits claim is a significant one, requiring considerably different treatment by the courts.

*Elliott* concluded that because certain procedural claims simply were not actions to recover on a claim within the meaning of section 405(h), federal mandamus jurisdiction was not precluded. Despite its logic, this conclusion of *Elliott* is questionable. First, the same analysis leads to the conclusion that federal question jurisdiction is available to entertain such procedural claims. Yet, implicit in the Supreme Court’s decision in *Eldridge*, which clearly involved a procedural claim, was an indication that *Salfi* precluded federal question jurisdiction over such claims. Although the Supreme Court in *Eldridge* left the question of whether federal mandamus jurisdiction was precluded by section 405(h) unanswered, the Court gave no indication that

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170. See supra notes 145-48 and accompanying text.
171. 564 F.2d at 1225 & n.8a.
172. Id. at 1226 (emphasis added) (citations omitted).
173. Id. at 1226-27.
174. The *Eldridge* Court described its holding in *Salfi* as “precluding federal-question jurisdiction in an action challenging denial of claimed benefits.” 424 U.S. at 327.
it did so because of the nature of the claim presented. Second, it was argued in *Salfi* that the plaintiff did not seek recovery on a claim within the meaning of section 405(h) because the relief requested was not tantamount to a direct recovery of benefits. Specifically, Mrs. Salfi alleged that she would need to resort to the administrative process to recover any benefits even if the challenged statutory provision was found unconstitutional. 176 This argument was rejected by the *Salfi* Court. 177 Although *Salfi* admittedly did not involve a procedural claim, the Court’s rejection of Mrs. Salfi’s argument makes it unlikely that essentially the same argument would be accepted simply because a procedural claim was involved. 178 Third, when factual matters are in dispute, such as whether a claimant is disabled, it is not unusual for a claimant to ask a federal district court to remand the question to the Secretary for further consideration, rather than seeking an award of benefits. 179 It is doubtful, given the Supreme Court’s reading of congressional intent in *Salfi*, 180 that actions seeking such relief could be premised on section 1331. Nevertheless, it could be argued that such actions do not fall within the meaning of section 405(h) in that they do not explicitly seek an award of benefits. Rather, a return to the administrative process is necessary before any benefits can be awarded. Fourth, implicit in the argument accepted in *Elliott* is the contention that some Social Security, S.S.I., and Medicare claims can be premised on jurisdictional provisions other than section 405(g). However, in concluding that federal district court jurisdiction to review a Social Security claim was not available under the Federal Administrative Procedure Act, the Supreme Court in *Califano v. Sanders* 181 appeared to be suggesting that section 405(g) was the exclusive jurisdictional vehicle to review such claims. Such an interpretation leads to the conclusion that Social Security, S.S.I., or Medicare claims cannot be premised on 28 U.S.C. § 1331 or 28 U.S.C. § 1361 regardless of the nature of the relief sought. 182


177. 422 U.S. at 756-59.

178. It should be noted that some procedural claims may seek to recover benefits. For example, it would seem that the "procedural" claims presented in *Eldridge* and *Elliott* were suits to recover on a claim because both Eldridge and Elliott wanted their benefits to continue pending an opportunity for an oral evidentiary hearing. Some procedural claims, however, might not directly involve a claim for benefits. A claim that decisions are not being made with reasonable promptness is an example of such a claim. See *Caswell* v. *Califano*, 583 F.2d 9 (1st Cir. 1978). Not surprisingly, whether a procedural claim is an action seeking to recover on a claim may be dependent on the nature of the relief sought.

179. 42 U.S.C. § 405(g) (1976) specifically contemplates this course of conduct.

180. See supra text accompanying note 16.


182. It must be emphasized, however, that the specific holding of *Sanders* was that the Federal Administrative Procedure Act is not a jurisdictional statute. *Sanders* did not specifically address the question of whether § 405(g) was the exclusive jurisdictional vehicle to hear Social Security claims. The concurring opinion of Justice Stewart, which Chief Justice Burger joined, reasoned that there was no need to address the question of whether the Federal Administrative Procedure Act was a jurisdictional statute because § 405(g) was the sole jurisdictional basis for
It appears that the preclusive effect of section 405(h) over procedural claims cannot be avoided by arguing that such claims are not "actions to recover on any claim." Clearly, the ultimate aim of these procedural actions is to recover benefits. Assuming the Salfi decision is correct, it is inconsistent to say that Congress did not intend section 405(h) to cover such procedural claims.

The related argument that constitutional challenges to Social Security, S.S.I., and Medicare procedures do not arise under the respective programs and, therefore, are not governed by section 405(h) is premised on language found in Salfi. In rejecting the argument that federal question jurisdiction was not precluded by section 405(h) because the action arose only under the Constitution, the Salfi Court declared in part that the claim also arose under the Social Security Act because the claimant sought to recover Social Security benefits. Based upon this language, it has been argued that constitutional challenges to Social Security, S.S.I., or Medicare procedures arise only under the Constitution, making section 405(h) inapplicable. The problem with this argument is that the Salfi Court did not rely solely on the fact that the claimant sought to recover benefits in concluding that the action arose under the Social Security Act. Rather, the Court also relied on the fact that "it is the Social Security Act which provides both the standing and the substantive basis for the presentation of their constitutional contentions." Because this latter rationale would apply to constitutional challenges to Social Security or S.S.I. procedures, it is difficult to believe that the Supreme Court would conclude that section 405(h) is inapplicable to such claims because they arise only under the Constitution.

To summarize, it is unlikely that the Supreme Court will find section 405(h) inapplicable to constitutional or statutory challenges to Social Security, S.S.I., Social Security claims. 430 U.S. at 110-11 (Stewart, J., concurring). On the other hand, in Califano v. Yamasaki, the Supreme Court noted that because jurisdiction was available under § 405(g), it saw no need to reach the question of whether mandamus jurisdiction otherwise would be available. 442 U.S. 682, 698 (1979). See also Ellis v. Blum, 643 F.2d 68, 78 (2d Cir. 1981) (finding mandamus jurisdiction available as an alternative to § 405(g) jurisdiction). Yamasaki obviously indicates that the Supreme Court has not yet resolved the question of whether § 405(g) is the exclusive jurisdictional vehicle to hear Social Security claims, at least when jurisdiction is premised on the federal mandamus statute.

183. See, e.g., Humana of S. C., Inc. v. Califano, 590 F.2d 1070, 1080-81 (D.C. Cir. 1978) (a procedural claim unrelated to a denial of benefits not precluded by § 405(h)); St. Louis Univ. v. Blue Cross Hosp. Serv., 537 F.2d 283, 292 (8th Cir. 1976) (federal court's jurisdiction over due process claim which sought to obtain a constitutionally adequate hearing not precluded by § 405(h)), cert. denied, 429 U.S. 977 (1976). But see Ellis v. Blum, 643 F.2d 68, 78-79 (2d Cir. 1981) (federal court's mandamus jurisdiction for procedural challenges in disability suits not precluded by § 405(h)).


185. Because statutory challenges to Social Security or S.S.I. procedures call for an interpretation or application of a statutory provision, they clearly arise under the legislation establishing the programs and not the Constitution.

186. See Levin, supra note 27, 2-8 n.91.

187. 422 U.S. at 760-61.
or Medicare procedures either because such challenges are not actions to recover on a claim or because they do not arise under the programs. The practical significance of this conclusion, however, is minimized by the Supreme Court decisions following *Salfi* which deal with the section 405(g) final decision requirement and by the Court's holding in *Yamasaki* with regard to class actions and injunctive relief.

**Mandamus Jurisdiction**

In *Eldridge, Norton v. Mathews,* and *Yamasaki,* the Supreme Court left unanswered the question of whether mandamus jurisdiction is available in challenges to provisions of the Social Security, S.S.I., and Medicare legislation and implementing regulations. The practical importance of this question and the question of whether other alternatives to section 405(g) jurisdiction exist depend on the problems of litigating such claims under section 405(g).¹⁸⁹

In assessing the availability of federal mandamus jurisdiction, the question of whether section 405(g) is the exclusive jurisdictional vehicle for Social Security, S.S.I., and certain Medicare claims should be kept separate from the question of whether mandamus jurisdiction is available given the specific nature of the claim. In addressing the propriety of federal mandamus jurisdiction over Social Security, S.S.I., and Medicare claims, one must first determine whether section 405(h) precludes any jurisdictional vehicle other than section 405(g) and, then assuming it does not, determine whether federal mandamus jurisdiction is appropriate given the nature of the claim.¹⁹⁰

With regard to whether section 405(g) is the exclusive jurisdictional vehicle to resolve Social Security claims, the Supreme Court in *Califano v. Sanders* had implied as much for essentially two reasons. First, in explaining why section 405(g) jurisdiction was available in *Salfi* and *Eldridge,* the *Sanders* Court noted that a federal forum would not have been available to review the constitutional claims presented absent section 405(g) jurisdiction.¹⁹¹ By definition, then, the *Sanders* Court apparently believed

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¹⁸⁹. For example, as has been noted, the Ninth Circuit in *Elliott* chose to premise jurisdiction on 28 U.S.C. § 1361, the federal mandamus statute, because the question of the propriety of class actions and the availability of injunctive relief in § 405(g) litigation was unresolved. See supra notes 171-73 and accompanying text. After *Yamasaki,* however, the importance of the federal mandamus statute as a jurisdictional vehicle in social welfare legislation cases is primarily dependent upon the difficulty of satisfying the § 405(g) final decision requirement and, more specifically, its nonwaivable element. See supra notes 72-73 and accompanying text. The feasibility of the federal mandamus statute as a jurisdictional vehicle is also dependent on any problems engendered by the sixty-day statute of limitations, especially in the class action context.

¹⁹⁰. See supra note 25.

¹⁹¹. 430 U.S. 99, 109 (1977). It should be noted, however, that the Supreme Court in *Eldridge* specifically left unanswered the question of whether federal mandamus jurisdiction would be available to review Social Security claims. 424 U.S. 319, 332 n.12 (1976). *Sanders* was decided after *Eldridge.*
that federal mandamus jurisdiction would not have been available to resolve the claims presented in *Salfi* and *Eldridge*. Second, in resolving whether the federal Administrative Procedure Act (APA) was a jurisdictional statute, the *Sanders* Court assessed the significance of Congress' action in 1976 in removing the jurisdictional amount requirement in 28 U.S.C. § 1331 in actions brought against federal officials in their official capacity and the significance of Congress' concomitant retention of section 405(h). The Court emphasized that, given the removal of the jurisdictional amount requirement, it would make little sense to conclude that Congress intended the APA to be jurisdictional because its practical significance would be limited to situations involving federal officials where federal question jurisdiction was unavailable, such as, perhaps, in Social Security claims. But, the Court believed that such a conclusion was unlikely because Congress retained section 405(h) when it deleted the jurisdictional amount requirement. Thus, implicit in the *Sanders* Court's conclusion that the federal APA was not a jurisdictional statute because of the 1976 amendments to 28 U.S.C. § 1331(a), and the retention of section 405(h), is the belief that Congress intended all Social Security claims to be governed by section 405(g). If such was the case, federal mandamus jurisdiction over Social Security, S.S.I., and Medicare claims would not be available.

Despite the Court's comments in *Sanders*, federal appellate courts subsequent to *Yamasaki* have not necessarily concluded that mandamus jurisdiction is unavailable for Social Security, S.S.I., and Medicare claims. Perhaps the most scholarly treatment of the question of the availability of federal mandamus jurisdiction over Social Security, S.S.I., and Medicare claims has been Judge Friendly's opinion for the Second Circuit Court of Appeals in *Ellis v. Blum*. The claimant in *Ellis* alleged that the procedures used in terminating Social Security disability benefits by the Social Security Administration and the state agency administering the program were constitutionally deficient because terminations were not preceded by a written notice containing a summary of the evidence justifying the proposed termination and an explanation of why the recipient was no longer considered to be disabled. Mrs. Ellis premised federal district court jurisdiction for her claim on 42 U.S.C. § 405(g) and 28 U.S.C. §§ 1331 and 1361. As to section 405(g) jurisdiction, the Secretary argued that the final decision requirement had not been satisfied because, at the time the complaint was filed, Mrs. Ellis' benefits had not actually been terminated despite several pretermination notices.

192. 5 U.S.C. §§ 701-706 (1976). The Administrative Procedure Act provides that a person who is wronged by an agency action is generally entitled to judicial review.
194. 430 U.S. at 106-07.
195. The Court stated: "Congress' explicit entry into the jurisdictional area counsels against our reading the APA as an implied jurisdictional grant designed solely to fill such an interstitial gap in § 1331 jurisdiction." Id. at 107.
196. 643 F.2d 68 (2d Cir. 1981).
197. Id. at 71.
Although Judge Friendly recognized that the Supreme Court in *Eldridge* had indicated that the final decision requirement should not be construed so as to nullify collateral claims, he stated that the Court was reluctant to find section 405(g) jurisdiction when no decision to terminate benefits had been made. The appellate court, consequently, chose not to resolve the question of whether section 405(g) jurisdiction was available to resolve Mrs. Ellis' claim. As to section 1331 jurisdiction, the claimant argued that section 405(h) did not preclude federal question jurisdiction over constitutional procedural challenges which did not directly seek to recover benefits. Judge Friendly indicated that the Second Circuit was inclined to agree with this argument notwithstanding the *Eldridge* and *Sanders* decisions. Nevertheless, the court stopped short of doing so, and, as it did with its decision regarding section 405(g) jurisdiction, it chose not to resolve this question.

The *Ellis* court found it unnecessary to resolve the section 405(g) and section 1331 jurisdictional questions because it concluded that jurisdiction was available under the federal mandamus statute. In so doing, the court rejected the argument implicit in *Sanders* that section 405(g) was the exclusive jurisdictional vehicle to resolve Social Security claims. First, Judge Friendly noted that, whereas the Court in *Sanders* read the legislative history concerning the removal of the jurisdictional amount requirement as demonstrating a congressional belief that the federal APA was not a jurisdictional statute, the legislative history concerning the interaction between removal of the jurisdictional amount requirement and the federal mandamus statute dictated the opposite conclusion. Specifically, the evidence indicated that Congress intended for the federal mandamus statute to supplement section 1331, thereby filling the jurisdictional gaps that according to the *Sanders* Court, Congress did not intend the APA to fill. Second, with regard to the significance of section 405(h), Judge Friendly pointed out that at the time it was enacted in 1939, the District Court of the District of Columbia had the authority to issue writs of mandamus against federal officials, and there was no indication that Congress intended to preclude the court

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198. *Id.* at 77. The claimant argued that the § 405(g) final decision had been made with regard to the procedures utilized in terminating disability benefits. The claimant, in part, sought damages for injuries allegedly resulting from the use of the constitutionally defective procedures. *Id.*

199. *Id.*

200. *Id.* at 77-78. See *St. Louis Univ. v. Blue Cross Hosp. Serv.*, 537 F.2d 283 (8th Cir. 1976), *cert. denied*, 429 U.S. 977 (1976).

201. The Second Circuit apparently agreed with the Eighth Circuit's conclusion that "*Salfi* did not preclude § 1331 jurisdiction over procedural challenges not necessarily affecting entitlement to benefits." 643 F.2d at 77.

202. *Id.*

203. Note in particular the concurring opinion of Justice Stewart in *Sanders*. 430 U.S. at 110 (Stewart, J., concurring).

204. 643 F.2d at 78-81.


206. 643 F.2d at 80-81.

207. *See supra* notes 191-94 and accompanying text.
from continuing that practice when it enacted § 405(h). Further, he observed that when 28 U.S.C. § 1361 was passed in 1962, granting federal district courts nationwide the authority to issue writs of mandamus, there was no indication that Congress intended for this grant of federal mandamus jurisdiction to be subject to the limitations of section 405(h).\footnote{208} Finally, Judge Friendly concluded that even if section 405(h) was read generally to preclude federal mandamus jurisdiction over Social Security claims, it would not be dispositive of the present case because the action was not one to recover on a claim. Thus, it did not come within the purview of section 405(h).\footnote{209}

Although the Ellis court found that federal mandamus jurisdiction was available, it was careful to limit its holding to claims that are essentially procedural in nature.\footnote{210} This limited holding illustrates that the availability of federal mandamus jurisdiction over Social Security, S.S.I., or Medicare claims is dependent upon the nature of the claim. The question of which claims are appropriate for federal mandamus jurisdiction is not unique to Social Security, S.S.I., or Medicare litigation and is beyond the scope of this Article. To the extent one can generalize, federal mandamus jurisdiction should be available for statutory challenges to procedural or substantive regulations promulgated to implement the aforementioned entitlement programs. These actions should come within the "ministerial" limitation of federal mandamus jurisdiction.\footnote{211} Federal mandamus jurisdiction also should be available for constitutional challenges to statutory provisions and regulations of a procedural nature.\footnote{212} It is doubtful, however, that federal mandamus jurisdiction will be available for constitutional challenges to statutory provisions or regulations of a substantive nature.\footnote{213}

\footnote{208. \textit{Id.} at 81. \textit{See also} Elliott v. Weinberger, 564 F.2d 1219, 1227 n.12 (9th Cir. 1977) (§ 1361 jurisdiction not precluded by § 405(h)), \textit{aff'd sub nom.} Califano v. Yamasaki, 442 U.S 682 (1979).

209. 643 F.2d at 82. The Court then in the context of its discussion of federal mandamus jurisdiction accepted the argument that it found persuasive, but saw no need to definitively address, in the context of federal question jurisdiction. Interestingly, the Court recognized that it could be argued that the action was one to recover on a claim because the complaint in part did seek reinstatement of benefits for those class members whose benefits had been terminated without receiving a constitutionally adequate pretermination notice. However, the Court indicated that it did not believe that this was the kind of recovery Congress had in mind when it adopted § 405(h). \textit{Id.} It should be emphasized, however, that given the somewhat unique fact that Mrs. Ellis was still receiving her disability benefits at the time the action was filed, it clearly cannot be said that her individual action was one to recover on a claim within the meaning of § 405(h).

210. \textit{Id.}

211. \textit{See supra} note 25.


213. \textit{See Winningham v. United States Dep't of Hous. \\& Urban Dev., 512 F.2d 617 (5th Cir. 1975).}
The availability of federal mandamus jurisdiction over Social Security, S.S.I., or Medicare claims has yet to be resolved by the Supreme Court. Given the decisions in Diaz and Yamasaki, however, practically this issue is most likely to arise in cases similar to Ellis, in which there is difficulty in satisfying the section 405(g) final decision requirement.

**Retroactive Benefits**

The availability of retroactive benefits to the named plaintiffs and affected class members in Social Security, S.S.I., and Medicare litigation is a question of obvious significance. Particularly with regard to a constitutional or statutory challenge to program regulations and procedures over which the Secretary has control, there is little incentive for the Secretary to reconsider the propriety of his policies if an award of retroactive benefits is not available. An award of retroactive benefits also will act to insure that claimants receive all benefits to which they are legally entitled.

The availability of retroactive benefits essentially involves two questions: (1) whether the doctrine of sovereign immunity precludes such an award; and, (2) assuming that it does not, whether such an award should be precluded because any judicial decision in favor of a claimant should only be applied prospectively.

The Supreme Court has not yet resolved the question of the availability of retroactive benefits in Social Security, S.S.I., or Medicare litigation. In Califano v. Boles and Califano v. Aznavorian, lower courts had struck down statutory provisions on constitutional grounds and had awarded retroactive benefits. In both cases, the Supreme Court reversed on the merits, thereby making it unnecessary to address the issue, which had also been raised on appeal, of the availability of retroactive benefits.

A recent appellate court decision addressing this question is Wright v. Califano. Wright involved a constitutional challenge to a provision of the...
Social Security legislation which required a husband seeking benefits based
upon his wife's eligibility for old age or disability benefits to establish that
he was receiving at least one-half of his support from his wife. Wives seek-
ing similar benefits were not required to satisfy this support requirement.
The district court held the challenged statutory provision to be unconsti-
tutional. The court ordered the Secretary to pay retroactive benefits to those
individuals who were denied benefits because of the challenged statutory pro-
vision and for whom a final decision was made on or after sixty days prior
to the date the class action complaint was filed. On appeal to the Seventh
Circuit, the Secretary argued that the district court's award was precluded
by the doctrine of sovereign immunity and, in the alternative, that the district
court's decision on the merits should only have been applied prospectively.

In considering the sovereign immunity argument, the Seventh Circuit
recognized that although the district court had jurisdiction under section
405(g) to resolve the plaintiff's claim, that, in and of itself, did not mean
that a retroactive monetary award against the Secretary was not precluded
by the doctrine of sovereign immunity. Rather, to determine whether
sovereign immunity precluded such an award the court looked to whether
the specific relief sought had been authorized by a federal statute. The
Seventh Circuit found authorization for a retroactive monetary award in three
separate statutory provisions. First, the court noted that section 405(g)
specifically authorized a district court to enter a judgment reversing the deci-
sion of the Secretary. Second, the court pointed out that 42 U.S.C. § 404
mandated that the Secretary make payment of any monies owing to a clai-
mant who had received less than the correct amount due him. Finally,
the court emphasized that 42 U.S.C. § 402(j) provided that those "who would
have been entitled to benefits under sections 402(a)-(g) or (h)" of the Social
Security legislation were eligible for retroactive benefits for a one year period,
provided they were eligible in all other respects. Taken together, the court
held that these provisions indicated Congress' "unequivocal" intent to in-
sure that claimants received both retroactive and prospective benefits.

221. Id. at 668-69 nn.5 & 7.
222. Id. at 670-73.
223. See United States v. Testan, 424 U.S. 392 (1976) (this conclusion recognizes that the
concepts of jurisdiction and relief involve separate concerns). See also Davis v. Passman, 442
U.S. 228, 239 n.18 (1979) (jurisdiction concerns power of court to hear case; cause of action
involves whether any private party may invoke court's power; standing involves whether par-
ticular individual has right to invoke court's power; relief encompasses various remedies court
may make available).
224. 603 F.2d at 670-72.
225. An analogous provision for the S.S.I. program can be found at 42 U.S.C. § 1383(b)
(1976).
226. This was the case now for the plaintiffs given the court's decision. 603 F.2d at 671.
Lassow, supra note 3, 917 n.138, suggests that 42 U.S.C. § 405(j) also authorizes an award
of monetary retroactive benefits.
227. 603 F.2d at 671-72. See Cash v. Califano, 621 F.2d 626 (4th Cir. 1980) (court, citing
Wright, found that doctrine of sovereign immunity did not preclude award of retroactive benefits).
See also Jimenez v. Weinberger, 523 F.2d 689, 702 (7th Cir. 1975) (§ 405(g) itself operates
Notwithstanding the Seventh Circuit's interpretation of congressional intent in *Wright*, it is arguably unclear that the statutory language relied on supports a finding that Congress intended to waive sovereign immunity and to award benefits retroactively in Social Security litigation, at least as to class members. Three federal appellate court decisions have implied as much: *Johnson v. Mathews*,228 *Tatum v. Mathews*,229 and *De Lao v. Califano*.230 Each was a class action which involved a due process challenge to the procedures used in terminating the benefits of certain S.I. disability recipients.231 In each case, the appellate court held that the challenged practice, which permitted the termination of benefits without an opportunity for a prior evidentiary hearing, violated due process. In none of these cases, however, were the courts willing to enter an award requiring the payment of benefits to claimants for monies withheld from the date of termination until a hearing was held. The courts reached this conclusion because they were unable to find any federal statutory authorization for an award of retroactive payments.232 Accordingly, they were unable to find any waiver of sovereign immunity. Unlike *Wright*, the courts in *Johnson*, *Tatum*, and *De Lao* found that nothing in section 405(g), as it concerns the S.I. program or the enabling legislation, indicated Congress’ intent to waive sovereign immunity.233 Interestingly, the courts concluded that sovereign immunity would not bar retroactive payments to claimants who were successful at post-termination hearings because such an award of back benefits was arguably authorized by statute.234 For those found ineligible, however, the courts concluded that

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228. 539 F.2d 1111 (8th Cir. 1976).
229. 541 F.2d 161 (6th Cir. 1976).
230. 560 F.2d 1384 (9th Cir. 1977).
231. *Johnson*, 539 F.2d at 1114-15; *Tatum*, 541 F.2d at 163; *De Lao*, 560 F.2d at 1386-87.
232. See *De Lao*, 560 F.2d at 1390-91; *Tatum*, 541 F.2d at 165-66; *Johnson*, 539 F.2d at 1122-25.
233. See, e.g., *De Lao*, 560 F.2d at 1390 (citing *Johnson*, 539 F.2d at 1123); *Tatum*, 541 F.2d at 166 (citing *Johnson*, 539 F.2d at 1123); *Johnson*, 539 F.2d at 1123.
an award of benefits for the period during which they were unconstitutionally deprived of benefits was barred by the sovereign immunity doctrine.\textsuperscript{235}

It is difficult to reconcile Johnson, De Lao, and Tatum with Wright.\textsuperscript{236} The Wright court attempted to do so by noting that Congress' express intent would be ignored if retroactive benefits were paid in Johnson, De Lao, and Tatum because some payments would be made to individuals who ultimately were found ineligible.\textsuperscript{237} Yet, it clearly was not Congress' intent to pay retroactive benefits to individuals similarly situated to the claimant in Wright.\textsuperscript{238} The Wright court also emphasized that those ultimately found eligible through the administrative process in Johnson, De Lao, and Tatum would be entitled to back benefits pursuant to a statutory provision.\textsuperscript{239} This would appear to be of little relevance, however, in determining whether a judicial award of retroactive benefits is precluded by the doctrine of sovereign immunity. Perhaps the better reconciliation of Wright with Johnson, De Lao, and Tatum is to recognize that the claimants who were unsuccessful at the post-termination hearings involved in the latter three cases were not damaged by the challenged actions. The same might be said of the claimants in Wright if it was established on remand that they were ineligible for reasons unconnected with the challenged statutory provisions. This explanation, of course, is of little help in resolving the sovereign immunity issue. Ultimately, of course, the sovereign immunity question is one of congressional intent. It must be determined whether Congress desired to preclude retroactive monetary relief in Social Security, S.S.I., and Medicare litigation. As the above discussion illustrates, the answer to this question is not clear. To the extent that a clear expression of congressional intent is required before a finding of a waiver of sovereign immunity is appropriate, the precedential value of Wright may be suspect.

Interestingly, the decisions in Johnson, De Lao, and Tatum may minimize the practical significance of the sovereign immunity question. In each of these cases, the appellate court determined that the doctrine of sovereign immunity would not preclude an award of retroactive benefits if the claimants established their eligibility at a post-termination hearing. Analogously, it could be argued that the doctrine of sovereign immunity would not preclude an award of retroactive benefits if a court did not order such an award, but simply required the Secretary to notify all affected class members of the court's finding that a statutory provision or regulation was unconstitutional.\textsuperscript{240}

\begin{footnotes}
\textsuperscript{235} Johnson, 539 F.2d at 1125; Tatum, 541 F.2d at 166; De Lao, 560 F.2d at 1391.
\textsuperscript{236} See supra note 227.
\textsuperscript{237} Wright, 603 F.2d at 672 n.16.
\textsuperscript{238} It could be argued that this is not necessarily the case for if Congress had known that treating Mr. Wright differently from a similarly situated wife would be unconstitutional, it might have determined his eligibility for benefits in the same manner that eligibility of a wife was determined.
\textsuperscript{239} Id. See also supra note 226 and accompanying text.
\textsuperscript{240} There may be some question of whether requiring the Secretary to give such notice to affected class members is precluded by the doctrine of sovereign immunity because to do
If these individuals, after notification, then sought benefits and were successful, it could be argued that, even given the decisions in *Johnson*, *De Lao*, and *Tatum*, the doctrine of sovereign immunity would not foreclose an award of retroactive benefits.

A federal district court utilized this reasoning in *Aznavorian v. Califano* to justify a decision that ultimately could have led to an award of retroactive benefits. In *Aznavorian*, the court, after finding a provision of the S.S.I. legislation unconstitutional, indicated that claimants who later were able to establish their eligibility in light of the court's decision would be entitled to retroactive benefits notwithstanding the doctrine of sovereign immunity. If this rationale is correct, the barrier of sovereign immunity will result only in the delay, and not a complete denial, of the receipt of retroactive benefits.

A reading of *Johnson*, *De Lao*, *Tatum*, and *Aznavorian* then implies that a court may permissibly order the Secretary to reconsider a claimant's eligibility after a finding that the claimant has been illegally denied benefits, which reconsideration may result in back payments. However, a court may not simply order the payment of retroactive benefits upon a finding that a claimant was denied benefits because of an unconstitutional statutory provision. The difficulty with this analysis is that, in both situations, the judiciary is mandating the expenditure of funds from the public treasury to redress past wrongs—a direct order that traditionally has been barred by the doctrine of sovereign immunity. Arguably, absent an affirmative finding of a waiver of sovereign immunity, such a result should not be permitted. To this extent, the sovereign immunity question presented in *Johnson*, *De Lao*, *Tatum*, *Aznavorian*, and *Wright* should be the same: Did Congress intend to authorize an award of retroactive monetary benefits? This should be the dispositive question rather than the question suggested by *Aznavorian*—whether a judicial decision explicitly requires such an award or only implicitly does so.

It also must be noted that in certain situations, even in the absence of a waiver, the doctrine of sovereign immunity is inapplicable. In *Dugan v. Rank*, the Supreme Court indicated that the doctrine was inapplicable to proceedings alleging that the actions of a federal officer were either outside his statutory authority or unconstitutional. In *Larson v. Domestic & Foreign Commerce Corp.* however, the Supreme Court, in addressing the sovereign immunity issue, wrote in a footnote:

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242. Id. at 803. This same rationale could be used in the context of the eleventh amendment barrier to an award of retroactive benefits with regard to entitlement programs operated by the states.
244. See *supra* note 240.
246. 337 U.S. 682, 691 n.11 (1949).
Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.\textsuperscript{247}

The Seventh Circuit in \textit{Wright} apparently saw no need to reconcile \textit{Larson} with \textit{Dugan} because the court found an affirmative waiver of sovereign immunity within the Social Security legislation. Consequently, there was no need to identify the circumstances under which the doctrine of sovereign immunity would be applicable to claims challenging the actions of federal officers on constitutional or federal statutory grounds. This precise question was addressed in \textit{Johnson} and \textit{De Lao}.

In \textit{Johnson}, the Eighth Circuit noted that the \textit{Larson} footnote had been the subject of considerable controversy.\textsuperscript{248} The \textit{Johnson} court concluded that the footnote significantly modified \textit{Dugan} and precluded an award of retroactive benefits because to require such an award "would require affirmative action to produce essentially compensatory rather than remedial payments."\textsuperscript{249} Given the \textit{Johnson} court's reading of the \textit{Larson} footnote, absent a waiver, the doctrine of sovereign immunity, at least in the Eighth Circuit, will continue to pose a significant barrier to an award of retroactive monetary relief in actions alleging that federal officials have acted in violation of a federal statute or the Constitution.

Conversely, the Ninth Circuit in \textit{De Lao} interpreted the \textit{Larson} footnote differently than the \textit{Johnson} court. The \textit{De Lao} court concluded that the \textit{Larson} language that "a suit may fail" did not mean that a suit challenging the action of federal officials \textit{must} fail.\textsuperscript{250} To determine whether sovereign immunity should cause a suit to fail, the court held that the crucial inquiry in proceedings challenging the actions of federal officials on statutory or constitutional grounds was whether the "relief sought would work an intolerable burden on the government which outweighs any considerations of private harm."\textsuperscript{251} The \textit{De Lao} court, in applying what is essentially a balancing approach, concluded that because retroactive benefits would be available to those individuals found eligible after an administrative hearing, the additional requirement of payment to those found to be ineligible after a hearing would work an intolerable burden on the government, which would outweigh any consideration of private harm.\textsuperscript{252}

\textsuperscript{247} \textit{Id.}
\textsuperscript{248} 539 F.2d 1111, 1124 (8th Cir. 1976).
\textsuperscript{249} \textit{Id.} at 1124 n.21.
\textsuperscript{250} 560 F.2d 1384, 1391 (9th Cir. 1977).
\textsuperscript{251} \textit{Id.} See also Washington v. Udall, 417 F.2d 1310, 1317-18 (9th Cir. 1969) (doctrine of sovereign immunity inapplicable because relief sought did not impose intolerable burden on governmental functions).
\textsuperscript{252} 560 F.2d at 1391. Lassow suggests that where S.S.I. benefits are at issue, because they are based on need, an award of retroactive benefits might be warranted under the \textit{De Lao} approach. Lassow, \textit{supra} note 3, at 917.
Given the decisions in *Johnson* and *De Lao*, and assuming that there has been no waiver of sovereign immunity, the initial question, in light of *Larson*, in determining whether the doctrine of sovereign immunity will preclude certain relief is whether the relief sought "will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." Assuming this to be the case, if *De Lao* is followed and if the remedy requested is found not to impose an intolerable burden on the government that outweighs any private harm, then sovereign immunity will not preclude the requested relief irrespective of any waiver.

The *De Lao* approach to the sovereign immunity issue obviously involves a balancing of the equities. Some of the considerations which should be weighed in this process include whether an award of retroactive benefits is needed to deter improper governmental conduct; whether such an award is consistent with the purposes of the legislation; and whether such an award would impose a substantial administrative burden on the government.

Assuming an award of retroactive benefits is not precluded by sovereign immunity either because of a waiver or because the defense is inapplicable, it still must be determined whether a judicial decision should only be applied prospectively. If only prospective application is warranted, then irrespective of sovereign immunity, retroactive monetary relief will not be available. In *Wright*, the Seventh Circuit briefly addressed the question of whether a lower court decision should only be applied prospectively, thereby precluding an award of retroactive monetary relief. The appellate court implicitly recognized that the leading Supreme Court decision addressing this issue is *Chevron Oil Co. v. Hudson*. In *Chevron Oil*, the Supreme Court focused on whether it is appropriate to apply a judicial decision to conduct that arose prior to the decision. The Court stated:

In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."
The *Wright* court determined that an application of *Chevron Oil* did not preclude an award of retroactive benefits. The court reached this conclusion not because it believed that an application of the previously identified factors dictated this result, but rather because it believed that, given the facts of the case, such an award would not involve a retroactive application of a judicial decision. Specifically, *Wright* found that if the class had been properly certified, all those seeking benefits would have been in court at the time the decision which favorably resolved the plaintiff’s substantive claim was decided. Implicit in this conclusion is the idea that the application of a judicial decision to a pending claim does not necessarily involve a retroactive application of that decision. Although the logic of this conclusion may be debatable depending upon the relief sought, the real question when retroactivity is an issue, which question was not directly addressed in *Wright*, is how the considerations enunciated in *Chevron Oil* should be applied in determining whether a judicial decision in favor of a class of claimants should be applied retroactively.

These considerations were applied by former Circuit Court Judge Stevens for the Seventh Circuit in *Jimenez v. Weinberger*. He first noted that, given the nature of the claim and the lack of an authoritative Supreme Court decision at the time the case was filed, the first consideration—whether the decision established a new principle of law—suggested a nonretroactive result. Interestingly, he also noted that when the substantive issue presented is the constitutionality of a statutory provision over which the Secretary is powerless, the first *Chevron Oil* consideration would always suggest a nonretroactive result. He apparently believed this to be true because the Secretary is required to administer federal statutes as written until ordered otherwise. As a result, judicial decisions which cast doubt on the propriety of a particular practice should not be significant in determining whether a nonretroactive result is warranted. Notwithstanding this logic, when judicial decisions indicate significant constitutional problems with a particular practice, a retroactive result may be warranted in order to prompt Congress to change statutory provisions which have obvious constitutional defects.

Although the *Jimenez* court concluded that the first *Chevron Oil* factor suggested a nonretroactive result, it concluded that a retroactive result was warranted in light of the remaining two considerations. Specifically, the court

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258. *Id.* at 672 n.17.


260. *Jimenez* involved a constitutional challenge to provisions of the Social Security legislation which arguably discriminated against illegitimate children.

261. *Id.* at 703. If the challenge is to a regulation or procedure then this logic would not be applicable.

262. In *Cash v. Califano*, 621 F.2d 626 (4th Cir. 1980), and in *Novak v. Harris*, 504 F. Supp. 101, 103-04 (E.D.N.Y. 1980), the courts concluded that the first *Chevron Oil* consideration justified a retroactive result even though the constitutionality of a statutory provision was at issue.
noted that retroactive awards are likely to be consistent with the purposes of the Social Security legislation and seemingly are mandated by those provisions of the legislation authorizing a recovery of underpayments. The Jimenez court further emphasized that retroactive application of its decision would not diminish benefits to current recipients or create administrative havoc. In considering the third factor set forth in Chevron Oil, the court stressed that the burden is on the Secretary to establish that a retroactive application of a judicial decision would produce substantial inequities.

The approach suggested in Jimenez for determining whether a judicial decision should be applied only prospectively was followed, with one significant exception, by the Fourth Circuit in Cash v. Califano. The issue in Cash was whether the Supreme Court's decision in Califano v. Goldfarb should be applied retroactively. In concluding that it should, the court went one step further than the Jimenez court, and found that all three of the considerations set forth in Chevron Oil mandated retroactive payments. Specifically, unlike the Jimenez court, the Cash court held that the fact that the constitutionality of a statutory provision was at issue did not preclude a retroactive application of a judicial decision if the case was not of first impression, did not involve a complete reversal of prior law, and other judicial decisions existed which put the Secretary on notice that the decision at issue might be forthcoming.

Although the question of the retroactive application of a judicial decision invariably will involve a balancing of a number of considerations in the context of a particular case, given the reasoning in Cash and Jimenez, this balancing, unlike the sovereign immunity question, should not pose a significant barrier to an award of retroactive benefits.

CONCLUSION

The Supreme Court decision in Salfi raised the spectre that there would be a number of significant procedural obstacles in federal court litigation involving challenges to provisions of Social Security, S.S.I., and Medicare legislation and regulations implementing this legislation. Judicial decisions subsequent to Salfi, however, have substantially lessened the concerns that were expressed by representatives of program beneficiaries. These decisions

264. 523 F.2d at 704. See also Califano v. Aznavorian, 440 F. Supp. 788, 800-02 (S.D. Cal. 1977) (court noted that if retroactive relief was denied because of increased administrative costs alone, the government would never be compelled to repay benefits to which recipients were later found entitled), rev'd, 439 U.S. 170 (1978).
265. 523 F.2d at 704.
266. 621 F.2d 626, 632 (4th Cir. 1980).
267. Id. at 628. See supra note 262. The claimant in Cash had filed a claim with the Social Security Administration. The Administration refused to apply Goldfarb retroactively, relying on the fact that the Supreme Court had not specifically ruled that Goldfarb was to be applied retroactively. 621 F.2d at 628.
268. Id. at 630.
are especially significant in light of the likelihood of a restructuring in the Social Security program. To the extent that any restructuring results in significant changes affecting program benefits and beneficiaries, it is inevitable that these changes will be challenged in the federal courts, most often in class-oriented litigation. Although many procedural obstacles will be encountered in such litigation, the majority of these barriers should not prove to be insurmountable. The most difficult one to overcome undoubtedly will be the assertion that sovereign immunity precludes an award of retroactive benefits to claimants in federal court litigation.