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Weinberger v. Salfi

422 U.S. 749 (1975)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1975

Re: 74-214 - Weinberger v. Salfi

Dear Bill:

Please join me in your circulation of June 5.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 19, 1975

Re: No. 74-214 - Weinberger v. Salfi

Dear Bill:

I will circulate tomorrow a short separate dissent.

Sincerely,

William O. Douglas

Mr. Justice Rehnquist

cc: The Conference

Wm. Douglas
Oct. 74

No. 74-214

Caspar Weinberger, Secretary of Health, Education, and Welfare, et al., Appellants

v.

Concetta Salfi, et al.

On Appeal from the United States District Court for the Northern District of California

[June __, 1975]

MR. JUSTICE DOUGLAS, dissenting.

I agree with Mr. Justice Brennan that because there is clearly jurisdiction the Court's extended discussion of the subject is unwarranted.

On the merits, I believe that the main problem with these legislatively created presumptions is that they frequently invade the right to a jury trial. See Tot v. United States, 319 U.S. 463, 473 (1943) (concurring opinion). The present law was designed to bar payment of certain Social Security benefits when the purpose of the marriage was to obtain such benefits. Whether this was the aim of a particular marriage is a question of fact, to be decided by the jury in an appropriate case. I therefore would vacate and remand the case to give Mrs. Salfi the right to show that her marriage did not offend the statutory scheme, that it was not a sham.

152-4

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Douglas, J.

Circulate: 6-24-75

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SUPREME COURT OF THE UNITED STATES

No. 74-214

Caspar Weinberger, Secretary of Health, Education, and Welfare et al., Appellants, *v.* Concetta Salfi et al.

On Appeal from the United States District Court for the Northern District of California.

[June 26, 1975]

MR. JUSTICE DOUGLAS, dissenting.

I agree with MR. JUSTICE BRENNAN that because there is clearly jurisdiction the Court's extended discussion of the subject is unwarranted.

On the merits, I believe that the main problem with these legislatively created presumptions is that they frequently invade the right to a jury trial. See *Tot* v. *United States*, 319 U. S. 463, 474 (1943) (concurring opinion). The present law was designed to bar payment of certain Social Security benefits when the purpose of the marriage was to obtain such benefits. Whether this was the aim of a particular marriage is a question of fact, to be decided by the jury in an appropriate case. I therefore would vacate and remand the case to give Mrs. Salfi the right to show that her marriage did not offend the statutory scheme, that it was not a sham.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 1, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 74-214 - Weinberger v. Salfi

I emphasize at the outset that even if the Conference agrees with Bill, the hope that we could avoid deciding the merits must be disappointed. Bill and I now agree that whether or not he is right, we cannot dispose of the case without deciding the merits. Because there is the possibility of jurisdiction under § 1252 as well as under § 1253, the appeal from the District Court judgment must be to this Court whether the judgment is regarded as rendered under § 405(g) or under § 1331, and whether it is treated as coming from a three-judge or a single-judge court.[1/] Therefore, the difference between my views and Bill's as to the reach of §§ 405(g) and (h) become of consequence only if the vote of the Conference is to affirm on the merits.

1/ Flemming v. Nestor, 363 U.S. 603 (1960), was a direct appeal under § 1252 from a single-judge district court in a 405(g) action; the district court held part of the Social Security Act unconstitutional. Flemming held, 363 U.S. at 607, that a three-judge court was not required since a pure 405(g) action does not necessarily restrain a federal statute. However, neither Flemming nor McLucas suggests that a § 1252 appeal is improper where a three-judge court was improperly convened, if it would have been proper had the convening judge acted alone. Thus, I agree with Bill that it is immaterial for purposes of our jurisdiction whether or not the three-judge court was necessary.

If the vote is to reverse, there would be no point in examining the niceties of §§ 405(g) and (h) merely to conclude, as Bill does, that no class relief or injunction is available in a constitutional attack on the Social Security Act; if there is no recovery on the merits, the relief available is immaterial. And, since the points Bill has raised were not directly addressed in the briefs or oral argument of this case, I would think we would not reach them unless absolutely necessary.

Second, I point out that even on Bill's view of §§ 405(g) and (h), we did have jurisdiction in Weinberger v. Wiesenfeld. Weinberger was not a class action; the district court declined to certify the class. See slip op. at 5, n. 9. While the action in Weinberger was not brought within sixty days of the denial of the claim, § 402(g) says that the civil action must be brought "within sixty days . . . or within such further time as the Secretary may allow." Thus, the sixty-day requirement is clearly not jurisdictional and can be waived by the Secretary; since the Secretary never raised the sixty-day limit at any point, I would suppose he waived it. As to exhaustion, in Wiesenfeld no exhaustion whatever was attempted,[2/] while in Salfi the first stage of exhaustion,

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2/ Actually, exhaustion would have been impossible in Wiesenfeld. The record shows that the employees in the New Brunswick Social Security office refused even to provide Stephen Wiesenfeld with an application for benefits, since no provision of the Act conceivably applied to him. In Salfi, the situation was slightly different, since Mrs. Salfi was not precluded by virtue of the obvious fact of her sex, but by a fact which presumably did not appear until she filled out the application -- that she had not been married long enough. To me, the fact that exhaustion is administratively impossible in some of these cases only shows the absurdity of

application for reconsideration, did occur. However, since in both Salfi and Weinberger plaintiff did not pursue administrative remedies to their conclusion, see § 405(b) and 20 C.F.R. §§ 404.916, 404.940, 404.951,[3/] I fail to see why it matters at which stage administrative remedies were abandoned. Further, in Wiesenfeld there was a stipulation that exhaustion would have been futile; such a stipulation, it seems to me, is at least equivalent to the failure to contest exhaustion. If the decision in Salfi is final for 405(g) purposes, the decision in Wiesenfeld was also. Thus, the only possible problem in Wiesenfeld under Bill's theory is the fact that part of the judgment reads like an injunction;[4/]

3/ Section 404.916 provides that a reconsidered determination is final and binding unless a hearing is requested before an Administrative Law Judge; section 404.940 provides that the Administrative Law Judge's decision is final and binding unless the Appeals Council agrees to review it or review is sought under § 405(g) in district court; section 404.951 provides that a decision by the Appeals is final and binding unless suit is filed under § 405(g). (There are situations in which these final determinations can be administratively "reopened." See 20 C.F.R. § 404.957.)

4/ The order of the court in Wiesenfeld, which we affirmed, was as follows:

> 1. That 42 U.S.C. Section 402(g) is unconstitutional insofar as it discriminates against widowers on the basis of sex.
>
> 2. That the defendant Secretary of Health, Education and Welfare be and hereby is enjoined from denying benefits under Section 402(g) to widowers solely on the basis of sex.
>
> 3. That the defendant Secretary of Health, Education and Welfare be and hereby is directed to make payments to the plaintiff Stephen Wiesenfeld for such periods during which he would have been qualified to receive benefits but for the discrimination against widowers based upon sex contained in Section 402(g) herein held unconstitutional.

(cont'd next page)

however the injunction was never separately attacked and, read as I believe it must be, to apply only to Wiesenfeld himself, it does not differ from an order reversing the denial of benefits, which Bill concedes may be done under § 405(g). Therefore, there was jurisdiction over the appeal in Weinberger, under § 1252 if not under § 1253.[5/]

All of the above assumes Bill's reading of §§ 405(g) and (h). However, I think he is quite wrong about the impact of the last sentence of § 405(h), which is central to his thesis. I also question whether, even if § 405(h) does apply to a claim for benefits based on the contention that the Act is unconstitutional, it excludes a suit under other jurisdictional statutes for injunctive and declaratory relief.

I.

The last sentence of § 405(h) reads: "No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 or Title 28 to recover on any claim arising under this subchapter." (Emphasis added.) To me, the meaning of this is quite clear. A claim "arising under" this subchapter is one which alleges that the subchapter grants someone certain rights. This

---

4/ cont'd.

The injunction in terms seems to enjoin the application of the statute to all widowers whom it would exclude. However, since the class action was denied, I think we must read the injunction as applying only to Wiesenfeld himself.

5/ Thus, the only part of Wiesenfeld which may be questionable under Bill's theory is n. 10, which assumes that § 1331 is applicable. However, n. 8 makes clear that we were not considering whether 405(h) excludes § 1331, because the issue was not raised.

claim does not "arise under" the subchapter, because if the subchapter itself were applied, Mrs. Salfi would clearly lose. Instead, this claim "arises under" the Constitution and seeks to hold invalid the result which would be reached under the subchapter itself.

One need only look at the jurisdictional statutes which comprised old section 41 to affirm this reading of "arising under." Since the last sentence of § 405(h) refers explicitly to these statutes, it is reasonable to assume that "arising under" is used in § 405(h) in the same sense as it is used in those statutes. Section 1331, of course, deals with any civil action which "arises under" the Constitution, laws, or treaties of the United States; § 1337 deals with any action "arising under" an Act regulating commerce or restraints of trade; § 1338 deals with any action "arising under" federal patent, copyright, and trademark laws; § 1339 concerns any action "arising under" any federal postal law. Doesn't an action raising an equal protection attack on a state benefit program statute "arise under" the United States Constitution and therefore fall within § 1331, rather than under state law, even though if there were no state law there would be no right whatever to benefits? Would an action attacking the patent laws as unconstitutional necessarily "arise under" the patent laws, so that the $10,000 requirement of § 1331 would not have to be met? Have we not held, in land title cases in which the line of title of the property in dispute derived from a grant under federal

law, that an action does not "arise under" federal law merely because the original grant was under a federal statute, if one need not consider that statute to determine present rights? [6/] Quite certainly, I think, "arising under" is a term of art in jurisdictional statutes, and it refers to the body of law necessary to consider in order to determine the rights in question. Here, there is no dispute about the application of the Social Security Act, only about whether the Constitution permits the result which the Social Security Act would require. Thus, § 405(h) does not oust the jurisdictional statutes which would otherwise apply to this kind of case.

Bill suggests that this reading of § 405(h) makes the last sentence of § 405(h) a redundancy. It seems to me that this last sentence means only that no claim under the Social Security Act can be brought except as a review of the "findings of fact or decision of the Secretary." That is, a plaintiff cannot avoid § 405(g) and the first two sentences of § 405(h) by bringing an action under the Tucker Act equivalent, for example, 28 U.S.C. § 1346 (part of old § 41), alleging that the Social Security Act grants him certain rights. Instead, on such a claim a plaintiff must exhaust administrative remedies and then seek review of the administrative action in district court, and the district judge cannot

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6/ See, e.g., Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900); Joy v. St. Louis, 201 U.S. 332 (1906).

disturb the Secretary's ruling except for errors of law or lack of "substantial evidence," § 405(g).

II.

The meager legislative history I have been able to uncover, read with Johnson v. Robison, 415 U.S. 361 (1974), supports my reading. The Social Security Board, which formulated most of the changes embodied in the 1939 amendments, recommended a "Provision that findings of fact and decisions of the Board in the allowance of claims shall be final and conclusive. Such a provision would follow the precedent of the World War Veterans Act and of other legislation with respect to agencies similar to the Board which handle a large number of small claims." Report of the Social Security Board, H.R. Doc. No. 110, 75th Cong., 1st Sess. 13 (1939). Thus, the Board recommended that the Social Security Act follow the model we analyzed in Johnson v. Robison, in which the statute in question was a direct derivative of the World War Veterans Act. See 415 U.S., at 368 n. 5. Under Johnson, it seems clear that if this had been done, review of constitutional claims such as this one would not have been precluded, and jurisdiction could be based on any otherwise applicable grant of jurisdiction.

But Congress did not adopt this recommendation of the Board. Instead, it did provide judicial review for any "findings of fact or decision of the Secretary" as long as § 405(g) is complied with. The legislative

history I have uncovered does not explain why the Board recommendation was rejected; I can only guess that because Congress in the 1939 amendments continued to regard Social Security benefits as a "matter of right," see Weinberger v. Wiesenfeld, slip op. at 10, it decided to provide more protection than for Veteran's Benefits, which were considered "gratuities." The House Report says of § 405(g) that:

> "The present provisions of the Social Security Act do not specify what remedy, if any, is open to a claimant in the event his claim to benefits is denied by the Board. The provisions of this subsection are similar to those made for the review of decisions of many administrative bodies."

H. R. Rep. No. 728, 76th Cong., 1st Sess. 43 (1939). (§ 405(h) is explained basically in its own words, so on this the Report is entirely unhelpful.) Thus, Congress apparently regarded § 405(g) as nothing more than the usual provision requiring exhaustion and limiting review of administrative decisions; there is no suggestion that it intended to filter through § 405(g) constitutional attacks, as to which administrative agencies have no expertise, see Johnson, supra, 915 U.S., at 368, and cases cited,[7/] and as to which no facts are in controversy.

7/ "'[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.'" [Citations omitted.]

Further, §§405(g) and (h), whatever their purpose, were obviously intended to grant broader rights of review in Social Security Act cases than in Veteran's Act cases. Yet, under Bill's theory, the relief available in constitutional attacks on the Social Security Act would be severely limited, while the ordinary panoply of relief would be available under Johnson v. Robison in Veteran's Act cases.

Thus, I see no escape from the conclusion that Johnson is controlling here. Contrary to Bill's conclusion, Johnson was not decided as it was "basically because such a [statutory] limitation was not a 'decision' of the Administrator 'on any question of law or fact.'" Rather, it turned upon the principle that "a decision . . . 'under' a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts . . . . [A]s the District Court stated: 'The question of law presented in these proceedings arise under the Constitution, not under the statute whose validity is challenged.'" 415 U.S., at 367.[8/] [Emphasis supplied.]

8/ As in Johnson, the administrative agency itself has held that it has no jurisdiction over constitutional claims, see Brief for Appellees in Salfi, at 30, and this administrative interpretation of the procedural statutes is entitled to great weight, 415 U.S., at 367-68.

III.

Common sense also dictates that §§ 405(g) and (h) not be read to preclude constitutional attacks on the face of the Social Security Act except under § 405(g). The main point of § 405(g) is to assure exhaustion and a limited standard of review, in order to give proper scope to the presumed agency expertise in dealing with run-of-the-mill claims. In Wiesenfeld it was stipulated that exhaustion would have been futile; in Salfi the Government seems to concede that exhaustion was sufficient on the individual claim, even though it was not completed and even though the one administrative decision does not mention the constitutional attack; see Appendix at 17-19. Thus, to read §§ 405(g) and (h) as Bill would do seems to impute to Congress a requirement of futile exhaustion, in which the only issues in the case are not discussed, in which the actual issues are in no way clarified, in which no factual findings are made, and in which there is no agency expertise to apply.

Perhaps to avoid this absurdity, Bill now suggests that a decision of the Secretary can be "final" even though exhaustion has not been completed. Several district courts have so held. Kohr v. Weinberger, jurisdictional statement pending, No. 74-5538, Opinion of 3-judge court in Jurisdictional Statement at 3a; Williams v. Richardson, 347 F. Supp. 544, 548 (W. D. N. C. 1972); Diaz v. Richardson, 361 F. Supp. 1, 4-5 (S. D. Fla. 1973).

If Bill is right about the exclusivity of 405(g), then, in order to apply 405(g) sensibly, it might be necessary to adopt his approach. But none of the district courts which have found § 405(g) jurisdiction without exhaustion have noted that § 405(g) does not merely require a final decision of the Secretary; it requires a final decision "made after a hearing." [Emphasis supplied]. The regulations, quite sensibly, consider the hearing to be the proceedings before the Administrative Law Judge, see p. 2 and n. 3, supra. Since § 405(g) is clearly jurisdictional as to those actions to which it applies, I do not see how the fact that the Secretary does not object to failure to proceed through a hearing can be of any consequence. Thus, to find jurisdiction under § 405(g) in this case and cases like it requires much more manipulation of statutory language in order not to attribute to Congress an absurd intention than the view I would adopt -- that § 405(g) does require exhaustion through all the administrative proceedings, but that a plaintiff raising constitutional attacks upon the face of the Act need not proceed under § 405(g).[9/]

9/ Of course, if a person who believes the Act is unconstitutional as applied to him does exhaust, he can proceed under § 405(g). See, e.g., Flemming v. Nestor, supra; Davis v. Weinberger, 342 F. Supp. 588, 590 (D. Conn.), aff'd, 409 U.S. 1069 (1972).

IV.

Even if Bill is right about his central premise -- that § 405(h) precludes any suit seeking benefits under the Act except under § 405(g) -- I do not see how the conclusion that no injunctive or class relief is available in suits attacking the Social Security Act as unconstitutional necessarily follows. Section 405(h) concerns only an "action . . . to recover on any claim." In Gainville v. Richardson, 319 F. Supp. 16, 18 (1970), the court noted that:

> Nor are the specific provisions of § 205(h) of the Social Security Act, 42 U.S.C. § 405(h) a bar. That section merely provides that:
>
> > "No action against the United States, the Secretary [of HEW], or any officer or employee thereof shall be brought under section 41 [now 28 U.S.C. § 1331] to recover on any claim arising under this subchapter." [emphasis added.]
>
> In the present action, while plaintiff does, perhaps improperly, seek damages, his complaint also has prayers for a declaratory judgment that § 203(f)(3) of the Social Security Act, 42 U.S.C. § 403(f)(3) is unconstitutional, and for an injunction restraining defendant from applying that section. If he were to be successful with respect to those prayers, plaintiff would not, in the language of the statute, "recover on any claim" for benefits. For recovery of benefits he would still need to resort to the administrative process. The only effect of a declaratory judgment or injunction by this court would be to preclude the Secretary from making the challenged deduction.

This holding seems eminently sensible to me. Indeed, we affirmed basically the same view, though less clearly stated, in Griffin v. Richardson, 346 F. Supp. 1226, 1230 (D. Md.), aff'd, 409 U.S. 1069

In Salfi, plaintiffs sought, in addition to individual benefits, declaratory and injunctive relief for the class, as well as damages for the class. Perhaps this last would be improper under § 405(g) because the class members may never have applied for benefits at all and thus could by no stretch of statutory language have exhausted. 10/ However, the order actually issued merely enjoined defendants from denying benefits to the class by reason of § 416(c)(5) and (e)(2) and ordered them

> "to provide benefits, from the time of original entitlement, to plaintiffs and each member of the class they represent, provided only that in each case such persons are otherwise fully eligible to receive the benefits."

See Jurisdictional Statement, 10a. [emphasis supplied.] Thus, the court merely ordered the agency to deal with class members as if §§ 416(c)(5) and (e)(2) did not exist. Such relief, it seems to me, is not equivalent to recovery on a claim, and is not barred by § 405(h) under any reading of it. 11/ Bill concludes that there was jurisdiction

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10/ But see n. 2 supra.

11/ In Flemming v. Nestor, supra, the Court held that a suit brought only under § 405(g) was not necessarily one for injunctive relief, and a three-judge court was therefore unnecessary. It did not, however, suggest that an injunction could not be granted in a suit brought under § 405(g), or that a § 405(g) suit could not be joined with a suit for injunctive and declaratory relief if other jurisdictional grants applied. 363 U.S., at 607.

under 405(g) for the individual claim to benefits; § 405(h), I believe, does not apply at all to suits for injunctive and declaratory relief. I cannot see why it matters that the various claims for relief were joined in one lawsuit; if there was jurisdiction under one jurisdictional statute or another for each part, there was jurisdiction over the whole.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 6, 1975

RE: No. 74-214 Weinberger v. Salfi

Dear Bill:

I know you will be surprised but I will be filing a dissent in the above.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 10, 1975

RE: No. 74-214 Weinberger v. Salfi

Dear Bill:

It's getting so late and Nantucket beckons so seductively, I'm wondering whether a just discovered bit of legislative history squarely confining the reach of section 405(h) may persuade you, and make unnecessary a dissent in Salfi on the jurisdictional question. The discovery is a contemporary report of the Attorney General's Committee on Administrative Procedure, Sen. Doc. #10, 77th Cong., 1st Sess. 1941, to be found in Vol. 3 Sen. Doc. 77th Cong., 1st Sess. p. 39. It explains the reach of 42 U.S.C. Sec. 405(h), Sec. 205(h) of the Act, precisely as I defined that reach in my memorandum to the Conference of April 1, 1975 in response to your memorandum. The Report states

> "The judicial review section of the act, section 205(g), provides for civil suits against the Social Security Board in the United States District Courts. These may be filed by parties to hearings before the Board who are dissatisfied with final decisions of the Board. The review of the Board's actions in these suits will consist of a review of the Board's records in these cases. Thus, on the one hand, the Board is protected against the possibility of reversals of its decisions in separate actions filed for the purpose, in which the courts might try the facts independently. Actions of this kind are specifically excluded by section 205(h). On the other hand, judicial review on the basis of the Board's records in the cases makes it necessary that the record in each case be in the best possible state so as to avoid difficulties if a challenge in court occurs.
>
> "The statute gives the courts power to affirm, modify, or reverse the decisions of the Board, with or without remanding

> them to the Board. Although the Board's findings of fact, if supported by substantial evidence, are conclusive upon the courts, it will be possible for reversals to occur either because there is a lack of substantial evidence to support particular findings, because the Board has misapplied the law, or because the procedure in a particular case has been inadequate. Reversals upon the first and third of these grounds should be largely avoidable through the provision of adequate administrative procedures."

In other words, as I said in my memorandum, a plaintiff cannot avoid section 405(g) and the first two sentences of 405(h) by bringing a separate action in the District Courts, for example, under section 1331, alleging that the Social Security Act grants him certain rights. Instead on such a claim a plaintiff must exhaust administrative remedies and then seek review of administrative action in District Court. Thus, section 405(h) is not a prohibition against a suit under section 1331 challenging the constitutionality of a provision of the Act.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

74-214

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

6/17/75

Recirculated: _____

Caspar Weinberger, Secretary of Health, Education, and Welfare, et al.,

Appellants,

v.

Concetta Salfi, et al.

On Appeal from the United States District Court for the Northern District of California

[June ____, 1975]

MR. JUSTICE BRENNAN, dissenting.

The District Court did not err, in my view, either in holding that it had jurisdiction by virtue of 28 U.S.C. §1331, or in holding that the nine-month requirements of 42 U.S.C. §§416(c)(5) and (e)(2) are constitutionally invalid.

I

Jurisdiction

The jurisdictional issue to which the Court devotes ten pages, only to conclude that there is indeed jurisdiction over the merits of this case both here and in the district court, was not raised in this Court by the parties before us nor argued, except most peripherally, [1/]

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-214

Caspar Weinberger, Secretary of Health, Education, and Welfare et al., Appellants, *v.* Concetta Salfi et al.	On Appeal from the United States District Court for the Northern District of California.

[June —, 1975]

MR. JUSTICE BRENNAN, dissenting.

The District Court did not err, in my view, either in holding that it had jurisdiction by virtue of 28 U. S. C. § 1331, or in holding that the nine-month requirements of 42 U. S. C. §§ 416 (c)(5) and (e)(2) are constitutionally invalid.

I

Jurisdiction

The jurisdictional issue to which the Court devotes 10 pages, only to conclude that there is indeed jurisdiction over the merits of this case both here and in the District Court, was not raised in this Court by the parties before us nor argued, except most peripherally,[1] in the briefs or

[1] The Government in its Jurisdictional Statement raised as one of the Questions Presented "whether sovereign immunity bars this [suit] *insofar as it seeks retroactive social security benefits.*" Jurisdictional Statement, at 2 (emphasis supplied). Its argument was that no retroactive benefits were available to the class, because 28 U. S. C. § 1331 does not waive sovereign immunity, because 42 U. S. C. § 405 (h) bars a suit *seeking retroactive benefits* except under § 405 (g), and because the exhaustion requirements of § 405 (g) were not met. Brief for the Appellant, at 16–18. See also Tr. of Oral Arg., at 7–8:

[*Footnote 1 is continued on p. 2*]

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 22, 1975

Re: No. 74-214, Weinberger v. Salfi

Dear Chief,

My Conference notes indicate that we were divided 4 to 4 on this case, but that at least 2 of the 4 who voted to affirm were very tentative. In order to rescue this case from the limbo in which so many of this Term's cases seem to be, I would now vote to reverse the judgment.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 6, 1975

74-214 - Weinberger v. Salfi

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 10, 1975

Re: No. 74-214 - Weinberger v. Salfi

Dear Bill:

I am with you in this very good job.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 18, 1975

Re: No. 74-214 -- Caspar Weinberger v. Concetta Salfi

Dear Bill:

Please join me in your dissent.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 20, 1975

Re: No. 74-214 - Weinberger v. Salfi

Dear Bill:

Please join me.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

June 13, 1975

From: Powell, J.

Circulated: _____

Recirculated: _____

No. 74-214 Weinberger v. Salfi

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

LFP/gg

CC: The Conference

73-5

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 25, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 74-214 - Weinberger v. Salfi

Subchapter II of Title 42 is entitled "Federal Old-Age, Survivors, and Disability Insurance Benefits". Any claim for benefits under that program necessarily originates in some provision of Subchapter II.

42 U.S.C. § 405(b) provides for the processing of claims for payment under the subchapter by the Secretary. Section 405(g) provides that "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 . . . ." It also provides that "[t]he 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 . . . ."

Section 405(h) provides:

> "Finality of Secretary's decision
> (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."

[The reference to § 41 is in the context of the Judicial Code prior to 1948 codification, and in that version § 41 covered almost all of the grants of jurisdiction to United States District Courts, specifically including what is presently embraced in 28 U.S.C. § 1331.]

Before analyzing these provisions sentence by sentence, it seems to me that a fair summary of the quoted language is that Congress intended judicial review of Social Security Act determinations to be on a retail basis, and that it certainly intended the language of 405(h) to restrict otherwise available modes of judicial review. The judgment of the District Court under review in this case, on the contrary, seems to me to be an exercise in wholesale adjudication of claims. The judgment enjoins the Secretary from denying benefits under the nine-month limitation to class members who had neither pursued the administrative remedies provided in § 405(b), nor sought judicial review within sixty days of the administrative denial of their claims, as required by § 405(g). Nor did the District Court stop with merely enjoining the enforcement of the nine-month requirement as to this broad class; it affirmatively ordered the Secretary "to provide benefits, from the time of original entitlement, to plaintiffs in the class they represent, provided said plaintiffs and class are otherwise fully eligible to receive said benefits".

I.

Were § 405(h) to consist of nothing more than its first two sentences, it would be a perfectly unexceptional limitation

on judicial review of matters before an administrative agency -- the only method of review which is "herein provided" is that in § 405(g), which prescribes typical requirements for administrative exhaustion, timely filing and venue for judicial review, the standard of review, the available remedies, and other procedural matters. If such were the case, presumably there could be some possibility of judicial action with regard to Social Security claims on terms other than those specified in § 405(g). This would be because the first two sentences of § 405(h) neither deprive Social Security litigants of the normal bases for federal court jurisdiction, nor do they in terms affect review of matters, such as the constitutionality of limitations plainly imposed by the statute, which are not "findings of fact or decisions of the Secretary."

Section 405(h), however, contains a third sentence, and I believe that this sentence bars, about as plainly as any sentence could, any judicial consideration of efforts to obtain Social Security benefits other than in an action brought pursuant to § 405(g):

> "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."

Surely any claim which may result in a judgment, such as the one entered by the District Court here, directing the Secretary to pay benefits, is a claim arising under the substantive provisions for federal old age, survivors, and disability insurance benefits (Subchapter II, Title 42). Congress has said that in the case of such claims, a litigant shall proceed under § 405(g) and not otherwise.

The District Court relied on two of our cases involving exhaustion of administrative remedies, McKart v. United States, 395 U.S. 185 (1969), and Parisi v. Davidson, 405 U.S. 34 (1972). Both seem quite inapplicable here. In McKart, Thurgood's opinion speaks of the necessity that "[i]n Selective Service cases, the exhaustion doctrine must be tailored to fit the

peculiarities of the administrative system Congress has created." 395 U.S., at 195. Such tailoring may be accomplished where the exhaustion requirement is judicially created, but is much less easy to do where Congress has by express statutory language required exhaustion as a prerequisite to jurisdiction. McKart also emphasized that the consequences of requiring exhaustion in that case would have barred the petitioner "from defending a criminal prosecution", and went on to say that "it is well to remember that use of the exhaustion doctrine in criminal cases can be exceedingly harsh. The defendant is often stripped of his only defense; he must go to jail without having any judicial review of an assertedly invalid order. This deprivation of judicial review occurs not when the affected person is affirmatively asking for assistance from the court but when the government is attempting to impose criminal sanctions on him." 395 U.S., at 197. (Emphasis supplied.)

In the case now before us, on the contrary, Mrs. Salfi and her class are "affirmatively asking for assistance from the courts" in the teeth of a statute which by its terms requires both exhaustion of remedies and the seeking of judicial review within a specified period of time after those remedies have been exhausted.

In Parisi v. Davidson, 405 U.S. 34 (1972), Potter, writing for the Court, held that "there can be no doubt that the petitioners fully met the demands of the doctrine of exhaustion . . . ." 405 U.S., at 37.

The District Court would have been closer to the mark if it had relied on Bill Brennan's opinion for the Court in Johnson v. Robison, 415 U.S. 361 (1974), but that opinion was handed down on March 4, 1974, and the District Court's opinion was filed less than three weeks later, so that it may be that the District Court had not heard of it. In Johnson we considered 38 U.S.C. § 211(a), which provides:

> "[T]he decisions of the [Veterans'] Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no other official or any court of the United States shall have power to review any such decision by an action in the nature of mandamus or otherwise."

We were required to resolve whether this language precluded an attack on the constitutionality of a statutory limitation. We concluded that it did not, basically because such a limitation was not a "decision" of the Administrator "on any question of law or fact;" indeed, the issue was one which the Administrator considered to be beyond his jurisdiction. Thus the question sought to be litigated was simply not within § 211(a)'s express language, and there was accordingly no basis for concluding that Congress sought to preclude review of the constitutionality of veterans' legislation.

The language of § 405(h) is quite different. Its reach is not limited to decisions of the Secretary on issues of law or fact. Rather, it extends to any "action" seeking "to recover on any [Social Security] claim" -- irrespective of the reason that resort to judicial processes is necessary. Were the third sentence of § 405(h) not of such greater breadth, it would be mere surplusage, adding nothing to the statutory scheme, since the second sentence adequately encompasses the type of decisions which, in Johnson v. Robison, were acknowledged to be committed to the Administrator's final and conclusive determination.

There is a further reason that Johnson v. Robison is inapposite. It was expressly based at least in part on the fact that if § 221(a) reached constitutional challenges to

statutory limitations, then absolutely no judicial consideration of the issue would be available. Not only would such a restriction have been extraordinary, such that "clear and convincing evidence" would be required before we would ascribe such intent to Congress, but it would have raised a serious constitutional question of the validity of the statute as so construed. In the present case, to the contrary, the plain words of § 405(h) do not bar constitutional challenges to statutory limitations. Rather, they simply require that they be brought in the manner specified by § 405(g). The result is not only of unquestionable constitutionality, but is also manifestly reasonable, since it assures the Secretary the opportunity prior to constitutional litigation to reconsider his interpretation of imprecise statutory language, and to ascertain that the particular claims involved are neither invalid for other reasons nor allowable under other provisions of the Social Security Act.

II.

Because of § 405(h), the procedures specified in § 405(g) are jurisdictional prerequisites. Since the complaint contains no allegations that the class has either exhausted administrative remedies or has filed for review in the appropriate court within sixty days of the Secretary's final decision, the District Court was without jurisdiction to grant class-wide relief. 1/ Mrs. Salfi, the named party plaintiff in the District Court and appellee here, is however in a different position.

1/ This conclusion is inconsistent with our affirmance of the District Court opinion in Weinberger v. Wiesenfeld. While we have the responsibility to raise jurisdictional problems sua sponte, I do not think that we should expect to catch all defects in jurisdiction of district courts, regardless of whether the parties raise them. I would thus be satisfied to have any inconsistency attributed to the government's failure in Wiesenfeld to direct our attention to the problem.

Even though she does not allege jurisdiction under § 405(g), I have no difficulty with the proposition that a federal court may rely on that jurisdictional basis if its requirements are satisfied. To the extent that the complaint seeks a reversal of the Secretary's decision denying benefits to her, it is within the ambit of § 405(g), assuming she has exhausted administrative remedies (the complaint was filed in the appropriate district court within sixty days of final administrative action). The Appendix contains a decision denying benefits, written by the Chief of the Reconsideration Branch of the Social Security Administration. Given that the government does not contest exhaustion as to her personal claim, Brief for Appellants 4, I would be willing to treat this as a "final decision of the Secretary" for § 405(g) purposes.

But in view of the specificity of § 405(g), I do not believe the District Court had authority to enjoin the Secretary from enforcing the nine-month statutory limitation, even at the behest of Mrs. Salfi. In addition to prescribing conditions precedent to judicial review, § 405(g) specifies the following relief as being available in the District Court:

> "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 . . . ."

It is conceivable that a court, reviewing the decision of the Secretary under § 405(g), might in dealing with a constitutional claim in effect render a declaratory judgment that some section of the substantive provisions of Subchapter II was unconstitutional. This gets down to almost a matter of nomenclature, and I don't think it is important for determining the proper outcome in this case.

But the sweeping injunction issued against the Secretary here is, to me, a horse of a different color. Nothing in the authorizing language of 405(g) relating to "affirming,

modifying, or reversing the decision of the Secretary" suggests any authority to enjoin the enforcement of some provision of Subchapter II. While federal courts have inherent equitable authority to issue injunctions, I do not believe that an injunction was appropriate in this case. To the extent that the benefit of the injunction was intended not for Mrs. Salfi, but for the class, I have previously indicated that I do not think they were entitled to any relief, say nothing of injunctive relief. Assuming that it makes sense to speak of an injunction of the operation of a statute for the benefit of only the named plaintiffs, I think that such relief is inconsistent with § 405(g)'s specification that the reviewing court may affirm, modify or reverse. Especially is this so because once the District Court granted Mrs. Salfi's claim for monetary benefits, no further advantage could accrue to her by enjoining the Secretary from enforcing the section which would have defeated her claim.

Contrary to the view I expressed at Conference on Friday, I now realize that regardless of whether or not the District Court could properly have enjoined the Secretary from enforcing the statute, this Court has jurisdiction of the Secretary's appeal. Even if we do not have jurisdiction under 28 U.S.C. § 1253, Lewis' opinion in McLucas v. DeChamplain makes clear that we have such jurisdiction under § 1252, since the District Court judgment holds an Act of Congress unconstitutional in a civil action to which a federal officer is a party. Therefore the availability of injunctive relief plays a much smaller part in my present view of the case than it did when I spoke at Conference.

In summary, I would reverse the District Court's award of relief to any but Mrs. Salfi, on the grounds that the allegations of the complaint relating to the class do not

show that they properly pursued their administrative remedies, or that they thereafter properly filed for judicial review. With respect to Mrs. Salfi, I would be inclined to reverse the grant of injunctive relief at her behest for the reasons previously stated, and then go on to the merits of that portion of the District Court's judgment awarding her benefits. On the basis of the views expressed by several members of the Conference in discussing the merits, I would reverse the constitutional holding on the authority of Dandridge v. Williams, 397 U.S. 471 (1970), and Geduldig v. Aiello, 417 U.S. 484 (1974). If we voted to reverse on the merits of Mrs. Salfi's constitutional claim, I would certainly concede that it might not be necessary to separately inquire into the propriety of injunctive relief in her case.

Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 9, 1975

MEMORANDUM TO THE CONFERENCE:

Re: No. 74-214 - Weinberger v. Salfi (Reply to WJB)

I.

I take the principal thrust of Bill Brennan's argument to be that Mrs. Salfi's claim arises under the Constitution, and not under Title II of the Social Security Act. It seems to me that it is not enough for him to show that her claim comes within the literal language of both 28 U.S.C. § 1331 (arising under the Constitution) and of § 405(h) ("claim arising under this subchapter"), since in that event the language of § 405(h) makes the jurisdiction granted by § 405 (g) exclusive. Certainly she could not bring a nonconstitutional statutory claim under the jurisdiction granted in § 1331, even though that claim would literally arise "under . . . laws . . . of the United States," as the term is used in § 1331; jurisdiction would be precluded, not because it was literally outside of the language of § 1331, but because it was literally inside the language of § 405(h) which precludes the use of § 1331 as a jurisdictional basis for "any claim arising under this subchapter".

Bill says that "if the subchapter were applied, Mrs. Salfi would clearly lose". But except for the subchapter, she would have neither standing nor substantive basis to make any constitutional contentions. It is well settled that jurisdictional determinations are made on the basis of a "well pleaded complaint". Not only did Mrs. Salfi specifically seek to recover widows' and children's benefits, which must have their source in subchapter II, but I doubt that it would be possible to fashion a complaint which established standing and a case or controversy to

litigate the constitutional question without alleging entitlement to Social Security benefits conferred by subchapter II. That subchapter defines the rights which the claimant seeks to enforce, allows him to challenge the constitutionality of the statutory provisions in a proceeding brought under § 405 (g), Flemming v. Nester, 363 U.S. 603 (1960), and in general provides for the granting of all the relief to which he is entitled if his claims are resolved in his favor. Mrs. Salfi's claim, therefore, was one "arising under" subchapter II, and was cognizable under § 405(g) and not under § 1331.

My opening memorandum indicated that the district court would have been better served had it relied on Johnson v. Robison rather than McKart or Parisi. Bill apparently has realized that if any case supports him, it is Robison, and he argues that it is controlling. I adhere to my original discussion of the case, but add several observations. First, while Congress may well have intended to grant broader rights of review in Social Security cases than in veterans' cases, nothing in what I take to be the plain language of § 405(h) is inconsistent with this intent. The section permits challenges to administrative action, and it affects only the manner in which constitutional challenges may be brought; it does not restrict the basic availability of either type of challenge. Under the Veterans Act, on the other hand, no challenges of the Administrator's "decisions" are permitted, and it was only in Robison that it was established that constitutional challenges could be raised at all.

Second, Bill relies on language in Robison supporting the proposition that a "decision" is not "under" a statute unless it involves the application of a particular statutory provision to particular facts; when the "decision" is that of Congress rather than of the Administrator, it does not arise under the statute, and the questions of law which are presented arise under the Constitution rather than the statute. I have no quarrel with this proposition, but fail to see how the fact that a decision or question of law does not arise under a statute has any bearing on whether a claim does so. While Mrs. Salfi is being denied benefits by virtue of a congressional, rather than administrative decision, and while the basic legal questions are constitutional rather than statutory, those questions are

presented in an "action" which incontestably seeks "to recover on [a] claim" for widows' children's benefits under subchapter II.

II.

Bill's final argument against what I consider to be the natural reading of § 405(h) is that it requires an absurd degree of futile exhaustion. I do not see that this is the result at all, because it is the Secretary who determines when his decision is "final." One notes that the requirements for exhaustion which Bill cites, at p. 3, are stated in administrative regulations, not statutes, and that under those regulations the "final decision of the Secretary" can be made by an Administrative Law Judge rather than the Secretary himself. In short, I see no problem with interpreting § 405(g)'s exhaustion requirement to be satisfied by whatever exhaustion the Secretary deems appropriate.[1] Nor does the requirement that the "final decision" be made after a hearing require a different result. The Secretary can of course grant Social Security benefits without a formal hearing, so I would suppose he can also, without a formal hearing, concede all requirements for entitlement save for constitutional issues which he cannot resolve. This position is consistent with our usual pragmatic attitude towards exhaustion, yet preserves for § 405(h) the role of channeling Social Security litigation so as to protect against constitutional adjudication which might be avoided if the Secretary were first accorded a fair opportunity to consider a claim -- for example, the claimant might be found otherwise ineligible, or eligible under alternative programs. Such a statutory system is certainly not "absurd," and is, I think, entirely rational. Moreover, the liberties it takes with § 405(g)'s exhaustion requirement are substantially less significant, and substantially less at odds with statutory language, than are those which Bill would take with the third sentence of § 405(h).[2]

1/Having reconsidered the problem in this light, I am no longer certain that I was correct in my opening memo to assert that we were without jurisdiction in Wiesenfeld.

2/Bill has, at pp. 6-7, suggested a reading of the third sentence of § 405(h) which, he argues, preserves jurisdiction over the

III.

Two further points require brief comment. First, this issue concerns district court jurisdiction. I would thus be unwilling to pass over it merely because we vote to reverse on the merits of Mrs. Salfi's claim.

Second, at pages 12-14, Bill discusses Gainville v. Richardson, a District Court case, in which the third sentence of § 405(h) was held to bar only judicial claims for money benefits, and not for declaratory or injunctive relief against the denial of benefits on the basis of a challenged statutory provision. Because, as noted above, I think it is impossible, without seeking to recover on a claim under subchapter II, to allege standing or case or controversy sufficient to obtain a judicial determination of a constitutional challenge to a provision of the statute, I believe Gainville was wrongly decided. But I do not believe that even the Gainville approach can support the result apparently reached by the District Court here.

Gainville states that even if a potential claimant successfully prosecutes an action of the type held to be authorized there, "he would still need to resort to the administrative process" to effect an actual "recovery of benefits". 319 F. Supp., at 18. In the case now before us, the district court ordered benefits "from the time of original entitlement." Since I am unclear as to exactly what this might encompass, and as to whether Bill relies on Gainville as a basis for retroactive relief, I state my own understanding of that case: it permits § 1331 jurisdiction for persons or a class seeking a declaratory judgment that a statutory limitation is unconstitutional,

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class-wide claims, yet saves that sentence from redundancy. While I think that such a reading is necessary to the tenability of Bill's position, the reading he has proffered is less than satisfactory. He suggests that the third sentence simply prevents benefits from being sought through judicial complaints rather than applications filed with the Secretary; this assures that exhaustion will occur prior to judicial review, and that review will be in accordance with statutory standards. Yet the entitlement sections of the Act specify the filing of an application as a prerequisite to entitlement, so a court could not award

and/or an injunction against the denial of benefits on the basis of the challenged limitation; parties and class members who were successful in such litigation could then rely on the judgment to recover benefits pursuant to subsequent individual administrative applications, or pursuant to prior applications which had not become stale; benefits could be retroactive only to the extent normally permitted under the Act (§ 402(j)(1) provides for benefits retroactive to one year prior to application, if the claimant was eligible during that year), and not to whatever earlier date that a claimant might have qualified for benefits save for the defective statutory limitation.

Sincerely,

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benefits absent an application. See §§ 402(a)-(h). See also § 402(j)(1). Once the application is filed, it is either approved, in which event any suit for benefits would be mooted, or it is denied. Even if the denial is non-final, it is still a "decision of the Secretary" which by virtue of the second sentence of § 405(h), may not be reviewed save pursuant to § 405(g). Thus the third sentence of § 405(h) is quite unnecessary to accomplish the task which Bill would have it perform.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

Circulated: JUN [illegible] 1975

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-214

Caspar Weinberger, Secretary of Health, Education, and Welfare et al., Appellants, *v.* Concetta Salfi et al.	On Appeal from the United States District Court for the Northern District of California.

[June —, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellants, the Department of Health, Education, and Welfare, its Secretary, the Social Security Administration and various of its officials, appeal from a decision of the United States District Court for the Northern District of California invalidating duration-of-relationship Social Security eligibility requirements for surviving wives and stepchildren of deceased wage earners. 373 F. Supp. 961 (1974).

That court concluded that it had jurisdiction of the action by virtue of 28 U. S. C. § 1331, and eventually certified the case as a class action. On the merits, it concluded that the nine-months requirements of 42 U. S. C. §§ 416 (c)(5) and (e)(2) constituted "irrebuttable presumptions" which were constitutionally invalid under the authority of *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974), *Vlandis* v. *Kline*, 412 U. S. 441 (1973), and *Stanley* v. *Illinois*, 405 U. S. 645 (1972). We hold that the District Court did not have jurisdiction of this action under 28 U. S. C. § 1331, and that while it had jurisdiction of the claims of the named appellees under the provisions of 42 U. S. C. § 405 (g), it had no

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1975

Re: No. 74-214 - Weinberger v. Salfi

Dear Bill:

As soon as I received your letter of June 10th, I tried to locate your newly discovered evidence, only to learn by the grapevine that you had apparently taken it home with you. As soon as I have a chance to read it, I will respond.

Sincerely,

Bill

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 11, 1975

Re: No. 74-214 - Weinberger v. Salfi

Dear Bill:

I have now had a chance to review the material which you refer to in your letter of June 10th. In view of your eagerness to depart to Nantucket, and of the fact that you are clearly qualified for membership in the Ancient Order of Hibernians, I propose to dispute only two of the assertions contained in the letter: First, that what you have discovered is legislative history, and second, that it supports your position on the jurisdictional issue.

The document from which you quote is indeed a Senate document -- Senate Document No. 10, to be exact -- but I am unwilling to concede that this fact alone makes it "legislative history" furnishing authoritative guidance for the construction of 42 U.S.C. § 405(h), enacted in 1939.

Senate Document No. 10 is entitled "Monograph of the Attorney General's Committee on Administrative Procedure", and is further described as "embodying the results of the investigation made by the staff of said Committee relative to the administrative practices and procedures of several agencies of the government". Following the text is an "Appendix" which appendix is described in a "Foreword" as

a "statement, developed from a report by the Bureau of Old-Age and Survivors Insurance making certain recommendations for the Board's consideration, describ[ing] the essential features of a hearing and review system which has been authorized by the Board and the social purposes of the Old Age and Survivors Insurance program. It has been developed during several months under the leadership of Ralph F. Fuchs, Professor of Law, Washington University, St. Louis, Mo., a consultant of this Bureau, by whom the Bureau's report, in the main, was written." Then follows a three-part report in somewhat smaller type than the "Foreword" the second of which parts is entitled "Considerations Affecting the Hearing and Review System". Sen. Doc. 36. Within the second part of this "Report", apparently by Professor Fuchs, appears the language which you quote on page 1 of your letter.

Am I being too skeptical if I question whether such a report prepared by an outside consultant in 1941 can truly be described as "legislative history" of a section of the Social Security Act enacted two years earlier?

My second contention, briefly stated, is that even if what you have found is legislative history, it does not support you. The entire focus is on administrative law considerations, and the fact that the language which you have underlined speaks of § 405(h) [§ 205(h) of the Act] as specifically excluding separate actions in which the courts might try the facts independently does not to my mind indicate even that Professor Fuchs thought that this was necessarily the only effect of § 405(h).

I remain of the opinion, expressed in my original memorandum and in the present draft opinion, that the third sentence of 42 U.S.C. § 405(h) does exclude all forms of judicial action seeking Social Security benefits except those brought under § 405(g).

Sincerely,

Bill

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1975

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 74-214 - Weinberger v. Salfi

No. 74-1137 - Lavine, Commissioner, New York Department of Social Services v. Milne. This is an appeal from a three-judge District Court in the Southern District of New York (Oakes, Bonsal, Wyatt). That court held invalid under the Due Process Clause of the Fourteenth Amendment the provision in the New York law that any person who applies for welfare benefits within 75 days after having voluntarily terminated his employment is presumed "in the absence of evidence to the contrary supplied to such persons" to have done so for the purpose of qualifying for assistance. The District Court held that the presumption is irrational because there is insufficient connection between the known fact and the presumed fact; appellant Commissioner points out that the presumption is rebuttable, and deals with facts wholly within the knowledge of the applicant. Appellant also claims that it is entirely rational to assume that someone who applies for public assistance shortly after voluntarily terminating employment quit his job with the intent of seeking assistance.

This case is certainly not squarely controlled by Salfi, nor by any of the cases that the District Court relied upon. Salfi dealt with irrebuttable presumption and the Stanley-

Wm. Douglas
Oct 74

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-214

Caspar Weinberger, Secretary of Health, Education, and Welfare et al., Appellants, *v.* Concetta Salfi et al.	On Appeal from the United States District Court for the Northern District of California.

[June —, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellants, the Department of Health, Education, and Welfare, its Secretary, the Social Security Administration and various of its officials, appeal from a decision of the United States District Court for the Northern District of California invalidating duration-of-relationship Social Security eligibility requirements for surviving wives and stepchildren of deceased wage earners. 373 F. Supp. 961 (1974).

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