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SANDERS V. WEINBERGER: JUDICIAL REVIEW OF DECISIONS NOT TO REOPEN ADMINISTRATIVE PROCEEDINGS UNDER THE SOCIAL SECURITY ACT

Pursuant to authority granted under the Social Security Act, the Secretary of Health, Education, and Welfare has established numerous procedural safeguards designed to prevent the unjust denial of social security benefits to qualified applicants.¹ Before exercising his statutory right to appeal to the courts,² an applicant may obtain administrative review of an adverse determination at least three times.³ Even then, his administrative remedies are not necessarily foreclosed, for years after the decision has been made "otherwise final," certain circumstances may warrant a reopening of the original claim.⁴ The extent to which the Secretary's refusal to permit

1. 42 U.S.C. § 405(a) (1970) reads in pertinent part:

"The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions. . . ."

2. See note 6 *infra*.

3. After receiving an application for benefits, the agency makes an initial determination based upon the claimant's statement and upon investigations performed by agency caseworkers. This initial determination is final unless the claimant applies for reconsideration within six months from the mailing of notice of an adverse decision. 20 C.F.R. §§ 404.908, 404.911 (1976). After reconsideration, essentially a repeat of the first stage except that new evidence also is considered, the claimant has another six months to request a hearing. 20 C.F.R. § 404.918 (1976). Upon a showing of good cause, the period may be extended. 20 C.F.R. 404.954(a) (1976). If the claimant again suffers an adverse decision, he may seek review by the Appeals Council. 20 C.F.R. § 404.945 (1976). A failure to request review renders the examiner's decision final. 20 C.F.R. § 404.940 (1976). If review is granted by the Council, however, the claimant can appear before its chambers in Washington, D.C. Upon a rejection of review or affirmation of an adverse determination after review, the action becomes final and the claimant may seek judicial review under the provisions of 42 U.S.C. § 405(g) (1970) [note 6 *infra*]. For a discussion of this procedure see Comment, *The Social Security Appeals Process: A Critical Analysis of Administrative and Judicial Reviews*, 3 CUM.-SAM.L. REV. 279 (1972).

4. 20 C.F.R. § 404.957 (1976) provides in pertinent part:

An initial, revised, or reconsidered determination of the Administration or a decision or revised decision of a hearing examiner or of the Appeals Council which is otherwise final . . . may be reopened:

(a) Within 12 months from the date of the notice of the initial determination . . . to the party to such determination, or

(b) After such 12-month period, but within 4 years after the date of the notice of the initial determination . . . to the party to such determination, upon a finding of good cause for reopening such determination or decision, or

(c) At any time when:

(8) Such initial, revised, or reconsidered determination or decision or revised decision is unfavorable, in whole or in part, to the party thereto but only for the

such a reopening is reviewable in federal court, however, has been the subject of much debate.⁵

Although the Social Security Act expressly entitles an applicant to judicial review of a final decision made after a hearing, it is silent as to decisions not to reopen.⁶ Section 405(h) of the Act, however, declares post-hearing "findings and decisions" to be "binding" and proscribes review of such determinations "except as herein provided."⁷ Nevertheless, in *Sanders v. Weinberger*⁸ the Court of Appeals for the Seventh Circuit recently held that a federal court has independent jurisdiction under section 10 of the Administrative Procedure Act (APA)⁹ to review reopening decisions for possible abuse of discretion. According to the court, the Social Security Act's section 405(h) preclusion of review applies to final decisions made after mandatory hearings, but not to reopening decisions. Thus review is available under the APA, which authorizes limited review of agency action unless "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."¹⁰

Although the court's interpretation of section 405(h) is consistent with the trend of authority,¹¹ the issue of reviewability of Social Security Agency decisions not to reopen a prior determination remains unresolved; the circuit courts are not in accord¹² and, until

purpose of correcting clerical error or error on the face of the evidence on which such determination or decision was based.

5. *Compare* *Stuckey v. Weinberger*, 488 F.2d 904 (9th Cir. 1973) with *Cappadora v. Celebrezze*, 356 F.2d 1 (2d Cir. 1966).

6. 42 U.S.C. § 405(g) (1970) provides 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. . . .

7. 42 U.S.C. § 405(h) (1970) provides in pertinent part:

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. . . .

8. 522 F.2d 1167 (7th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3685 (U.S. Jan. 1, 1976) (No. 75-1443).

9. 5 U.S.C. §§ 704-706 (1970).

10. 5 U.S.C. § 701(a) (1970).

11. See cases cited note 12 *infra*.

12. Of the six other circuits that directly have confronted the issue, four have held specifically that a refusal to reopen is reviewable under the APA. *Ruiz-Olan v. Secretary of HEW*, 511 F.2d 1056 (1st Cir. 1975); *Maddox v. Richardson*, 464 F.2d 617 (6th Cir. 1972); *Davis v. Richardson*, 460 F.2d 772 (3d Cir. 1972); *Cappadora v. Celebrezze*, 356 F.2d 1 (2d Cir. 1966). The Ninth Circuit has declined to review reopening decisions when prior factual determina-

Sanders, the Supreme Court refused to consider the matter.¹³ This Comment will focus on the validity of the *Sanders* rationale.¹⁴

PRE-SANDERS CASE LAW

The court in *Sanders* relied heavily on the Second Circuit decision *Cappadora v. Celebrezze*,¹⁵ the first in a series of circuit court cases directly confronting the issue of whether section 405(h) of the Social Security Act¹⁶ forecloses judicial review of reopening decisions under the APA. In *Cappadora* a widow's claim for insurance benefits initially was disallowed for lack of proof.¹⁷ Following her death some eight years later, her administratrix sought to have the decision set aside and the application reconsidered. When an agency hearing concerning whether reconsideration should be awarded resulted in the denial of her request, the administratrix sought judicial review.

Considering first the jurisdictional question, the court conceded that nothing in the Social Security Act authorizes courts to review refusals to reopen. Section 405(g), the provision allowing a claimant to seek review within sixty days of a post-hearing final determination,¹⁸ applies to final decisions.¹⁹ The court, however, rejected the

tions have been made final by res judicata. *Stuckey v. Weinberger*, 488 F.2d 904 (9th Cir. 1973). And the Fifth Circuit, though appearing to follow the majority, has left the question open whether res judicata forecloses review when the claimant is given a full evidentiary hearing. *Ortego v. Weinberger*, 516 F.2d 1005, 1009 n.3 (5th Cir. 1975). The Tenth Circuit has not considered the impact of the APA, but has refused to review dismissals of second applications. See *Neighbors v. Secretary of HEW*, 511 F.2d 80 (10th Cir. 1974).

13. Before granting certiorari, the Court twice had refused to do so. *Bailey v. Weinberger*, 419 U.S. 953 (1974); *Wallace v. Weinberger*, 417 U.S. 913 (1974), *denying cert. to*, 488 F.2d 606 (9th Cir. 1973). In *Bailey* three justices, noting the division among the circuits, dissented.

14. The court in *Sanders* also decided that section 10 of the APA amounts to an independent grant of subject matter jurisdiction. 522 F.2d at 1169-70. For a discussion of this issue see *Ortego v. Weinberger*, 516 F.2d 1005, 1009-15 (5th Cir. 1975).

15. 356 F.2d 1 (2d Cir. 1966).

16. See note 7 *supra*.

17. As the claimant made no written request for a hearing or for reconsideration within six months of the initial determination, the initial determination became final, pursuant to 20 C.F.R. § 404.908 (1976).

18. For the relevant provisions of 42 U.S.C. § 405(g) (1970) see note 6 *supra*.

19. Although the court recognized that section 405(g), if taken literally would apply to any decision that happened to follow a hearing, it rejected such a reading as "unnatural and unsound, and scarcely consistent with the wise counsel to reject 'the tyranny of literalness' and remember that 'a restrictive meaning for what appear to be plain words may be indicated by the Act as a whole.'" 356 F.2d at 4, *quoting* *United States v. Witkovich*, 353 U.S. 194, 199 (1957). It would be more reasonable, according to the court, to limit section 405(g) review to final decisions based on hearings made mandatory by 42 U.S.C. § 405(b), which entitles an applicant to a hearing only when one is timely requested after an adverse initial determination on the merits. To apply section 405(g) review to reopening decisions based on discre-

contention that section 405(h)'s preclusion of review "except as herein provided"²⁰ operates to bar review under the APA.²¹ A correct interpretation of the reviewability provisions of the Social Security Act requires a conjunctive reading; sections 405(g) and 405(h) should be construed as applying to the same kinds of decisions. Viewed in this light, section 405(h) is merely a procedural mandate foreclosing review of final decisions on the merits by any avenue but that prescribed by section 405(g). The court concluded therefore that a refusal to reopen is subject to neither section 405(g) review, nor section 405(h) finality.²²

Having overcome the first statutory obstacle to APA reviewability, the court proceeded to dismiss the second,²³ deciding that though the Secretary's discretion in deciding whether to reopen an

tionary hearings "might deter the agency from giving a procedural benefit" not required by law. 356 F.2d at 4-5.

20. For pertinent text of section 405(h) see note 7 *supra*.

21. Pertinent provisions of the Administrative Procedure Act read:

Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) Statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

. . . .

5 U.S.C. § 701 (1970).

Right of review. A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 5 U.S.C. § 702 (1970).

Actions Reviewable. Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . . 5 U.S.C. § 704 (1970).

Scope of review. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law 5 U.S.C. § 706 (1970).

22. 356 F.2d at 5 (emphasis supplied).

23. See note 10 *supra* & accompanying text.

otherwise final determination is extensive, it is not so absolute as to be immunized from review for abuse.²⁴ In addition to being procedurally feasible²⁵ such a limited scope of review accords with the Social Security Act's scheme.²⁶ Moreover, it is doubtful that Congress intended to deny a claimant access to the courts "because of an unreasonable or inappropriate agency rule on reopening or because of a truly arbitrary administrative decision."²⁷

The reasoning of the court in *Cappadora* in applying the APA provisions on reviewability to social security reopening decisions has persuaded several other appellate courts to hold similarly. In *Maddox v. Richardson*,²⁸ decided six years after *Cappadora*, the Court of Appeals for the Seventh Circuit considered a refusal to reopen a decision that, as in *Cappadora*, had become final because of failure to request timely administrative review.²⁹ The Secretary contended that just as a refusal to reopen is not a "final decision" within the review provisions of the Social Security Act, it should not be considered under the APA a final agency action for which no other remedy is available in a court.³⁰ Unimpressed with the Secretary's arguments and quoting heavily from *Cappadora*, the court concluded that a decision not to reopen appeared to be "squarely within the meaning" of the APA provision.³¹

24. 356 F.2d at 5-6.

25. The court noted that most appeals would entail nothing more than "a motion for summary judgment based on the administrative record." *Id.* at 6.

26. Quoting 42 U.S.C. § 405(a), the court noted that rules and procedures established by the Secretary, in addition to being "not inconsistent" with the Act, must be "necessary and appropriate" for carrying out its provisions. 356 F.2d at 6. Inherent in these restrictions are guidelines for judging the limits of agency discretion once the regulations are promulgated. 356 F.2d at 6.

27. 356 F.2d at 6. In an oft-quoted statement the court also maintained that "[a]bsent any evidence to the contrary, Congress may . . . be presumed to have intended that the courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual."

28. 464 F.2d 617 (6th Cir. 1972).

29. See note 17 *supra*. In *Maddox*, however, the request for reopening was made within the four-year time period permitting reopening for good cause [see note 4 *supra* & accompanying text] and was accompanied by additional medical information allegedly constituting new and material evidence within the meaning of 20 C.F.R. § 404.958 (1976), which provides that new and material evidence furnished after notice to the party to the initial determination constitutes good cause. 464 F.2d at 618.

30. 464 F.2d at 621. Administrative Procedure Act § 10(c), 5 U.S.C. § 704 (1970) permits review only of "[a]gency action made reviewable by statute and final action for which there is no adequate remedy in a court. . . ."

31. 464 F.2d at 621. The court noted that although the Social Security Act provides for review of final decisions on the merits, the APA permits only limited review. The Secretary's

Prior to *Sanders v. Weinberger*³² two other circuit courts reached similar conclusions. In *Davis v. Richardson*,³³ decided the same year as *Maddox*, the Court of Appeals for the Third Circuit held that an APA review for abuse of discretion is consistent with the Social Security Act scheme, which limits the Secretary to making rules that are "necessary and appropriate" to the Act's purposes.³⁴ Three years later the Court of Appeals for the First Circuit in *Ruiz-Olan v. Secretary of HEW*,³⁵ stated perfunctorily in a per curiam opinion citing *Maddox* and *Cappadora*:

[T]his administrative action is subject to judicial review under the Administrative Procedure Act, notwithstanding [sections] 405(g) and (h) of the Social Security Act. . . . But review is restricted to ascertaining whether the administrative action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. . . .³⁶

That court's summary treatment of the jurisdictional question, however, masked the division between the circuits. Two years prior to *Ruiz-Olan*, the Court of Appeals for the Ninth Circuit in *Stuckey v. Weinberger*³⁷ had rejected a substantial portion of the *Cappadora* rationale.³⁸ Basing his claim for jurisdiction on the APA, Stuckey sought judicial review of a partial denial of his request for the reopening of six final, adverse decisions.³⁹ The district court, however, dismissed the suit for lack of jurisdiction and the appellate court affirmed.⁴⁰ Although the court basically agreed with certain princi-

refusal to reopen is final in that no further administrative steps remain to be taken; if the APA does not apply, no judicial review is available. *Id.*

32. 522 F.2d 1167 (7th Cir. 1975).

33. 460 F.2d 772 (3d Cir. 1972).

34. *Id.* at 775. The court was referring to 42 U.S.C. § 405(a) (1970), which is set out in part at note 1 *supra*.

35. 511 F.2d 1056 (1st Cir. 1975).

36. *Id.* at 1058 (citations omitted).

37. 488 F.2d 904 (9th Cir. 1973).

38. See notes 18-22 *supra* & accompanying text.

39. Stuckey had filed seven applications for disability payments within an eleven year period. The seventh sought reconsideration in light of a 1965 amendment enlarging the class of compensable disabilities. All of the applications presented essentially the same facts, but with several of them, Stuckey had exhausted his rights to administrative and judicial review. On his final application he was found disabled, under the 1965 amendment, and after a hearing he was awarded retroactive payments dating from 1963. The Appeals Council, however, refused to reopen all of his prior applications despite Stuckey's claim that there was error on the face of the evidence. 488 F.2d at 906-908, 911.

40. *Id.* at 908, 912. But the circuit court, sitting en banc, was divided eight to five over the correct reasons for affirming. See note 48 *infra*.

ples articulated in *Cappadora*,⁴¹ it found convincing evidence in section 405(h) of the Social Security Act⁴² that Congress intended "to commit irrevocably to agency discretion those decisions which are rendered after full and fair agency hearings and to which, accordingly, the application of the traditional concept of res judicata could not be fairly seen as unreasonable."⁴³ Because Stuckey's request for reopening involved prior factual determinations made final by res judicata, even limited review of the denial was foreclosed.⁴⁴

The court was unwilling to follow *Cappadora* for several reasons. It relied foremost on the "broad" and "unambiguous" language of the first sentence of section 405(h) of the Social Security Act, as embodying a policy of strict administrative finality within the confines of the res judicata doctrine.⁴⁵ According to the court, Congress recognized the need for administrative efficiency and fiscal stability, and thus intended to give social security applicants only one chance to take advantage of the comprehensive review procedures afforded by the statutory system.⁴⁶ That an applicant even had the opportunity to seek a reopening of a final decision was deemed to be "entirely a matter of administrative grace."⁴⁷ Consequently, the

41. *Id.* at 909. The court quoted the statements quoted at note 27 *supra* & accompanying text.

42. 42 U.S.C. § 405(h) (1970).

43. 488 F.2d at 910.

44. Stuckey had claimed that there was error on the face of the evidence and that the prior determination was not founded on sufficient evidence. *Id.* at 911-12. Such factual claims, according to the court, were made binding by res judicata. See note 48 *infra*.

45. 488 F.2d at 910. The first sentence of 42 U.S.C. § 405(h) (1970) provides that the findings and decisions of the Secretary after a hearing shall be binding upon all parties to such hearing. The court read this provision as rendering all findings and decisions on the merits final and subject to res judicata when judicial review either had been obtained or precluded because not timely sought, pursuant to 42 U.S.C. § 405(g) (1970) (see note 6 *supra*). 488 F.2d at 909 n. 11. Interestingly, in deciding that review of reopening decisions was not available because of this finality, the court did not focus on the second sentence of section 405(h), which bars review of "findings of facts or decisions of the Secretary . . . except as herein provided." 42 U.S.C. § 405(h) (1970). That this sentence was not deemed a general prohibition of review activating the first exception to APA reviewability (see note 10 *supra* & accompanying text) was made clear by the court's recognition that some reopening decisions are reviewable. See note 49 *infra*. In a subsequent opinion, the court expressly adopted the majority interpretation of the second sentence as applying only to decisions on the merits. *Rothman v. Hospital Service*, 510 F.2d 956, 958-60 (9th Cir. 1975).

46. 488 F.2d at 911. The court also noted that section 405(h)'s bar against review would be meaningless unless applied to the courts in that each judicial proceeding necessarily would involve the agency and ultimately the court in a reexamination and reevaluation of evidence previously adduced. *Id.* at 910.

47. *Id.* at 911. The court reasoned that as the regulations permitting reopening of prior

court held that reopening petitions based on allegedly erroneous factual determinations are committed to agency discretion and thus, not reviewable under the APA.⁴⁸

The critical distinction, therefore, between the Ninth Circuit's approach in *Stuckey* and the Second Circuit's approach in *Cappadora* lies in the significance attributable to section 405(h) of the Social Security Act. Whether the section's second sentence expressly precludes review of reopening decisions was not in dispute; both courts treated it as applying only to decisions on the merits.⁴⁹ They differed, however, as to the congressional intent underlying the statute. The court in *Cappadora* found no evidence warranting the conclusion that reopening decisions were intended to be committed to the Secretary's discretion and thus justified assuming review jurisdiction under the APA,⁵⁰ whereas the court in *Stuckey* concluded that the Secretary's discretion over such matters is absolute and decided that because Congress had not specifically granted such jurisdiction, "the courts should exercise a discreet restraint . . . in assuming it."⁵¹ Faced with these conflicting decisions, the Court of Appeals for the Seventh Circuit, in *Sanders v. Weinberger*,⁵² considered the reviewability of Social Security reopening decision.

SANDERS V. WEINBERGER

In 1964 a Mr. Sanders, claiming to be mentally impaired, applied for Social Security disability payments. The denial of the application both initially and upon reconsideration was affirmed at a hearing requested by Sanders. Failing to exercise his right to judicial review, the claimant did not pursue the matter further until seven

factual determinations were reasonable exceptions to "strict res judicata principles," within the Secretary's power to establish, the Secretary had absolute discretion in their application. *Id.* at 910.

48. *Id.* at 911. Res judicata, according to the court, would bar any review of reopening requests alleging error on the face of the record or proffering new and material evidence. *Id.* n. 15. Referring to 20 C.F.R. § 404.957 (see note 4 *supra*), the court recognized, however, that reopening also is permitted on non-factual grounds, such as for clerical errors on the face of the record. In these instances, refusals to reopen are not subject to res judicata and hence, are reviewable for abuse of discretion. 488 F.2d at 911. Judge Merrill, however, in an opinion concurred in by four other judges, rejected the majority's rationale. Although he agreed that, in the instant case, it was within the Secretary's discretion to deny the reopening on the grounds of res judicata, he felt that the court had jurisdiction under the APA to review the decision for abuse of discretion. 488 F.2d at 912.

49. See notes 22 & 45 *supra* & accompanying text.

50. See notes 26-27 *supra* & accompanying text.

51. 488 F.2d at 911.

52. 522 F.2d 1167 (7th Cir. 1975).

years later when he submitted a second application based on the same facts as the original claim and offering no new evidence. The Social Security Administration denied the second application on res judicata grounds and refused to reopen the first because no error on the face of the record had been shown.⁵³ Sanders' attempt to have the refusal reviewed in federal district court was dismissed for lack of jurisdiction,⁵⁴ and thus on appeal, the circuit court's sole concern was the reviewability of reopening decisions.

The court confronted a factual situation inviting the application of res judicata principles. Because the claimant had requested reopening more than four years after the initial determination, the Secretary's statutory discretion was at its broadest; he needed to consider only error on the face of the record.⁵⁵ Similarly in *Stuckey v. Weinberger*, not only had the claimant been offered a full evidentiary hearing before the denial of his initial application, but also his request for reopening offered no new evidence.⁵⁶ The court, however, in disregarding the *Stuckey* res judicata analysis, did not consider the particular circumstances surrounding the request; rather it focused on the broader issue of whether section 405(h) of the Social Security Act expressly bars review under the APA. The pivotal factor was neither the procedural steps taken nor the time that had elapsed, but rather the court's authority to review the decision not to reopen.

Writing for the majority of the court, Judge Tuttle found little merit in the Secretary's contention that section 405(h) precludes all judicial review not expressly authorized elsewhere in the Social Security Act. Although the court agreed that the Act gives no grant of jurisdiction to review reopening decisions, it adopted the *Cappadora* analysis of section 405(h) that rather than barring review altogether, the section merely prohibits attempts to review final decisions on the merits except as provided in section 405(g).⁵⁷ The court also accepted the *Cappadora* position that reopening decisions is not committed to agency discretion. In finally deciding that a refusal to

53. According to the Secretary, Sanders' original claim only could be reopened on this basis because more than four years had lapsed since the initial adverse determination. 522 F.2d at 1169. See 20 C.F.R. § 404.957(c)(8) (1976) quoted at note 4 *supra*.

54. 522 F.2d at 1168.

55. "Error on the face of the evidence" is limited to error within the four corners of the record that has caused a patently incorrect decision. *Shelton v. Secretary of HEW*, 428 F.2d 81 (3d Cir. 1970).

56. See notes 17 & 53 *supra* & accompanying text.

57. 522 F.2d at 1171.

reopen constitutes a "final agency action" reviewable under the APA, however, the court did more than merely reiterate the Second Circuit's holding. Integral to the court's endorsement of *Cappadora* was a recognition of the virtual presumption of judicial review that has emerged in several recent Supreme Court decisions construing the review provisions of the APA.⁵⁸ Quoting from *Abbott Laboratories v. Gardner*,⁵⁹ Judge Tuttle stated that administrative action generally is found to be reviewable unless "'clear and convincing evidence of a contrary legislative intent'" can be demonstrated.⁶⁰ Because the Social Security Act contains no such evidence applicable to reopening decisions, the court determined that the presumption of review makes the *Cappadora* analysis even more convincing.⁶¹

Although *Sanders*, because of its failure to confront directly the position adopted in *Stuckey v. Weinberger*,⁶² does not clarify completely the issue of reviewability of reopening decisions, the decision is significant. Not only does it strengthen *Cappadora* and its progeny,⁶³ but also it encourages an uncompromising application of the review provisions of the APA to important individual concerns at a time when the overburdened judiciary is increasingly aware of the need for lighter court dockets. Notwithstanding Judge Bauer's dissent,⁶⁴ a closer examination of the APA's presumption of review indicates that *Sanders* was decided correctly.

58. *Id.* at 1170.

59. 387 U.S. 136 (1967).

60. 522 F.2d at 1170, quoting 387 U.S. at 141. In support of this view the court also cited *Barlow v. Collins*, 397 U.S. 159, 166 (1970) and *Data Processing Service Org'ns v. Camp*, 397 U.S. 150, 157 (1970). 522 F.2d at 1170.

61. *Id.* The court denied that the Supreme Court's recent interpretation of section 405(h) in *Weinberger v. Salfi*, 422 U.S. 749 (1975), should affect the reviewability of reopening decisions. In *Salfi*, the claimants, asserting that a certain statutory restriction on eligibility was unconstitutional, sought review of a denial of benefits under 28 U.S.C. § 1331 (1970). The Court held, however, that the third sentence of section 405(h), barring all actions against the Secretary brought under sections 1331 et. seq. to recover on any claim arising under the Social Security Act, foreclosed federal question jurisdiction of the suit. But the Court never considered the review provisions of the APA and eventually held jurisdiction existed 11 under 42 U.S.C. § 405(g) (1970). The court in *Sanders* thus deemed *Salfi* inapplicable to whether reopening decisions are reviewable under the APA. 522 F.2d at 1171. *Accord*, *Lejeune v. Mathews*, 526 F.2d 950, 953 (5th Cir. 1976); *Ortego v. Weinberger*, 516 F.2d 1005, 1011 n.4 (5th Cir. 1975).

62. 488 F.2d 904 (9th Cir. 1973).

63. See note 12 *supra*.

64. Judge Bauer concluded that the simple language of section 405(h) forbids judicial review of the decision not to reopen the determination. 522 F.2d at 1171.

SECOND SENTENCE OF SECTION 405(H): NOT AN ABSOLUTE PRECLUSION
OF REVIEW

Historically, administrative bodies were seldom subject to judicial overview. In their capacity as policymakers, they were identified with the legislative and executive branches. The doctrine of separation of powers dictated judicial deference to their determinations unless clear legal questions were at issue.⁶⁵ As noted in *Sanders*, recent Supreme Court interpretations of the APA have evinced a trend toward abandoning such judicial restraint.⁶⁶ In *Abbott Laboratories v. Gardner*⁶⁷ the Court recognized that the broad language of the APA reviewability provisions⁶⁸ must be treated liberally: judicial review of a final agency action by an aggrieved person will not be precluded unless there is a convincing reason to believe that such was Congress' intent.⁶⁹ In *Barlow v. Collins*,⁷⁰ decided three years later, the Court concluded that judicial review of administrative action was the rule, and nonreviewability an exception that must be established.⁷¹

The legislative history of the APA suggests a similar conclusion. Labeled an "Act to improve the administration of justice by prescribing fair administrative procedure,"⁷² it essentially codifies the presumption of review.⁷³ Under its provisions, review is available to any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute. . . ." ⁷⁴ Noting the Act's purpose of conferring full procedural protection to the individual, both the Senate and House Committee Reports stated that statutory proscription of judicial review would be rare, for to do otherwise would afford the

65. See, e.g., *Eberlein v. United States*, 257 U.S. 82 (1921); *Keim v. United States*, 177 U.S. 290 (1900); *Hadden v. Merritt*, 115 U.S. 25 (1885).

66. See notes 58-60 *supra* & accompanying text.

67. 387 U.S. 136 (1967).

68. See note 21 *supra*.

69. 387 U.S. at 140.

70. 397 U.S. 159 (1970).

71. *Id.* at 166. Other significant Court decisions recognizing the presumption of review include *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Mulloy v. United States*, 398 U.S. 410 (1970); *Association of Data Processing Service Org'ns v. Camp*, 397 U.S. 150 (1970); and *Rusk v. Cort*, 369 U.S. 367 (1962).

72. ADMINISTRATIVE PROCEDURE ACT, U.S. Code Congressional Service, 79th Cong. 2d Sess. 228 (1946).

73. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 372 (abr. student ed. 1965).

74. Administrative Procedure Act § 10(a), 5 U.S.C. § 702 (1970).

administrative bodies unfettered discretion.⁷⁵ Thus, although confirming that the APA would not contravene an explicit statutory preclusion of review, the legislative history indicates that the intent to forbid review must be expressed in "clear and convincing" terms,⁷⁶ especially if money claims are involved.⁷⁷

In view of the foregoing, section 405(h) of the Social Security Act apparently should not be applied to bar judicial review of reopening decisions. Although the second sentence of the section seems to preclude absolutely any review not expressly provided for in the Act,⁷⁸ a literal interpretation of statutory language taken out of context does not constitute persuasive evidence of congressional intent.⁷⁹ The broadly remedial provisions of the APA require that a statute be viewed in its entirety before being deemed an absolute preclusion of review.⁸⁰ Read in conjunction with the other provisions of section 405, section 405(h) most reasonably applies only to decisions on the merits.

Section 405(b) of the Act⁸¹ outlines the process by which the Secretary is directed to make decisions on the merits of an application for benefits. Under its terms the applicant is entitled to notice and an opportunity to be heard.⁸² Section 405(g) dictates the procedures

75. APA LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 212, 275 (1946). See *Heikkila v. Barber*, 345 U.S. 229, 232 (1953).

76. According to the House Report, "[t]o preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." H.R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946).

77. The Senate Committee specifically noted that if Congress desired to place pension or benefit cases beyond court review, it did so by express statute.

78. The second sentence of 42 U.S.C. § 405(h) (1970) provides: "No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided."

79. See *Heikkila v. Barber*, 345 U.S. 229, 232-33 (1953); Note, *Reviewability: Statutory Limitations on the Availability of Judicial Review*, 1973 DUKE L.J. 253, 270 [hereinafter cited as *Statutory Limitations*].

80. *Heikkila v. Barber*, 345 U.S. 229, 232-33 (1953).

81. 42 U.S.C. § 405(b) (1970).

82. 42 U.S.C. § 405(b) (1970) provides:

The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Upon request by any such individual . . . he shall give such applicant . . . reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. Any such request with respect to such a decision must be filed within such period after such decision as may be prescribed in regulations of the Secretary, except that the period so

by which the applicant may obtain judicial review of an adverse decision after a hearing.⁸³ There is no dispute that the hearing that creates the right to review in section 405(g) is the same hearing that is provided for in section 405(h), thus both sections apply only to decisions on the merits.⁸⁴ Consequently, as the court in *Cappadora* concluded, section 405(h) reasonably should apply to the same kinds of decisions.⁸⁵ The first sentence makes a decision after the hearing binding and the second sentence prohibits review of that decision unless the applicant complies with the requirements of section 405(g). Even the Court of Appeals for the Ninth Circuit in *Stuckey v. Weinberger*⁸⁶ conceded that the second sentence of section 405(h) does not bar review of reopening decisions, but only of decisions on the merits if an applicant attempts to bypass section 405(g) procedures.⁸⁷

The Supreme Court's recent consideration of section 405(h) in *Weinberger v. Salfi*⁸⁸ lends further support to such an interpretation. In *Salfi*, the claimants based their suit for review of a denial of benefits on federal question jurisdiction.⁸⁹ Although the Court eventually found jurisdiction to review the denial under section 405(g) of the Act,⁹⁰ it first held that the third sentence of section 405(h) absolutely foreclosed any action for benefits founded on federal question jurisdiction.⁹¹ Rejecting the contentions that the

prescribed may not be less than six months after notice of such decision is mailed to the individual making such request. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter.

83. 42 U.S.C. § 405(g) (1970). For pertinent provisions, see note 6 *supra*.

84. See, e.g., *Stuckey v. Weinberger*, 488 F.2d 904, 909 n. 11 (9th Cir. 1973); note 19 *supra*.

85. See notes 18-22 *supra* & accompanying text.

86. 488 F.2d 904 (9th Cir. 1973).

87. See note 45 *supra*. Section 405(h) has been interpreted similarly with regard to medicare claims. See, e.g., *Rothman v. Hospital Serv.*, 510 F.2d 956, 958-59 (9th Cir. 1975); *Kingsbrook Jewish Medical Center v. Richardson*, 486 F.2d 663, 666-67 (2d Cir. 1973).

88. 422 U.S. 749 (1975).

89. The claimant brought a class action under 28 U.S.C. § 1331 (1970) alleging that he had been denied benefits pursuant to an unconstitutional statutory restriction on eligibility.

90. Although the claimant had not participated in a hearing, a prerequisite to review under 42 U.S.C. § 405(g) (1970) (see note 6 *supra*), the Court held that the initial determination had been final because the only remaining issue concerned the constitutionality of the statutory restriction. Thus it was held that the claimant should be able to obtain review under section 405(g). 422 U.S. at 766-67.

91. 422 U.S. at 761. The third sentence of 42 U.S.C. § 405(h) (1970) provides: "No action against the . . . Secretary . . . shall be brought under [sections 1331 et. seq.] of Title 28 to recover on any claim arising under this subchapter."

provision was intended merely to require the exhaustion of administrative remedies or to prevent a bypass of section 405(g) review procedures, the Court maintained that those functions are fulfilled by the first two sentences of the section, which "prevent review of decisions of the Secretary save as provided in [section] 405(g)." ⁹²

Although *Salfi* is not controlling in that the Court considered neither reopening decisions nor the review provisions of the APA, the case does indicate that the second sentence of section 405(h) does not stand alone as an absolute preclusion of review. By construing the sentence as a requirement for administrative exhaustion under section 405(g), the Court implicitly accepted the *Cappadora* view that the preclusion of review was intended to reach only decisions on the merits of an application, that is, the same decisions that section 405(g) reaches.⁹³ Thus, it appears that the Court also would accept the *Cappadora* conclusion that the sentence does not reach reopening decisions.⁹⁴

The Social Security Act's silence as to reopening decisions and the broad language of section 405(h) do not in themselves overcome the presumption of review embodied in the APA. As the Supreme Court has stated, "[m]ere failure to provide for judicial intervention is not conclusive; neither is the presence of language which appears to bar it."⁹⁵ The question is not whether Congress would have precluded review of reopening decisions had it considered the matter, but whether such review was in fact precluded.⁹⁶ As no indication exists that Congress even contemplated that the Secretary would provide for reopening, it is highly improbable one could uncover "clear and convincing evidence" that the legislature intended to exempt refusals to reopen from review. Consequently, unless reopening decisions are "committed to agency discretion," the court in *Sanders v. Weinberger*⁹⁷ was correct in holding they are subject to review for abuse of discretion under the APA.⁹⁸

92. 422 U.S. at 757.

93. See notes 18-22 *supra* & accompanying text.

94. In *Sanders*, the Secretary argued that *Salfi* implies that the second sentence should be read as broadly as the Court read the third and thus should bar review of reopening decisions. See note 61 *supra*.

95. *Heikkila v. Barber*, 345 U.S. 229, 233 (1953).

96. One reason for the bill was to afford review in cases where the relevant federal statutes do not provide for it or do not cover the particular situation involved. APA LEGISLATIVE HISTORY, S. Doc. No. 248, 79th Cong., 2d Sess. 368 (1946).

97. 522 F.2d 1170 (7th Cir. 1975).

98. See notes 58-61 *supra* & accompanying text.

REOPENING DECISIONS AND THE SECOND EXCEPTION TO APA REVIEWABILITY

The APA expressly authorizes a court to set aside agency action that is "arbitrary, capricious, [or] an abuse of discretion. . . ." ⁹⁹ Courts and commentators have not agreed how this authority is qualified by the provision that bars review "to the extent" that a decision is "committed to agency discretion." ¹⁰⁰ The mere existence of discretion, however, clearly neither totally bars nor invariably creates a right to review; rather, the question is the degree to which discretion is committed. ¹⁰¹ Courts will examine the purpose and legislative history of the relevant statute to determine the intended scope of discretionary powers. ¹⁰² Even though an agency's discretion is broad, it thus may be subject to limited review under the APA. ¹⁰³ Moreover, if significant personal or property interests are involved, or if justice demands redress, judicial intervention seldom is foreclosed. ¹⁰⁴

In *Sanders*, the Seventh Circuit deemed the absence of explicit authorization of judicial review inadequate to overcome the presumption of review of administrative actions. ¹⁰⁵ The court, however, never directly confronted the Ninth Circuit's contention in *Stuckey v. Weinberger* ¹⁰⁶ that the Secretary has absolute discretion in deciding whether to reopen a case. The court in *Stuckey* interpreted the

99. 5 U.S.C. § 706 (2)(A) (1970).

100. 5 U.S.C. § 701 (1970). See generally Mahinka, *The Problem of Nonreviewability: Judicial Control of Action Committed to Agency Discretion*, 20 VILL. L. REV. 1 (1974). Note, *Reviewability of Administrative Action: The Elusive Search for a Pragmatic Standard*, 1974 DUKE L.J. 382.

101. See 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 28.08 at 33-34 (1958).

102. *E.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410-13 (1971) (Secretary of Transportation's authorization of federal funds for expressway construction reviewable under APA); *Adams v. Richardson*, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (Dept. of H.E.W. does not have absolute discretion in enforcing certain provisions of Civil Rights Act).

103. Despite the breadth of discretionary powers given to the Secretary of Transportation, the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) concluded that judicial review was available not only to determine whether the Secretary acted within the scope of his authority, but also to determine whether he reasonably could have believed that there were no "feasible alternatives" to his choice. *Id.* at 415-16. Commenting on the APA exception for action committed to agency discretion, the Court said that is a narrow exception applicable only in those exceptional instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." *Id.* at 410, quoting S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945).

104. See L. JAFFE, *supra* note 73 at 375.

105. See notes 60 & 61 *supra* & accompanying text.

106. 488 F.2d 904 (9th Cir. 1973).

first sentence of section 405(h) of the Social Security Act as a codification of *res judicata* principles: final decisions after a hearing are binding, rendering the opportunity to reopen such a decision subject to administrative grace.¹⁰⁷ The court's holding, however, is neither consistent with the trend of authority¹⁰⁸ nor founded on sound reasoning.

First, the provision in dispute, which makes the Secretary's post-hearing decisions "binding upon all . . . parties to such hearing,"¹⁰⁹ is read more reasonably as a confirmation of the finality of the Secretary's action, signifying only administrative conclusiveness.¹¹⁰ As the Supreme Court asserted in *Weinberger v. Salfi*,¹¹¹ "the first two sentences of section 405(h) . . . assure that administrative exhaustion will be required."¹¹² When the section is read in conjunction with section 405(g) providing for judicial review of "any final decision of the Secretary made after a hearing. . ." such an interpretation is compelling.¹¹³ As the clear purpose of Congress was to render the "binding" decisions of section 405(h) subject to judicial review under section 405(g), it is unreasonable to conclude that section 405(h) gives the Secretary absolute discretion over any decision.

Nevertheless, even if section 405(h) could be interpreted as a codification of *res judicata*, the doctrine should not be applied to preclude judicial review of reopening decisions, in that the issue of reopening differs from that of the prior determination. Rather than determining if the applicant is entitled to benefits, the Secretary must decide whether there is a sufficient, statutorily defined cause to reconsider the application.¹¹⁴ He has the discretion to apply *res judicata* if the reopening request has no merit,¹¹⁵ but that discretion

107. See notes 44-48 *supra* & accompanying text.

108. See note 12 *supra*.

109. 42 U.S.C. § 405(h) (1970).

110. See L. JAFFE, *supra* note 73 at 356.

111. 422 U.S. 749 (1975). The legislative history of § 405(h) is somewhat ambiguous. *Id.* at 758-59 n. 6. But see *Id.* at 790-94 (Brennan & Marshall, J.J., dissenting).

112. *Id.* at 757.

113. 42 U.S.C. § 405(g) (1970).

114. See regulations providing for reopening, note 4 *supra*.

115. The applicable provisions of 20 C.F.R. 404.937 (1976) provide:

The Administrative Law Judge may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:

(a) *Res judicata*. Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same

may be abused. Moreover, reopening claims often involve alleged new and material evidence¹¹⁶ that might not have been considered in the prior determination. Many courts have recognized that such circumstances warrant a relaxation of *res judicata* principles, and thus should not foreclose limited review of Social Security decisions.¹¹⁷ As the Court of Appeals for the Fourth Circuit stated: "The dictates of equity and fundamental fairness that allow a decision containing error on the face of the evidence to be reopened preclude use of the same decision as a foundation for *res judicata*."¹¹⁸ Following the majority view, the court in *Sanders* doubted that Congress intended to deny judicial relief to an applicant for reopening who has been rejected "because of a truly arbitrary administrative decision."¹¹⁹ This view not only comports with the presumption of review as embodied in the APA,¹²⁰ but also reflects the need to safeguard the special purposes of the Social Security Act. The Act was adopted to counteract the burdens imposed by modern society on vast segments of the population, notably the aged, the unemployed, and the disabled.¹²¹ The public interest requires that every qualified applicant receives the statutory benefits.¹²² Moreover, as applicants entitled to benefits because of contributions to the program have a significant personal interest, they merit adequate safeguards to protect that interest.¹²³ Consequently, courts consistently have con-

facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision. . . .

116. See 20 C.F.R. §§ 404.957 & 404.958 (1976).

117. Courts often have refused to adhere to strict *res judicata* principles when reviewing denials of second and subsequent applications for abuse of discretion, e.g., *Coulter v. Weinberger*, 527 F.2d 224 (3d Cir. 1975) (alleged error on face of evidence); *Little v. Richardson*, 471 F.2d 715 (9th Cir. 1972) (alleged error on face of evidence); *Leviner v. Richardson*, 443 F.2d 1338 (4th Cir. 1971) (alleged new and material evidence); *Noonan v. Richardson*, 338 F. Supp. 734 (W.D. Pa. 1972) (alleged new evidence); *Mullins v. Cohen*, 296 F. Supp. 260 (W.D. Va. 1969) (good cause). But see *Hobby v. Hodges*, 215 F.2d 754, 759 (10th Cir. 1954) (prior determination could not be revived by subsequent application on same issue).

118. *Grose v. Cohen*, 406 F.2d 823, 825 (4th Cir. 1969).

119. 522 F.2d at 1170, quoting *Cappadora v. Celebrezze*, 356 F.2d 1, 6 (2d Cir. 1966).

120. See notes 67-73 *supra* & accompanying text.

121. *Sayers v. Gardner*, 380 F.2d 940, 942 (6th Cir. 1967).

122. See Note, *Procedural Due Process and the Termination of Social Security Disability Benefits*, 46 S. CAL. L. REV. 1263, 1280 (1973) [hereinafter cited as *Due Process*]. See also *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) (recognizing the governmental interests in providing public welfare).

123. See *Statutory Limitations*, *supra* note 79, at 262 n. 47. Social Security disability benefits have been likened to benefits received under an insurance contract, thus they are said to involve a right rather than a privilege. See *Due Process*, *supra* note 122, at 1265.

strued the Act's remedial provisions liberally.¹²⁴ Careful oversight of agency action is warranted especially when the outcome directly affects personal interests in life and health.¹²⁵

Practical considerations also require judicial review of administrative decisions not to reopen a case. The typical claimant for disability benefits is uneducated and unskilled.¹²⁶ By statutory definition, he cannot qualify for benefits unless his income and resources are limited.¹²⁷ These traits make him highly vulnerable to administrative technicalities and intricacies, unable either to understand and negotiate the complex agency procedures,¹²⁸ or to hire counsel to pursue his claim in his behalf. Nor is the agency always a disinterested party in the proceedings. Although theoretically the interests of the agency and the applicant should coincide, applicants at times have not been informed adequately of their appellate rights.¹²⁹ Furthermore, as noted by one commentator, "[t]hrough its substantive regulations, the agency has adopted the policy of strictly construing the law against a questionable case, a posture which does not truly reflect the Congressional intent."¹³⁰ Judicial review provides the necessary safeguard against such procedural failure and administrative bias. Furthermore, although the courts should defer to an administrative decision if a case presents complex issues requiring the agency's expertise,¹³¹ they should not so treat reopening decisions, for the reopening process is governed by regulations that the judiciary is well able to construe.¹³² Moreover, as recognized by the court in *Cappadora v. Celebrezze*,¹³³ granting re-

124. See Note, *Administrative Procedure and the Social Security Disability Program*, 2 IND. LEGAL F. 295, 307 (1969) [hereinafter cited as *Administrative Procedure*].

125. See L. JAFFE, *supra* note 73, at 356.

126. See *Administrative Procedure*, *supra* note 124, at 298-99.

127. 42 U.S.C. § 423(d)(1)(A) (1970).

128. Judge Friendly described the regulations as "a model of what regulations addressed mostly to laymen—or even to lawyers—ought not to be." *Cappadora v. Celebrezze*, 356 F.2d 1, 3 n.1 (1966).

129. Cook & McKenna, *Due Process in the Administration of the Social Security Program*, 33 FED. B.J. 168, 171 (1974).

130. *Administrative Procedure*, *supra* note 124, at 302. The author also points out that "on the highest level, there is a mingling of the functions of supervising the hearing examiners, promulgating administrative regulations, and exercising the ultimate powers of review over the administrative adjudication." *Id.* at 312.

131. *Board of Governors v. Agnew*, 329 U.S. 441, 450 (1947) (Rutledge, J., concurring).

132. Determinations of new and material evidence and error on the face of the evidence are not foreign to the judiciary and do not require agency expertise. Moreover the regulations allowing reopening constitute law that can be applied.

133. 356 F.2d 1 (2d Cir. 1966).

view of reopening decisions would not overburden either the agency or the courts; in most instances, when the agency has properly fulfilled its role, the case can be disposed of by summary judgment upon presentation of the administrative record.¹³⁴

CONCLUSION

On its face, section 405(h) of the Social Security Act appears to bar judicial review under the APA of administrative decisions not to reopen an otherwise final adjudication. If the section is read in conjunction with the Act as a whole, and in view of the presumption of review embodied in the APA, such an interpretation is indefensible. Rather than being merely products of administrative grace, and hence absolutely committed to agency discretion, the regulations, which provide for reopening, are essential to the underlying purpose of the Social Security Act, which is to afford relief to qualified applicants.¹³⁵ To decide that the Act bars judicial review of reopening decisions is to defeat that purpose.

134. See note 25 *supra* & accompanying text.

135. The Secretary has power to establish only regulations that are "necessary or appropriate" to the Act's purposes. 42 U.S.C. § 405(a) (1970).