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# Note

## From Misapplication to No Application of the Issue Exhaustion Doctrine in Social Security Cases: *Sims v. Apfel*

Lori Oosterbaan\*

### I. INTRODUCTION

The Social Security Administration (“SSA”) receives over three million applications for disability benefits every year.<sup>1</sup> Bertha Meanel filed one of these applications in April 1993, complaining of back pain and depression.<sup>2</sup> The SSA Administrative Law Judge (“ALJ”) denied Meanel’s claim for benefits in 1995.<sup>3</sup> She later filed her case in federal district court to contest the SSA’s decision.<sup>4</sup> On appeal, Meanel argued that the type of job the ALJ said she could perform was not readily available in her area.<sup>5</sup> The Ninth Circuit affirmed the denial of benefits because she failed to raise the claim about job availability at the administrative and district court levels.<sup>6</sup>

The SSA has been described as “the Mount Everest of Bureaucratic Structures” and is the largest system of administrative adjudication in the United States.<sup>7</sup> The complexity of the application process for

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\* J.D. expected May 2002. I would like to thank my family and friends for all their support and encouragement.

1. SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY BULLETIN: ANNUAL STATISTICAL SUPPLEMENT 2000, at 141, available at <http://www.ssa.gov/statistics/Supplement/2000/supp2000.pdf> (last modified Feb. 27, 2001).

2. *Meanel v. Apfel*, 172 F.3d 1111, 1112 (9th Cir. 1999).

3. *Id.* at 1113.

4. *Id.* Proceeding before a magistrate, summary judgment was granted in favor of the Commissioner at the district court level. *Id.*

5. *Id.* at 1115.

6. *Id.*; see also *infra* note 117 and accompanying text (describing the Ninth Circuit’s strict dismissal of claims not presented at the administrative level).

7. See Jon C. Dubin, *Poverty, Pain, and Precedent: The Fifth Circuit’s Social Security Jurisprudence*, 25 ST. MARY’S L. J. 81, 91-92 (1993) [hereinafter Dubin, *Poverty*].

benefits is difficult for most applicants, especially those without a representative to help them understand the various paperwork and hearings involved.<sup>8</sup> Most circuit courts in the past have held that Social Security claimants may not raise new issues when bringing their case to the courts for judicial review of the agency's decision.<sup>9</sup> The Supreme Court changed this direction of Social Security law in *Sims v. Apfel*,<sup>10</sup> when it held that Social Security claimants may raise new issues upon judicial review.<sup>11</sup> The Court found barring new claims on judicial review inappropriate in the context of SSA cases due to the informal and non-adversarial nature of SSA proceedings.<sup>12</sup> This decision gives claimants a small advantage in a system that often keeps them waiting years for benefits and embroils them in an arduous and complicated application process.<sup>13</sup>

This Note begins with an overview of the SSA and the criteria for a disability determination.<sup>14</sup> It then discusses the procedural review process that a claimant's application for benefits must go through before receiving a final decision from the SSA.<sup>15</sup> This Note then summarizes the development of the issue exhaustion doctrine and the goals it serves.<sup>16</sup> Further, this Note discusses the various exceptions to the issue exhaustion rule.<sup>17</sup> This Note next briefly summarizes how courts have

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8. *The Processing of Attorney Fee Payments by the Social Security Administration: Hearing Before the Social Security Subcomm. of the House Ways and Means Comm.*, 106th Cong. (2000) (statement of Rep. Clay Shaw Jr., Chairman, House Ways and Means Comm.), available at LEXIS, Legislation & Politics Library, U.S. Congress, Committee Hearing Transcripts, Federal News Service File.

9. *Infra* notes 109-10 and accompanying text (describing conflicting court opinions on issue exhaustion at the administrative level). The First, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, and District of Columbia Circuits have held that claimants may not bring new issues on appeal because they have failed to exhaust the issues at the administrative level. See, e.g., *James v. Chater*, 96 F.3d 1341 (10th Cir. 1996); *Paul v. Shalala*, 29 F.3d 208 (5th Cir. 1994); *HCA Health Servs. of Oklahoma, Inc. v. Shalala*, 27 F.3d 614 (D.C. Cir. 1994); *Pleasant Valley Hosp. v. Shalala*, 32 F.3d 67 (4th Cir. 1994); *Smart v. Shalala*, 9 F.3d 921 (5th Cir. 1993); *Avol v. Sec'y of Health & Human Servs.*, 883 F.2d 659 (9th Cir. 1989); *Walker v. Sec'y of Health & Human Servs.*, No. 87-1159, 1998 WL 7909 (6th Cir. 1988); *Gonzalez-Ayala v. Sec'y of Health & Human Servs.*, 807 F.2d 255 (1st Cir. 1986); *Ginsburg v. Richardson*, 436 F.2d 1146 (3rd Cir. 1971).

10. *Sims v. Apfel*, 120 S. Ct. 2080 (2000).

11. *Id.* at 2086.

12. *Id.* at 2085-86.

13. *Infra* Part II.C (outlining the SSA application and appeals process).

14. *Infra* Part II.A-B.

15. *Infra* Part II.C.

16. *Infra* Part II.D.

17. *Infra* Part II.E.

applied the issue exhaustion doctrine to SSA cases in the past.<sup>18</sup> Next, *Sims v. Apfel* is discussed in detail.<sup>19</sup> Then, this Note argues that the majority and plurality opinions correctly decided that the issue exhaustion doctrine does not apply to SSA cases. Further, this Note reasons that the dissent arrived at the wrong conclusion based on the functional realities of the SSA administrative process.<sup>20</sup> Finally, this Note demonstrates how the *Sims* decision will affect SSA claimants, the federal courts, and Social Security attorneys.<sup>21</sup>

## II. BACKGROUND

Before discussing the issue exhaustion doctrine and its subsequent eradication in *Sims v. Apfel*, this section examines the fundamental aspects of the SSA that relate to the doctrine.<sup>22</sup> This section first profiles the SSA and explains the agency's main functions and duties.<sup>23</sup> It then describes the procedure followed by the SSA in determining whether a person qualifies for disability benefits<sup>24</sup> and recounts the administrative and judicial appeals process that SSA claimants must follow.<sup>25</sup> This section then explains the development of the issue exhaustion doctrine<sup>26</sup> and the various exceptions to the doctrine,<sup>27</sup> concluding with an overview of past judicial applications of the issue exhaustion doctrine.<sup>28</sup>

### A. Overview of SSA

With the change from an agricultural to an industrial society in the early 1900s came an increased need for social insurance programs.<sup>29</sup> Social insurance initiatives began with workers' compensation, implemented by the states in the 1910s and 1920s.<sup>30</sup> In addition, the federal government subsequently developed a system to help support

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18. *Infra* Part II.F.

19. *Infra* Part III.

20. *Infra* Part IV.

21. *Infra* Part V.

22. *Infra* Part II.

23. *Infra* Part II.A.

24. *Infra* Part II.B.

25. *Infra* Part II.C.

26. *Infra* Part II.D.

27. *Infra* Part II.E.

28. *Infra* Part II.F.

29. Social Security Administration, *Historical Development 1*, available at <http://www.ssa.gov/history/pdf/histdev.pdf> (last visited Feb. 19, 2001).

30. *Id.* The worker's compensation programs began in 1911 and by 1929, all but four states had enacted a law to help care for injured workers and their families. *Id.*

veterans of the Armed Forces and their widows.<sup>31</sup> Further, the need for nationwide governmental assistance became imperative during the Great Depression in the 1930s, and, as a result, President Roosevelt signed the Social Security Act into law in 1935.<sup>32</sup> The Social Security Act reacted to the economic upheaval of the Great Depression, high unemployment, and the inability of the elderly to support themselves.<sup>33</sup> The Social Security Board paid out the first benefits to retirees under the Act in 1937.<sup>34</sup> While the SSA began primarily as an assistance program for retirees,<sup>35</sup> Congress expanded it in 1950 to include disability benefits with the enactment of the Aid to the Permanently and Totally Disabled (“APTD”) program.<sup>36</sup> Once enacted, the disability programs expanded to allow greater numbers of disabled individuals the opportunity to participate in the APTD program.<sup>37</sup>

Currently, the SSA processes over three million claims each year under its two cash benefits programs.<sup>38</sup> Supplemental Security Income (“SSI”), or Title XVI, operates as a welfare program for the elderly and disabled.<sup>39</sup> The Old Age Survivors and Disability Insurance (“OASDI”), or Title II, functions as an insurance program because premiums are paid by workers and benefits are paid at the time of retirement, death, or disability.<sup>40</sup> In October 2000, the average monthly benefits to recipients were \$815 for retired workers, \$758 for disabled

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31. *Id.* After World War I, the federal government created a full system of medical care and hospitals as part of the program to assist veterans. *Id.* at 2.

32. Social Security Administration, *History Page: Brief History*, available at <http://www.ssa.gov/history/early.html> (last visited Feb. 19, 2001). When President Roosevelt signed the Social Security Act into law it only provided retirement benefits. In 1956, Social Security was expanded to include Disability Insurance. Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 401 (1996).

33. Social Security Administration, *History Page: Brief History*, available at <http://www.ssa.gov/history/keydates.html> (last visited Feb. 19, 2001).

34. *Id.*

35. The original benefits included “Aid to the Blind” in addition to retirement benefits. Diller, *supra* note 32, at 410.

36. *Id.*

37. *Id.* at 410-21 (chronicling a history of the SSA’s implementation and expansion of APTD and its disability determinations).

38. Jon C. Dubin, *Social Security Law*, 26 TEX. TECH. L. REV. 763, 763-64 (1995) [hereinafter Dubin, *Social Security*].

39. *See id.* SSI provides benefits to individuals who meet the income requirement and exhibit a disability. Diller, *supra* note 32, at 367.

40. Jon C. Dubin, *Developments in the Law of Government Benefits Programs*, 42 LOY. L. REV. 33, 37 (1996) [hereinafter Dubin, *Developments*]. Workers pay OASDI premiums through the Federal Insurance Contribution Act (“FICA”) as a deduction from their paychecks and benefits issue to the worker or her family if the worker retires, dies, or becomes disabled. *Id.*

workers, and \$782 for non-disabled widows and widowers.<sup>41</sup> Together, SSI and OASDI provide support for almost 45 million Americans each year.<sup>42</sup>

### B. Procedure for Determining Disability

Social Security claimants must apply for disability benefits through SSI and/or OASDI.<sup>43</sup> To qualify, claimants must meet the congressional definition of disability.<sup>44</sup> Congress defines disability as the inability to sustain gainful employment as a result of physical or mental impairments that can be expected to result in death or last at least one full year.<sup>45</sup> The SSA employs a five step sequential evaluation process for determining whether a claimant fits within this narrow category of disability.<sup>46</sup> The first step is whether the claimant is engaged in “substantial gainful activity.”<sup>47</sup> If the claimant participates in substantial gainful activity, benefits are denied.<sup>48</sup> If not, the decision-

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41. Social Security Administration, *Highlights of Social Security Data, October 2000*, available at <http://www.ssa.gov/policy/programs/ssd.html> (last visited Feb. 19, 2001).

42. Social Security Administration, *Annual Statistical Supplement 2000, Table 5.A4—Number and Monthly Benefits, 1940-99*, at 173, available at <http://www.ssa.gov/statistics/Supplement/2000/supp2000.pdf> (last visited Feb. 19, 2001). In 1999, 44,595,624 people received cash benefits from OASDI and SSI. *Id.* OASDI provided benefits to 38,071,894 of the 1999 beneficiaries, with the remaining 6,523,730 people qualifying under SSI. *Id.*

43. See Dubin, *Developments, supra* note 40, at 37. Under OASDI (Title II), the claimant files an application for disability insurance benefits. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987). Beginning in 1972, children were also able to apply for disability benefits. Dubin, *Poverty, supra* note 7, at 90.

44. See, e.g., Dubin, *Developments, supra* note 40, at 49 (discussing disability determinations and their role in cases involving pain).

45. 42 U.S.C.A. §§ 423(d)(1)(A), 1382c(a)(3)(A) (West 1994 & Supp. 1999). The statutes both indicate that:

[A]n individual shall be considered to be disabled for the purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

*Id.* SSI, in section 1382 of title 42, and SSDI in section 423 of title 42, use identical definitions of disability and evaluate claimants on the same criteria for determining disability. *Id.* In the battle over enacting a disability program through the SSA, those opposing the implementation of the programs passed the bill only with this strict definition of disability. Diller, *supra* note 32, at 415.

46. Social Security Administration, 20 C.F.R. §§ 404.1520(a), 416.920(a) (2001); see also *Sullivan v. Zebley*, 493 U.S. 521, 524-25 (1990) (applying the five step test to a disability applicant's impairments); Dubin, *Social Security, supra* note 38, at 766-67 (discussing the five step process).

47. 20 C.F.R. §§ 404.1520(b), 416.920(b). Congress defines “substantial gainful activity” as full- or part-time work done for pay or profit that involves a significant amount of mental or physical activity. 20 C.F.R. § 404.1572(a), (b).

48. 20 C.F.R. §§ 404.1520(b), 416.920(b).

maker uses the second step of the process to determine whether the claimant's impairments are medically severe.<sup>49</sup> A severity determination involves an examination of the claimant's impairments without consideration of the claimant's age, education, work experience, or ability to return to prior employment.<sup>50</sup> If the claimant's impairments are not considered "severe," benefits will be denied.<sup>51</sup>

If the Administration's decision-maker determines that the claimant's impairments are severe, the claim proceeds to the third step in which a determination is made regarding whether the claimant's impairments appear on the SSA's list of approved impairments.<sup>52</sup> If the claimant's impairments are listed, he or she will receive benefits without further processing of his or her claim.<sup>53</sup> If, however, the claimant's impairments are not listed, the decision-maker must evaluate the claim in the fourth step of the process. This step involves a determination of whether the impairments prevent the claimant from performing the type of work he or she has done in the past.<sup>54</sup> If the claimant's impairments do not prevent him or her from performing tasks relevant to his or her past work experience, the claimant will be denied benefits. However, if the decision-maker deems the claimant unable to perform such tasks, the claim progresses to the fifth step.<sup>55</sup> The fifth step involves a determination of whether the claimant is capable of performing any work other than the type of work he or she performed in the past.<sup>56</sup> If

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49. 20 C.F.R. §§ 404.1520(c), 416.920(c). The "severity regulation" denies benefits to claimants whose impairments do not limit their ability to perform "basic work activities." *Id.* Congress defines "basic work activities" as "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b); *see also* Bowen v. Yuckert, 482 U.S. 137, 141 (1987) (discussing severity regulation determinations).

50. Dubin, *Poverty*, *supra* note 7, at 105. Severe impairments do not include minor sight or hearing problems, unsubstantial neurosis, or any type of slight medical irregularity or combination of insignificant impairments. *Id.* The regulations were changed to this standard in 1978, allowing for the denial of claims at this second stage in the evaluation process where the impairments fail to meet the severity threshold. *Id.*

51. 20 C.F.R. §§ 404.1520(c), 416.920(c).

52. 20 C.F.R. §§ 404.1520(d), 416.920(d). The SSA uses the list of disabling impairments in *SSA Public Number 64-039*, a 205 page book used to determine a claimant's impairment. *See generally* SOCIAL SECURITY ADMINISTRATION, DISABILITY BENEFITS (2000), available at <http://www.ssa.gov/pubs/englist.html> (describing the book). The *Disability Evaluation Under Social Security* ("Blue Book") is meant for use by doctors and health care workers. *See id.*

53. 20 C.F.R. §§ 404.1520(d), 416.920(d).

54. 20 C.F.R. §§ 404.1520(e), 416.920(e). At this stage, the SSA evaluates the claimant's residual functional capacity and looks at the physical and mental demand required to perform work of the type she has done in the past. 20 C.F.R. §§ 404.1520(e), 416.920(e).

55. 20 C.F.R. §§ 404.1520(e), 416.920(e).

56. 20 C.F.R. §§ 404.1520(f), 416.920(f). In this determination, the agency considers the claimant's "residual functional capacity and [the claimant's] age, education, and past work

the claimant's impairments prevent him or her from doing other work, the claimant will receive benefits. If the decision-maker finds the claimant physically and mentally able to pursue another type of gainful employment, however, he or she will be denied benefits.<sup>57</sup>

### C. Appeals Process for Denial of Benefits

When a claimant applies for benefits through the SSA, his or her claim may go through some or all of a five-step procedural review process.<sup>58</sup> First, the claimant must apply to an approved state agency.<sup>59</sup> Claimants may apply either in person at a local Social Security office or over the telephone.<sup>60</sup> The claimant must gather medical evidence and occupational information that he or she must then submit to the local agency for a disability determination.<sup>61</sup> On average, a claimant must wait 155 days to receive a determination on his or her disability application.<sup>62</sup> If the claimant is dissatisfied with the state agency's decision, he or she may participate in the second step of the process by asking the state agency to reconsider his or her claim.<sup>63</sup> A claimant has sixty days to file a request for reconsideration. Completion of this review takes an average of fifty days.<sup>64</sup> If, after reconsideration, the claimant remains dissatisfied, he or she may participate in the third step of the process by requesting review within sixty days by a Social Security Administration Administrative Law Judge ("ALJ").<sup>65</sup>

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experience" to consider other possible jobs the claimant could perform. 20 C.F.R. §§ 404.1520(f)(1), 416.920(f)(1).

57. *Id.*

58. 42 U.S.C. § 421 (1994); 20 C.F.R. § 404.1503; *see also* LAWRENCE A. FROLIK & RICHARD J. KAPLAN, *ELDER LAW IN A NUTSHELL* § 11.8 (2d ed. 1999).

59. 42 U.S.C. § 421(a)(2). State agencies must notify the SSA of their desire to make disability determinations and must make their decisions based on the guidelines set forth in the SSA regulations. *Id.* § 421(a)(1).

60. Social Security Administration, *How to Apply for Social Security Disability Benefits*, available at <http://www.ssa.gov/disability.html> (last visited Feb. 19, 2001).

61. Jennifer J. Dickinson, Comment, *Square Pegs, Round Holes, and the Myth of Misapplication: Issue Exhaustion and the Social Security Disability Benefits Process*, 49 EMORY L. J. 957, 962 (2000).

62. *Id.*

63. Social Security Administration, 20 C.F.R. § 404.907 (2001). The state agency reviews the disability claims de novo when a claimant requests reconsideration. *Id.* § 404.913. The claimant has sixty days from the date of receiving notice of the agency's decision to make a request for reconsideration in writing. *Id.* § 404.909. An appeal de novo is one "in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." BLACK'S LAW DICTIONARY 94 (7th ed. 1999).

64. Dickinson, *supra* note 61, at 962.

65. *Id.*



In this third step, the ALJ reviews the claimant's application for disability benefits *de novo*,<sup>66</sup> accepting evidence and rendering a decision on the claimant's qualifications for disability benefits.<sup>67</sup> At this stage, the ALJ functions as a judge, an investigator and an attorney for each side.<sup>68</sup> The ALJ investigates the claims and finds issues and arguments for both the SSA and for the claimant, making an objective determination in the end. The ALJ also has the duty to inform the claimant of his or her right to a representative for assistance in the application process.<sup>69</sup> This representative may be an attorney or any other person the claimant finds suitable.<sup>70</sup> Often, however, claimants cannot afford an attorney and about one-third of all claimants do not obtain a representative at all.<sup>71</sup> This is the first arena for the claimant to present his or her case orally to a Social Security official.<sup>72</sup> A determination from the ALJ generally takes 265 days.<sup>73</sup>

If the claimant disagrees with the ALJ's decision, he or she may proceed to the fourth step by requesting review by the Appeals Council of the Department of Health and Human Services.<sup>74</sup> From the time of the ALJ's decision, the claimant has sixty days to request a review. To do so, the claimant must fill out a form with just three lines provided for the claimant to state his or her reasons for requesting a review.<sup>75</sup> This form, Form HA-520, entitles the claimant to receive another *de novo* review from the SSA.<sup>76</sup> The SSA designed Form HA-520 with the

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66. 42 U.S.C. § 405(b) (1994); 20 C.F.R. §§ 404.967 to 404.983; *see also supra* note 63 (defining an appeal *de novo*).

67. 20 C.F.R. § 404.944. The issues before the ALJ include all issues not decided in favor of the claimant and any other issues, including new issues, that either the ALJ or the claimant raises at the hearing. *Id.*

68. Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1304 (1997) [hereinafter Dubin, *Torquemada*].

69. *Binion v. Shalala*, 13 F.3d 243, 245 (7th Cir. 1994). The claimant has a right to counsel, which can be waived if the ALJ properly informed the unrepresented claimant of her right to counsel and the manner in which counsel can assist her and the associated fee limitations. *Id.*

70. Dubin, *Torquemada*, *supra* note 68, at 1294 (stating that "many law offices . . . cover a large portion of their public benefits adjudications with paralegals and reserve their lawyers for court proceedings on judicial review").

71. *Id.*

72. Dickinson, *supra* note 61, at 963.

73. *Id.*

74. Social Security Administration, 20 C.F.R. § 404.967 (2001). This request must be filed with the SSA not more than sixty days after notification of the ALJ's decision. *Id.*

75. Social Security Administration, *Request for Review of Hearing Decision/Order (Form HA-520)* 1, available at <http://www.ssa.gov/online/ha-520.pdf> (last visited Feb. 19, 2001) [hereinafter *Request for Review of Hearing Decision/Order*].

76. Petitioner's Brief at 20, *Sims v. Apfel*, 120 S. Ct. 2080 (2000) (No. 98-9537); *see also*

intent that it would take a claimant about ten minutes to complete.<sup>77</sup> The instructions for the form contain no warning that issues not raised in the request for Appeals Council review will be waived in federal court.<sup>78</sup> A claimant's case may also be brought in front of the Appeals Council through a random selection process the SSA uses as a check for accuracy and ALJ proficiency.<sup>79</sup> An Appeals Council review averages 441 days,<sup>80</sup> after which a claimant will receive either a denial of review, dismissal of his or her case, or a grant of review.<sup>81</sup>

If the claimant receives an unfavorable result from the Appeals Council, he or she may then take the fifth step in the process and file a claim in federal district court.<sup>82</sup> Claimants may file civil complaints against the SSA if they have met the requirements of section 405(g) of the Social Security Act, the statutory provision that grants claimants the right to appeal their claims to the federal courts after all administrative appeals have been unsatisfactorily completed.<sup>83</sup>

#### D. Development of the Issue Exhaustion Doctrine

Section 405(g) of the Social Security Act allows for judicial review of SSA administrative decisions provided the claimant first received a

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*Request for Review of Hearing Decision/Order*, *supra* note 75, at 1.

77. Petitioner's Brief at 21, *Sims* (No. 98-9537).

78. Social Security Administration, *Request for Review of Decision/Order of Administrative Law Judge Form HA-520*, available at <http://www.ssa.gov/online/ha-520.html> (last visited Feb. 19, 2001) (listing the instructions for completing Form HA-520).

79. Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 243 (1990). The case arrives at the Appeals Council either by "requests for review" where the claimant completes Form HA-520 seeking review or by "own-motion review" in which the Appeals Council decides to review a case sua sponte. *Id.* Sua sponte is defined as occurring "[w]ithout prompting or suggestion; on its own motion." BLACK'S LAW DICTIONARY 1437 (7th ed. 1999).

80. Dickinson, *supra* note 61, at 966.

81. Koch & Koplow, *supra* note 79, at 255.

82. 42 U.S.C. § 405(g) (1994). Again, a suit must be filed within sixty days of receiving notice of the Appeals Council's decision. *Id.* Any "final" decision of the SSA may be brought to the District Court for judicial review of the administrative decision. *Id.*

83. *Id.* 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 a decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia . . . .

*Id.*

“final” decision from the administrative agency.<sup>84</sup> A claimant must fulfill two requirements for an Agency decision to be considered “final.”<sup>85</sup> First, the claimant must have presented the claim for benefits to the SSA. This requirement cannot be waived.<sup>86</sup> Second, the claimant must exhaust all administrative remedies before bringing his or her claim to federal court.<sup>87</sup> This second requirement developed into an “issue exhaustion” doctrine under which the reviewing federal district court generally will not review issues that were not presented at the administrative level, unless the case falls within an exception.<sup>88</sup> If the court finds that the case fits within an exception, the second requirement, exhaustion, will be waived.<sup>89</sup>

The issue exhaustion doctrine found its roots in the familiar concept that an appellate court will not address new issues on appeal.<sup>90</sup> Use of the doctrine in administrative law cases began with a case involving the National Labor Relations Board, *Myers v. Bethlehem Shipbuilding Corp.*,<sup>91</sup> in 1938 and has since received widespread use in decisions involving many different agencies.<sup>92</sup> Courts have also applied the issue exhaustion doctrine in criminal cases, whereby defendants lose the opportunity to plead issues they failed to raise at the trial level.<sup>93</sup> The

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84. *Id.*; see also Dubin, *Developments, supra* note 40, at 37-38 (discussing the judicial interpretation of a “final” determination).

85. *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976). The *Mathews* Court drew these two requirements out of its decision in *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975). *Id.*

86. *Id.*

87. *Id.*

88. *Infra* Part II.E (discussing exceptions to issue exhaustion). Courts generally allowed exceptions to issue exhaustion when further administrative proceedings would be futile, would produce an inadequate remedy, or would result in irreparable harm to the litigant. *Id.*

89. Each of the following cases illustrate the issue exhaustion doctrine: *Heckler v. Ringer*, 466 U.S. 602 (1984); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); *James v. Chater*, 96 F.3d 1341 (10th Cir. 1996); *Pleasant Valley Hosp., Inc. v. Shalala*, 32 F.3d 67 (4th Cir. 1994); *Paul v. Shalala*, 29 F.3d 208 (5th Cir. 1994); *Smart v. Shalala*, 9 F.3d 921 (11th Cir. 1993); *Weiket v. Sullivan*, 977 F.2d 1249 (8th Cir. 1992); *Avol v. Sec’y of Health & Human Servs.*, 883 F.2d 659 (9th Cir. 1989); *Gonzalez-Ayala v. Sec’y of Health & Human Servs.*, 807 F.2d 255 (1st Cir. 1986); *Krafsur v. Sec’y of Health & Human Servs.*, 757 F.2d 446 (1st Cir. 1985); *Ginsburg v. Richardson*, 436 F.2d 1146 (3d Cir. 1971); *Bailey v. Finch*, 312 F. Supp. 918 (N.D. Miss. 1970).

90. Dubin, *Torquemada, supra* note 68, at 1310; see also *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) (stating that “[o]rordinarily an appellate court does not give consideration to issues not raised below”).

91. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) (holding that a district court cannot enjoin the NLRB from adjudicating unfair labor claims).

92. *Id.* at 50.

93. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (holding that first time claims in a state habeas proceeding are not reviewed in a federal habeas proceeding). The Court applied a similar issue exhaustion standard in this criminal case where the petitioner was convicted on charges of

doctrine developed from the *Myers* case, spreading to agencies such as the SSA. By 1996, all but three federal circuits had directly applied the doctrine to SSA cases.<sup>94</sup>

Issue exhaustion requirements were created either by statute or in a prudential manner by the courts.<sup>95</sup> Very few administrative agencies have regulations that specifically provide for issue exhaustion.<sup>96</sup> In the absence of a specific statutory mandate, issue exhaustion requirements evolved from judicial interpretation of agency regulations and congressional intent.<sup>97</sup> Courts point to section 405(g) as the basis of the doctrine, relying on the statement that claimants may only file cases in district court after receiving a “final” decision from the SSA.<sup>98</sup> When a court determines that an issue has not been exhausted at the administrative level, the court may refuse to hear the issue by employing the issue exhaustion doctrine and declaring that no “final” decision was reached on that issue.<sup>99</sup>

Proponents of the issue exhaustion doctrine state that it serves two main goals: allowing the Agency to maintain authority and promoting judicial economy.<sup>100</sup> Within those two goals lie several specific objectives.<sup>101</sup> First, the Agency specifically created a review procedure to hear claims within its realm of governance. An interruption of this administrative process frustrates the purpose of administrative review.<sup>102</sup> Second, the Agency handles cases of this type daily, thereby

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rape and capital murder to enforce the principle that the states have a right to hear the issues first and state judicial proceedings are not to be interrupted. *Id.* at 732.

94. Dubin, *Torquemada*, *supra* note 68, at 1313. The Second, Eleventh, and District of Columbia Circuits were the only ones not to directly apply issue exhaustion to SSA cases by the fall of 1996. *Id.*

95. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (holding that a federal prisoner need not exhaust all administrative procedures of the Federal Bureau of Prisons).

96. *Fed. Power Comm'n v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497 (1955). Section 19(b) of the Natural Gas Act specifically prohibits a plaintiff from bringing an issue to the Court of Appeals unless she has had the issue heard previously by the Federal Power Commission. *Id.* at 499.

97. *Darby v. Cisneros*, 509 U.S. 137, 144 (1993) (applying issue exhaustion doctrine to an administrative decision made by the Department of Housing and Urban Development); *Omnipoint v. Fed. Communications Comm'n*, 78 F.3d 620, 635 (D.C. Cir. 1996) (upholding issue exhaustion doctrine in a case against the Federal Communications Commission).

98. *Bowen v. City of New York*, 476 U.S. 467, 482 (1986) (concluding that members of a class action can be certified despite the failure to exhaust all administrative remedies).

99. *Id.* at 483.

100. Dubin, *Torquemada*, *supra* note 68, at 1307.

101. *Id.*

102. *McKart v. United States*, 395 U.S. 185, 193-94 (1969) (stating that the “agency, like a trial court, is created for the purpose of applying a statute in the first instance”).

possessing a level of expertise in this area not held by the courts.<sup>103</sup> Third, it is more efficient to let the claims advance through administrative channels than to stop them at an intermediary stage and remove them to federal court.<sup>104</sup> Fourth, failure to exhaust issues at the administrative level may impede the Agency's ability to develop an adequate factual record from which a court might make a more accurate, informed decision.<sup>105</sup> Keeping the claims within the administrative body for review also gives the Agency the opportunity to correct its own mistakes and prevents the flooding of federal court dockets.<sup>106</sup> As an administrative body, the Agency acts separately, possessing its own regulations and powers; those in favor of issue exhaustion argue that disrupting administrative proceedings takes away from the Agency's autonomy and encourages a policy whereby courts give the Agency the time necessary to resolve matters falling under its regulations.<sup>107</sup> Finally, application of the doctrine prevents the claimant from unfairly surprising the agency with new issues upon judicial review.<sup>108</sup>

Circuits have differed in their application of the issue exhaustion doctrine to SSA cases. Some circuits claimed a lack of subject matter jurisdiction and refused to hear new issues at the judicial level.<sup>109</sup> Other circuits applied the doctrine as a judicially created rule, dismissing claims based solely on the claimant's waiver of new issues.<sup>110</sup> While

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103. *Id.* at 194.

104. *Id.*

105. *Id.*

106. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (stating that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has the opportunity for correction).

107. *McCarthy*, 503 U.S. at 145. The Court points out, "Exhaustion concerns apply with particular force when the action under review involves the exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise." *Id.* (citing *McKart v. United States*, 395 U.S. 185, 194 (1969)); see also *Bowen v. City of New York*, 476 U.S. 467, 484 (1986).

108. Dubin, *Torquemada*, *supra* note 68, at 1309.

109. See, e.g., *Paul v. Shalala*, 29 F.3d 208, 210 (5th Cir. 1994) (holding that a claimant's failure to raise claims with the Appeals Council that the ALJ was required by regulation to give the treating physician the opportunity to supplement his initial report deprived Court of Appeals of jurisdiction to review that claim); *Pleasant Valley Hosp., Inc. v. Shalala*, 32 F.3d 67, 70 (4th Cir. 1994) (holding that Pleasant Valley's challenge of the regulations regarding provider accounts and income offset would not be considered because it was not raised at the administrative level).

110. See, e.g., *Smart v. Shalala*, 9 F.3d 921, 924 (11th Cir. 1993) (dismissing the claimant's argument of an incorrect record because it was not raised below); *Avol v. Sec'y of Health & Human Servs.*, 883 F.2d 659, 661 (9th Cir. 1989) (refusing to hear issue that a contract did not authorize certain agency conduct because it was a new issue); *Ginsburg v. Richardson*, 436 F.2d 1146, 1152 (3rd Cir. 1971) (dismissing the claimant's objection to the conduct of the examiner

the SSA claimed that the issue exhaustion doctrine applies only to pro se claimants, case law is conflicting on this subject.<sup>111</sup> The SSA did not regulate whether the doctrine applies only to attorney representatives or to all claimant representatives,<sup>112</sup> but the Fifth Circuit did not consider whether the claimant has representation in its decision to apply the doctrine.<sup>113</sup> The Ninth Circuit, on the other hand, held that the rule may be applied only when claimants had representation.<sup>114</sup> Some courts, instead, applied a balancing test, weighing the interests of upholding the exhaustion rule against the potential harm to a claimant under the doctrine.<sup>115</sup> The courts in these cases considered the loss of judicial review for the plaintiff against the policy reasons for enforcing an issue exhaustion rule.<sup>116</sup> Other courts strictly applied the doctrine, dismissing claims outright if the issues were not presented at the administrative level.<sup>117</sup>

#### *E. Exceptions to the General Rule of Issue Exhaustion*

While most courts applied the general rule that no new issues may be heard on judicial review, courts also developed several exceptions to this rule.<sup>118</sup> Although courts usually adhered to the doctrine, the exhaustion requirement was “not inflexible” and was created for use in conjunction with an understanding of the goals of the doctrine and of the specific administrative agency involved.<sup>119</sup> Exceptions to this

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because it was raised for the first time at the Third Circuit); *Bailey v. Finch*, 312 F. Supp. 918, 920 (N.D. Miss. 1970) (refusing to consider claimant’s argument regarding the application of certain recovery provisions in the Social Security Act because they were not raised before).

111. *Dickinson*, *supra* note 61, at 972. Pro se is defined as, “[o]ne who represents oneself in a court proceeding without the assistance of a lawyer.” BLACK’S LAW DICTIONARY 1237 (7th ed. 1999).

112. *Dickinson*, *supra* note 61, at 972.

113. *Id.*

114. *Id.* (citing *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999)).

115. *McKart v. United States*, 395 U.S. 185, 197 (1969); *see also Yakus v. United States*, 321 U.S. 414 (1944).

116. *McKart*, 395 U.S. at 197. The Court stated that “[s]uch a result [of loss of judicial review] should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review.” *Id.* The Court went on to apply the balancing test by weighing the governmental interests and the petitioner’s loss of remedies should the issue exhaustion doctrine preclude his claim. *Id.*

117. *Meanel*, 172 F.3d at 1115. The court in *Meanel* held that “appellants must raise issues at their administrative hearings in order to preserve them on appeal before this Court” and accused the appellant of attempting to circumvent the “well-established rule” of issue exhaustion. *Id.*; *see also Avol v. Sec’y of Health & Human Servs.*, 883 F.2d 659, 659 (9th Cir. 1989).

118. *McKart*, 395 U.S. at 193; *see also Dubin, Torquemada*, *supra* note 68, at 1309 (briefly discussing the discretionary nature of the doctrine and various exceptions).

119. *Atlantic Richfield Co. v. U.S. Dept. of Energy*, 769 F.2d 771, 781 (D.C. Cir. 1985)

waivable requirement of a "final" decision<sup>120</sup> allowed a litigant to bring new issues in court as long as he or she fulfilled the non-waivable requirement by presenting his or her case to the agency.<sup>121</sup> Courts developed various exceptions to the rule that comport with the goals of the issue exhaustion doctrine.<sup>122</sup> However, because exceptions fall under the court's discretion, no uniform set of exceptions developed.<sup>123</sup>

A common exception arose when the Agency waives the issue exhaustion requirement because further administrative proceedings would be futile.<sup>124</sup> Where further examination of the claims at an administrative proceeding would produce the same results, exhaustion defeated the purpose of the requirement.<sup>125</sup> If, after further administrative proceedings, the agency would most likely return the same result to the claimant, judicial and agency efficiency are best served by the claimant filing in federal court, rather than delaying the inevitable.<sup>126</sup> One particular type of futility exception arises in instances of abuse of the administrative process or agency bias.<sup>127</sup> For instance, if an agency makes a decision beyond the scope of its authority, judicial review of such egregious actions would be appropriate.<sup>128</sup> Litigants arguing that the agency predetermined an issue or held a bias may also be futile to try before the administration itself.<sup>129</sup>

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(citing *Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n.*, 707 F.2d 1485, 1488 (D.C. Cir. 1983), quoting *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1156 (D.C. Cir. 1979)).

120. *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976).

121. *Id.* The litigant must still perform the non-waivable element of the finality requirement. *Id.*

122. *See infra* notes 124-36 and accompanying text (discussing the three noted exceptions that occur when the agency waives the issue exhaustion requirement, where the administrative remedy would be inadequate, and when the litigant would be irreparably harmed by completion of the administrative process).

123. *Atlantic Richfield Co.*, 769 F.2d at 781; *see also* *Wash. Assoc. for Television & Children v. FCC*, 712 F.2d 677, 683 (D.C. Cir. 1983) (implying that courts may create a new exception to the doctrine at any time).

124. *Weinberger v. Salfi*, 422 U.S. 749, 765-66 (1975). In *Weinberger*, the claimants sought review of the constitutionality of that part of the SSA regulations stating that survivors' benefits could only be received by eligible relatives if the relationship existed at least nine months prior to the decedent's death. *Id.* at 753. Continuing to argue the constitutionality of the statute at the administrative level was futile because only the federal courts could decide on that issue. *Id.*

125. *Atlantic Richfield Co.*, 769 F.2d at 782 (citing *Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n.*, 707 F.2d 1485, 1489 (D.C. Cir. 1983)).

126. *Id.*

127. *Washington Ass'n. for Television & Children*, 712 F.2d at 682.

128. *Id.*

129. *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992). The Court said that judicial remedies may be more appropriate where "the administrative body is shown to be biased or has otherwise predetermined the issue before it." *Id.*

An exception then existed for those situations in which the litigant requests review of the agency's procedural methods.<sup>130</sup>

Second, the requirement was waivable where the administrative remedy would be inadequate.<sup>131</sup> There may be situations where the Agency had the authority to hear claims on a certain issue but cannot grant the specific relief requested.<sup>132</sup> The Secretary of Health and Human Services had the option of waiving the issue exhaustion requirement if the Secretary believed that the usefulness of the administrative process had been served, or that the agency lacked the power to help the claimant.<sup>133</sup>

Third, the issue exhaustion requirement may be waived where the litigant would be irreparably harmed by completion of the administrative process.<sup>134</sup> For example, if the administrative process causes undue delay in the applicant receiving life-sustaining benefits, judicial review without a full exploration of the administrative process would be appropriate.<sup>135</sup> Wrongful denials of benefits also could create irreparable harm to claimants, and in those situations the claimants deserved the right to have their claims heard in court, even if the claims were not raised at the administrative proceedings.<sup>136</sup>

#### F. Judicial Application of the Issue Exhaustion Requirement

The Supreme Court decision in *United States v. L. A. Tucker Truck Lines, Inc.*<sup>137</sup> originally set out the guidelines of issue exhaustion as

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130. *Id.*

131. *Id.* at 147. The *McCarthy* Court indicated that in some instances an agency may not possess the power to award the relief requested by the litigant. *Id.* at 147-48 (citing *Gibson v. Berryhill*, 411 U.S. 565, 575 n.14 (1973)). The Court gives an example of a litigant bringing a constitutional issue for consideration where the agency lacks the power to hear constitutional claims. *Id.* at 148.

132. *Id.* at 148 (citing *McNeese v. Bd. of Ed. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 675 (1963)).

133. *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976) (discussing *Weinberger* and the Secretary's ability to waive issue exhaustion).

134. *McCarthy*, 503 U.S. at 146-47.

135. *Id.* at 147. If the timeframe for adjudication at the administrative level is unreasonable or, due to a particular claimant's situation a more reasonable delay would still cause irreparable harm, a failure to exhaust would be excused. *Id.* (citing *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 773 (1947)).

136. *Bowen v. City of New York*, 476 U.S. 467, 477 (1986). In *Bowen*, the plaintiffs, a certified class, were all found by the New York Office of Disability Determinations to have severe mental impairments but were denied benefits. *Id.* at 473. Without a waiver of the issue exhaustion requirement, the plaintiffs would not have received the disability benefits to which they were entitled. *Id.* at 478.

137. *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952) (applying the issue exhaustion doctrine under the Administrative Procedure Act in a case involving the Interstate



used in both SSA cases and cases from other agencies.<sup>138</sup> In *L. A. Tucker*, a motor carrier applied to the Interstate Commerce Commission for a certificate to extend its route.<sup>139</sup> Following a hearing by an examiner of the Commission at the request of other motor carriers and a railroad, the Commission granted the motor carrier the certificate.<sup>140</sup> The plaintiff in *L. A. Tucker* was one of the motor carriers objecting to the extension of the route. He requested a rehearing of the decision granting the certificate.<sup>141</sup> The plaintiff depleted all available administrative appeals and brought suit under section 10(c) of the Administrative Procedure Act ("APA"),<sup>142</sup> alleging, for the first time in the district court, that the Commission's action was invalid for want of jurisdiction.<sup>143</sup> The Court held that under the APA, issue exhaustion was necessary to give the agency an opportunity to correct its own mistakes and to encourage "orderly procedure."<sup>144</sup> The Court noted that the agency would be put on notice about new issues by enforcing issue exhaustion and that fairness dictated the application of the issue exhaustion doctrine.<sup>145</sup> Application of the issue exhaustion requirement as outlined in *L. A. Tucker* is mirrored in SSA cases because of the similarities between the Social Security Act and the APA.<sup>146</sup>

Most circuits extended the rule in *L. A. Tucker* to SSA cases, enforcing the exhaustion requirement strictly and dismissing issues that

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Commerce Commission).

138. *Id.* at 35-38. The opinion refers to the appellee's new issue in court as "clearly an afterthought" and as a result of its failure "to bestir itself to learn the facts." *Id.* at 35-36.

139. *Id.* at 34.

140. *Id.*

141. *Id.*

142. Although an umbrella statute for all administrative agencies, courts need not consider the Administrative Procedure Act ("APA") in SSA cases because of their similarity. *Richardson v. Perales*, 402 U.S. 389, 409 (1971). The Court held that, "[w]e need not decide whether the APA has general application to social security disability claims, for the social security administrative procedure does not vary from that prescribed by the APA. *Id.* Indeed, the latter is modeled upon the Social Security Act." *Id.* The *L. A. Tucker* decision is nonetheless important because the language of section 10(c) of the APA and section 405(g) of the SSA regulations bear great similarity. *See* Dubin, *Torquemada*, *supra* note 68, at 1303.

143. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. at 34. Plaintiff took exception to the Commission's decision; on rehearing, however, the decision was affirmed. *Id.* Plaintiff then sought a hearing by the full Commission, and this was denied. *Id.* Plaintiff then petitioned for "extraordinary relief" and was again denied. *Id.* At this point, the plaintiff appealed to the District Court to have the decision set aside. *Id.*

144. *Id.* at 37.

145. *Id.* The *L. A. Tucker* Court decided that fairness required that "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Id.*

146. *See supra* note 142 (stating that the APA was modeled after the Social Security Act).

claimants presented for the first time in federal court.<sup>147</sup> For instance, in *Paul v. Shalala*,<sup>148</sup> the Fifth Circuit decided that it lacked subject matter jurisdiction because the plaintiff, Ms. Paul, did not present certain issues raised in court at the administrative level.<sup>149</sup> The Fifth Circuit decision in *Paul* held that the court only had jurisdiction over final decisions resulting from the claimant's exhaustion of all administrative remedies.<sup>150</sup> The disability applicant in *Paul* argued, for the first time in district court, that her personal physician should have been able to augment an initial SSA report.<sup>151</sup> The court held that Ms. Paul never raised this issue at administrative proceedings and applied the issue exhaustion doctrine.<sup>152</sup>

The First Circuit also dismissed the claims of a disability claimant in *Gonzalez-Ayala v. Secretary of Health and Human Services*,<sup>153</sup> but under different reasoning than that used in *Paul*.<sup>154</sup> In *Gonzalez-Ayala*, the claimant suffered from several impairments, including gout, arthritis, poor vision, and high blood pressure.<sup>155</sup> The claimant properly received a final decision from the ALJ after the Appeals Council declined to hear the case.<sup>156</sup> The First Circuit did not mention any jurisdictional issues; however, the court did state the general rule of issue exhaustion and applied it to this claimant's case.<sup>157</sup> The court called it a procedural problem and would not hear a new issue involving a complaint of ALJ error because the claimant did not raise this issue to the Appeals Council or to the district court.<sup>158</sup>

147. See, e.g., *Gonzalez-Ayala v. Sec'y of Health & Human Servs.*, 807 F.2d 255, 256 (1st Cir. 1986).

148. *Paul v. Shalala*, 29 F.3d 208 (5th Cir. 1994).

149. *Id.* at 210.

150. *Id.* (citing *Muse v. Sullivan*, 925 F.2d 785, 791 (5th Cir. 1991) (per curiam)).

151. *Id.* Ms. Paul alleged that the "ALJ failed to comply with [20 C.F.R.] § 404.1512(e)(1)" which lets a doctor add to an initial opinion of the patient if the ALJ wants more information. *Id.*

152. Looking at the record, the court held:

The closest Paul comes to a § 404.1512(e)(1) issue in her Appeals Council brief is the statement that "[f]or the [ALJ] to assume that Dr. Hunter did not have the totality of the records in his possession is an unsubstantiated assumption." This assertion falls well short of an argument that § 404.1512(e)(1) . . . requires that the doctor be recontacted.

*Id.* The court referred to the exhaustion issue as "her own doing" and withheld jurisdiction. *Id.* at 211.

153. *Gonzalez-Ayala v. Sec'y of Health & Human Servs.*, 807 F.2d 255, 256 (1st Cir. 1986).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* (quoting *United States v. Krynicki*, 689 F.2d 289, 291 (1st Cir. 1982)).

158. *Id.* The SSA claimant argued "that the ALJ erred in basing his determination of non-

In 1999, the Seventh and Eighth Circuits split from the other circuits by allowing claimants to bring new issues at the federal court level in SSA cases, declaring that all SSA cases should be excepted from the issue exhaustion doctrine.<sup>159</sup> In *Johnson v. Apfel*, the Seventh Circuit condemned the application of the issue exhaustion doctrine in SSA cases because the Appeals Council does not function like an appellate court so much as it acts like a complaint department.<sup>160</sup> In *Harwood v. Apfel*, the Eighth Circuit held that application of the doctrine “makes little sense” in light of the circumstances of a Social Security disability case.<sup>161</sup>

In *Johnson*, the disability claimant brought a new issue regarding findings by the ALJ based on physician reports.<sup>162</sup> After discussing the general rule of issue exhaustion, the Seventh Circuit decided that the application of issue exhaustion to a case involving the Appeals Council and its regulations was erroneous.<sup>163</sup> To support this view, the court made several observations about the management of the SSA appeals process.<sup>164</sup> First, the court noted that the SSA did not even argue that Johnson should not be able to raise a new issue in court.<sup>165</sup> Second, the court noted that the SSA never mentioned issue exhaustion to the claimant at any point in the appeals process.<sup>166</sup> Third, the court found that a review by the Appeals Council should be plenary unless noted as

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disability on medical factors alone without considering vocational factors.” *Id.*

159. *Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999) (declining to adopt a waiver rule that compelled disappointed applicants for benefits to file full briefs with the Appeals Council to preserve their right to judicial review); *Harwood v. Apfel*, 186 F.3d 1039, 1042 (8th Cir. 1999) (holding that the general rule of issue exhaustion may be inapplicable to some cases involving the denial of disability benefits).

160. *Johnson*, 189 F.3d at 563.

161. *Harwood*, 186 F.3d at 1042.

162. *Johnson*, 189 F.3d at 562. Johnson worked as a carpenter before applying for disability benefits, and the ALJ found that he could still perform carpentry work though he only had “limited use of his right arm.” *Id.* Johnson used as a grounds for review the fact that the ALJ failed to explain how he could do carpentry with only limited use of his dominant hand. *Id.*

163. *Id.* at 562-63. The court generally requires that “an issue to be preserved must be developed and not merely mentioned” in order to stand on appeal. *Id.* at 562. This doctrine, however, “cannot be squared with the regulations governing appeals to the Appeals Council.” *Id.* at 563.

164. *Id.* at 563-64.

165. *Id.* at 563. The district court took it upon itself to refuse review of the new issue, without a SSA argument of failure to exhaust. *Id.*

166. *Id.* at 563. Johnson took all the required steps in the appeals process, and while he filled out the correct forms, there was never a mention made verbally or printed on the appeals forms. As the Seventh Circuit points out, “The Social Security Administration knows how to draft a waiver rule.” *Id.*

otherwise by the Appeals Council.<sup>167</sup> Finally, appeals to the Appeals Council only receive approximately ten minutes of agency time.<sup>168</sup> To file for this consideration, the claimant must fill out a simple one-page form with just a few lines on which to state the reason for appeal.<sup>169</sup> The court stated that the procedures of the Appeals Council did not promote a fair and thorough adjudication of the claimant's appeal.<sup>170</sup>

The Eighth Circuit employed similar reasoning in *Harwood* and also based its decision on the informal and non-adversarial nature of SSA proceedings.<sup>171</sup> The court gave practical reasons for disregarding the issue exhaustion rule where the claimant failed to raise issues concerning the ALJ's use of a physician's testimony.<sup>172</sup> The court found that the agency itself does not enforce a waiver rule; in fact, the SSA routinely considers arguments not raised by the claimant and does so in an informal, non-adversarial manner.<sup>173</sup> The court also stressed the fact that the non-adversarial proceedings and one-page form used to request an appeal from the Appeals Council did not inform claimants that issues not raised will be waived.<sup>174</sup> Finally, the court rejected the Commissioner's interpretation of two cases used to support the issue exhaustion doctrine.<sup>175</sup>

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167. *Id.* As with all reviews made by the SSA, the entire application is to be reviewed by the agency at each step, both those issues the claimant seeks to have reviewed and any additional issues the administrator wishes to review. *Id.* Plenary review refers to review that is "[f]ull; complete; entire." BLACK'S LAW DICTIONARY 1175 (7th ed. 1999).

168. *Johnson*, 189 F.3d at 563; see also *Dubin, Torquemada*, *supra* note 68, at 1326 n.181.

169. *Johnson*, 189 F.3d at 563. Form HA-520 has only two inches in which a claimant may express his or her reasons for appeal; while additional materials (briefs) are permitted, they are not required. *Id.*

170. *Id.*

171. *Harwood v. Apfel*, 186 F.3d 1039, 1042-43 (8th Cir. 1999).

172. *Id.*

173. *Id.* The court opined that "the Commissioner urges us to adopt a waiver rule that the agency itself does not enforce" and made reference to the agency's adoption of a plenary review system for all cases reaching the Appeals Council. *Id.* at 1042.

174. *Id.* at 1043. Form HA-520 gives the claimant only three lines to write the reason for requesting review, but does not mention that any issues not mentioned will be waived if the case is brought to the district court. The regulations do state, however, that the Appeals Council may "review your case for any reason." *Id.*

175. *Id.* The Commissioner argued that *Weikert v. Sullivan*, 977 F.2d 1249, 1254 (8th Cir. 1992), and *Johnson v. Chater*, 108 F.3d 942 (8th Cir. 1997), strengthened the SSA's argument to apply the issue exhaustion doctrine to this case. The Eighth Circuit disagreed, holding that both of those cases involved claimants failing to bring issues at both the administrative proceedings and at the district court level. *Id.*

### III. DISCUSSION

#### A. *Facts of Sims v. Apfel*

Ms. Sims filed for SSI and OASDI on August 11, 1994, alleging disability due to several impairments, including degenerative joint disorder and carpal tunnel syndrome.<sup>176</sup> The state agency denied Ms. Sims' application for benefits. Consequently, she appealed to the SSA Administrative Law Judge.<sup>177</sup> Ms. Sims' attorney filed a letter with the ALJ stating the legal and medical reasons Ms. Sims was entitled to benefits.<sup>178</sup> The ALJ denied her disability benefits, and she appealed to the SSA Appeals Council on March 26, 1996.<sup>179</sup> Accompanying her request for review, Ms. Sims submitted a letter by her attorney alleging errors on the part of the ALJ.<sup>180</sup> The Appeals Council denied Ms. Sims' request for review on May 13, 1997.<sup>181</sup> She filed suit in the District Court for the Northern District of Mississippi on May 23, 1997.<sup>182</sup>

#### B. *Lower Court Decisions*

On November 24, 1997, the United States Magistrate Judge issued a report and recommendation on Ms. Sims' case.<sup>183</sup> The Magistrate's report recommended that the district court adopt the decision of the ALJ and deny benefits to Ms. Sims.<sup>184</sup> Ms. Sims filed objections to the Magistrate's report, arguing that the report and recommendation failed to take into account the medical evidence and Ms. Sims' inability to perform work tasks.<sup>185</sup>

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176. *Sims v. Apfel*, 120 S. Ct. 2080, 2082 (2000); Petitioner's Brief at 2, *Sims* (No. 98-9537). SSI and SSDI (a part of OASDI) are the disability benefits programs offered under Title XVI and Title II of the Social Security Act. *Supra* notes 43-57 and accompanying text (discussing the procedure by which disability is determined).

177. *Sims*, 120 S. Ct. at 2082.

178. Petitioner's Brief at 2-3, *Sims* (No. 98-9537).

179. *Id.* at 3.

180. *Id.* The ALJ denied her claims for benefits, having determined that Ms. Sims had medical impairments but did not qualify under the statutory definition of "disability." *Id.*

181. *Id.*

182. *Id.*; *Sims*, 120 S. Ct. at 2083.

183. Petitioner's Brief at 3, *Sims* (No. 98-9537).

184. *Id.*

185. *Id.* Ms. Sims raised four issues in objection to the adoption of the Report and Recommendation by the District Court, specifically that, "the SSA: (1) failed to accord proper weight to the uncontroverted medical opinion of a consulting psychologist; (2) improperly evaluated her residual functional capacity; (3) failed to consider all of her impairments; and (4) failed to develop a full and fair record by ordering a consultative examination." *Id.*

Ms. Sims made three contentions in her complaint with the district court.<sup>186</sup> First, she alleged that the ALJ made selective use of the record.<sup>187</sup> Second, she claimed that the questions the ALJ asked of the vocational expert were defective because they overlooked some of Ms. Sims' impairments.<sup>188</sup> Third, she argued that the ALJ should have ordered a consultative examination.<sup>189</sup> The district court rejected all counts of her complaint and, in its final judgment on January 9, 1998, adopted the report and recommendation of the Magistrate.<sup>190</sup>

Ms. Sims filed a timely notice of appeal with the Court of Appeals for the Fifth Circuit alleging, as she did in the administrative hearings, that the SSA gave inadequate weight to the psychologist's opinion.<sup>191</sup> She also reiterated the arguments raised in district court that the SSA overestimated her residual functional capacity, and that the SSA failed to order further necessary medical and psychological examinations.<sup>192</sup> In its reply brief, the SSA argued that the Court of Appeals lacked jurisdiction over two of her three claims under the doctrine of issue exhaustion.<sup>193</sup>

The Fifth Circuit affirmed the lower court's decision on November 6, 1998.<sup>194</sup> The court affirmed the dismissal of the first contention on the merits.<sup>195</sup> The court then cited *Paul v. Shalala* in dismissing the second and third claims, holding that it did not have jurisdiction to hear those claims because of the issue exhaustion doctrine.<sup>196</sup>

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186. *Sims*, 120 S. Ct. at 2083.

187. *Sims v. Apfel*, 200 F.3d 229, 230 (5th Cir. 1998), *rev'd*, 120 S. Ct. 2080 (2000). Ms. Sims argued that the ALJ "failed to afford proper weight to a psychologist's opinion that she was severely depressed." *Sims*, 200 F.3d at 230.

188. *Sims*, 120 S. Ct. at 2083.

189. *Id.*

190. Petitioner's Brief at 3, *Sims* (No. 98-9537). The Magistrate's Report and Recommendation did not mention or apply the issue exhaustion doctrine, although it did consider all issues raised by Ms. Sims. *Id.*

191. *Id.* at 4.

192. *Id.*

193. *Id.*

194. *Id.* In its *per curiam* opinion, the Fifth Circuit noted Sims's appeal and affirmed the District Court's judgment. *Sims v. Apfel*, 200 F.3d 229, 229 (5th Cir. 1998).

195. *Id.* The Fifth Circuit decided that "[t]he first contention is without merit because the ALJ is entitled and expected to determine the credibility of medical experts and to weigh their opinions accordingly." *Sims*, 200 F.3d at 230 (citing *Greenspan v. Shalala*, 38 F.3d 232 (5th Cir. 1994)).

196. *Id.* "We lack jurisdiction to review Sims's second and third contentions because they were not raised before the Appeals Council." *Id.*

Following the decision of the Court of Appeals, Ms. Sims filed a petition for rehearing.<sup>197</sup> In her petition, Ms. Sims made three arguments regarding the dismissal of two of her claims based on the issue exhaustion doctrine.<sup>198</sup> First, she maintained that she raised the issue about her residual functional capacity in her letters to the ALJ and the Appeals Council.<sup>199</sup> She also argued that the SSA waived any objections to non-exhaustion when it failed to contest the report and recommendation of the Magistrate which reviewed her claims on their merits.<sup>200</sup> Finally, she reasoned that application of the issue exhaustion doctrine is inappropriate in SSA cases.<sup>201</sup> The Court of Appeals denied the petition for rehearing in a per curiam order.<sup>202</sup>

### C. Supreme Court Decision

In a 5-4 decision, the majority, in an opinion written by Justice Thomas, reversed the Fifth Circuit and held that a Social Security claimant does not waive judicial review of issues not presented to the Appeals Council.<sup>203</sup>

#### 1. The Majority Opinion

The majority agreed that Ms. Sims met the “finality” requirement as stated in section 405(g) of the SSA regulations.<sup>204</sup> Ms. Sims received a

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197. Petitioner’s Brief at 4, *Sims* (No. 98-9537).

198. *Id.*

199. *Id.*

200. *Id.* at 4-5.

201. *Id.* at 5. In her argument that the issue exhaustion doctrine should not apply to SSA cases, Ms. Sims argued that the doctrine was inappropriate:

[I]n light of (a) the non-jurisdictional nature of this form of exhaustion rule; (b) the SSA’s non-adversarial, informal administrative process; (c) the rule’s lack of authorization under or consistency with the Social Security Act and SSA regulations; and (d) the SSA’s misleading notice by regulations and forms that provide only three lines for a statement of issues and no warnings about the consequences of failing to raise issues before the Appeals Council.

*Id.*

202. *Id.* at 4.

203. *Sims v. Apfel*, 120 S. Ct. 2080, 2082 (2000). Justices Stevens, Souter, Ginsburg, and O’Connor joined in Justice Thomas’ majority opinion. *Id.* Parts I and II-A of the opinion constitute a narrow majority. *Id.* at 2082-84. Part II-B is a plurality opinion, written by Justice Thomas and joined by Justices Stevens, Souter, and Ginsburg. *Id.* at 2084-86 (Thomas, J., plurality). Part I sets out the facts of the case and reviews the lower courts’ decisions. *Id.* at 2082-83.

204. *Id.* at 2083. “SSA regulations provide that, if the Appeals Council grants review of a claim, then the decision that the Council issues is the Commissioner’s final decision. But if, as here the Council denies the request for review, the ALJ’s opinion becomes the final decision.” *Id.* Ms. Sims met this definition and therefore obtained a final decision.

final decision because she exhausted available administrative procedural remedies when she received a decision from the ALJ and properly requested review by the Appeals Council.<sup>205</sup> Having completed all steps in the administrative process, Ms. Sims fulfilled the requirements as stated in section 405(g), allowing judicial review of the ALJ's decision.<sup>206</sup>

Justice Thomas began the opinion by stating that issue exhaustion is primarily a statutory doctrine,<sup>207</sup> noting that agencies frequently include an issue exhaustion provision in their regulations.<sup>208</sup> Without a statutory requirement for issue exhaustion, the majority decided that imposition of a prudential requirement is inappropriate in SSA cases.<sup>209</sup> Administrative agencies may require issue exhaustion in administrative proceedings by adding it into the regulations, but the SSA has not created, and cannot point to, a statute that specifically mandates that the claimant must exhaust all issues at the administrative level.<sup>210</sup>

While the majority acknowledged that it has enforced the issue exhaustion doctrine in the absence of agency regulations or statutes, it held that the reasons for enforcing the doctrine were not present in this case.<sup>211</sup> The majority discussed the objectives of the issue exhaustion doctrine: that claimants should defer to agency expertise, should not surprise the other party with new issues, and should have the opportunity to present their arguments in a less formal forum.<sup>212</sup> However, the majority found that the goals of issue exhaustion are best achieved in adversarial proceedings.<sup>213</sup>

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205. *Id.*

206. *Id.* As the Court stated, "Petitioner thus obtained a final decision, and nothing in § 405(g) or the regulations implementing it bars judicial review of her claims." *Id.*

207. *Sims*, 120 S. Ct. at 2083 (citing *Marine Mammal Conservancy, Inc. v. Dept. of Agric.*, 134 F.3d 409 (D.C. Cir. 1998)).

208. *Id.* (citing *South Carolina v. United States Dept. of Labor*, 795 F.2d 375 (4th Cir. 1986); *Sears, Roebuck & Co. v. Fed. Trade Comm'n*, 676 F.2d 385 (9th Cir. 1982)).

209. *Id.* at 2084 ("Initially, we note that requirements of administrative issue exhaustion are largely creatures of statute." (citing *Marine Mammal Conservancy Inc. v. Dept. of Agric.*, 134 F.3d 409, 412 (D.C. Cir. 1998))); *see also supra* Part II.D (discussing the development of the issue exhaustion doctrine).

210. *Sims*, 120 S. Ct. at 2084. The Court noted that, "Although the question is not before us, we think it likely that the Commissioner could adopt a regulation that did require issue exhaustion." *Id.*

211. *Id.*

212. *Id.* (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)); *see also supra* notes 100-08 and accompanying text (discussing the positive aspects of the issue exhaustion doctrine).

213. *Sims*, 120 S. Ct. at 2084-85 (quoting *L. A. Tucker Truck Lines, Inc. v. United States*, 344 U.S. 33, 36-37 (1952)).



The majority concluded that the aims of the issue exhaustion doctrine are best served when it is applied only to cases where the proceedings most closely resemble typical litigation proceedings.<sup>214</sup> A fundamental reason for requiring issue exhaustion in adversarial administrative proceedings has been because the claimants need to fully develop the issues.<sup>215</sup> In adversarial proceedings, the Court expects parties to fully develop any and all arguments they wish to make. Where this system is not present, the Court discerned fewer reasons for upholding an exhaustion requirement.<sup>216</sup> The Court opined that application of the issue exhaustion doctrine in non-adversarial proceedings would not advance the purpose of the doctrine, and that the differences between agency and court proceedings would require an examination of the agency's procedures before blindly transferring judicial principles to agency proceedings.<sup>217</sup>

## 2. The Plurality Opinion

Comparing the likeness of SSA proceedings to judicial proceedings, the plurality found that the SSA acts differently than a court by filling the objective role of decision-maker and by making arguments for the SSA.<sup>218</sup> The SSA reviews applications for benefits in an informal, non-adversarial manner, acting less like the "other party" and more like an investigative body.<sup>219</sup> The plurality found wide variation between how the SSA and courts handle the adjudication of a matter.<sup>220</sup> While agency procedures are modeled on the judicial system, the SSA procedures stray significantly from their judicial roots.<sup>221</sup>

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214. *Id.* at 2085.

215. *Id.*

216. *Id.*

217. *Id.* After stating that adversarial administrative proceedings present cases for the doctrine, the Court concluded that "[w]here . . . an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker." *Id.*

218. *Id.* (Thomas, J., plurality). The plurality outlined the ALJ's role as one where there is a "duty to investigate the facts and develop the arguments both for and against granting benefits." *Id.* (Thomas, J., plurality). Justice Thomas was joined in the plurality by Justices Stevens, Souter, and Ginsburg. *Id.* (Thomas, J., plurality).

219. *Id.* (Thomas, J., plurality). The SSA regulations specifically provide that the SSA will conduct "the administrative review process in an informal, nonadversary manner." Social Security Administration, 20 C.F.R. § 404.900(b) (2001).

220. *Sims*, 120 S. Ct. at 2085 (Thomas, J., plurality).

221. *Id.* (Thomas, J., plurality) (quoting 2 K. DAVIS & R. PIERCE, ADMINISTRATIVE LAW TREATISE § 9.10, at 103 (3d ed. 1994)). The plurality found that, "[t]he differences between courts and agencies are nowhere more pronounced than in Social Security proceedings." *Id.* (Thomas, J., plurality).

The plurality noted that the SSA regulations specifically state that the administrative review process is to operate in an “informal, non-adversary manner.”<sup>222</sup> The regulations do not require the claimant to file a brief in support of his or her claims, but permit a claimant to file a brief should he or she desire to do so.<sup>223</sup> Justice Thomas’ plurality opinion noted that the Appeals Council also makes the claimant aware that it will consider all information relevant to the claimant’s case including, and in addition to, his or her claims on appeal.<sup>224</sup> The Commissioner acts in the review process not as a party opposing the claimant, but as a type of advisor to the Appeals Council on which cases to review *sua sponte*.<sup>225</sup>

The plurality also found the plenary review promised by the Appeals Council to be compelling evidence against the use of issue exhaustion.<sup>226</sup> The Appeals Council advertises on Form HA-520 that it will consider all parts of the ALJ’s decision, including issues not raised on the appeals request form by the claimant.<sup>227</sup> Justice Thomas mentioned that the vast lack of claimant representation also indicates that the SSA may not always rely on claimants to raise all issues they wish to have examined by the Appeals Council.<sup>228</sup>

The plurality found the functional realities of the appeals procedure persuasive for not imposing an issue exhaustion requirement.<sup>229</sup> In addition to conducting the process informally and participating on both sides, the SSA provides Form HA-520 to request review by the Appeals Council; the form contains only limited space for the claimant to write his or her reasons for requesting review.<sup>230</sup> The plurality found the fact

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222. *Id.* (Thomas, J., plurality) (quoting 20 C.F.R. § 404.900(b)(1999)).

223. *Id.* (Thomas, J., plurality) (citing 20 C.F.R. § 404.975 (1999)).

224. *Id.* at 2085-86 (Thomas, J., plurality) (citing 20 C.F.R. § 404.976(a)(1999)).

225. *Id.* at 2086 (Thomas, J., plurality). Cases reviewed “*sua sponte*” are those reviewed by the Appeals Council “[w]ithout prompting or suggestion; on its own motion.” BLACK’S LAW DICTIONARY 1437 (7th ed. 1999).

226. *Sims*, 120 S. Ct. at 2086 (Thomas, J., plurality). The Appeals Council informs claimants that it will review all parts of the ALJ’s decision, both those issues the claimant raises, and any other issues the Council desires to review. *Id.* (Thomas, J., plurality).

227. *Id.* (Thomas, J., plurality).

228. *Id.* (Thomas, J., plurality). “Given that a large portion of Social Security claimants either have no representation at all or are represented by non-attorneys . . . the lack of such dependence [on claimants to raise issues] is entirely understandable.” *Id.* (Thomas, J., plurality).

229. *Id.* (Thomas, J., plurality). The plurality focused on what a claimant actually does in order to appeal benefits decisions and looked in particular at the fact that SSA holds itself out to claimants as an ally by investigating both sides of the claim and by making the appeals plenary and simple to file. *Id.* (Thomas, J., plurality).

230. *Id.* (Thomas, J., plurality). The plurality indicated that the three lines on the form available for the claimant’s reasons for requesting review were inadequate in light of the finality

that the SSA estimates that Form HA-520 will take the claimant about ten minutes to complete as indicative of the fact that the Council does not expect the claimant to specifically raise all issues for review.<sup>231</sup> Together, these factors of SSA administrative procedure led the plurality to agree with the Eighth Circuit that the issue exhaustion doctrine “makes little sense” in the context of SSA cases.<sup>232</sup>

### 3. The Concurring Opinion

Justice O'Connor concurred in the judgment and with Parts I and II-A of the majority opinion.<sup>233</sup> Justice O'Connor wrote separately to express her view that the SSA's failure to notify the claimant could stand by itself as grounds for allowing new claims.<sup>234</sup> Neither the regulations nor the form to request review notify the claimant that issues not raised on appeal to the Appeals Council will be waived in judicial proceedings.<sup>235</sup>

Where the regulations of the agency do not specifically state that all issues must be exhausted at the administrative level, Justice O'Connor noted that the courts take into account the characteristics of the agency and the policies behind its procedural framework.<sup>236</sup> Justice O'Connor also recognized that the regulations and administrative procedure fail to show that a claimant needs to raise all issues before the Appeals

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of the issue exhaustion requirement. *Id.* (Thomas, J., plurality).

231. *Id.* (Thomas, J., plurality). The plurality decided that “[t]he form therefore strongly suggests that the Council does not depend much, if at all, on claimants to identify issues for review.” *Id.* (Thomas, J., plurality). The three lines on the form, along with the plenary system of review, indicate that the Appeals Council will review any issues it feels necessary. *Id.* (Thomas, J., plurality).

232. *Id.* (Thomas, J., plurality) (quoting *Harwood v. Apfel*, 186 F.3d 1039, 1042 (8th Cir. 1999)).

233. *Id.* (O'Connor, J., concurring). Part I of the opinion set out the facts of the case and presented the issue for review. *Id.* at 2082-83. Part II-A discussed the finality of the ALJ's decision, the fact that there are no SSA regulations requiring issue exhaustion, and that the requirement is meant more for adversarial agency proceedings. *Id.* at 2083-85. Part II-B, in which Justice O'Connor did not concur, but which constituted the plurality opinion, discussed the informal and nonadversarial nature of SSA review of decisions, and the procedural barriers to claimants that indicate that the SSA does not expect the claimant to raise all issues to the Appeals Council. *Id.* at 2085-86 (Thomas, J., plurality).

234. *Id.* at 2086 (O'Connor, J., concurring).

235. *Id.* at 2086-87 (O'Connor, J., concurring).

236. *Id.* at 2084 (O'Connor, J., concurring). Justice O'Connor reiterated the principle stated in *McCarthy v. Madigan*, that an “inquiry [into whether to apply the issue exhaustion rule] requires careful examination of ‘the characteristics of the particular administrative procedure provided.’” *Id.* (O'Connor, J., concurring) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992)).

Council. Justice O'Connor agreed with the plurality's examination of the SSA and concluded that it reached the correct decision.<sup>237</sup>

Justice O'Connor argued that the agency's failure to notify the claimant that all issues not raised will be barred is significant enough to hold in favor of the claimant.<sup>238</sup> The concurrence further expressed concern that the regulations provide that the claimant must follow the five-step appeals procedure, but never indicate that the claimant waives any issue not raised at the administrative level. The appeals process, Justice O'Connor noted, through its repeated de novo reviews, indicates that the claimant waives nothing.<sup>239</sup> The claimant can, but need not file a brief in support of her arguments. Justice O'Connor stressed that Form HA-520 only has three lines for stating the issues to be reviewed, and the SSA does not intend for the claimant to spend more than approximately ten minutes completing the Form.<sup>240</sup> The concurrence would hold that without notice to the claimant that issues not raised are waived, an issue exhaustion requirement cannot be enforced.<sup>241</sup>

Justice O'Connor also proposed that the issue exhaustion doctrine should not apply to either unrepresented or represented claimants.<sup>242</sup> The Commissioner argued that the SSA did not apply the issue exhaustion rule to unrepresented claimants.<sup>243</sup> Justice O'Connor, however, noted that this statement did not hold true in all federal circuits, and concluded that a division of claimants by represented and unrepresented would be imprudent for application of the doctrine.<sup>244</sup>

#### 4. The Dissenting Opinion

The dissent, written by Justice Breyer, focused on the integrity of agency decisions and the ability of claimants to obtain representation at

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237. *Id.* at 2086-87 (O'Connor, J., concurring). "Requiring issue exhaustion is particularly inappropriate here, where the regulations and procedures of the SSA affirmatively suggest that specific issues need not be raised before the Appeals Council." *Id.* (O'Connor, J., concurring).

238. *Id.* at 2086 (O'Connor, J., concurring). Justice O'Connor stated that, "in my view, the agency's failure to notify claimants of an issue exhaustion requirement in this context is a sufficient basis for our decision." *Id.* (O'Connor, J., concurring).

239. *Id.* at 2087 (O'Connor, J., concurring). All reviews at the administrative level are de novo. *Supra* Part II.C (describing the administrative appeals process).

240. *Sims*, 120 S. Ct. at 2087 (O'Connor, J., concurring).

241. *Id.* (O'Connor, J., concurring).

242. *Id.* (O'Connor, J., concurring). Justice O'Connor stated that, "I think it would be unwise to adopt a rule that imposes different issue exhaustion obligations depending on whether claimants are represented by counsel." *Id.* (O'Connor, J., concurring).

243. *Id.* (O'Connor, J., concurring).

244. *Id.* (O'Connor, J., concurring).

the administrative hearings.<sup>245</sup> First, the dissent set out the general rule of issue exhaustion: “under ordinary principles of administrative law” new issues may not be raised at the level of judicial review.<sup>246</sup> Justice Breyer, quoting *L. A. Tucker Truck Lines, Inc.*, reiterated that the goal of the issue exhaustion doctrine is to preserve the integrity of agency decisions and that federal courts should overrule administrative decisions only when the agency made a mistake on an issue that was previously brought before it.<sup>247</sup>

The dissent argued that courts should not intrude on an area where the agency, with its specialized knowledge, sits in a better position to make an informed decision.<sup>248</sup> The general rule of issue exhaustion should be applied with special force where the agency possesses specialized knowledge on the issues and is better equipped to make decisions regarding its own policy and regulations.<sup>249</sup> Although the dissent recognized that there are exceptions to the issue exhaustion doctrine, Justice Breyer found that this case presented no exception to the general rule and should have been decided accordingly.<sup>250</sup>

The dissent found that the new exception created by the plurality was illogical.<sup>251</sup> Justice Breyer agreed with the plurality’s propositions that issue exhaustion is similar to the judicially created appellate court rule of not hearing new issues on appeal and that the SSA proceedings are nonadversarial.<sup>252</sup> The dissent, however, found the nonadversarial nature of the SSA administrative process logically persuasive toward a holding that issue exhaustion should be applied.<sup>253</sup> The claimant may be successful in bringing the issue to the agency and the courts may not need to intervene. This possibility promotes agency autonomy by allowing the agency to utilize its understanding of its own policies and

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245. *Id.* at 2088 (Breyer, J., dissenting). Chief Justice Rehnquist and Justices Scalia and Kennedy joined in Justice Breyer’s dissent. *Id.* (Breyer, J., dissenting).

246. *Id.* (Breyer, J., dissenting).

247. *Id.* at 2087-88 (Breyer, J., dissenting); *see also* *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

248. *Sims*, 120 S. Ct. at 2088 (Breyer, J., dissenting).

249. *Id.* (Breyer, J., dissenting). Justice Breyer stated, “Although the rule has exceptions, it applies with particular force where resolution of the claim significantly depends upon specialized agency knowledge or practice.” *Id.* (Breyer, J., dissenting).

250. *Id.* (Breyer, J., dissenting).

251. *Id.* (Breyer, J., dissenting).

252. *Id.* (Breyer, J., dissenting).

253. *Id.* (Breyer, J., dissenting). While the dissent agreed that the proceedings are nonadversarial, they concluded that, “There are, of course, important differences between a court and an administrative agency, but those differences argue *in favor of*, not against, applying the waiver principle here.” *Id.* (Breyer, J., dissenting) (alteration in original).

to correct its own mistakes.<sup>254</sup> The dissent also found credibility in the argument that agency authority would weaken in a system lacking an issue exhaustion rule.<sup>255</sup> Similarly, Justice Breyer concluded that both the massive volume of cases heard by the Appeals Council and the fact that the SSA supports the doctrine reinforce the need for application of the issue exhaustion doctrine in SSA cases.<sup>256</sup>

To the dissent, the informality of the proceedings is irrelevant because the claimant is allowed to have a representative at the administrative level.<sup>257</sup> Indeed, Justice Breyer argued, the law in this area supports the general rule of issue exhaustion, regardless of the formality or informality of the administrative proceedings.<sup>258</sup> The dissent argued that the nonadversarial nature of the proceedings applies not only to the Appeals Council, but also to the ALJ, and postulated that the plurality would conclude that claimants waive issues with the Appeals Council not raised to the ALJ.<sup>259</sup>

Justice Breyer observed that the lack of notice to the claimant of the requirement of issue exhaustion was the one exception where the informality of the proceedings has an impact.<sup>260</sup> Though an attorney practicing administrative law in this area will be familiar with the issue exhaustion requirement, an unrepresented claimant may not.<sup>261</sup> Form HA-520 does not include in its instructions notification that a claimant will waive any issue not raised on the three lines provided to list the reasons to request review.<sup>262</sup> Justice Breyer admitted that this flaw in

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254. *Id.* at 2088 (Breyer, J., dissenting) (quoting *McKart v. United States*, 395 U.S. 185, 195 (1969)).

255. *Id.* (Breyer, J., dissenting). Justice Breyer stated that “frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.” *Id.* (Breyer, J., dissenting) (quoting *McKart v. United States*, 395 U.S. 185, 193-94 (1969)).

256. *Id.* at 2088-89 (Breyer, J., dissenting).

257. *Id.* at 2089 (Breyer, J., dissenting). Justice Breyer expressed the view that “since a Social Security claimant is permitted his own counsel or other representative if he wishes, the informality does not necessarily work to his disadvantage.” *Id.* (Breyer, J., dissenting).

258. *Id.* at 2089 (Breyer, J., dissenting) (citing *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)).

259. *Id.* (Breyer, J., dissenting). Justice Breyer assumed “the plurality would not forgive the requirement that a party ordinarily must raise all relevant issues before the ALJ.” *Id.* (Breyer, J., dissenting).

260. *Id.* (Breyer, J., dissenting).

261. *Id.* (Breyer, J., dissenting).

262. *Id.* (Breyer, J., dissenting). Justice Breyer found that the short time estimated to complete Form HA-520, the fact that it fails to inform claimants of the exhaustion requirement, and the small space available to list the reasons for requesting review do not accurately depict the necessity of listing all issues pertinent to the claim on the form. *Id.* (Breyer, J., dissenting).

Form HA-520 might lead claimants to believe that, when they request Appeals Council review, they do not need to exhaust all issues in their request.<sup>263</sup>

Justice Breyer, however, would hold that this exception for informality does not apply where the claimant had representation.<sup>264</sup> He reasoned that the SSA claims that it does not seek application of the waiver rule for unrepresented claimants.<sup>265</sup> Justice Breyer concluded that, in this case, Ms. Sims's lawyer should have known the issue exhaustion rule and should have followed it.<sup>266</sup> The dissent would hold that Ms. Sims should be accountable for her attorney's failure to abide by the well-developed doctrine and her claims should have been denied in the federal courts.<sup>267</sup>

#### IV. ANALYSIS

The plurality correctly held that the issue exhaustion rule does not apply in SSA cases in light of the informal and non-adversarial nature of the administrative proceedings.<sup>268</sup> This section first demonstrates why the practical features of the SSA appeals process prohibit the application of the issue exhaustion doctrine.<sup>269</sup> The analysis then turns to the lack of statutory support for the issue exhaustion rule that bolsters the plurality's rejection of its application.<sup>270</sup> Finally, this section discusses the concurring opinion's mistaken argument that the notice factor could support the judgment alone.<sup>271</sup>

##### *A. Appeals Council Procedural Factors Oppose Issue Exhaustion*

Form HA-520 is only one of the factors of the SSA review process forbidding issue exhaustion.<sup>272</sup> The plurality, concurring, and dissenting opinions all correctly point to Form HA-520 as a source of

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263. *Id.* (Breyer, J., dissenting) (citing Justice O'Connor's concurrence, 120 S. Ct. at 2087).

264. *Id.* (Breyer, J., dissenting).

265. *Id.* (Breyer, J., dissenting) (quoting Respondent's Brief at 41-42, *Sims* (No. 98-9537)).

266. *Id.* at 2090 (Breyer, J., dissenting).

267. *Id.* (Breyer, J., dissenting).

268. *Id.* at 2086 (Thomas, J., plurality). The Court held "that a judicially created issue-exhaustion requirement is inappropriate." *Id.*

269. *Infra* Part IV.A (discussing particular procedural factors that preclude application of the issue exhaustion doctrine).

270. *Sims*, 120 S. Ct. at 2084 (Thomas, J., plurality); *infra* Part IV.B (examining the lack of statutory support for applying the issue exhaustion doctrine).

271. *Sims*, 120 S. Ct. at 2086 (O'Connor, J., concurring); *infra* Part IV.C (arguing that the failure to notify claimants of issue exhaustion, alone, does not support a judgment for the claimant).

272. *Sims*, 120 S. Ct. at 2087 (O'Connor, J., concurring).

misconception by claimants.<sup>273</sup> The form to request review by the Appeals Council contains only three lines on which the claimant is to write her reasons for requesting review; this hardly implies to the reasonable person that failure to mention an issue will be held against her.<sup>274</sup>

Often, the Appeals Council considers each request for review for approximately ten minutes<sup>275</sup> and will deny review without explanation.<sup>276</sup> The short shrift awarded to each claimant's case by the ALJ and Appeals Council requires, in all fairness, that the issue exhaustion doctrine not be applied.<sup>277</sup> The overwhelming docket facing the Appeals Council and the ALJ creates a minimal amount of time for each claimant's case to be heard, thereby reducing the chances that the administrator would locate and develop all the relevant issues.<sup>278</sup> With a lowered chance of having all the issues raised, the courts cannot, in good conscience, shut out claimants seeking benefits to help support themselves.<sup>279</sup>

The claimant who does persevere to have her claims continually reviewed deserves her day in court.<sup>280</sup> While each case before an ALJ or Appeals Council judge is just another in an endless line, a few hours of agency time can mean the difference between starving and eating for a claimant.<sup>281</sup> Claimants are not asking for free riches: they are asking for help in supporting themselves because their disabilities have rendered them unable to support themselves, and they may suffer harm if they do not receive the benefits.<sup>282</sup> The amount a beneficiary receives each month, currently averaging \$758, is enough to live on, but hardly

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273. *Id.* at 2086 (Thomas, J., plurality); 2087 (O'Connor, J., concurring); 2089 (Breyer, J., dissenting).

274. Social Security Administration, *Request for Review of Hearing Decision/Order (Form HA-520)*, 1 available at <http://www.ssa.gov/online/ha-520.pdf> (last visited Feb. 19, 2001); see also Petitioner's Brief at 14, *Sims* (No. 98-9537).

275. Dubin, *Torquemada*, *supra* note 68, at 1326.

276. Petitioner's Brief at 36-37, *Sims* (No. 98-9537) (explaining the boilerplate nature of SSA denials and their lack of specificity toward claimants).

277. *Id.*

278. Koch & Koplów, *supra* note 79, at 267 (stating that "the Appeals Council has been swallowed whole by its docket").

279. *Id.*

280. See *supra* Part II.C (discussing the long waits claimants must endure to receive benefits).

281. Koch & Koplów, *supra* note 79, at 228-29. Even though "each individual case may be insignificant from a societal viewpoint, each is terribly important to the particular claimant, because the disability benefits often provide the barest cushion against destitution." *Id.*

282. *Bowen v. City of New York*, 476 U.S. 467, 483-84 (1986) (stating that claimants will be irreparably injured without benefits and that "[m]any persons have been hospitalized due to the trauma of having disability benefits cut off"); Koch & Koplów, *supra* note 79, at 228-29.



vast riches.<sup>283</sup> The formal procedure of barring claims not raised at the administrative level ignores the simple fact that poverty hangs in the balance.<sup>284</sup> Such a sensitive and basic claim does not deserve a harsh dismissal, but rather a thorough review of the issues by all parties concerned.

Justice O'Connor's concurrence correctly stated that the issue exhaustion requirement should apply to all claimants, represented and unrepresented.<sup>285</sup> Conversely, Justice Breyer's dissent would incorrectly hold that the issue exhaustion requirement prevents only represented claimants from raising new issues in federal court.<sup>286</sup> Claimant representatives need not be attorneys; law clerks, legal secretaries, or practically any other person, with or without bar certification, can serve as a claimant representative.<sup>287</sup> Because the SSA fails to notify claimants and their representatives of the issue exhaustion rule and because representatives are not always attorneys, neither the claimant nor the representative should be held to an unpublicized rule that prevents judicial review.<sup>288</sup> Claimants, represented or not, should not be punished by the SSA's failure to promulgate its own rules.<sup>289</sup>

The dissent also mistakenly employed the large volume of cases the SSA handles every year as support for the application of issue exhaustion in SSA cases.<sup>290</sup> In reality, the high number of cases handled by the Appeals Council supports the opposite contention.<sup>291</sup>

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283. Social Security Administration, *Office of Policy, Highlights of Social Security Data, October 2000*, available at <http://www.ssa.gov/policy/programs/ssd.html> (last visited Feb. 19, 2001).

284. Koch & Koplow, *supra* note 79, at 228-29.

285. *Sims v. Apfel*, 120 S. Ct. 2080, 2087 (2000) (O'Connor, J., concurring); *see also supra* notes 242-43 and accompanying text.

286. *Sims*, 120 S. Ct. at 2089 (Breyer, J., dissenting) (citing Respondent's Brief at 41-42, *Sims* (No. 98-9537)).

287. *Supra* notes 69-72 and accompanying text (discussing a claimant's options for obtaining representation).

288. *Supra* notes 238-41 and accompanying text (discussing Justice O'Connor's concurring opinion on the SSA's failure to notify claimants of the issue exhaustion requirement); *see generally* Social Security Administration, *Hearings and Appeals: Information About Representatives*, available at <http://www.ssa.gov/oha/inforep.htm> (last visited Feb. 19, 2001) (stating that a claimant's representative need not be an attorney).

289. *See Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999). The SSA "knows how to draft a waiver rule." *Id.*

290. *Sims*, 120 S. Ct. at 2088-89 (Breyer, J., dissenting). Justice Breyer stated in his dissenting opinion that issue exhaustion is "particularly important in Social Security cases, where the Appeals Council is asked to process over 100,000 claims each year." *Id.* (Breyer, J., dissenting).

291. *See generally* Petitioner's Brief at 36, *Sims* (No. 98-9537) (discussing the Appeals

With the Appeals Council handling more than 115,000 appeals each year, it seems impossible that each claim receives adequate attention.<sup>292</sup> The docket of cases facing the Appeals Council is too great for its staff to handle.<sup>293</sup> Without adequate attention at the SSA level, the claimant would lose twice if both the Appeals Council and the federal courts do not look into every possible issue.<sup>294</sup> The claimant loses at the Appeals Council stage because the Appeals Council does not have the time to thoroughly investigate all aspects of her claim, and she loses in the federal courts because she did not previously raise issues she may have thought the SSA decision-maker was going to raise.

While some may see the Court's decision as a call to Congress to draft a waiver rule for inclusion in the SSA regulations, the real call to Congress is to reform the Appeals Council.<sup>295</sup> Just as the ALJ review system came under heavy scrutiny in the late 1970s and early 1980s,<sup>296</sup> producing reform, the *Sims* decision calls for reform of the Appeals Council. The Administrative Conference of the United States called for an investigation into the Appeals Council's effectiveness in 1990, resulting in Professors Koch and Koplów's drafting of four suggestions for reforming the Council.<sup>297</sup> Now, ten years after that study was published, the SSA has attempted reform by eliminating the Appeals Council in certain regions of the country and promising more permanent and widespread reform.<sup>298</sup> Elimination of the Appeals Council is not

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Council's large case load); Dubin, *Torquemada*, *supra* note 68, at 1320-21 (listing statistics on the increase in the number of disability claims and indicating that the SSA is "bursting at the seams" with cases).

292. Koch & Koplów *supra* note 79, at 236-37. In the late 1980s, the Appeals Council consisted of only twenty members to handle all of the incoming cases. *Id.*

293. *See infra* note 303 and accompanying text (enumerating the volume of incoming and completed cases each year).

294. Petitioner's Brief at 36, *Sims* (No. 98-9537).

295. Koch & Koplów, *supra* note 79, at 302 (discussing possible Congressional reforms).

296. KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 9.10 (3d ed. 1994).

297. Koch & Koplów, *supra* note 79, at 199. "In response to criticism and controversy surrounding this obscure branch of the Social Security Administration, the Administrative Conference of the United States (ACUS) asked Professors Koch and Koplów to study the Appeals Council's effectiveness in disability claims and adjudication." *Id.* Professors Koch and Koplów suggested four models for reform: keeping the Appeals Council as is, getting rid of the Appeals Council entirely, modifying the Appeals Council's role in handling cases, and optimizing the Appeals Council for reform. *Id.* at 200-01.

298. Social Security Administration, *Appeals Council Process Improvement: Action Plan*, available at <http://www.ssa.gov/reports/acpi/html> (last visited Feb. 19, 2001) [hereinafter *Appeals Council Process Improvement*]. The SSA's action plan for improving the effectiveness of the Appeals Council involves a strategy aimed at lowering the process time for claims and increasing worker productivity. *Id.*

the solution. If the SSA were to eliminate the Appeals Council, it would be a hypocritical act.<sup>299</sup> By eliminating a round of administrative review, the SSA defeats its own argument that the agency should be given every opportunity to correct its own mistakes.<sup>300</sup>

The current functioning of the Appeals Council leaves much to be desired.<sup>301</sup> The members of the Appeals Council are overburdened.<sup>302</sup> The Appeals Council only disposes of about 90,000 cases each year, while more than 115,000 claimants request review each year.<sup>303</sup> It takes approximately more than a year for a claimant to receive notice of the Appeals Council's decision, which is more often than not a simple denial of review.<sup>304</sup> The current system leaves claimants unsatisfied and adds nothing to the review process except delays.<sup>305</sup> Furthermore, the SSA only spends one percent of its incoming revenue on operating costs.<sup>306</sup> Increasing that amount could dramatically improve the functioning of the overburdened agency.<sup>307</sup> Eliminating the Appeals Council will not solve the current problems, but adding staff to the Appeals Council and encouraging review of claimant's applications for benefits would add meaningful benefit for both claimants and the courts.<sup>308</sup>

While the dissent correctly identified the goals of the issue exhaustion doctrine, it falls short of showing that those goals are achieved in the SSA setting.<sup>309</sup> Justice Breyer argued that not enforcing issue exhaustion in SSA cases might weaken agency effectiveness, but claimants still must satisfy the requirements of section 405(g) by completing all administrative reviews and receiving a "final" result.<sup>310</sup> Justice Breyer also argued that without issue exhaustion, the agency will

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299. See *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992).

300. *Id.* at 145.

301. JERRY L. MASHAW, BUREAUCRATIC JUSTICE 103-164 (1983). See generally Koch & Koplow, *supra* note 79.

302. Koch & Koplow, *supra* note 79, at 267 (stating that the "Appeals Council has been swallowed whole by its docket").

303. *Appeals Council Process Improvement*, *supra* note 298.

304. Petitioner's Brief at 36, *Sims* (No. 98-9537).

305. See *supra* Part II.C (discussing procedural steps in filing a claim).

306. Tommy Morgan, *Report: Cost of Running S.S. is Quite Low*, LEWISTON MORNING TRIB. (Idaho), June 25, 2000, at 2D.

307. *Id.*

308. Koch & Koplow, *supra* note 79, at 302-18 (outlining an SSA Appeals Council improvement plan).

309. *Sims v. Apfel*, 120 S. Ct. 2080, 2088 (2000) (Breyer, J., dissenting).

310. *Id.*; see also *supra* notes 84-89 and accompanying text (reviewing section 405(g) and the finality requirement).

not have an opportunity to correct its own mistakes.<sup>311</sup> The agency, however, gives itself three de novo reviews as opportunities to correct its own mistakes.<sup>312</sup> If the agency cannot mend its errors after three tries, the claimant should be given the opportunity to have the mistakes fixed by someone else.<sup>313</sup> The same reasoning refutes Justice Breyer's argument that the agency's specialized knowledge can alone decide the issues.<sup>314</sup> The agency has a claimant's case for an average of more than three years in which it can put its expertise to use.<sup>315</sup>

Additionally, Justice Breyer's argument that the SSA will be unfairly surprised by new arguments upon judicial review holds little weight for two reasons.<sup>316</sup> First, when the SSA claims to have examined all possible issues of the claimant's case during three plenary reviews, it is contradictory to argue that it will be surprised by issues arising from that case.<sup>317</sup> Second, during the SSA proceedings, the SSA is not present as an opposing party, whereas in federal court the acts of the Commissioner oppose the claimant.<sup>318</sup> As a "new" party to the case, the SSA cannot argue surprise.<sup>319</sup>

### *B. Lack of Statutory Support for Issue Exhaustion*

There is no statutory support for imposing the issue exhaustion rule in SSA cases. The majority begins its discussion by stating that the SSA has not produced regulations spelling out the issue exhaustion rule.<sup>320</sup> As the Seventh Circuit noted in its decision in *Johnson v. Apfel*,

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311. *Sims*, 120 S. Ct. at 2088 (Breyer, J., dissenting).

312. *Supra* notes 63-83 and accompanying text (discussing plenary review at the reconsideration, ALJ, and Appeals Council stages of review).

313. Petitioner's Brief at 39-40, *Sims* (No. 98-9537) (stating that the fact-finding is repetitive at the administrative and judicial levels).

314. *Sims*, 120 S. Ct. at 2088 (Breyer, J., dissenting). Justice Breyer states that the issue exhaustion rule "applies with particular force where resolution of the claim significantly depends upon specialized agency knowledge or practice." *Id.* (Breyer, J., dissenting).

315. *Supra* notes 62-81 and accompanying text (listing the average number of days the claim stays in a particular stage of review).

316. *Sims*, 120 S. Ct. at 2088 (Breyer, J., dissenting).

317. *Supra* notes 62-83 and accompanying text (illustrating that the SSA decision-maker is aware of the issues at all stages of review).

318. Dubin, *Torquemada*, *supra* note 68, at 1331. Professor Dubin states that because the SSA is not represented at the administrative level "there is no possibility of prejudice or unfairness to opposing counsel . . ." *Id.*

319. *Id.*

320. *Sims*, 120 S. Ct. at 2084. The Court notes that while "it is common for an agency's regulations to require issue exhaustion in administrative appeals . . . SSA regulations do not require issue exhaustion." *Id.*

the SSA is quite capable of drafting a waiver regulation.<sup>321</sup> Principles of fairness indicate that the doctrine should remain applicable to SSA claimants only through a clear statutory indication of waiver.<sup>322</sup>

A statutory provision, however, would not solve the problems created by the informalities of the SSA appeals system.<sup>323</sup> By acknowledging the ability of regulations to establish an issue exhaustion requirement, the Court indicated that creation of a new SSA regulation would resolve the issue.<sup>324</sup> According to the majority opinion, Congress needs only to adopt a regulation stating the issue exhaustion rule in order to enforce the issue exhaustion doctrine in courts.<sup>325</sup> The majority's approach, however, fails to acknowledge that if issue exhaustion fit within the SSA regulatory scheme, it would have been included initially.<sup>326</sup> However, examining congressional intent and the policies behind the SSA administrative procedural process, creation of an explicit waiver rule seems unlikely.<sup>327</sup> Section 405(g) imparts unusually broad access to judicial review, expressing congressional concern for a claimant's ability to obtain justice.<sup>328</sup> Part of this congressional desire to allow claimants access to review stems from Social Security's origins as an insurance program.<sup>329</sup> Having paid "premiums" on Social Security through wages leads to the conclusion that issue exhaustion is not applicable to SSA cases.<sup>330</sup> SSA hearings are decidedly not adversarial,<sup>331</sup> and the ALJ especially has a duty to investigate and develop a case

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321. *Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999); *see also supra* note 96 (discussing the Natural Gas Act regulation imposing an issue exhaustion requirement).

322. Petitioner's Brief at 14, *Sims* (No. 98-9537).

323. *Supra* Part II.C (revealing the informal nature of the administrative review process).

324. *Sims*, 120 S. Ct. at 2084. The Court insinuates that, if the Commissioner were to create a regulation that enforced the requirement in SSA cases, the issue would be settled. *Id.*

325. *Id.*

326. *Id.* at 2084-85; *see also Johnson*, 189 F.3d at 563 (stating that the SSA could draft a waiver rule).

327. Petitioner's Brief at 12-17, *Sims* (No. 98-9537). Congress has not thus far made issue exhaustion a strict requirement through legislation, and congressional intent has never been to do so. *Id.* "Congress intended to provide broad judicial review access to protect social insurance rights." *Id.* at 14.

328. *Id.* at 15-16. Section 405(g) is the statutory provision allowing SSA claimants to appeal their cases to federal courts after completion of the administrative review process. *Supra* notes 84-89 and accompanying text (explaining section 405(g)).

329. Petitioner's Brief at 14-17, *Sims* (No. 98-9537) (discussing the origins of the Social Security system and President Franklin Delano Roosevelt's aspiration that all participants in the Social Security program be able to access a return on their investments).

330. *Sims*, 120 S. Ct. at 2085.

331. *Cannon v. Harris*, 651 F.2d 513, 519 (7th Cir. 1981) (citing *Richardson v. Perales*, 402 U.S. 389 (1971)).

record.<sup>332</sup> Imposing issue exhaustion requirements arising out of the adversarial judicial system on claimants who have most likely spent almost three years operating within an informal, non-adversary system violates the congressional purpose of instituting these informal proceedings.<sup>333</sup>

Additionally, the SSA *de novo* review mentioned by the plurality indicates to claimants that any issues they fail to raise will be reviewed nonetheless.<sup>334</sup> By the time a claimant reaches the federal court system, he or she has purportedly received three separate plenary reviews of his or her claims.<sup>335</sup> At the initial reconsideration, the ALJ review, and at the Appeals Council stage, all reviews are conducted by the SSA to encompass the claimant's reasons for requesting review and any other issues the SSA might find while examining the case.<sup>336</sup> As the Eighth Circuit opined, the SSA is asking courts to enforce a principle it does not exercise in its own proceedings.<sup>337</sup> A sense of consistency demands that issue exhaustion not be applied in SSA cases.

### *C. Failure to Notify Does Not Support the Decision Alone*

Justice O'Connor would incorrectly base the Court's decision solely on the SSA's failure to notify claimants either on Form HA-520 or in the regulations that issues not raised at the administrative level would be waived.<sup>338</sup> Justice O'Connor incorrectly stated that the notice issue alone could decide the case; even with proper warning, an issue exhaustion requirement is inconsistent with the realities of the SSA administrative procedure.<sup>339</sup>

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332. *Id.* (citing *Smith v. HEW*, 587 F.2d 857, 860 (7th Cir. 1978)).

333. Petitioner's Brief at 13, *Sims* (No. 98-9537). Adding up the average times to complete each stage of the administrative review process, the claimant spends on average almost three years before he or she can appeal to the district court. *Supra* notes 61-82 and accompanying text (listing the average number of days each stage of administrative review takes).

334. *Supra* notes 62-81 and accompanying text (discussing the reconsideration, ALJ, and Appeals Council plenary reviews in which all issues, those raised by the claimant, and any other applicable issues, are examined).

335. *Sims*, 120 S. Ct. at 2086 (Thomas, J., plurality) (discussing SSA review of the ALJ decision by the Appeals Council).

336. *Supra* Part ILC (discussing the stages of administrative review).

337. *Harwood v. Apfel*, 186 F.3d 1039, 1042 (8th Cir. 1999).

338. *Sims*, 120 S. Ct. at 2086-87 (O'Connor, J., concurring). Justice O'Connor asserted that the SSA's failure to notify claimants that issue exhaustion will be enforced at the federal court level misleads claimants, adding to the reasons not to apply the doctrine in SSA cases. *Id.* Form HA-520 is the SSA form claimants use to request review of their cases by the Appeals Council. *Supra* notes 74-78 and accompanying text (describing Form HA-520).

339. Dubin, *Torquemada*, *supra* note 68, at 1313-31 (analyzing issue exhaustion and listing the various reasons why the doctrine should not be applied to SSA cases).

While the notice issue adds to the practical reasons for dropping the general issue exhaustion requirement for SSA claimants, it does not take into account the laundry list of factors obligating courts to allow new issues at the judicial review stage of review.<sup>340</sup> Regardless of notice, the informal and investigative nature of SSA proceedings warrants a lenient rule allowing judicial review of new issues.<sup>341</sup> Revising Form HA-520 to include a statement about the issue exhaustion doctrine would not solve the injustices created by holding claimants to those issues raised at the administrative level.<sup>342</sup> Even if notified, claimants may not understand the waiver, or may not take it seriously because the form contains three lines for raising all the issues to be reviewed. In addition, claimants may not have representatives to help them raise the relevant issues.<sup>343</sup> If the claimant has a non-attorney representative, that representative may fail to raise pertinent legal issues.<sup>344</sup> The system encourages such a degree of informality and amicability that a simple notice of waiver is incongruent with the application of such a harsh rule.<sup>345</sup>

Neither Form HA-520 nor the agency regulations give a claimant notice of the issue exhaustion requirement. This presents just one of the practical realities that support claimants' rights to raise new issues during judicial review.<sup>346</sup> As the plurality correctly held, the comparison to nonadversarial litigation, the investigatory model used by the SSA, the plenary system of review, and the inadequacies of both Form HA-520 and the Appeals Council all contribute to the decision that issue exhaustion does not apply to SSA cases.<sup>347</sup>

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340. *Id.* The informality of the proceedings, their nonadversarial nature, and the defects of Form HA-520 present adequate reason not to enforce the issue exhaustion doctrine. *Id.*

341. *Supra* Parts IV.A-C (explaining the practical aspects of the SSA proceedings).

342. Dubin, *Torquemada*, *supra* note 68, at 1315-31.

343. Dubin, *Poverty*, *supra* note 7, at 92-95 (explaining the need for representation to achieve success on disability claims).

344. Dubin, *Torquemada*, *supra* note 68, at 1293-94 (stating that often a claimant's representative is a paralegal or other non-attorney because a claimant's representative need not be admitted to the bar).

345. *Id.* at 1340 (stating that "courts should view SSA issue exhaustion as an oxymoron—a distinctly formal procedural bar for decidedly informal remedial proceedings").

346. *Request for Review of Hearing Decision/Order*, *supra* note 75; *see also* Dubin, *Torquemada*, *supra* note 68, at 1313-31 (stating additional reasons why issue exhaustion should not be applied to SSA cases).

347. *Sims v. Apfel*, 120 S. Ct. 2080, 2084-86 (2000) (Thomas, J., plurality).

## V. IMPACT

*Sims v. Apfel* affects all Americans who are eligible for or receive Social Security benefits. In particular, this decision affects the more than three million people applying for disability benefits each year.<sup>348</sup> Additionally, it affects people receiving Medicare and OASDI benefits because, while the Appeals Council mostly hears disability cases, it also hears cases arising from Medicare and retirement benefits cases.<sup>349</sup> This case also has the potential to impact everyone, because anyone could become seriously ill or suffer an injury at any time.<sup>350</sup> Ultimately, this decision will have three main impacts. First, and most important, SSA claimants will receive a full and fair opportunity to receive benefits.<sup>351</sup> Second, federal court dockets will not be overburdened as a result of this decision, despite the fears of the dissent.<sup>352</sup> Third, the *Sims* decision will continue to hold Social Security attorneys responsible for raising issues as early as possible in the review process.<sup>353</sup>

A. *SSA Claimants Will Receive a Better Opportunity to Receive Benefits*

Elimination of the issue exhaustion doctrine will bring about the benefits intended by Congress in drafting the Social Security Act.<sup>354</sup> All claimants, regardless of whether they have representation, will have the right to bring new issues on judicial review.<sup>355</sup>

Practically, this decision will not change the way in which claimants go about the benefits application process: they probably had no idea prior to the *Sims* decision that new issues could not be raised on appeal to the federal courts; therefore, most claimants will not be aware of the liberties afforded them by the *Sims* decision.<sup>356</sup> The SSA failed to

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348. SOCIAL SECURITY BULLETIN, *supra* note 1, at 141.

349. Koch & Koplow, *supra* note 79, at 263.

350. Diller, *supra* note 32, at 398-99.

351. *Infra* Part V.A (arguing that elimination of the issue exhaustion doctrine will lead to a fair result for claimants).

352. *Infra* Part V.B (stating that the *Sims* decision will not lead to increased Social Security cases in the federal district courts).

353. *Infra* Part V.C (arguing that the eradication of the issue exhaustion doctrine will not adversely affect attorneys).

354. Petitioner's Brief at 12-17, *Sims* (No. 98-9537).

355. *Sims v. Apfel*, 120 S. Ct. 2080, 2086 (2000).

356. *See generally supra* notes 236-41 and accompanying text (discussing the SSA's failure to notify claimants of the issue exhaustion rule).



notify claimants of the issue exhaustion rule, and, as a result, they will most likely not know that a bar to their claims has been lifted.<sup>357</sup>

*B. The Sims Decision Will Not Lead to an Increased Number of Social Security Cases in the Federal Districts*

The doctrine of issue exhaustion reflects a desire by the courts to relieve themselves of the burden of SSA cases. SSA cases fill up about 15% to 20% of the federal district court docket each year, and this number will likely remain unchanged post-*Sims*.<sup>358</sup> The goal of judicial economy is not well-served in the context of SSA proceedings because the Social Security Act ensures that repetitive fact-finding does not occur in the courts and because the informal nature of the proceedings does not normally produce legal issues at the administrative level.<sup>359</sup> Additionally, an Appeals Council review rarely lists claimant-specific reasons for denial, and claimants do not view this stage in the process as worthwhile.<sup>360</sup> An Appeals Council review seems only to delay a claimant's federal court complaint because it usually fails to resolve the issues to the claimant's satisfaction.<sup>361</sup>

*C. Social Security Attorneys Will Be Unaffected*

The eradication of issue exhaustion in SSA cases will not affect Social Security attorneys other than by eliminating the filing of potentially lengthy briefs with the Appeals Council.<sup>362</sup> While the SSA system of adjudication allows for judicial review of new issues, attorneys will still be expected to raise as many issues as possible at the early stages of administrative review.<sup>363</sup> In fact, the ratio of cases receiving benefits at earlier stages of review will not change because, regardless of attorney action, the number of cases awarded benefits at early stages are few in number.<sup>364</sup> An attorney handling an SSA case will remain culpable and should make every effort to develop a full and accurate record during the early stages of administrative review.<sup>365</sup>

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357. See generally *supra* notes 236-41 and accompanying text.

358. Koch & Koplow, *supra* note 79, at 290.

359. Dubin, *Torquemada*, *supra* note 68, at 1331.

360. Koch & Koplow, *supra* note 79, at 290.

361. *Id.*

362. *Supra* note 169 (mentioning that briefs may be filed with a request for review with the Appeals Council).

363. Carol A. Romero, *Representing the Social Security Disability Claimant at the Administrative Law Hearing*, 5 NEV. LAW. 23, 24 (1997).

364. *Id.* at 23.

365. *Id.* at 24.

Additionally, it is not to an attorney's financial advantage to wait until an appearance in federal court to raise new issues. Most attorney fees in SSA cases are contracted for at the outset of the case in an attorney fee agreement and are limited to the lesser of twenty-five percent of the back pay owed to the claimant or \$4,000.<sup>366</sup> Attorneys may construct the agreement so that this limit applies only to work done before the SSA.<sup>367</sup> Attorneys taking cases to the federal court level may obtain fees incurred in the civil action through the Equal Access to Justice Act.<sup>368</sup> A Social Security attorney does not stand to gain massive riches and will likely spend a fair amount of unpaid time filing the proper paperwork with the SSA and/or the federal courts to receive payment for work on a claimant's case.<sup>369</sup>

## V. CONCLUSION

The majority and plurality correctly decided that issue exhaustion should not apply to SSA cases because of their informal and non-adversarial nature. The SSA had the opportunity to create a formal issue exhaustion requirement in its regulations, but it did not. After a claimant spends years in a non-adversarial administrative review process in which he or she need not have a representative, it would be unfair to impose a strict exhaustion requirement on the claimant at the judicial stage of review. The rules governing judicial procedure are designed with the efficient service of justice as the ultimate goal, and in SSA cases, a rule prohibiting review of new claims at the judicial level would not serve justice upon the claimants. The *Sims* decision will allow SSA claimants the right to a fair adjudication of their claims at both the administrative and judicial stages of review.

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366. 42 U.S.C. § 406(a)(2)(A)(ii) (1994); *see also* CHARLES T. HALL, SOCIAL SECURITY DISABILITY PRACTICE § 6:43 (2000).

367. HALL, *supra* note 366, § 6:43.

368. 28 U.S.C. § 2412(d)(1)(A) (1994) (stating that a court "shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . including proceedings for judicial review of agency action"). The Equal Access to Justice Act applies only to adversarial adjudications and is therefore unavailable at the level of SSA review. *See* HALL, *supra* note 366, § 6:87.

369. HALL, *supra* note 366, § 6:1.

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