The Effects of the *Cruzan Case* on the Rights of Elderly Clients
Two Late-Term Sleepers from the Supreme Court Pose Questions for Advocates

by Gill Deford, Staff Attorney with the National Senior Citizens Law Center, 1052 W. 6th St., Ste. 700, Los Angeles, CA 90017; (213) 482-3550.

In the traditional June rash of end-of-term decisions, the Supreme Court resolved two cases that, although they have received little attention either from the media or from legal services advocates, may offer problems. At a minimum, the decisions raise issues that government lawyers may attempt to exploit in a variety of disturbing ways. One case, Sullivan v. Finkelstein, /1/ presented the dry issue of whether the Secretary of Health and Human Services (HHS) may appeal a remand order from a district court in a social security case. The other, Office of Personnel Management v. Richmond, /2/ came to the Court as an estoppel case, but was resolved in such a manner that government lawyers may attempt to employ it in other contexts involving government benefit programs.

I. Finkelstein: What Kind of Remand Is It and What Difference Does It Make?

A. The Decision

In Finkelstein v. Sullivan, /3/ the Third Circuit held that the Secretary could not immediately appeal an order of remand by the district court. The court recognized that, because the Secretary might award benefits on remand, it might not be possible to appeal at the conclusion of the case, but it still determined not to permit an immediate appeal. In an opinion by Justice White on behalf of all but Justice Blackmun, who filed a separate opinion concurring in the judgment, the Supreme Court reversed.

The Court's analysis purports to be narrow and limited to "orders of the type entered by the District Court in this case." /4/ In determining what type of order was at issue, the Court concludes that the district court judge had implicitly invalidated one of the Secretary's disability regulations as a necessary element of his remand order: "[I]n effect it ordered the Secretary to address respondent's ailment without regard for the regulations that would have precluded such consideration." /5/

The opinion then becomes a very precise and detailed analysis of 42 U.S.C. Sec. 405(g), the Social Security Act review provision. /6/ Looking to the first, fourth, and eighth sentences of that statute, the Court determines that "each final decision of the Secretary will be reviewable by a separate piece of litigation." /7/ with the district court having the power in that review
process to enter a judgment that may or may not include a remand order; accordingly, "such a remand order is a 'judgment' in the terminology of section 405(g)." /8/ And that judgment, according to section 405(g), is final and subject to appellate review like any other civil action. /9/ The Court rejects the claimant's contention that Finkelstein described a "sixth-sentence remand" (as opposed to a "fourth-sentence remand"):

"The sixth sentence of 405(g) plainly describes an entirely different kind of remand, appropriate when the district court learns of evidence not in existence or available to the claimant at the time of the administrative proceeding that might have changed the outcome of that proceeding." /10/

In similar fashion, the Court dispenses with the relevance of the seventh sentence, which allows entry of an appealable final judgment by the district court after a remand. That action, the Court explains, is only for sixth-sentence remands and "does not fit the kind of remand ordered by the District Court in this case." /11/

The Court should have been troubled by the apparent inconsistencies between its analysis and discussions about the Equal Access to Justice Act (EAJA). Instead, however, it simply distinguishes the EAJA as involving different considerations. Thus, it rejects EAJA legislative history that expressly states that a section 405(g) remand order is not a final judgment, because "this part of this particular committee report concerned the proper time period for filing a petition for attorney's fees under EAJA, not appealability." /12/

Similarly, the Court was not moved by seemingly contradictory language in an EAJA decision from last Term in which it held that work in the administrative process after remand was compensable. /13/ In that case, the Court explained, "[w]e were concerned . . . with interpreting the term 'any civil action' in the EAJA, not with deciding whether a remand order could be appealed as a 'final decision' under 28 U.S.C. Sec. 1291." /14/ While conceding that the Court had labeled the administrative proceedings on remand "part and parcel of the action for which fees may be awarded," /15/ Justice White narrows that holding with ease: "We did not say that proceedings on remand to an agency are 'part and parcel' of a civil action in federal district court for all purposes, and we decline to do so today." /16/

**B. Possible Ramifications**

More troubling than the almost undisguised result-oriented nature of the decision, however, are its unanswered questions and unknown consequences. May claimants also appeal a fourth-sentence remand? For instance, if the district court affirmed one aspect of the Secretary's holding, but remanded for misapplication in another area, could plaintiff appeal? At oral argument, the Solicitor General answered this question in the affirmative. /17/

Correspondingly, if claimant may appeal at that point but does not, is appeal prohibited after remand? The answer would appear to be no, because in most cases a new decision with new findings is issued after remand; claimant must have the right to seek review of that decision.

Another possible problem area is suggested by the Court's determination that each decision of the Secretary is "reviewable by a separate piece of litigation." /18/ Does this suggest that the
claimant must file a new complaint after remand? This is unclear, but a number of points should be considered. First, the significance, if any, of this ambiguous language should be tempered by the recognition that Finkelstein is just one case in a long line of decisions interpreting section 405(g), and the contrary indications in that history should not be repudiated because of this one vague reference. Second, such a result would have adverse practical consequences. Logic and judicial efficiency indicate that the case should be returned to the same judge who previously remanded it and is familiar with it. Furthermore, a second transcript may have been filed, and it would be irrational to have a different judge reviewing that transcript in a vacuum.

One possible solution would be to request that the remand order include a retention of jurisdiction by the district court judge, so that the case would automatically be returned to that judge after remand. In any event, it would be wise to seek review of the decision on remand (by whatever means) within 60 days of the Appeals Council's "action" /19/ to ensure that the statute of limitations does not run. /20/ Although the Court treats the timing of EAJA petitions as an entirely different life form from the questions of appealability arising under section 405(g), the Finkelstein decision must inevitably raise new questions about EAJA petitions as well. Because the entry of judgment provision of section 405(g)'s seventh sentence is only applicable to sixth-sentence remands, the question arises as to when the fee application must be filed for a fourth-sentence remand.

Without making the distinction between the fourth- and sixth-sentence remands, most appellate courts have held that petitions should be filed after entry of judgment by the district court after remand. /21/ The Supreme Court has confused that approach, however, by noting that the first decision to hold so, /22/ from which other decisions have followed, may have been a sixth-sentence remand case; /23/ one possible inference is that different timing would apply to fourth-sentence remands. On the other hand, the Secretary has apparently conceded that the proper response after any remand is for him to take action in order that the district judge may then determine whether a fee award is warranted:

"Of course, where the court has remanded the cause to the Secretary for a rehearing because it has found the Secretary's first decision denying benefits to have been unlawful, it is appropriate for the Secretary to file any new decision awarding benefits with the court so that the court can consider whether attorney's fees should be awarded under the EAJA. See Sullivan v. Hudson, 109 S. Ct. at 2255. Brief for the Petitioner, in Sullivan v. Finkelstein, No. 89-504, at 44 n.35." /24/

Some insight into these EAJA issues may emanate soon from the Eleventh Circuit, which has under submission an appeal that was stayed after oral argument to await the Finkelstein holding. That appeal, Myers v. Sullivan, /25/ came up in the context of a district court judge's determination that an EAJA petition filed more than 30 days after entry of judgment under the seventh sentence of 405(g) was untimely. /26/ The Court reasoned that, because plaintiff had been awarded benefits on remand by the Secretary, neither side had any basis for appeal; accordingly, the "final judgment" for EAJA purposes /27/ was the entry of judgment by the district court rather than, as is more common, the passage of 60 days after that entry with neither side appealing. Supplemental briefs discussing the effect of Finkelstein were filed in August. /28/
At this point, of course, the effect of Finkelstein remains unclear, and the Secretary's position on it has yet to be spelled out. The decision will have some impact, however, and social security advocates must be aware of the now-significant distinction between fourth- and sixth-sentence remands.

II. Richmond: Everything You Always Wanted to Know About the Appropriations Clause, But Somehow Never Thought to Ask

A. The Decision

If the excitement of distinguishing between fourth- and sixth-sentence remands is too draining, you might want to divert your attention to the always-popular effort of trying to estop the government. Charles Richmond, a disabled former Navy welder, did just that; representing himself, he succeeded in convincing two judges of a federal circuit panel that the Office of Personnel Management (OPM) should be estopped from applying a statute that deprived him of benefits for six months. /29/

Following the Supreme Court's repeated hints of the last 30 years that estoppel of the government might be possible, /30/ the majority concluded both that the traditional elements of estoppel, and the special circumstance necessary for governmental estoppel--"affirmative misconduct"--had been met. /31/ It therefore ordered OPM to pay disability benefits to which, under the statute, Richmond was not entitled. /32/

Unfortunately for Richmond, both the rules of the game and the level of his representation suffered when the government took the case to the Supreme Court. The government lobbied once again /33/ for "a sweeping rule" barring courts from ever estopping the government, as it contended that either the common-law doctrine of sovereign immunity or the constitutional principle of separation of powers precluded the judiciary from taking action that Congress had not authorized. /34/ The Court did not rule on those grounds, however; instead, it devised a constitutional theory that had been neither advanced by the government nor briefed by the parties, and eliminated estoppel in any situation that requires the payment of money by the Treasury not expressly appropriated by Congress.

The opinion by Justice Kennedy for six members of the Court relies on the little-used appropriations clause, which states, in its entirety, as follows: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." /35/ Drawing on a 1937 decision /36/ that quoted an 1851 decision, /37/ the Court stated that "[o]ur cases underscore the straightforward and explicit command of the Appropriations Clause. It means simply that no money can be paid out of the Treasury unless it has been appropriated by Congress." /38/ Those two decisions, and a third from 1877, /39/ represent virtually the entire repertoire of Supreme Court analysis of the appropriations clause. At least up until now.
B. Possible Ramifications

As with Finkelstein, the effect of Richmond is pure speculation. The decision has the potential, however, for exaggeration; although Richmond held only that the government may not be forced to pay out money as an equitable remedy in express violation of a statute, government attorneys will undoubtedly attempt to expand its range. Indeed, they are already rediscovering the long-lost appropriations clause. For instance, although the California Supreme Court held just last year that estoppel was applicable in some instances to prevent the recovery of AFDC overpayments, /40/ the California attorney general's office is now contending that Richmond undercuts that decision.

Government lawyers may also try to argue that the appropriations clause bars preliminary relief that requires the expenditure of federal money. This seems to be an extreme and incorrect reading of Richmond, but they may contend that, until a court has conclusively determined that a statute requires payment to the plaintiff, it is impermissible to order the federal agency to make any payments.

Another concern arises with equal protection cases. The Supreme Court has recognized that the presumptive remedy when a statute is found to discriminate against one class is to extend the benefits of the statutory scheme to that class. /41/ But government attorneys may now contend that Richmond has foreclosed that option, because, they may argue, the benefits so provided as a remedy to an equal protection violation were not authorized by Congress. Richmond did not involve the remediing of a constitutional violation, however, and Justice White's concurrence in Richmond indicates that the majority's analysis would not be applicable in that context: "[T]he Court does not state that statutory restrictions on appropriations may never fall even if they violate a command of the Constitution." /42/

Finkelstein and Richmond will undoubtedly form the premise for many government arguments in coming years. Until the courts have straightened out some of these tricky questions, advocates must be prepared to wade into this brave new world. /43/

footnotes

5. Id.
6. Because the decision gives detailed and careful attention to individual sentences of section 405(g), those sentences are set out here, with each one appropriately numbered:

(1) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

(4) The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing.

(6) The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

(7) Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision.

(8) The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.


8. Id. at 2664.

9. Id. In the same paragraph where he so closely parses the language of section 405(g), Justice White also leaves little doubt of the policy consideration motivating the result of immediate appealability: "[S]hould the Secretary on remand undertake the inquiry mandated by the District Court and award benefits, there would be grave doubt . . . whether he could appeal his own order." Id.

10. Id. (footnote omitted).

11. Id. at 2665.

12. Id. at 2666 n.8.


15. Id. (quoting Hudson, 109 S. Ct. at 2255).


17. Transcript of Oral Argument, Sullivan v. Finkelstein (No. 89-504) (argued April 24, 1990). In his opening brief, the Secretary stated that decisions such as the district court's in Finkelstein v. Sullivan "may well be appealable by a claimant who could show that he was aggrieved by a ruling of law by the district court--e.g., that if the court's ruling was in error he was entitled to outright reversal of the Secretary's decision. Such appeals, however, would surely be infrequent." Brief for Petitioner, at 21 n.17, Sullivan v. Finkelstein.


19. Under regulations effective last year, the Appeals Council's "decision" on remand is often no decision at all. If no action to review is taken within 60 days of the ALJ's decision, that decision stands as the decision of the Appeals Council. See 20 C.F.R. Sec. 404.984(d).

20. Another procedural issue is inherent in the nature of some fourth-sentence remands. Because in some instances (such as Finkelstein v. Sullivan) the court's order will amount to the de facto enjoining of a regulation, relief should follow automatically during the course of the appeal--unless the Secretary obtains a stay pending appeal. See FED. R. CIV. P. 62(c); FED. R. APP. P. 8. Because the remand order is not an award of benefits, there is no automatic stay pending appeal (see FED. R. CIV. P. 62(d), (e)), so that the government must seek a stay under the balancing test applicable to such motions. See, e.g., Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970).

21. See, e.g., Taylor v. Heckler, 778 F.2d 674 (11th Cir. 1985); Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983); contra Melkonyan v. Heckler, 895 F.2d 556 (9th Cir. 1989), petition for cert. filed Aug. 1990 (decision of Appeals Council on remand starts the time to file). Because Melkonyan, a pre-Sullivan v. Finkelstein decision, is probably a sixth-sentence remand case, for which there now seems little doubt that a judgment should be entered pursuant to the seventh sentence, it would appear that Sullivan v. Finkelstein overrules it and that the timing of the fee petition should be premised, as had always before been assumed, on the entry of the postremand judgment by the district court.


24. It may be the safer course, however, to file the fee petition earlier, in the 60- to 90-day period after the remand order is entered; but the issue is unclear. First, plaintiff may not then be entitled to fees, because she would not yet have prevailed, and "prevailing party" status is a condition to an award of EAJA fees. 28 U.S.C. Sec. 2412(d)(1)(A). On the other hand, the remand order is a final judgment, and the plaintiff has prevailed in some respect. See Texas State Teachers Ass'n v. Garland Indep. School Dist., 109 S. Ct. 1486, 1492-1493 (1989) (prevailing party status for purposes of fees under 42 U.S.C. Sec. 1988 does not require
success on "central issue"). Secondly, if plaintiff is eligible for fees at that point, she probably
would not be required to file before completion of the appeal. The legislative history of the
EAJA has generally been interpreted to allow a fee petition to be filed either after the district
court decision (i.e., while the case is pending on appeal), or after completion of the appeal. See,

Cir. 1989), is actually four consolidated appeals: Myers v. Sullivan, No. 89-3533; Grimes v.


28. Three of the four Myers cases are sixth-sentence remands, and plaintiffs argued in their
Supplemental Brief that Sullivan v. Finkelstein holds that a sixth-sentence remand is not
immediately appealable, but is appealable after the district judge enters judgment. Thus, the
time to file the fee petition should not have begun to run until 60 days after the district court
entered judgment.

For the one fourth-sentence remand case, claimant distinguishes Sullivan v. Finkelstein on the
ground that it dealt with the appealability of a remand order, while the issue before the
Eleventh Circuit is the appealability of an order entered after remand.


8337(d).


35. U.S. CONST. art. I, Sec. 9, cl. 7.


38. Office of Personnel Management v. Richmond, 110 S. Ct. at 2471 (citations omitted).


42. Office of Personnel Management v. Richmond, 110 S. Ct. at 2476-2477 (White, J., concurring); see also id. at 2478 (Marshall, J., dissenting).