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A RIGHT TO NO MEANINGFUL REVIEW UNDER THE DUE PROCESS CLAUSE: THE AFTERMATH OF JUDICIAL DEFERENCE TO THE FEDERAL ADMINISTRATIVE AGENCIES

Ruqaiyah A. Yearby[†]

INTRODUCTION

No one ever looks forward to entering a nursing home because it means leaving the things most dear to them: family, home, and independence. Nevertheless, without the current nursing home system,¹ many elderly and disabled persons, who require comprehensive treatment, would not have access to necessary care.² In 2000, nursing homes provided care to 1.6 million elderly and disabled persons, and

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¹ Three main parties fund nursing homes: Medicare, Medicaid, and private parties. Of the payments received by nursing homes in 2001, Medicare accounted for 11.7 percent, Medicaid for 47.5 percent, and private payors (including out-of-pocket, private health insurance, and other private funds) were responsible for 38.5 percent. See Ctrs. for Medicare & Medicaid Servs., Office of the Actuary, Table 13: Nursing Home Care Expenditures Aggregate and per Capita Amounts, Percent Distribution and Average Annual Percent Change by Source of Funds: Selected Calendar Years 1980-2012, <http://63.241.27.79/statistics/nhe/projections-2002/t13.asp> (last visited Jan. 27, 2006). Medicare spending on nursing home care totaled \$9.5 billion in 2000 and \$11.6 billion in 2001. *Id.*

² U.S. GEN. ACCOUNTING OFFICE, GAO-02-431R, NURSING HOME EXPENDITURES AND QUALITY (2002), *available at* <http://www.gao.gov/new.items/d02431r.pdf> (report on the necessity of well-staffed nursing home facilities).

by 2050, nursing homes are projected to provide care to 6.6 million elderly and disabled persons.³ Thus, we can ill afford to cripple the nursing home industry. But, this is exactly what has occurred. The Constitution,⁴ the Administrative Procedure Act (APA),⁵ and the Medicare Act⁶ and regulations⁷ mandate that nursing homes be afforded procedural due process rights before the loss of the property, namely Medicare payments.⁸ This article will show that the U.S. Department of Health and Human Services (HHS)⁹ has unduly restricted the rights of nursing homes by denying them access to Medicare¹⁰

³ Encyclopedia of American Industries, SIC 8051 Skilled Nursing Care Facilities, <http://www.referenceforbusiness.com/industries/Service/Skilled-Nursing-Care-Facilities.html> (last visited Feb. 23, 2006). Medicare spending on nursing home care totaled \$9.5 billion in 2000 and \$11.6 billion in 2001. See Ctrs. for Medicare & Medicaid Servs., *supra* note 1, at tbl.13.

⁴ See U.S. CONST. amend. V & XIV, § 1.

⁵ Administrative Procedure Act of 1966, Pub. L. No. 89-554, 80 Stat. 378 (codified as amended in scattered sections of 5 U.S.C.).

⁶ See Health Insurance for the Aged Act (Medicare Act), Pub. L. No. 89-97, 79 Stat. 290 (codified as amended in scattered sections of 42 U.S.C.). The Medicare Act is a section of the Social Security Act. See Social Security Act (Old Age Pension Act), Pub. L. No. 109-80, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.). The hearing requirements and limitations concerning nursing homes are found both in the Social Security Act and the Medicare Act. Therefore, throughout the article both the Social Security Act and the Medicare Act are discussed.

⁷ 42 C.F.R. §§ 498.5, 498.60-66 (2005).

⁸ No federal court has ruled that Medicare payments constitute property; however, most courts ignore this issue and simply review the merits of the case. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976) (ignoring the issue of whether Medicare payments constitute property and reviewing the merits of the case); *Heckler v. Ringer*, 466 U.S. 602 (1984); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667 (1986); *Jordan Hosp., Inc. v. Shalala*, 276 F.3d 72 (1st Cir. 2002).

⁹ The U.S. Department of Health, Education, and Welfare was renamed the U.S. Department of Health and Human Services (HHS) in 1980. Department of Education Organization Act of 1979 § 509(e), Pub. L. No. 96-88, 93 Stat. 695 (codified at 20 U.S.C. § 3508 (2000)). For simplicity and continuity, this article refers to the agency only as HHS.

¹⁰ Medicare is a federal entitlement program to pay for health insurance for the elderly and disabled. See COMM. ON NURSING HOME REGULATION, INST. OF MED., IMPROVING THE QUALITY OF CARE IN NURSING HOMES 238-45 (1986) [hereinafter IOM REPORT]. See also PETER A. CORNING, THE EVOLUTION OF MEDICARE . . . FROM IDEA TO LAW app. A (1969). This article will primarily focus on issues relating to the Medicare Act because federal regulation of nursing homes takes place almost exclusively under Medicare. Even though nursing homes are similarly regulated under the Medicaid Act, each state administers its own Medicaid program based on distinct rules promulgated and implemented by that individual state. The federal government does provide guidance regarding Medicaid regulation; however, the federal government does not actively supervise the activities of regulating nursing homes other than in budgetary matters. Medicaid will only be discussed as it pertains to changes in the Medicare program.

compliance hearings. I argue that the denial of a nursing home's procedural due process rights by HHS is a constitutional and statutory violation that the Supreme Court erroneously affirmed by its decision in *Shalala v. Illinois Council on Long Term Care, Inc. (Ill. Council)*.¹¹ Specifically, this denial of procedural due process rights occurs when HHS determines that a nursing home is in violation of the Medicare regulations. If HHS fails to impose or rescinds the "remedies"¹² imposed for a nursing home's alleged noncompliance, nursing homes do not have a right to a hearing.¹³ HHS claims no hearing is required because it is not depriving the nursing home of property, namely Medicare payments, and there is no harm.¹⁴

Even without the imposition of a remedy, however, HHS, arguably, is still depriving the nursing home of Medicare payments and harming nursing homes in a variety of ways. HHS uses these unreviewable findings of noncompliance as the basis for increasing the severity of remedies imposed for future incidents of noncompliance.¹⁵ The findings are also used as the basis for Medicare fraud and abuse cases that lead to stiff fines, resulting in financial harm.¹⁶ Additionally, once a nursing home is granted a hearing, the hearing is often limited to in-person cross-examination even though there are issues of material fact in dispute.¹⁷ This practice of denying a full evidentiary hearing to nursing homes challenging the deprivation of property vio-

¹¹ *Shalala v. Ill. Council on Long Term Care, Inc. (Ill. Council)*, 529 U.S. 1 (2000).

¹² The term "remedies" is a term of art created by Congress in the Medicare statute, which refers to the sanctions HHS imposes for violations of the Medicare Act. See H.R. REP. NO. 100-391(II), at 941-43 (2d Sess. 1987) (using the term to describe the sanctions HHS places on non-complying nursing homes). Remedies that may be imposed includes directed plan of correction, state monitoring, directed in-service training, denial of payment for new admissions, denial of payment for all Medicare patients, a civil money penalty, and temporary management. See 42 C.F.R. § 488.404.

¹³ See 42 C.F.R. § 498.3(b)(13). This section was originally designated as § 498.3(b)(12) until 2001. See 65 Fed. Reg. 18549 (Apr. 7, 2000).

¹⁴ See *Arcadia Acres, Inc.*, DAB No. 1607 (Dep't of Health & Human Servs. 1997) (final determination) (the Administrative Law Judge (ALJ) dismissed nursing home appeal challenging findings of noncompliance because there was allegedly no harm).

¹⁵ See 42 C.F.R. §§ 488.404(c)(2), 488.438(f)(1), (3).

¹⁶ Joan H. Krause, *A Conceptual Model of Health Care Fraud Enforcement*, 12 J. L. & POL'Y 55, 95-98 (2003).

¹⁷ See DAB No. C-04-401 (Dep't of Health & Human Servs. 2004) (initial pre-hearing order) (petitioner's name concealed) (on file with author); DAB No. C-05-445 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author).

lates the Constitution, the APA, and the Medicare Act,¹⁸ but nursing homes are barred from seeking federal review.

The Due Process Clause provides individuals with a right to the procedure of a hearing when deprived of a constitutionally protected right.¹⁹ With the passage of the APA, these procedural due process standards have been routinely applied to federal administrative agencies.²⁰ The APA grants individuals a full evidentiary hearing on the record to challenge the deprivation of liberty or property.²¹ A full evidentiary hearing includes a right to counsel, in-person witness testimony, and an impartial decision-maker.²² These rights to a hearing remain subordinate to each agency's governing statute, which often limit the structure of the hearing process and the right to federal review.²³ For instance, the Medicare Act mandates that HHS provide nursing homes with a hearing to appeal findings of alleged noncompliance with the Medicare regulations.²⁴ The Medicare regulations further provide nursing homes with the right to a full evidentiary hearing when a nursing home is dissatisfied with any finding of noncompliance with the Medicare regulations.²⁵ Nursing homes challenging noncompliance findings are not provided with a full evidentiary hearing as required by the Constitution, the APA, and the Medicare Act and regulations. Notwithstanding this violation, nursing homes have no means to address this violation because they are barred from seeking federal review.

The Social Security Act prohibits federal review of a case until HHS reviews the case and issues a final ruling.²⁶ This prohibition applies to all cases arising under the Social Security Act and the Medicare Act.²⁷ The Supreme Court applied this prohibition to Medicare

¹⁸ See 28 U.S.C.A. §§ 1331, 1346 (West 2005).

¹⁹ See *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Eldridge*, 424 U.S. at 319 (stating that the Due Process Clause provides individuals with a right to a hearing when they are being deprived of a constitutionally protected right).

²⁰ Administrative Procedure Act of 1966, Pub. L. No. 89-554, 80 Stat. 378 (codified as amended in scattered sections of 5 U.S.C.).

²¹ 5 U.S.C.A. § 554 (West 2005).

²² 5 U.S.C.A. §§ 554, 556-57.

²³ 5 U.S.C.A. §§ 554, 556-57. For instance, the requirement of exhausting all administrative remedies before bringing a case in federal court only applies when provided by an agency's governing statute. See *Darby v. Cisneros*, 509 U.S. 137 (1993).

²⁴ 42 U.S.C.A. §§ 405(g), 1395cc(h)(1)(A) (West 2005).

²⁵ The right to a hearing is provided by 42 C.F.R. § 488.330(e)(3) (2005). The right to a full evidentiary hearing is provided for by 42 C.F.R. §§ 498.5, 498.60-66.

²⁶ See 42 U.S.C.A. §§ 405(g)-(h) (West 2005).

²⁷ 42 U.S.C. § 1395cc(h)(1)(A) incorporates §§ 405(g) and (h) into the nurs-

compliance hearings in *Ill. Council*.²⁸ The Supreme Court ruled that the prohibition barred federal review of nursing home challenges to Medicare compliance findings until the case had been presented to HHS and a final ruling had been issued.²⁹ The Court ruled in this manner because the Secretary of HHS (Secretary)³⁰ asserted that nursing homes were afforded the right to procedural due process protections, which included the right of any dissatisfied nursing home to a *full evidentiary hearing* to challenge any findings of noncompliance.³¹

Notwithstanding the assertions made in *Ill. Council*, HHS has not provided any of the procedural due process rights that the Court relied upon in its ruling in *Ill. Council*.³² When no remedy is imposed, the case is summarily dismissed without a final ruling.³³ Hence, as a practical matter it is impossible for nursing homes to gain access to federal review to challenge this constitutional issue because they never fulfill the finality requirement of the Social Security Act. Because nursing homes never obtain a final ruling if no remedy is imposed, the Supreme Court's decision requiring a final decision before federal review has effectively denied nursing homes procedural due process to challenge any issue, including constitutional issues.³⁴

ing home hearing procedure. This bar is understandable when a nursing home is challenging the Medicare regulations, which the Secretary has the authority to change. However, when the channeling provision limits the federal review of constitutional challenges to the Medicare Act, the Secretary's review of the issue is meaningless because the Secretary has no authority to issue a ruling or even make changes to the Medicare Act.

²⁸ *Ill. Council*, 529 U.S. 1 (2000).

²⁹ *Id.* at 20.

³⁰ At the time of the case the Secretary of Health and Human Services (Secretary), was Donna Shalala.

³¹ *Ill. Council*, 529 U.S. 1, 20 (2000).

³² In fact, this proposition was codified in the Code of Federal Regulations in 1996, four years before the Supreme Court heard and issued its ruling in *Ill. Council*. Provider Appeals: Technical Amendments, 61 Fed. Reg. 32347, 32348-32349 (June 24, 1996) (codified at 42 C.F.R. § 431.153(b) (2003)).

³³ The ALJs summarily dismiss nursing home appeals in Medicare noncompliance cases when HHS has not imposed a remedy. See *Arcadia Acres, Inc.*, DAB No. 1607 (Dep't of Health & Human Servs. 1997) (final determination); *Jacinto City Healthcare Ctr.*, DAB No. CR627 (Dep't of Health & Human Servs. 1999); *Heritage Manor of Franklinton*, DAB No. CR666 (Dep't of Health & Human Servs. 2000); *Lutheran Home - Caledonia*, DAB No. CR674 (Dep't of Health & Human Servs. 2000) (initial determination); *Lakewood Plaza Nursing Ctr.*, DAB No. CR691 (Dep't of Health & Human Servs. 2000) (initial determination); *Lakeland Lodge Nursing Ctr.*, DAB No. CR893 (Dep't of Health & Human Servs. 2002); *Southwood Care Ctr.*, DAB No. CR1029 (Dep't of Health & Human Servs. 2003); *Highlands at Brighton*, DAB No. CR1104 (Dep't of Health & Human Servs. 2003); *Manorcure Health Servs. Sandia*, DAB No. CR1255 (Dep't of Health & Human Servs. 2004).

³⁴ This argument was raised by the Illinois Council on Long Term Care, but

Furthermore, since *Ill. Council*, many of the Administrative Law Judges (ALJs) have arbitrarily reduced the full evidentiary hearing process³⁵ to direct testimony through submission of affidavits and in-person cross-examination of witnesses.³⁶ Consequently, even if a nursing home is afforded a right to a hearing HHS still violates the law by not providing the procedures mandated by the APA,³⁷ and the Medicare Act³⁸ and regulations.³⁹ The abrogation of nursing homes' procedural due process rights has pushed the industry to near collapse.⁴⁰ For instance, not only do alleged violations of Medicare regu-

the Court dismissed these claims as too speculative. *Ill. Council*, 529 U.S. at 20.

³⁵ 42 C.F.R. §§ 498.5, 498.60-66 (2005). See also Dep't Appeals Board, Civil Remedies Division, Dep't of Health & Human Servs., Procedures (providing hearing procedures for the Civil Remedies Division of the DAB) (on file with author).

³⁶ Compare Initial Hearing Orders that provide a full evidentiary hearing with in-person direct testimony, DAB No. C-00-438 (Dep't of Health & Human Servs. 2000) (initial pre-hearing order) (petitioner's name concealed) (on file with author), DAB No. C-02-172 (Dep't of Health & Human Servs. 2002) (initial pre-hearing order) (petitioner's name concealed) (on file with author), DAB No. C-05-404 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author), and DAB No. C-06-189 (Dep't of Health & Human Servs. 2006) (initial pre-hearing order) (petitioner's name concealed) (on file with author), with Initial Hearing Orders that require written direct testimony in lieu of in-person testimony, DAB No. C-04-401 (Dep't of Health & Human Servs. 2004) (initial pre-hearing order) (petitioner's name concealed) (on file with author), and DAB No. C-05-445 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author).

³⁷ The APA provides for a full evidentiary hearing once the statute mandates that a hearing be held on the record. See 5 U.S.C.A. § 554 (West 2005).

³⁸ The Medicare Act grants nursing homes the right to a hearing to the same extent as 42 U.S.C. § 405(g). See 42 U.S.C.A. § 1395cc(h)(1)(A) (West 2005). Section 405(b)(1) of the Medicare Act provides individuals "reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision. . . . In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses and receive evidence." 42 U.S.C.A. § 405(b)(1) (West 2005).

³⁹ At the hearing, the ALJs must review in detail all the "matters at issue, and receive[] in evidence the testimony of witnesses and any documents that are relevant and material." 42 C.F.R. § 498.60. At the hearing each party is required to examine their own witness and make the witness available for cross-examination. 42 C.F.R. § 498.62. A full evidentiary hearing is held unless there are no material issues in dispute or the nursing home requests a waiver for the hearing. 42 C.F.R. § 498.66.

⁴⁰ Providing care for the elderly in nursing homes is an enormous cost that "bankrupt all but the wealthiest in nursing homes." 133 CONG. REC. S5714-02 (1987). In 1987, the General Accounting Office reported that the federal government had not fulfilled its statutory assurances of reimbursing nursing homes at a level to provide high quality care. 133 CONG. REC. S5714-02. This is further exacerbated by nursing homes losing residents due to public noncompliance findings and legal fees to chal-

lations serve as the basis for the imposition of future remedies and Medicare fraud and abuse,⁴¹ but also insurance companies use these findings in determining yearly insurance premiums for nursing homes.⁴² Therefore, procedural due process rights, or lack thereof, afforded nursing homes during hearings to challenge alleged violations of the Medicare regulations are paramount to a nursing home's continued operation. In order to comply with traditional notions of procedural due process required by the Constitution, the APA, and the Medicare Act and regulations, this article argues that HHS must provide nursing homes with hearing rights in all cases and allow them to bypass the administrative system if the only challenge concerns constitutional or statutory procedures. This is significant because the denial of a nursing home's due process rights in administrative hearings is emblematic of the federal administrative agency system.⁴³

This article will examine the failure of HHS to provide nursing homes with procedural due process rights in light of the Supreme Court decision in *Ill. Council*. Part I will define the current structure and problem with Medicare compliance hearings, while Part II briefly traces the right to procedural due process rights in federal administrative agency and Medicare compliance hearings. Part III reviews the Social Security Act's bar to federal review and the application of this

lenge all the resulting claims from these unreviewable findings.

⁴¹ Krause, *supra* note 16, at 95-98.

⁴² Currently in many states, such as Texas, Florida and Illinois there is an insurance crisis for nursing homes. Many nursing homes are forced to operate without insurance because insurance companies are unwilling to offer nursing homes with less than perfect compliance histories reasonable insurance rates. See Kendall Anderson, *Nursing Homes Pay Premium to Survive: Soaring Liability Costs Blamed for Closure of Nonprofit Care Centers*, DALLAS MORNING NEWS, July 25, 2002, at 21A. Liability insurance rates, tied to litigation costs and the quality of care, have increased on average 1,000 percent since 1998. *Id.*

⁴³ Throughout the years there have been many actions challenging the denial of due process rights in agency hearings conducted by the Immigration and Naturalization Services. See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (ruling that the exclusive clause of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) barred federal review of claims and causes originating from the Attorney General's action to commence proceedings, adjudicate cases, or execute removal orders); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991) (holding that individuals challenging the Immigration and Naturalization Services administration of the Special Agricultural Workers provisions of the Immigration Reform Control Act to determine the adjustment status of immigrants could be reviewed in federal court based on federal question jurisdiction to evaluate issues concerning the Due Process Clause, even though the statute barred federal question jurisdiction). See *Hamdi v. Rumsfeld*, 542 U.S. 507, 530-31 (2004) (ruling that procedural due process mandates that a U.S. citizen held as an enemy combatant be granted a meaningful opportunity to challenge the factual basis for his containment).

bar to Medicare compliance hearings in the pivotal case of *Ill. Council*. The problems with the case and possible solutions to rectify these problems are addressed in Part IV.

I. PROCEDURAL DUE PROCESS IN MEDICARE COMPLIANCE HEARINGS: THE FIGHT FOR FAIRNESS

The principal health care program funded and directly administered by HHS is the Health Insurance for the Elderly and Disabled program, better known as Medicare.⁴⁴ Medicare pays for sundry health care services provided to the elderly and consists of three parts: Part A (Hospital Insurance), Part B (Supplemental Medical Insurance), and Part C (Medicare Managed Care).⁴⁵ Part A covers nursing home care for persons over the age of sixty-five if they are placed in a nursing home within thirty days of being in the hospital for three or more days, and the placement is certified as medically necessary.⁴⁶ Medicare covers up to one hundred days of care received at a nursing home.⁴⁷

To participate in the Medicare program, nursing homes must submit to a certification process, which includes a thorough inspection of the facility and an assessment of services being provided patients to ensure that they comply with the Medicare regulations.⁴⁸ Once the nursing home is certified for participation in Medicare, HHS contracts with state health agencies⁴⁹ to conduct annual re-certification inspections of each Medicare certified nursing home.⁵⁰ This re-certification

⁴⁴ See Social Security Act, 42 U.S.C.A. §§ 1395-1395hhh (West 2005). Initially, the Office of Nursing Home Affairs, a division of HHS, administered Medicare. IOM REPORT, *supra* note 10, at 244. In 1977, the Centers for Medicare & Medicaid Services, formerly known as the Health Care Financing Administration (HCFA), was created to administer and regulate Medicare. See Pub. L. No. 95-135, 91 Stat. 1166 (1977); Centers for Medicare & Medicaid Services: Statement of Organization, Functions and Delegations of Authority, 66 Fed. Reg. 35437 (July 5, 2001) (organization and delegation of authority).

⁴⁵ See Social Security Act, 42 U.S.C.A. §§ 1395c-1395w-29.

⁴⁶ See Social Security Act, 42 U.S.C.A. § 1395x(i).

⁴⁷ See 42 U.S.C.A. § 1395d(a)(2). However, Part A does not cover any nursing home services if the patient who requires skilled nursing or skilled rehabilitation services can receive these services on an outpatient basis. See 42 U.S.C.A. § 1395k.

⁴⁸ See 42 C.F.R. §§ 488.3(a)(2), (b)(2), (b)(3) (2005).

⁴⁹ The State agency in Illinois responsible for conducting surveys of nursing homes is the Illinois Department of Public Health. See 210 ILL. COMP. STAT. ANN. 45/1-109, 45/3-212 (West 2004).

⁵⁰ 42 C.F.R. § 488.308(a) (Survey Frequency).

process is called survey and certification.⁵¹ HHS aggressively regulates the nursing home industry through its survey and certification process, citing nursing homes for noncompliance with the Medicare regulations.⁵² Although the Medicare Act provides nursing homes with a right to a full evidentiary hearing, HHS is limiting the access of nursing homes to full evidentiary hearings.

A. Structure of Medicare Compliance Hearings

Under the current survey and certification system, once a nursing home is certified to participate in Medicare, the home is visited every nine to fifteen months⁵³ by a State health agency survey team⁵⁴ comprised of nurses, nutritionists, social workers, and physical therapists.⁵⁵ The team assesses whether the nursing home continues to be in compliance with the Medicare regulations.⁵⁶ If the survey team finds the nursing home out of compliance with the Medicare regulations, it cites the facility for a deficiency⁵⁷ and assigns a scope and severity level to the deficiency based on the egregiousness of the offense. The scope is the number of residents affected and the severity level refers

⁵¹ 42 C.F.R. §§ 488.300-488.335 (Subpart E - Survey & Certification of Long-Term Care Facilities).

⁵² See Ctrs. for Medicare & Medicaid Servs., Assuring Quality Care for Nursing Home Residents (Sept. 29, 2000), <http://www.cms.hhs.gov/media/press/release.asp?Counter=384>.

⁵³ This survey is called an annual standard survey. There are three other types of surveys: complaint, revisit, and extended standard survey. Although named differently, the appeals for each survey are the same. See 42 C.F.R. §§ 488.308(a)-(e) (2005).

⁵⁴ See 42 C.F.R. § 488.308(a).

⁵⁵ 42 C.F.R. § 488.314.

⁵⁶ 42 U.S.C.A. § 1395i-3(g)(2) (West 2005). The majority of nursing homes are also certified to participate in the Medicaid program. See 42 C.F.R. § 488.300. Thus, the survey team usually cites the nursing home for both Medicare and Medicaid violations. That is where the similarity ends. Unlike the Medicare hearing process, States usually provide nursing homes with an opportunity to refute survey findings during an informal hearing process. 42 C.F.R. § 488.331(a)(1). In addition, the State affords the nursing home the opportunity to challenge all noncompliance findings in a full evidentiary hearing. 42 C.F.R. § 431.153(i).

⁵⁷ There are a total of 190 possible deficiencies divided into seventeen different categories, for which HHS can cite a nursing home. See DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF THE INSPECTOR GENERAL, OEI-02-01-00600, NURSING HOME DEFICIENCY TRENDS AND SURVEY AND CERTIFICATION PROCESS CONSISTENCY 1 (2003), available at <http://oig.hhs.gov/oei/reports/oei-02-01-00600.pdf>. Most deficiencies are categorized into three main areas: quality of care (42 C.F.R. § 483.25); quality of life (42 C.F.R. § 483.15); and resident behavior and facility practice (42 C.F.R. § 483.13).

to the seriousness of the harm.⁵⁸ The scope and severity of each deficiency assigned is based on the matrix shown in Table 1. The team then denotes the seriousness of any alleged deficiencies by completing a Statement of Deficiencies (SOD) that sets out the letter in the matrix shown in Table 1 that corresponds to the appropriate scope and severity level.⁵⁹ The SOD is then sent to HHS for approval.⁶⁰ Once HHS approves the findings of noncompliance, it posts the findings on its website and notifies the nursing home ombudsman, the physicians and skilled nursing facility administration licensing board, and the State Medicaid fraud and abuse control units.⁶¹

TABLE 1⁶²

Severity	Scope		
	Isolated	Pattern	Widespread
Immediate Jeopardy	J	K	L
Actual Harm	G	H	I
Potential for more than minimal harm, but not immediate jeopardy	D	E	F
No actual harm with a potential for minimal harm	A	B	C

⁵⁸ 42 C.F.R. § 488.404(b). The scope of the deficiency means whether the deficiency was isolated, constituted a pattern of behavior, or was widespread. *See* 42 C.F.R. § 488.404(b)(2). The severity is whether a facility's deficiencies caused: no actual harm with a potential for minimal harm; no actual harm with a potential for more than minimal harm, but not immediate jeopardy; actual harm that is not immediate jeopardy; or immediate jeopardy to a resident's health or safety. *See* 42 C.F.R. § 488.404(b)(1).

⁵⁹ The Statement of Deficiencies (SOD) details the nursing home's violations of the Medicare regulations and factual incidents to support these allegations. *See* 42 C.F.R. § 488.402(f)(1). The SOD is issued prior to a nursing home requesting a hearing. 42 C.F.R. § 488.18(b)(1).

⁶⁰ 42 C.F.R. §§ 488.330(d), 488.402(f)(1).

⁶¹ 42 U.S.C.A. § 1395i-3(g)(5). The information remains posted until the next annual survey is conducted.

⁶² LISA MATTHEWS-MARTIN ET. AL, AM. HEALTH CARE ASSOC., COMPARING NURSING HOME QUALITY AND PERFORMANCE: AN EVALUATION OF THE BASIC METHOD IN NURSING HOME RANKING SYSTEMS 3 (2003), available at http://www.ahca.org/research/NHC_Note_EvalNHRatingSystems_Final_20030922.pdf.

Upon approval from HHS, the State agency sends a copy of the SOD to the offending nursing home along with a letter noting all the remedies imposed.⁶³ Remedies that may be imposed include a directed plan of correction, state monitoring, directed in-service training, denial of payment for new admissions, denial of payment for all Medicare patients, a civil money penalty from \$50 to \$10,000, and temporary management.⁶⁴ HHS also sends the nursing home a letter confirming the imposition of a remedy and the duration of each imposed remedy.⁶⁵ If the nursing home decides to appeal the alleged noncompliance findings, it bears the burden of proof and must file a separate hearing request within sixty days from the date of the state's and HHS's letter.⁶⁶ The hearing request is sent to HHS's judicial board, and then assigned to a specific ALJ.⁶⁷ The hearing process varies significantly based on which of the eight ALJs is presiding over the case;⁶⁸ hearings can last from one to five days and include only cross-examination testimony.⁶⁹ Once the ALJ issues a ruling, the

⁶³ See 42 C.F.R. §§ 488.18(b)(1), 488.402(f)(2).

⁶⁴ See 42 C.F.R. §§ 488.406, 488.408(a)(2). A nursing home is out of compliance with the Medicare regulations if the deficiency creates more than a potential for causing minimal harm. 42 C.F.R. § 488.301. Remedies are only imposed if a nursing home is not in substantial compliance with the Medicare regulations. 42 C.F.R. § 488.400.

⁶⁵ 42 C.F.R. § 488.402.

⁶⁶ 42 C.F.R. § 498.82. Usually to preserve its hearing rights, nursing homes *must* file an appeal to each letter it receives that discusses the imposition of remedies even if the information is duplicated. See *Concourse Rehab. & Nursing Ctr., Inc. v. Thompson*, No. 03 Civ.260(NRB), 2004 WL 434434 (S.D.N.Y.), *aff'd*, No. 04-2586-CV, 2005 WL 3076899 (2d Cir. 2005).

⁶⁷ 42 C.F.R. § 498.44.

⁶⁸ There are eight HHS ALJs to cover all of the nursing homes cases nationwide. The Chief ALJ is Silva and he serves with the following ALJs in order of seniority: Kessel, Hughes, Anglada, Montano, Smith, Sickendick, and Blair. U.S. Dep't of Health & Human Servs., Administrative Law Judges, <http://www.hhs.gov/dab/judges.html> (last visited Mar. 25, 2006).

⁶⁹ Compare Initial Hearing Orders that provide a full evidentiary hearing with in-person direct testimony, DAB No. C-00-438 (Dep't of Health & Human Servs. 2000) (initial pre-hearing order) (petitioner's name concealed) (on file with author), DAB No. C-02-172 (Dep't of Health & Human Servs. 2002) (initial pre-hearing order) (petitioner's name concealed) (on file with author), DAB No. C-05-404 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author), and DAB No. C-06-189 (Dep't of Health & Human Servs. 2006) (initial pre-hearing order) (petitioner's name concealed) (on file with author), with Initial Hearing Orders that require written direct testimony in lieu of in-person testimony, DAB No. C-04-401 (Dep't of Health & Human Servs. 2004) (initial pre-hearing order) (petitioner's name concealed) (on file with author), and DAB No. C-05-445 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author).

nursing home has sixty days to appeal the decision to the Departmental Appeals Board (DAB), the appellate body of HHS.⁷⁰ After receiving a ruling from the DAB, the nursing home may appeal the case to federal court. This whole hearing process usually takes a number of years to reach the federal level.⁷¹

B. The Problem: Lack of Procedural Due Process

The Medicare Act provides individuals dissatisfied with the non-compliance findings of the Secretary with “reasonable notice and opportunity for a hearing with respect to such decision. . . . In the course of any hearing, investigation, or other proceeding, the Commissioner⁷² may administer oaths and affirmations, examine witnesses, and receive evidence.”⁷³ This section has been interpreted to mean that nursing homes dissatisfied with findings of noncompliance have a right to a hearing.⁷⁴ This article will show, however, that the agency’s current practices fall short of this ideal.

If HHS fails to impose or rescinds the remedies imposed for a nursing home’s alleged noncompliance, nursing homes do not have a right to a hearing even though the findings of noncompliance are not rescinded,⁷⁵ nor removed from the HHS website,⁷⁶ and are the basis

⁷⁰ 42 C.F.R. § 498.80.

⁷¹ See *Lutheran Home – Caledonia*, DAB No. CR674 (Dep’t of Health & Human Servs. 2000) (initial determination); *Lakewood Plaza Nursing Ctr.*, DAB No. CR691 (Dep’t of Health & Human Servs. 2000) (initial determination).

⁷² Under the Medicare Act, the Secretary of HHS was inserted to replace the term Commissioner. 42 U.S.C.A. § 1395cc(h)(1)(A) (West 2005).

⁷³ 42 U.S.C.A. § 405(b) (West 2005). Section 1395cc(h)(1)(A) of the Medicare Act incorporates sections 405(b), (g), and (h). The Medicare Act grants nursing homes the right to a hearing to the same extent as 42 U.S.C. § 405(b), (g). See 42 U.S.C.A. § 1395cc(h)(1)(A).

⁷⁴ *Shalala v. Ill. Council on Long Term Care, Inc. (Ill. Council)*, 529 U.S. 1, 20 (2000).

⁷⁵ See *Arcadia Acres, Inc. v. HCFA*, CR 424 (1996), *aff’d*, DAB No. 1607 (1997); *Jacinto City Healthcare Center v. HCFA*, CR627 (1999); *Heritage Manor of Franklinton v. HCFA*, CR666 (2002); *Lutheran Home - Caledonia v. HCFA*, CR 674 (2000), *aff’d*, DAB No. 1753 (2000); *Lakewood Plaza Nursing Center v. HCFA*, CR 691 (2000), *aff’d*, DAB No. 1767 (2001); *Lakeland Lodge Nursing Center v. HCFA*, CR893 (2002); *Southwood Care Center v. CMS*, CR1029 (2003); *Highlands at Brighton v. CMS*, CR1104 (2003); *Manor Care Health Services Sandia v. CMS*, CR1255 (2004).

⁷⁶ See *Arcadia Acres, Inc. v. HCFA*, CR 424 (1996), *aff’d*, DAB No. 1607 (1997); *Jacinto City Healthcare Center v. HCFA*, CR627 (1999); *Heritage Manor of Franklinton v. HCFA*, CR666 (2002); *Lutheran Home - Caledonia v. HCFA*, CR 674 (2000), *aff’d*, DAB No. 1753 (2000); *Lakewood Plaza Nursing Center v. HCFA*, CR 691 (2000), *aff’d*, DAB No. 1767 (2001); *Lakeland Lodge Nursing Center v. HCFA*, CR893 (2002); *Southwood Care Center v. CMS*, CR1029 (2003); *Highlands at Brigh-*

for the imposition of remedies for future incidents of noncompliance.⁷⁷ In addition, HHS has consistently disregarded nursing homes' rights to a full evidentiary hearing as required by the Medicare regulations.⁷⁸ Many of the ALJs have drastically reduced the full evidentiary hearing process to direct testimony through submission of affidavit and in-person cross-examination of witnesses. The ALJs have made these arbitrary changes without any change in the hearing procedures or regulations.⁷⁹ As a result of these changes, nursing homes have been left without an opportunity to be heard in the agency proceeding and in federal court before the loss of their property, Medicare payments.⁸⁰ This is a violation of the letter and spirit of the Due Process Clause of the Fifth Amendment, the APA, and the Medicare Act and regulations that guarantees a right to process before the loss of property.

II. PROCEDURAL DUE PROCESS IN FEDERAL ADMINISTRATIVE HEARINGS

The cornerstone of the American justice system, the Due Process Clause of the Fifth Amendment of the U.S. Constitution, guarantees that no person will "be deprived of life, liberty, or property, without

ton v. CMS, CR1104 (2003); *Manor Care Health Services Sandia v. CMS*, CR1255 (2004).

⁷⁷ See 42 C.F.R. §§ 488.404(c)(2), 488.438(f)(1) and (3) (2003).

⁷⁸ 42 C.F.R. §§ 498.5, 498.60-498.66 (2003).

⁷⁹ See Dep't Appeals Board, Civil Remedies Division, Dep't of Health & Human Servs., Procedures (providing hearing procedures for the Civil Remedies Division of the DAB) (on file with author). Compare Initial Hearing Orders that provide a full evidentiary hearing with in-person direct testimony, DAB No. C-00-438 (Dep't of Health & Human Servs. 2000) (initial pre-hearing order) (petitioner's name concealed) (on file with author), DAB No. C-02-172 (Dep't of Health & Human Servs. 2002) (initial pre-hearing order) (petitioner's name concealed) (on file with author), DAB No. C-05-404 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author), and DAB No. C-06-189 (Dep't of Health & Human Servs. 2006) (initial pre-hearing order) (petitioner's name concealed) (on file with author), with Initial Hearing Orders that require written direct testimony in lieu of in-person testimony, DAB No. C-04-401 (Dep't of Health & Human Servs. 2004) (initial pre-hearing order) (petitioner's name concealed) (on file with author), and DAB No. C-05-445 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author).

⁸⁰ No federal court has ruled that Medicare payments constitute property; however, most courts ignore this issue and simply review the merits of the case. See *Matthews v. Eldridge*, 424 U.S. 319 (1976); *Heckler v. Ringer*, 466 U.S. 602 (1984); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986); *Michigan Ass'n of Homes & Servs. for the Aging, Inc. v. Shalala*, 127 F.3d 496 (6th Cir. 1997); *Jordan Hosp., Inc. v. Shalala*, 276 F.3d 72 (1st Cir. 2002).

due process of law.”⁸¹ Individuals deprived of property must be granted procedural due process, which entails a hearing.⁸² Procedural due process rights are an integral part of a full and fair hearing in federal and state courts.⁸³ Due Process also applies to the administrative agency adjudicative system. Even though few administrative law disputes are resolved using the Due Process Clause, the procedural requirements granted during administrative hearings is determined by courts,⁸⁴ Congress, and the administrative agency’s understanding of procedural Due Process.⁸⁵ Over the years, the interpretation of Due Process as applied to administrative agency hearings has evolved to prevent the probability of an erroneous deprivation of property.⁸⁶

Congress tried to further standardize the requirements of procedural due process granted by federal administrative agencies with the passage of the APA.⁸⁷ Unfortunately, individuals are not always granted these due process rights when challenging the deprivation of liberty or property by federal administrative agencies.⁸⁸ The abrogation of these protections during federal administrative agency adjudications has created an eternal tension between the agencies, the individuals regulated by the agencies, and the federal

⁸¹ U.S. CONST. amend. V & XIV, § 1. Businesses (i.e. corporations) are considered persons under the law and thus are guaranteed due process under the law. *County of Santa Clara v. S. Pac. R. Co.*, 118 U.S. 394 (1886).

⁸² *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁸³ See 5 U.S.C.A. §§ 554, 556 (West 2005); COMM. ADMIN. PROCEDURE, OFFICE OF THE ATT’Y GEN., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 8 (1940).

⁸⁴ In *Califano v. Yamasaki*, the Supreme Court noted that when “presented with both statutory and constitutional grounds to support relief requested usually should pass on the statutory claim before considering the constitutional question.” *Califano*, 442 U.S. 682, 692-693 (1979). Nevertheless, the Supreme Court has been inconsistent in its application of this rule as shown by its discussion of the Due Process Clause in *Califano* even though it noted that the case could be resolved based on the statute. *Id.* at 693 and 696.

⁸⁵ RICHARD PIERCE, JR., ET AL, ADMINISTRATIVE LAW AND PROCESS 231 (4th ed. 2004).

⁸⁶ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (“[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property” (citing *Carey v. Phipus*, 435 U.S. 247, 259 (1978))). See also *Carey*, 435 U.S. at 266 (noting “the importance to organized society that procedural due process be observed” and emphasizing that “the right to procedural due process is ‘absolute’ in the sense that it does not depend upon the merits of a claimant’s substantive assertions”).

⁸⁷ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37-38 (1950) (citing S. 5154, 70th Cong. (2nd Sess. 1929)).

⁸⁸ Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1999 (1996).

courts.⁸⁹ This tension pervades the lives of every individual and business as federal administrative agencies, such as HHS, govern vital aspects of all daily living.

A. Procedural Due Process under the Constitution

The amount of procedural due process individuals are guaranteed under the Fifth Amendment when challenging the deprivation of property by Federal administrative agencies centers on two questions: (1) When is due process required?; and (2) What process is due? The Supreme Court answered these questions in the landmark cases *Goldberg v. Kelly*⁹⁰ and *Mathews v. Eldridge*.⁹¹

In *Goldberg*, the Supreme Court ruled that welfare recipients' right to statutorily granted payments constituted property.⁹² The deprivation of this property right required the government to provide procedural due process rights.⁹³ The Court further ruled that due process required welfare recipients to be provided with a full hearing before their welfare payments were terminated.⁹⁴ The Court further stated that Congress usually incorporates some form of review in the statutes that grant administrative agencies authority to regulate individuals.⁹⁵ Thus, administrative agencies are required to provide individuals with

⁸⁹ *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991) (holding that individuals challenging the Immigration and Naturalization Services administration of the Special Agricultural Workers provisions of the Immigration Reform Control Act to determine the adjustment status of immigrants could be reviewed in federal court based on federal question jurisdiction to evaluate issues concerning the Due Process Clause, even though the statute barred federal question jurisdiction).

⁹⁰ 397 U.S. 254 (1970).

⁹¹ 424 U.S. 319 (1976).

⁹² The recipients in this case were receiving financial aid under the auspices of the federal assistance program, Aid to Families with Dependent Children (AFDC), or under New York State's general Home Relief Program. *Goldberg*, 397 U.S. at 255-56. Two suits were brought and consolidated in the District Court. *Id.* at 257. There were twenty named plaintiffs, fourteen of which had been or were about to be cut off from AFDC and six from Home Relief. *Id.* During the course of litigation most, though not all, of the plaintiffs received a fair hearing or were restored to the roles without a hearing. The case continued because the questions raised by the plaintiffs have still not been addressed even though their assistance has been restored. *Id.* at 256 n.2.

⁹³ *Id.* at 260-61.

⁹⁴ *Id.* at 260

⁹⁵ *Id.* at 262. For example, the Medicare Act grants beneficiaries, physicians, and nursing homes the right to review most agency actions. Although the extent of the right to review under Medicare varies, the right of review is triggered when HHS initiates an action to deprive an individual or entity of its Medicare payments. Once the right is triggered, the issue becomes what procedures must be part of the review. It is unclear what procedures, such as witness testimony, must be part of the review.

a right to review when action by an agency causes a deprivation of property.⁹⁶ However, in *Eldridge*,⁹⁷ the Supreme Court fashioned a rule used to determine what process is due, making the process commensurate to the harm suffered from the deprivation of property.

In *Eldridge*, Mr. Eldridge, a Social Security recipient, challenged HHS's decision to revoke his disability benefits prior to providing an evidentiary hearing.⁹⁸ Although HHS did not provide a pre-termination hearing, it had arrived at this decision based on a thorough standard process.⁹⁹ Eldridge's condition was verified annually by a state agency.¹⁰⁰ The state sent Eldridge's physician a questionnaire concerning Eldridge's disability.¹⁰¹ Due to the answers on this questionnaire and a review of his condition by agency physicians, the state agency determined that Eldridge's disability had ceased.¹⁰² Eldridge was informed that his benefits would be terminated and he was provided with an opportunity to review the evidence in his case file.¹⁰³

Eldridge submitted a letter noting that the physicians were mistaken about his condition and that a resolution of this mistake made him still disabled.¹⁰⁴ The state agency reviewed Eldridge's letter and ruled that he was no longer disabled.¹⁰⁵ The agency then submitted its findings to HHS, which accepted the agency's finding.¹⁰⁶ HHS sent a letter to Eldridge notifying him that he could seek reconsideration by

⁹⁶ *Id.* at 270.

⁹⁷ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁹⁸ *Id.* at 326. The Supreme Court noted that the Secretary could not resolve the matter because it arose under constitutional issues and thus, the Court had subject matter jurisdiction over the issue. *Id.* at 329-30. This is important because the year before it decided Mr. Eldridge's case, the Court ruled in *Weinberger v. Salfi* that federal courts did not have subject matter jurisdiction over cases arising from Social Security claims unless the case was first presented to HHS and the Secretary issued a final ruling. *Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975). The *Weinberger* decision clearly applied to *Eldridge* because Mr. Eldridge's claims arose under Social Security and were presented in federal court before the Secretary issued a final ruling. Thus, based on the subject matter jurisdiction bar applied in *Salfi*, *Eldridge* should never have been decided because Eldridge did not present his case to HHS and had not received a final ruling. The author is in the process of drafting an article to discuss why *Eldridge* should never have been decided because of the subject matter jurisdiction bar.

⁹⁹ *Eldridge*, 424 U.S. at 323-34.

¹⁰⁰ *Id.* at 337.

¹⁰¹ *Id.* at 338.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 339.

¹⁰⁵ *Id.* at 339.

¹⁰⁶ *Id.* at 340.

the state agency.¹⁰⁷ HHS would then review the decision and notify Eldridge of his right to an evidentiary hearing before an ALJ.¹⁰⁸ If there was an adverse decision, then Eldridge could request discretionary review by the Appeals Court and *then* obtain judicial review.¹⁰⁹ After receiving the agency's findings, Eldridge filed a claim in federal court instead of submitting his claim for reconsideration.¹¹⁰

In reviewing Eldridge's claim, the Supreme Court noted that due process was flexible and only called for procedural protections as demanded by the particular situation.¹¹¹ The hearing procedure is specific to the circumstances of the parties, but must always provide the parties with a *meaningful opportunity* to present their case.¹¹² The process due was dictated by three factors: (1) the private interest that was affected by the official action; (2) the risk of erroneous deprivation of such interest and the reduction of risk, if any, from the addition of procedural safeguards; and (3) the government's interest including the fiscal and administrative burdens that the additional or substitute procedures would entail.¹¹³

In applying these factors to Eldridge's case, the Court ruled that a post-enforcement hearing satisfied the requirements of procedural due process.¹¹⁴ The Court found that Mr. Eldridge's interest in uninterrupted disability payments was negligible compared with the government's interest in avoiding the administrative cost and the burden of providing an evidentiary hearing prior to the termination of benefits.¹¹⁵ Additionally, the Court ruled that there was minimal risk of erroneous deprivation that would not be reduced by additional procedural safeguards.¹¹⁶ The Court found that the procedures used by HHS were fair and reliable¹¹⁷ and that most of the initial termination decisions were upheld after a hearing.¹¹⁸ Hence, the Court ruled that the post-termination hearing fulfilled the requirements of due process.¹¹⁹

¹⁰⁷ *Id.* at 325.

¹⁰⁸ *Id.* at 324.

¹⁰⁹ *Id.* at 338-39.

¹¹⁰ *Id.* at 324-25.

¹¹¹ *Id.* at 334.

¹¹² *Id.* at 349.

¹¹³ *Id.* at 335.

¹¹⁴ *Id.* at 349.

¹¹⁵ *Id.* at 343.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 345.

¹¹⁸ *Id.* at 347.

¹¹⁹ In *Califano v. Yamasaki*, the Supreme Court modified *Eldridge* by limiting the right to full evidentiary hearing to matters where there are material issues of fact in dispute that create a threat of erroneous deprivation of property. *Califano*, 442 U.S. at 696. The *Califano* case involved disabled social security beneficiaries seeking a

Due process is an integral part of the hearing process in federal administration adjudications. According to the Supreme Court, "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"¹²⁰ Procedural due process grants individuals the right to some type of hearing when deprived of property.¹²¹ The type of hearing is dependent on the possibility of erroneous deprivation of property and balancing the interests of the individual and the government.¹²² To ascertain whether the type of hearing will cause an erroneous deprivation of property, one must review the APA, the agency's governing statute, regulations, and current process. The APA provides a right to a full evidentiary hearing and details what should be included in this type of hearing.¹²³ Congress enacted the APA to instill a sense of fairness and impartiality into federal administrative agency hearings. Although Congress made the APA subordinate to the agency's governing statute, it illustrates Congress' intent to provide individuals with procedural due process rights when challenging the actions of federal administrative agencies.

B. The Administrative Procedure Act—Fairness and Due Process in Administrative Agency Hearings

As early as the 1920s, Congress began delegating broad powers to federal administrative agencies to protect the health, safety and welfare of the public, but the Supreme Court regularly overturned these delegations.¹²⁴ After 1935, the Supreme Court upheld broad Congressional delegation of power to federal administrative agencies, culmi-

hearing before HHS recouped overpayments. *Id.* at 684-685. The Supreme Court ruled that when recipients requested a waiver regarding the factual determination of fault to prevent HHS' recoupment of overpayments, the recipients were guaranteed a right to a full evidentiary hearing. *Id.* at 696. This full evidentiary hearing include in-person witness testimony and cross-examination because "the Secretary could misjudge a number of cases" causing erroneous deprivation of social security payments. *Id.* at 697. In the case of nursing homes there are always issues of material fact in dispute. Thus, this limitation does not affect the nursing homes claim for a full evidentiary hearing.

¹²⁰ *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

¹²¹ See *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970).

¹²² *Eldridge*, 424 U.S. at 334-35.

¹²³ See *infra* Part I.B.

¹²⁴ See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (ruling that Congressional delegation of power to President under National Industrial Recovery Act to limit the interstate transportation of petroleum was an unconstitutional delegation of legislative power); *A.L.A. Schechter Corp. v. United States*, 295 U.S. 495 (1935) (ruling that Congressional delegation of power to President under National Industrial Recovery Act to limit the interstate transportation of petroleum was an unconstitutional delegation of legislative power).

nating in several cases in which the Court upheld delegation of power to agencies with little to no standards.¹²⁵ With the proliferation of federal administrative agencies, Congress became concerned with the potential for administrative bias in federal administrative hearings because agencies were granted significant discretion in their hearing procedures.¹²⁶ Because the agency served as the investigator, the prosecutor, and the judge, Congress questioned whether the agency could be genuinely impartial.¹²⁷ There were a series of bills introduced in Congress in the 1930s and 1940s aimed at correcting the problems with the administrative review process.¹²⁸

In 1937, President Roosevelt also became concerned with the fairness of the administrative review process and created the Committee on Administrative Management.¹²⁹ Two years later, the President also directed the Attorney General to establish a new "committee of eminent lawyers, jurists, scholars, and administrators to review the entire administrative process in the various departments of the executive Government and to recommend improvements, including the suggestion of any needed legislation."¹³⁰ Before the Attorney General's Committee Report was issued, Congress passed the Walter-

¹²⁵ See *Yakus v. United States*, 321 U.S. 414 (1944) (upholding the broad delegation of power to the Price Administrator to regulate commodity pricing); *Lichter v. United States*, 334 U.S. 742 (1948) (upholding a statute giving the executive branch the power to recover profits from war contracts deemed "excessive" without defining what constituted "excessive"); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (upholding Congressional delegation of power to the Federal Loan Bank Board to issue regulation for when a conservator could be appointed to take over a mismanaged federal savings and loan association). The Court's decisions in these cases, leading to the independence of agencies from executive, legislative, and judicial controls, solidified the place of the federal administrative agency as the "fourth branch" of the federal government. KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 13 (4th ed. 2002).

¹²⁶ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37-38 (1950) (citing S. 5154, 70th Cong. (2nd Sess. 1929)).

¹²⁷ *Id.*

¹²⁸ S. 1835, 73rd Cong. (1933); S. 3787, 74th Cong. (1936); S. 3676, 75th Cong. (1938); H.R. 4235, 76th Cong. (1939); H.R. 4236, 76th Cong. (1939); H.R. 6324, 76th Cong. (1939); S. 915, 76th Cong. (1939); S. 916, 76th Cong. (1939); H.R. 1203, 79th Cong. (1945); S. 7, 79th Cong. (1945); H.R. 4314, 78th Cong. (1944); H.R. 5081, 78th Cong. (1944); H.R. 5237, 78th Cong. (1944); S. 2030, 78th Cong. (1944); H.R. 3464, 77th Cong. (1941); H.R. 4238, 77th Cong. (1941); H.R. 4782, 77th Cong. (1941); S. 674, 77th Cong. (1941); S. 675, 77th Cong. (1941); S. 918, 77th Cong. (1941).

¹²⁹ PRESIDENT'S COMM. ON ADMIN. MGMT., *ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* 2 (1937).

¹³⁰ The quoted statement is from President Roosevelt's message to Congress on December 18, 1940, vetoing the Walter-Logan Act of 1940. 86 CONG. REC. 13942-3 (1940), reprinted in H.R. DOC. NO. 986, 76th Cong. (3d Sess. 1940).

Logan bill that standardized the administrative review process. The Walter-Logan bill provided for a standard hearing process that included a right to appeal agency actions in writing, a right to a hearing before a three-panel board, a right to call witnesses and compel documents, and a right to appeal the decision to the U.S. Circuit Courts of Appeal.¹³¹ President Roosevelt vetoed the bill,¹³² acknowledging the need for reform, but delaying his decision until the Attorney General's Committee Report was issued.¹³³

To instill a sense of fairness and eradicate the bias and arbitrary nature of agency hearings, the Attorney General's Committee Report (the Report) recommended that agencies completely separate adjudication functions and personnel from those investigating and prosecuting claims.¹³⁴ However, in comparison to the Walter-Logan bill, the Report provided generalized guidelines for attaining these goals rather than providing specific procedures. Congress used the Report to craft the bill that was later entitled the Administrative Procedure Act of 1946.¹³⁵ Even though the broad language in the Report allowed the agency more flexibility in fulfilling the requirements of fairness, the APA afforded the right to some procedural safeguards on the agency level once the agency's governing statute granted hearing rights.¹³⁶ Most significantly, section 554 of the APA provides hearing rights in "every case of adjudication required by statute to be determined *on the record*."¹³⁷

This section explicitly grants a right to a full evidentiary hearing on the record. Furthermore, section 556(d) of the APA states that:

Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. . . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.¹³⁸

¹³¹ 86 CONG. REC. 12901, 13674-75 (1940).

¹³² H.R. 6324, S. 915. *See also* 86 CONG. REC. 13942-3 (1940), *reprinted in* H.R. DOC. NO. 986, 76th Cong. (3d Sess. 1940).

¹³³ 86 CONG. REC. 13943 (1940).

¹³⁴ COMM. ADMIN. PROCEDURE, *supra* note 83.

¹³⁵ *See generally* S. REP. NO. 79-752, at 26 (1945).

¹³⁶ 5 U.S.C.A. § 554 (West 2005).

¹³⁷ 5 U.S.C.A. § 554 (emphasis added).

¹³⁸ 5 U.S.C.A. § 556.

This section explicitly limits the intake of evidence to that which is material to the case and grants individuals challenging agency actions the right to an oral hearing. In addition, Congress tried to provide safeguards in the APA by making it clear that all agency decisions were reviewable by the federal courts unless Congress clearly withheld that right. The Senate Committee on the Judiciary stated:

Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.¹³⁹

The House of Representatives Committee on the Judiciary further said that there should be judicial review and stressed that when that review is limited the intent should be clear.¹⁴⁰ Although Congress enacted the APA to address issues of fairness in the administrative hearing process,¹⁴¹ these rights to a hearing remain subordinate to each agency's governing statute,¹⁴² which often limits the structure of the hearing process and the right to federal review.¹⁴³

Based on the Supreme Court's rulings in *Goldberg* and *Eldridge*, procedural due process guarantees an individual deprived of property a right to a hearing.¹⁴⁴ The type of hearing depends on the agency's governing statute and regulations and balancing the individual's interest against the government's interest.¹⁴⁵ If the statute grants a hearing *on the record*, the APA requires that the individual be granted a full evidentiary hearing including witness testimony. The Medicare Act

¹³⁹ *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (citing S. REP. NO. 79-752, at 26 (1945)).

¹⁴⁰ H.R. REP. NO. 79-1980, at 41 (1946).

¹⁴¹ Administrative Procedure Act of 1966, Pub. L. No. 89-554, 80 Stat. 378 (codified as amended in scattered sections of 5 U.S.C.). See also COMM. ADMIN. PROCEDURE, *supra* note 83.

¹⁴² 5 U.S.C.A. §§ 554, 702, 704.

¹⁴³ See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (ruling that the exclusive clause of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) barred federal review of claims and causes originating from the Attorney General's action to commence proceedings, adjudicate cases, or execute removal orders).

¹⁴⁴ See *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970); *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976).

¹⁴⁵ See *Eldridge*, 424 U.S. at 340-43.

grants nursing homes a right to a hearing *on the record*.¹⁴⁶ The structure of nursing home hearings has always been connected to the severity of the sanctions imposed for noncompliance. Therefore, a review of the evolution of the entire regulatory system governing nursing home participation in the Medicare Program is necessary to understand what constitutes a hearing *on the record* under the Medicare Act.

C. Procedural Due Process under the Medicare Act and Regulations

When Congress enacted the Medicare Act,¹⁴⁷ it imposed strict health and safety standards on nursing home care.¹⁴⁸ Initially, the Medicare standards were so severe that only about 10 percent of the 6,000 nursing homes that applied to participate in the program achieved full compliance.¹⁴⁹ Another 50 percent were allowed to participate in the program for being in "substantial compliance" with the Medicare standards.¹⁵⁰ Therefore, the purpose of the first nursing home enforcement standards was to "allow some substandard facilities to participate in the [Medicare] program while encouraging them to achieve compliance, rather than to bar such facilities until they were in compliance."¹⁵¹ Thus, nursing homes did not need to request a hearing because there was no adversarial system.

Congress amended the Medicare program in 1967, creating less rigorous regulatory standards for participation.¹⁵² Without these changes people who needed nursing care would have been left with no option for care.¹⁵³ The regulatory standards were again revised in 1974.¹⁵⁴ Under these new regulations, if a facility was found in violation of the regulations, HHS required the states to try to resolve the

¹⁴⁶ 42 U.S.C.A. § 1320a-7a(c)(2) (West 2005).

¹⁴⁷ Medicaid is also a federally funded program; however, the States administer this program. See Social Security Act, 42 U.S.C.A. § 1396 (West 2005).

¹⁴⁸ IOM REPORT, *supra* note 10, at 241.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 148, 233.

¹⁵¹ *Id.* at 148.

¹⁵² *Id.* See also Assistance in Form of Institutional Services in Intermediate Care Facilities, 33 Fed. Reg. 12925 (Sept. 12, 1968); Institutional Services in Intermediate Care Facilities, 34 Fed. Reg. 9782-9784 (June 24, 1969)

¹⁵³ ROBERT STEVENS & ROSEMARY STEVENS, WELFARE MEDICINE IN AMERICA: A CASE STUDY OF MEDICAID 140 (Transaction Publishers 2003) (1940).

¹⁵⁴ Skilled Nursing Facilities, 39 Fed. Reg. 2238-2257 (Jan. 17, 1974). Under these regulations, HHS created an office in the federal regional offices to regulate and oversee state enforcement efforts of all long-term care facilities. IOM REPORT, *supra* note 10, at 245 (citation omitted). Nevertheless, many states chose not to implement or enforce these regulations. See *id.* at 244-45 (citation omitted).

case before reporting the problem to HHS or the police.¹⁵⁵ To resolve the case, states were mandated to send a notice of the violations to the facility and give the facility a thirty to sixty day grace period to correct violations.¹⁵⁶ If the facility failed to become compliant by the end of that time period, then and only then could the state impose the sanction of termination.¹⁵⁷ Prior to the termination of the facility, HHS did not make the findings of noncompliance public. Furthermore, with the imposition of this remedy, HHS granted the nursing home a full evidentiary hearing either before termination or within 120 days after the termination became effective.¹⁵⁸ In 1980, with the passage of the Omnibus Reconciliation Act of 1980 (OBRA of 1980), Congress created a new intermediate sanction, denial of payments for new Medicare admissions, and directed the Secretary to impose this remedy for nursing home deficiencies that did not cause immediate jeopardy¹⁵⁹ to patients.¹⁶⁰

Under this provision, a nursing home found out of compliance with the Medicare regulations was first given the opportunity to develop and implement a plan of correction for its deficiencies.¹⁶¹ If the facility was unable to fulfill the requirements set forth in the plan of correction, the Secretary then had the right to impose the sanction of denial of payments for new admissions.¹⁶² Congress created this new process and sanction because it would “serve to protect beneficiaries both by giving the skilled nursing facility an incentive to correct deficiencies in a timely manner and by forestalling the need for traumatic

¹⁵⁵ *Id.* at 148.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ 50 Fed. Reg. at 7191. From 1980 to 1984, there were 967 voluntary nursing home cancellations of participation in Medicare and only 159 terminations from the Medicare program. IOM REPORT, *supra* note 10, at 156-57. HHS used termination of a facility from Medicare as the last resort. HHS provided nursing homes with several opportunities to become compliant through follow-up visits. *Id.* at 148. Even once a facility was de-certified from the program, HHS would allow the facility to re-enter the Medicare program if the facility provided “reasonable assurance” that the deficiencies that caused termination would not be repeated. STEVENS & STEVENS, *supra* note 153, at 137-38.

¹⁵⁹ Immediate Jeopardy is defined as “a situation in which the provider’s noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident.” See 42 C.F.R. § 489.3 (2005). The States now have the authority to impose this remedy for Medicare violations. See 42 C.F.R. § 488.408.

¹⁶⁰ See Omnibus Reconciliation Act of 1980 (OBRA of 1980), Pub. L. No. 96-499, § 916, 94 Stat. 2599, 2623-2625 (1980).

¹⁶¹ H.R. REP. NO. 96-1167, at 56 (1980).

¹⁶² H.R. REP. NO. 96-1167, at 56.

transfers of large numbers of patients during the time needed improvements are being made in the facility."¹⁶³ Congress also created an informal hearing process for nursing facilities to challenge the imposition of this intermediate sanction.¹⁶⁴ In creating this new hearing process, Congress clearly stated that the process would not preclude nursing homes from seeking judicial review for factual disputes concerning noncompliance.¹⁶⁵

HHS promulgated specific regulations governing the imposition of the new sanction and a new corresponding hearing process in 1985.¹⁶⁶ The regulations granted nursing homes a hearing¹⁶⁷ in front of a hearing officer¹⁶⁸ before the imposition of this intermediate sanction.¹⁶⁹ This hearing allowed a nursing home the opportunity to present evidence in person or in writing that proved it was in substantial compliance.¹⁷⁰ HHS would then issue a written ruling to the facility.¹⁷¹ Even though HHS granted nursing homes these hearing rights to appeal the intermediate sanction, it specifically limited the hearing to "something less than a full evidentiary hearing."¹⁷² In the preamble of the proposed rule, HHS stated, "[W]e believe that since the imposition of a denial of payments as compared with terminations is a lesser and temporary sanction, a hearing less than a full evidentiary hearing would satisfy all due process requirements."¹⁷³ Therefore, according to HHS, the hearing nursing homes received for the imposition of this intermediate sanction would only be an "informal" one.¹⁷⁴ Nursing homes were only granted a full evidentiary

¹⁶³ H.R. REP. NO. 96-1167, at 57. Congress recognized that states already had a full array of sanctions for Medicaid and said that this rule would not pre-empt these sanctions.

¹⁶⁴ H.R. REP. NO. 96-1167, at 56.

¹⁶⁵ H.R. REP. NO. 96-1167, at 57.

¹⁶⁶ The final rule was codified at 42 C.F.R. § 442.118 (1986). The delay between the passage of the OBRA of 1980 and the promulgation of regulations was due to the change in administration and its focus on privatizing nursing home regulation. IOM REPORT, *supra* note 10, at 247.

¹⁶⁷ 50 Fed. Reg. at 7193 (Feb. 21, 1985). In the legislative history, Congress made a point to note that it was not altering access or the process of the full evidentiary hearing for termination. H.R. REP. NO. 96-1479, at 141 (1980) (Conf. Rep.), reprinted in 1980 U.S.C.C.A.N. 5903, 5932.

¹⁶⁸ See 50 Fed. Reg. at 7193; 51 Fed. Reg. 24484 (Jul. 3, 1986).

¹⁶⁹ 51 Fed. Reg. at 24487.

¹⁷⁰ 50 Fed. Reg. at 7194; 51 Fed. Reg. at 24487.

¹⁷¹ See 50 Fed. Reg. at 7194.

¹⁷² 50 Fed. Reg. at 7194.

¹⁷³ See 50 Fed. Reg. at 7194.

¹⁷⁴ 50 Fed. Reg. at 7194. See also 51 Fed. Reg. at 24487. HHS failed to provide a definition of a full evidentiary hearing versus an informal hearing in the Federal Register, so the definition for the APA controls. See 5 U.S.C.A. § 554 (West

hearing when HHS threatened termination from the Medicare Program.¹⁷⁵ This dichotomy between a formal and informal hearing continued until 1987 when Congress passed the Nursing Home Reform Act of 1984 (NHRA) eliminating this difference.¹⁷⁶

The NHRA, which changed the entire survey and certification process, was the culmination of a report issued by the IOM¹⁷⁷ and numerous hearings held by Congress.¹⁷⁸ The NHRA¹⁷⁹ included seven specific sections regulating the care of Medicare- and Medicaid-certified nursing homes, including a revision of the survey and certification process and the enforcement process.¹⁸⁰ The survey and certification section created a system by which nursing homes would be inspected annually and the enforcement section directed HHS to im-

2005). According to the APA, a formal hearing is defined as, "every case of adjudication required by statute to be determined on the record after opportunity of an agency hearing . . ." 5 U.S.C.A. § 554.

¹⁷⁵ 50 Fed. Reg. at 7194. Congress purposely did not alter nursing homes access to a full evidentiary hearing to challenge termination from Medicare. H.R. REP. NO. 96-1479, at 141 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 5903, 5932.

¹⁷⁶ Nursing Home Reform Act, Pub. L. No. 100-203, 101 Stat. 1330-160 (1987).

¹⁷⁷ To compile a study of quality of care in nursing homes, the IOM formed the Committee on Nursing Home Regulation, a committee consisting of twenty members with knowledge and experience in the regulation of nursing homes. IOM REPORT, *supra* note 10, at v-vi. Data for the Report was collected from sundry places. Public hearings were held in five different cities; reports from 1978 HHS hearings and congressional hearings on nursing home quality were reviewed; surveys were mailed to every state licensure and certification director; and case studies were conducted in six states. *Id.* at vi-vii. The Committee compiled its research and published its recommendations in March of 1986 to change the regulation of nursing homes to ensure that residents were provided quality care. *Id.* at 1.

¹⁷⁸ In 1982, President Reagan tried to deregulate the nursing home industry by reducing the inspection requirements of facilities with good compliance records and replacing government certification with accreditation by the Joint Commission on Accreditation of Healthcare Organizations, the same body that accredits hospitals. *Id.* at 248-49. Members of Congress and the public viewed these changes as a means to reduce federal oversight of the nursing home industry. *Id.* at 248. Congress imposed a moratorium on the proposed changes and ordered the IOM to study the quality of care provided in nursing homes and publish a report. On March 25, 1986, Dr. Katz, the Chair of the Committee on Nursing Home Regulation that authored the IOM Report, presented the IOM Report at a hearing held by the House of Representative's Committee on Energy and Commerce. *Id.* at 2. The IOM Report recommended forty-eight changes, including changes in the survey and certification of nursing homes and the hearing process granted nursing homes out of compliance with the Medicare regulations. *Id.* at 25.

¹⁷⁹ Nursing Home Reform Act, Pub. L. No. 100-203, 101 Stat. 1330-160 (1987).

¹⁸⁰ H.R. REP. NO. 100-391(I), at 453-79 (1st Sess. 1987).

pose remedies such as denial of payment for new admissions, civil money penalties, and temporary management.¹⁸¹ The enforcement section also required HHS and the states to impose harsher remedies for repeated noncompliance.¹⁸² It took eight years for HHS to promulgate final rules implementing the NHRA.¹⁸³

In the NHRA, Congress changed the severity of the sanctions as well as the structure of the hearing process.¹⁸⁴ Congress added several more sanctions, now entitled "remedies," to the Medicare Program.¹⁸⁵ Congress mandated that HHS take into account repeat deficiencies when imposing these remedies and made it harder for a facility that had been terminated from the Medicare program to reenter the program.¹⁸⁶ Additionally, Congress combined the formal hearing for termination and the informal hearing for other sanctions into a single hearing process.¹⁸⁷ This process was implemented in 1995, when HHS promulgated the hearing process regulations. The relevant regulations are 42 C.F.R. §§ 498.60,¹⁸⁸ 498.62,¹⁸⁹ and 498.66.¹⁹⁰ Under these new regulations nursing homes are granted the right to present evidence in front of an ALJ,¹⁹¹ unlike the original informal hearing process where

¹⁸¹ H.R. REP. NO. 100-391(I), at 465-77.

¹⁸² H.R. REP. NO. 100-391(I), at 474.

¹⁸³ See 59 Fed. Reg. 56116 (Nov. 10, 1994); 60 Fed. Reg. 50441 (Sept. 29, 1995). There have been no drastic changes in the regulations governing the hearing process since these amendments.

¹⁸⁴ These changes were based on the recommendations made in the IOM Report. See 133 CONG. REC. S5714-02 (1987); 133 CONG. REC. E2598-01 (1987). According to the IOM Report, more nursing homes would comply if the sanction was imposed prior to a hearing. IOM REPORT, *supra* note 10, at 159. Moreover, to prevent frivolous appeals, the IOM Committee suggested that facilities not be given a stay from termination during the appeals process and that deficiency findings be solely based on the events that occurred during the survey and not the condition of the facility at the time of the hearing. *Id.*

¹⁸⁵ H.R. REP. NO. 100-391(II), at 941-43 (2d Sess. 1987).

¹⁸⁶ 101 Stat. at 1330-160. These sections were based on the recommendations made in the IOM Report. IOM REPORT, *supra* note 10, at 155-156.

¹⁸⁷ H.R. REP. NO. 100-391(II), at 941-43; Medicare Program; Appeals Procedures for Determinations the Affect Participation in Medicare, 52 Fed. Reg. 22444, 22447-22448 (June 12, 1987).

¹⁸⁸ This regulation defines the conduct of nursing home hearings, which is left to the discretion of the ALJ within certain limits. 42 C.F.R. § 498.60 (2005). One particular limit is how witnesses are treated. See 42 C.F.R. § 498.62.

¹⁸⁹ This regulation states that, "[t]he representative of each party is permitted to examine his or her own witnesses subject to interrogation by the representative of the other party." 42 C.F.R. § 498.62.

¹⁹⁰ This rule governs a nursing home's right to waive its right to appear and present evidence at an in-person hearing. 42 C.F.R. § 498.66.

¹⁹¹ 42 C.F.R. §§ 498.45, 498.60.

nursing homes would present evidence to a hearing officer.¹⁹² The new regulations also gave nursing homes the right to examine their own witnesses at the hearing¹⁹³ and bring any participant to the hearing not limited to their representatives and technical advisors.¹⁹⁴

The current hearing system is a drastic change from the hearings that took place before the passage of the NHRA, which only allowed informal hearings for the imposition of remedies other than termination.¹⁹⁵ The evolution from an informal hearing process to a formal hearing process to challenge noncompliance findings reflects Congressional intent to provide nursing homes with procedural due process by providing a full evidentiary hearing. As of the date of this article, these regulations still govern the survey and certification process. Nevertheless, HHS has limited a nursing home's right to a hearing. HHS only allows nursing homes to challenge noncompliance findings when a remedy is imposed,¹⁹⁶ even though the findings remain on HHS's website and are used for the imposition of future remedies, namely the loss of Medicare payments.¹⁹⁷ Nonetheless, as discussed in Part III of this article, HHS has instituted practices that limit the reviewability of claims in both the administrative agency process and in the federal courts.¹⁹⁸ As a result of these practices, nursing homes have been denied any meaningful review when they are deprived of property, which is a violation of the Constitution, the APA, and the Medicare Act and regulations.

Hence, nursing homes filed a suit in federal court to challenge the lack of procedural due process protections afforded them in Medicare compliance hearings.¹⁹⁹ However, these claims were never fully reviewed by the Supreme Court. Instead, the Court dismissed the case for lack of subject matter jurisdiction because of the Medicare Act's limitation of federal-question jurisdiction.²⁰⁰ As a result of the dismissal of this case, nursing homes still have no right to a hearing

¹⁹² 51 Fed. Reg. 24484, 24491 (Jul. 3, 1986).

¹⁹³ 42 C.F.R. § 498.62.

¹⁹⁴ 42 C.F.R. § 498.60.

¹⁹⁵ 50 Fed. Reg. 7194 (Feb. 21, 1985).

¹⁹⁶ 42 C.F.R. §§ 488.406, 498.3(b)(13).

¹⁹⁷ 42 C.F.R. §§ 488.330(e)(3), 498.3(b)(13).

¹⁹⁸ See *Heckler v. Ringer*, 466 U.S. 602 (1984); *Dallas Healthcare, Inc. v. Health & Human Servs. Comm'n*, 921 F. Supp. 426 (N.D. Tex. 1996); *Int'l Long Term Care, Inc. v. Shalala*, 947 F. Supp. 15 (D.D.C. 1996); *Mich. Ass'n of Homes & Servs. for the Aging, Inc. v. Shalala*, 127 F.3d 496 (6th Cir. 1997).

¹⁹⁹ *Shalala v. Ill. Council on Long Term Care, Inc. (Ill. Council)*, 529 U.S. 1 (2000). The nursing homes challenged several issues including the right to procedural due process. *Id.* at 7.

²⁰⁰ *Id.* at 6.

when deprived of property and are barred from bringing a constitutional claim in federal court to challenge this practice.

III. NO FEDERAL REVIEW: THE SUBJECT MATTER JURISDICTION BAR

The failure of HHS to recognize that the NHRA, as codified in the Medicare regulations, grants nursing homes the right to a full evidentiary hearing for any findings of noncompliance was the basis of *Ill. Council*.²⁰¹ The Illinois Council on Long Term Care, Inc. (Council),²⁰² on behalf of its members, sued HHS Secretary Donna Shalala for the violation of their constitutional right to due process.²⁰³ The case ultimately reached the U.S. Supreme Court, but the constitutional claims were never decided because of the Medicare Act's subject matter jurisdiction bar to federal review.²⁰⁴ The Medicare Act requires nursing homes to first present any case to HHS and receive a final ruling from HHS before submitting a claim in federal court.²⁰⁵

Although there is an exception that allows federal review of a case if there is no meaningful agency review, the Court did not apply this exception in *Ill. Council*.²⁰⁶ According to the Court, the exception only applied when an entire industry was denied meaningful review, not when only individual nursing homes were harmed.²⁰⁷ Contrary to the Court's opinion, the entire nursing home industry has been hurt by HHS's continued practices of denying hearing rights to challenge noncompliance findings.²⁰⁸ Because of a quirk in the nursing home

²⁰¹ *Id.*

²⁰² The Illinois Council on Long Term Care, incorporated under the laws of Illinois, is an association of approximately two hundred nursing homes doing business in Illinois. See *Ill. Council for Long Term Care, Inc. v. Shalala*, No. 96 C 2953, 1997 WL 158347, at *1 (N.D. Ill. 1997).

²⁰³ *Ill. Council*, 529 U.S. at 6.

²⁰⁴ *Id.*

²⁰⁵ 42 U.S.C.A. §§ 405(g)-(h) (West 2005).

²⁰⁶ *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 678 (1986).

²⁰⁷ *Ill. Council*, 529 U.S. at 22-23.

²⁰⁸ The ALJs summarily dismiss nursing home appeals in Medicare noncompliance cases when HHS has not imposed a remedy. See *Arcadia Acres, Inc.*, DAB No. 1607 (Dep't of Health & Human Servs. 1997) (final determination); *Jacinto City Healthcare Ctr.*, DAB No. CR627 (Dep't of Health & Human Servs. 1999); *Heritage Manor of Franklinton*, DAB No. CR666 (Dep't of Health & Human Servs. 2000); *Lutheran Home - Caledonia*, DAB No. CR674 (Dep't of Health & Human Servs. 2000) (initial determination); *Lakewood Plaza Nursing Ctr.*, DAB No. CR691 (Dep't of Health & Human Servs. 2000) (initial determination); *Lakeland Lodge Nursing Ctr.*, DAB No. CR893 (Dep't of Health & Human Servs. 2002); *Southwood Care Ctr.*, DAB No. CR1029 (Dep't of Health & Human Servs. 2003); *Highlands at Brighton*, DAB No. CR1104 (Dep't of Health & Human Servs. 2003); *Manorcare Health*

hearing process that prevents nursing homes from having a hearing to challenge noncompliance findings when no remedy is imposed, nursing homes never obtain a final ruling. Without a final ruling, the federal courts do not have jurisdiction over the case. Thus, nursing homes are left with no meaningful review of noncompliance findings posted on the Internet, used for the imposition of future remedies, and used as the basis of Medicare fraud and abuse claims.

A. The Social Security Act's Subject Matter Jurisdiction Bar

Under sections 405(g) and 405(h) of the Medicare Act, federal courts are barred from reviewing any Social Security action under 28 U.S.C. §§ 1331²⁰⁹ and 1346²¹⁰ before HHS has issued a final ruling. Specifically, section 405(g) of the Medicare Act states:

Any individual, after any *final decision* of the Commissioner of Social Security 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. . . . Such action shall be brought in the district court of the United States. . . .²¹¹

This section limits federal review to final decisions issued by the Secretary. This review is further limited by section 405(h), which says:

No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under

Servs. Sandia, DAB No. CR1255 (Dep't of Health & Human Servs. 2004). For Initial Hearing Orders that require written direct testimony in lieu of in-person testimony, see DAB No. C-04-401 (Dep't of Health & Human Servs. 2004) (initial pre-hearing order) (petitioner's name concealed) (on file with author); DAB No. C-05-445 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author).

²⁰⁹ "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C.A. § 1331 (West 2005).

²¹⁰ "The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of [a]ny civil action against the United States for the recovery of any internal-revenue tax . . . [or] any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States. . . ." 28 U.S.C.A. § 1346 (West 2005).

²¹¹ 42 U.S.C.A. § 405(g) (West 2005) (emphasis added).

section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.²¹²

Section 405(h) prohibits federal review of claims based on federal question jurisdiction unless the statute authorizes agency review and the Secretary issues a final decision. Together, sections 405(g) and (h) prevent individuals from submitting claims in federal court, because without federal question jurisdiction the court has no jurisdiction over the case, and thus does not have the power to hear the subject, or issues, which arise in the case. This bar to federal review before a final decision from the Secretary was incorporated into the Medicare Act by 42 U.S.C. § 1395cc(h)(1)(A).²¹³

Although Congress enacted these limitations in 1935,²¹⁴ the Supreme Court did not use sections 405 (g) and (h) to bar claims until 1975 in *Weinberger v. Salfi*.²¹⁵ The Court did not provide any explanation for the use of sections 405 (g) and (h) in this case, while for forty years these sections had not been mentioned in any Social Security claims in federal court.²¹⁶ Although Congress drafted these sections, the Supreme Court's inconsistent decisions concerning the effect of this section is what has caused harm. The Supreme Court decided four main cases regarding sections 405(g) and (h), but in each case the Court has issued different rulings allowing some claims to be barred from any meaningful review,²¹⁷ while allowing federal review of claims never presented to HHS.²¹⁸ The Court's contradictory opinions lead nursing homes to submit a claim in federal court without presenting the matter to HHS and resulted in a ruling that has ultimately left nursing homes with no meaningful review.

1. The Supreme Court's Discovery of the Social Security Bar to Federal Review

In 1975, the Supreme Court decided *Salfi*, establishing a broad rule barring federal court review of all claims arising under the Social Security Act regardless of whether they involved constitutional or

²¹² 42 U.S.C.A. § 405(h) (West 2005).

²¹³ Under 42 U.S.C.A. § 1395cc(h)(1)(A), nursing homes are granted a right to a hearing. These hearing rights are limited by 42 U.S.C. §§ 405(g)-(h).

²¹⁴ See generally Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935).

²¹⁵ 422 U.S. 749 (1975).

²¹⁶ See *id.*

²¹⁷ *Heckler v. Ringer*, 466 U.S. 602 (1984).

²¹⁸ *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667 (1986).

statutory challenges.²¹⁹ In *Salfi*, a class action suit was brought in federal district court challenging HHS's denial of Social Security benefits because of the duration of relationship requirement.²²⁰ According to the duration requirement, the surviving spouse must have been married to the deceased worker for at least nine months before the death of the worker to receive Social Security benefits.²²¹ The class represented both members that had been denied and those that had not yet submitted claims for benefits.²²² The class asserted that the duration requirement was unconstitutional based on the Equal Protection Clause and requested the immediate payment of benefits.²²³ Even though neither party raised the issue of jurisdiction and the resolution of the jurisdiction issue did not resolve the entire case, the Supreme Court ruled that it did not have subject matter jurisdiction over the members of the class that had not presented their case to HHS.²²⁴ According to the Court, 42 U.S.C. § 405(h) barred federal review of claims arising under the Social Security Act until two steps had been completed: the case had first been presented to the agency and the Secretary had issued a final ruling.²²⁵

The complainants argued that the section was merely an exhaustion requirement.²²⁶ Courts usually require exhaustion "as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review."²²⁷ The complainants argued that

²¹⁹ *Salfi*, 422 U.S. at 770.

²²⁰ *Id.* at 754.

²²¹ Pub. L. No. 90-248 §§ 156(a)-(b), 81 Stat. 866 (1967) (codified at 42 U.S.C. §§ 416(c)(5) & (e)(2) (2000)).

²²² *Salfi*, 422 U.S. at 755.

²²³ *Id.* The United States District Court for the Northern District of California ruled for the class and granted declaratory and injunctive relief. *Id.*

²²⁴ *Id.* at 752. The dissent, written by Justice Brennan and joined by Justice Marshall, made a point to note the fact that the jurisdictional issue was not raised by either party, was only discussed in passing in the oral arguments, and did not resolve the entire case. *Id.* at 785-88 (Brennan, J., dissenting). Thus, the Court should not have discussed the jurisdiction issue. *Id.* at 788.

²²⁵ *Id.* at 756 (majority opinion).

²²⁶ *Id.* at 755. Furthermore, the dissent contended that the channeling provision of 42 U.S.C. § 405(h) was merely an exhaustion requirement for questions of fact and statutory interpretation. *Id.* at 789 (Brennan, J., dissenting). To support this contention, Justice Brennan cited to the legislative history when the amendment was passed and the Social Security Board's discussion of the statute immediately after its passage. *Id.* at 790-792.

²²⁷ *Id.* at 765 (majority opinion). The two relevant exceptions to the exhaus-

completing the agency process was futile because the issue of constitutionality is outside the scope of the Secretary's authority.²²⁸ The Supreme Court held that 42 U.S.C. § 405(h) was not a mere exhaustion requirement, but that the federal review bar prohibited all federal review save for those actions mentioned in 42 U.S.C. § 405(g).²²⁹

The Court announced that 42 U.S.C. § 405(h) was not limited to mere decisions of fact or law, but also applied to any action seeking to recover under the Social Security Act, including constitutional questions.²³⁰ Therefore, according to the Court, even constitutional claims must first be brought to the agency so that the Secretary may determine if the claims can be resolved under the Social Security Act.²³¹ Because the members of the class were seeking payment of Social Security benefits, their claims arose under the Act and were not reviewable until the claims were first presented to HHS and the Secretary issued a final ruling.²³² Nevertheless, the members of the class that had presented their case to HHS were not barred by 42 U.S.C. § 405(h) so the Court went on to address the substantive issue of the complaint.²³³ The Court extended the bar to federal review of Social Security claims to Medicare claims in *Heckler v. Ringer*.²³⁴

In *Ringer*,²³⁵ four Medicare recipients brought an action in federal court based on federal question jurisdiction challenging the disallowance of benefits to cover a surgical procedure to relieve respiratory distress.²³⁶ Medicare patients seeking reimbursement for the procedure were awarded money to cover their surgery costs until 1980, when HHS issued a formal administrative ruling prohibiting reimbursement for the surgery.²³⁷ Three of the four claimants had already

tion requirement in this case are futility of review and irreparable harm. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977); *McKart v. U.S.*, 395 United States 185, 197-201 (1969).

²²⁸ *Salfi*, 422 U.S. at 757.

²²⁹ *Id.* at 762.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 763. The dissent also asserted that the case did not arise under the Social Security Act. Instead, the claim arose under the Equal Protection Clause, a constitutional matter. *Id.* at 797 (Brennan, J., dissenting).

²³³ *Id.* at 760.

²³⁴ *Heckler v. Ringer*, 466 U.S. 602 (1984).

²³⁵ *Id.*

²³⁶ *Id.* at 605. Their claims were dismissed by the United States District Court for the Central District of California for lack of subject matter jurisdiction and reinstated by the United State Court of Appeals for the Ninth Circuit.

²³⁷ *Medicare Program, Exclusion From Medicare Coverage of Bilateral Carotid Body Resection to Relieve Pulmonary Distress*, 45 Fed. Reg. 71426-71427 (Oct. 28, 1980). Because of the lack of acceptance by the medical community over the

had the surgery before 1980 and were seeking reimbursement, while Ringer, the fourth claimant, could not afford the surgery and was seeking money to undergo surgery.²³⁸ Each claimant was at a different stage in the appeal process, but none of the claimants had received a final ruling from the Secretary.²³⁹ The Supreme Court dismissed three of the cases because the claimant had surgery before the Secretary issued the administrative ruling and was not barred from reimbursement by the ruling.²⁴⁰

The only remaining claimant, Ringer, had requested payment from HHS, but the Secretary was unwilling to issue a ruling in his case until he underwent the surgery.²⁴¹ Ringer had not undergone the surgery because he was indigent and was seeking a judgment to obtain the money necessary for the surgery.²⁴² In response to Ringer's case, the Court ruled that section 405(h) applied to his claim because although he maintained that the administrative ruling was unconstitutional, he was still seeking reimbursement of the award of benefits under the Medicare Act.²⁴³ Thus, his claims arose under the Medicare Act.²⁴⁴ According to the Court, regardless of whether his claim challenged the procedures of HHS or the substance of HHS's actions, Ringer's claims arose under 42 U.S.C. § 405(h), which barred federal review on the claims until a final action from the Secretary.²⁴⁵

The Court barred review even though there was an exception to the 405(h) bar that would have allowed Ringer's case to be reviewed in federal court.²⁴⁶ Specifically, the Secretary had drafted an exception to the subject matter jurisdiction requirement to allow cases to go to federal court after the reconsideration stage "when the only factor precluding an award of benefits is a statutory provision which the claimant challenges as unconstitutional."²⁴⁷ The Court ruled that the exception did not apply in this case because the constitutional claims

effectiveness of the surgery, the Secretary issued an administrative instruction to all fiscal intermediaries and ALJs that no payment is to be made for Medicare claims for the surgical procedure to relive respiratory distress. *Ringer*, 466 U.S. at 607.

²³⁸ *Ringer*, 466 U.S. at 609-10.

²³⁹ *Id.* at 610.

²⁴⁰ *Id.* at 613.

²⁴¹ *Id.* at 609-10.

²⁴² *Id.* at 610.

²⁴³ Under 42 U.S.C. §§ 1395cc(h)(1)(A), nursing homes are granted a right to a hearing. These hearing rights are limited by 42 U.S.C. §§ 405(g)-(h).

²⁴⁴ *Ringer*, 466 U.S. at 614-15.

²⁴⁵ *Id.* at 615.

²⁴⁶ *Id.* at 627.

²⁴⁷ *Id.* at 606 n.2.

were inextricably linked with Ringer's benefits claims.²⁴⁸ Furthermore, the Court ruled that the claimant seeking money to have the surgery still had an avenue of review even if there was a presumption against reimbursement.²⁴⁹ Thus, Ringer's case was dismissed for lack of subject matter jurisdiction.²⁵⁰ Effectively, this left Ringer with no avenue for review because he had no right to agency review until after he underwent the surgery, which he could not afford.²⁵¹ Although the Court's decision in *Ringer* left him with no meaningful administrative or federal review, the Court did not allow this as an exception. The Court's decision was particularly disturbing because in *Bowen v. Michigan Academy of Family Physicians* an exception to sections 405(g) & (h) was allowed when physicians were left with no meaningful administrative or federal review,²⁵² a direct contradiction to the *Ringer* decision.

In *Bowen*, the Court allowed Medicare providers to forgo presentment to HHS and a final decision because there was no right to agency review.²⁵³ The Supreme Court also created an exception to the subject matter jurisdiction bar in *Mathews v. Eldridge*.²⁵⁴ In *Eldridge*, the Court allowed a Social Security beneficiary to obtain federal review without a final ruling because his Constitutional claim was *collateral* to his claims arising under the Social Security Act.²⁵⁵ The nursing home association in *Ill. Council* argued that their case met both of these exceptions; however, the Court classified the nursing homes' claims as similar to those filed in *Salfi* and *Ringer* and dismissed the claims for lack of subject matter jurisdiction.²⁵⁶

²⁴⁸ *Id.* at 614.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 626-27.

²⁵¹ The dissent, authored by Justice Stevens and joined by Justices Brennan and Marshall, agreed with the Court's decision concerning the three claimants that had the surgery before 1980. *Id.* at 628 (Stevens, J., dissenting). However, the dissent reiterated their argument from *Salfi* that Ringer was not barred by 42 U.S.C. § 405(h) because his claim arose under the Constitution, not the Medicare Act. *Id.* at 631. Moreover, the dissent asserted that Ringer had no other avenue for review because the Secretary refused to issue a ruling on his case until he actually had the surgery, which he was unable to afford. *Id.* at 630. Thus, until he raised the money to have the surgery, he was prohibited from bringing any agency action or federal claim to challenge the denial of payment. *Id.* at 629.

²⁵² *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667 (1986).

²⁵³ *Id.* at 678.

²⁵⁴ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

²⁵⁵ *Id.* at 330.

²⁵⁶ See *infra* Part IV.B.

2. Exceptions to Social Security Act Bar to Subject Matter Jurisdiction

The Supreme Court decided in 1975 to impose the subject matter jurisdiction requirement for all cases arising under the Social Security Act regardless of the content of the claim and seemingly cut off Social Security claimants' access to the federal courts.²⁵⁷ In 1976, the Court created the first exception to this requirement for constitutional claims *collateral* to claims arising under the Social Security Act.²⁵⁸

The Supreme Court allowed the Social Security recipient in *Eldridge* to bring a claim in federal court challenging the constitutionality of the procedures afforded in a Social Security hearing even though he had not fulfilled the subject matter jurisdiction requirements announced in *Salfi*.²⁵⁹ In *Eldridge*, Mr. Eldridge challenged the Secretary's decision to revoke his Social Security disability benefits prior to providing an evidentiary hearing.²⁶⁰ Eldridge received a letter from the state agency administering Social Security benefits stating that his disability had ceased and thus his payments would be terminated.²⁶¹ Eldridge responded to the agency in writing disputing the characterization of his medical condition.²⁶² The state agency reviewed his response, but issued a final determination that Eldridge's disability had ceased.²⁶³ HHS accepted the state's determination and sent a letter to Eldridge stating that his benefits would be cancelled in July and granted him appeal rights.²⁶⁴ Instead of appealing the determination, Eldridge filed suit in federal court challenging the constitutionality of HHS's practice of granting only a post-termination hearing to appeal the termination of disability benefits rather than a pre-termination hearing.²⁶⁵ He also requested immediate reinstatement of his benefits pending such a hearing.²⁶⁶ The Secretary moved for dismissal based on the Supreme Court's

²⁵⁷ *Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975).

²⁵⁸ *Eldridge*, 424 U.S. at 332.

²⁵⁹ *Id.* at 326.

²⁶⁰ *Id.* at 324-25.

²⁶¹ *Id.* at 324.

²⁶² *Id.* at 324.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 324-25.

²⁶⁶ *Id.* at 324-325. The district court found that HHS's procedures violated Eldridge's due process rights because the hearing was a post-termination hearing rather than a pre-termination hearing that would ensure the uninterrupted payment of benefits to Eldridge. *Id.* at 326.

decision in *Salfi* that 42 U.S.C. § 405(h) required Eldridge to present the case to HHS and receive a final ruling before federal review.²⁶⁷

The Supreme Court ruled that Eldridge's letter to the state disputing the characterization of his medical condition fulfilled the "presentment requirement" of 42 U.S.C. § 405(h), even though Eldridge did not raise any constitutional question in his letter and never submitted the case to HHS.²⁶⁸ This was not fatal to his claim because 42 U.S.C. § 405(h) only required a presentment of the issues relating to the Social Security Act, not that all issues be presented to HHS.²⁶⁹ Furthermore, the Court ruled that Eldridge's constitutional claims were *collateral* to his claim for future Social Security benefits.²⁷⁰ The Court reasoned that Eldridge's claim regarding the timing of the benefits hearing under the Social Security Act did not arise under the Social Security Act because without this review Eldridge's constitutional claim would never be addressed.²⁷¹ Finally, the Court found that the finality requirement was waivable and waived the requirement because Eldridge's case was so significant "that deference to the agency's judgment is inappropriate."²⁷²

Hence, the Court seemingly created an exception for Eldridge where if 42 U.S.C. § 405(h) would serve to bar federal review, then the case could be filed in federal court after presentment to the agency. The Court's decision in *Eldridge* was a major shift from its decision in *Salfi* barring federal review until both steps were fulfilled. Amazingly, the Court ignored this decision when sections 405(g) and (h) were used to bar Ringer's constitutional claims from any review.²⁷³ In fact, the exception applied in *Eldridge* was never used again and never overruled, making it a mere aberration. However ten years later, the Court allowed Medicare physicians in *Bowen v. Michigan Academy of Family Physicians* to skip the entire agency process in spite of the subject matter jurisdiction bar when there was no meaningful agency review.²⁷⁴

In *Bowen*, an association of family physicians filed a lawsuit challenging the validity of a HHS regulation permitting lower payments for similar services based on the type of physician providing the

²⁶⁷ *Id.* at 325.

²⁶⁸ *Id.* at 329.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 330-31.

²⁷¹ *Id.* at 331.

²⁷² *Id.* at 330.

²⁷³ *Heckler v. Ringer*, 466 U.S. 602 (1984).

²⁷⁴ *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 678 (1986).

care.²⁷⁵ The Secretary argued that Congress had prohibited any federal review of amount determinations under Medicare Part B.²⁷⁶ According to the Secretary, 42 U.S.C. § 405(g) only granted hearing rights to those under Medicare Part A and 42 U.S.C. § 405(h) precluded all administrative and judicial review of claims not noted in 42 U.S.C. § 405(g).²⁷⁷ The Supreme Court ruled that the legislative history of the APA proved otherwise.²⁷⁸ Specifically, the Senate and House Judiciary Committee Report stated that there is a presumption of review unless explicitly stated otherwise.²⁷⁹ Moreover, the legislative history from 42 U.S.C. §§ 405(g) and (h) confined all amount determinations solely to the agency “to avoid overloading the courts with quite minor matters[.]” but did not discuss any other claims.²⁸⁰ Therefore, the Court ruled that because Congress neither granted HHS the authority to review all other claims nor clearly prohibited federal review of these issues, the physicians’ claims regarding the constitutionality of the regulations was reviewable.²⁸¹ Hence, the Court ruled that the physicians did not have to present the claim to HHS or wait until the Secretary issued a final ruling as required by *Salfi* and *Ringer*.²⁸²

The Court’s decision in *Bowen* that Congress did not intend to prevent federal review harkens back to the principles of fairness espoused by the Senate Committee on the Judiciary when discussing the APA.²⁸³ In enacting the APA, Congress specifically noted that the withholding of judicial review was rare and limited to when the intent was clear.²⁸⁴ In 1997, an association of nursing homes, the Council, filed a case in federal court challenging the constitutionality of the Medicare regulations and the survey and certification procedures.²⁸⁵ The Council filed their claims in federal court because HHS could not meaningfully resolve constitutional claims, which is within the sole jurisdiction of the federal courts.²⁸⁶ The Supreme Court dismissed the

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 669.

²⁷⁷ *Id.* at 673.

²⁷⁸ *Id.* at 678.

²⁷⁹ H.R. REP. NO. 79-1980, at 41 (1946); S. REP. NO. 79-752, at 26 (1945).

²⁸⁰ *Bowen*, 476 U.S. at 677 (citing 118 CONG. REC. 33992 (1972)).

²⁸¹ *Id.* at 681.

²⁸² *Id.* at 680.

²⁸³ S. REP. NO. 79-752, at 26.

²⁸⁴ S. REP. NO. 79-752, at 26; H.R. REP. NO. 79-1980, at 41.

²⁸⁵ *Shalala v. Ill. Council on Long Term Care, Inc. (Ill. Council)*, 529 U.S. 1 (2000).

²⁸⁶ *Marbury v. Madison*, 5 U.S. 137, 163 (1803); *United States v. Nourse*, 34 U.S. 8, 28-29 (1835).

case for lack of subject matter jurisdiction, precluding nursing homes from any meaningful review.

B. *Ill. Council*: The Death Knell for Nursing Home's Access to Federal Review

In 1998, the Council filed a complaint seeking injunctive and declaratory relief from the Secretary's and the Illinois Department of Public Health's use of the Medicare regulations, claiming that the drastic change in noncompliance rates was due to unconstitutionally vague standards.²⁸⁷ Moreover, the Council submitted that the appeals process to challenge noncompliance findings was *meaningless* and thus violated the Due Process Clause of the Fifth Amendment of the U.S. Constitution.²⁸⁸ The Council argued that (1) certain terms in the Medicare regulations such as "substantial compliance" were unconstitutionally vague; (2) the regulations and the State Operations Manual would allow inconsistent survey results in violation of the Medicare Act and exceeded the mandate of the Medicare Act; (3) the regulations created administrative procedures inconsistent with the Due Process Clause; and (4) the State Operations Manual and other publications used by surveyors in citing nursing homes for deficiencies was not promulgated in accordance with the rulemaking requirements mandated by the APA.²⁸⁹

Instead of addressing these issues, HHS collaterally attacked the Council's claims by arguing that the federal court lacked subject matter jurisdiction, under 28 U.S.C. §§ 1331²⁹⁰ and 1346,²⁹¹ to hear the

²⁸⁷ Several other cases challenged the constitutionality of the Medicare regulations, but many have been dismissed for lack of subject matter jurisdiction. *See Mich. Ass'n of Homes & Servs. for the Aging, Inc. v. Shalala*, 127 F.3d 496 (6th Cir. 1997); *Am. Acad. of Dermatology v. Dep't of Health & Human Servs.*, 118 F.3d 1495, 1499-1501 (11th Cir. 1997); *St. Francis Med. Ctr. v. Shalala*, 32 F.3d 805, 812-14 (3rd Cir. 1994); *Farkas v. Blue Cross & Blue Shield of Mich.*, 24 F.3d 853, 855-60 (6th Cir. 1994); *Abbey v. Sullivan*, 978 F.2d 37, 41-44 (2nd Cir. 1992); *Nat'l Kidney Patients Ass'n v. Sullivan*, 958 F.2d 1127, 1130-1134 (D.C. Cir. 1992). The Supreme Court granted certiorari to resolve the conflict in the circuits regarding the *Bowen* case and whether it created an exception to 42 U.S.C. § 405(g)-(h). Therefore, the Court did not discuss the Council's Medicaid claims.

²⁸⁸ *Ill. Council*, 529 U.S. at 7.

²⁸⁹ *Id.*

²⁹⁰ "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C.A. § 1331 (West 2005).

²⁹¹ "The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon

case because the case arose under the Medicare Act.²⁹² Under 42 U.S.C. §§ 405(g) and 405(h), federal courts are barred from reviewing any Medicare action under 28 U.S.C. §§ 1331 and 1346 before the issue is presented to HHS and HHS has issued a final ruling.²⁹³ The requirements in 42 U.S.C. § 405(g) and (h) allowed the Secretary to channel all nursing home claims through the agency in a special review process.²⁹⁴ Based on this bar, HHS requested that the Supreme Court dismiss the case because the Council never presented the case to HHS and failed to receive a final agency ruling before filing the claim in federal court.²⁹⁵ Before resolving the Council's substantive claims, the Court first had to determine whether it had subject matter jurisdiction by discussing its precedent.

The Court held that in *Salfi* it had ruled that 42 U.S.C. § 405(h) created a *nonwaivable* and *nonexcusable* requirement that an individual present a claim to the Secretary before seeking federal review when the claim arose under the Social Security Act.²⁹⁶ A claim arose under the Social Security Act when the Act provided "both the standing and the substantive basis for the presentation of th[e] constitutional contentions."²⁹⁷ Because the class members included requests for the payment of Social Security benefits, making it clear that the claims arose under the Social Security Act, the Court dismissed the claims of all the members.²⁹⁸ The Court in *Ill. Council* noted that the Council's arguments did not contain any claim for benefits like the parties in *Salfi* but was still barred by the channeling provision by the Court's decision in *Ringer*. The Court in *Ringer* ruled that 42 U.S.C. § 405(h) prevented federal review of a challenge to the Secretary's issuance of an administrative ruling denying reimbursement for a particular medical procedure where "both the standing and the substantive basis for the presentation" of a claim is the Medicare Act.²⁹⁹

any express or implied contract with the United States. . . ." 28 U.S.C.A. §1346 (West 2005).

²⁹² *Ill. Council*, 529 U.S. at 8-9.

²⁹³ *Id.* at 7-10.

²⁹⁴ *Id.* at 11-12.

²⁹⁵ *Id.* at 8-9.

²⁹⁶ *Id.* at 15.

²⁹⁷ *Weinberger v. Salfi*, 422 U.S. 749, 761 (1975).

²⁹⁸ *Ill. Council*, 529 U.S. at 11, 15. The Court in *Ill. Council* incorrectly states that the claims of all the class members in *Salfi* were dismissed. See *Salfi*, 422 U.S. at 752.

²⁹⁹ *Heckler v. Ringer*, 466 U.S. 602, 615 (1984) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 760-61 (1975)). This rule applies to both present and future claims for benefits. *Id.* at 622.

Based on these cases, the Court in *Ill. Council* reasoned that 42 U.S.C. § 405(h) was a channeling provision that required *all* cases to be presented to the agency.³⁰⁰ Furthermore, the Court ruled that the requirement was more than an exhaustion requirement, which provides for exceptions to presentment, but also an absolute requirement.³⁰¹ Even though the Court noted that this ruling might cause some hardship, the complexities of Medicare and the need for the Secretary to have an opportunity to “apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts applying ‘ripeness’ and ‘exhaustion’ exceptions [on a] case by case [basis]” justified this channeling procedure.³⁰² Additionally, the Court found no reason to distinguish between how 42 U.S.C. § 405(h) was applied to amount determinations versus constitutional challenges.³⁰³ The Council submitted that the Court’s decisions in *McNary v. Haitian Refugee Center, Inc.*,³⁰⁴ *Eldridge*,³⁰⁵ and *Bowen*³⁰⁶ provided exceptions to this absolute channeling rule.³⁰⁷

In response to the Council’s arguments, the Court ruled that in *Eldridge* the claimant seeking Social Security disability benefits had presented the case first to the agency as required by 42 U.S.C. § 405(h), unlike the Council.³⁰⁸ The Court in *Ill. Council* ruled that even though Eldridge had not completed the process and received a final ruling, presentment of his claim to the state agency was enough because his constitutional claims were collateral to his claims for benefits.³⁰⁹ Hence, the decision in *Eldridge* did not assist the Council because they failed to present their case to HHS.³¹⁰

Additionally, the Court in *Ill. Council* also ruled that the exception to 42 U.S.C. § 405(h) announced in *Bowen* only applied in in-

³⁰⁰ *Ill. Council*, 529 U.S. at 12.

³⁰¹ *Id.* at 13.

³⁰² *Id.*

³⁰³ *Id.* at 14.

³⁰⁴ *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991) (holding that individuals challenging the Immigration and Naturalization Services administration of the Special Agricultural Workers provisions of the Immigration Reform Control Act to determine the adjustment status of immigrants could be reviewed in federal court based on federal question jurisdiction to evaluate issues concerning the Due Process Clause, even though the statute barred federal question jurisdiction)

³⁰⁵ *Mathews v. Eldridge*, 424 U.S. 319 (1976) (creating an exception to the subject matter jurisdiction bar).

³⁰⁶ *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667 (1986).

³⁰⁷ *Ill. Council*, 529 U.S. at 13-14.

³⁰⁸ *Id.* at 15.

³⁰⁹ *Id.*

³¹⁰ *Id.*

stances when the provision would foreclose any review because a serious constitutional issue would be raised if 42 U.S.C. § 405(h) was constructed to deny, rather than delay, judicial review of constitutional claims.³¹¹ Moreover, the Court rejected the proposition that *Bowen* created a new rule that 42 U.S.C. § 405(h) only applied to amount determinations because it would overrule *Salfi* and *Ringer*.³¹² The Court opined that if it had planned to overrule these cases in *Bowen*, then it would have said so in its opinion.³¹³ The difference between *Salfi*, *Ringer*, and *Bowen* is the difference between postponement of review (*Salfi* and *Ringer*) and total preclusion (*Bowen*).³¹⁴ Consequently, the Court reviewed the Council's claims to ascertain whether the regulations would prevent any judicial review, and thus whether the *Bowen* exception applied.

The Council argued that HHS's application of its channeling provision to the portion of the Medicare statute and regulations governing nursing home hearings amounted to the "practical equivalent of a total denial of judicial review."³¹⁵ According to the Council, nursing homes were granted access to the special review process only when termination was imposed, not when the Secretary imposed any other remedy.³¹⁶ The Secretary asserted that any "dissatisfied" nursing home was entitled to have reviewed any determination that it failed to comply substantially with the statute, agreements, or regulations, regardless of the remedy imposed during the normal hearing process.³¹⁷ The Court deferred to the Secretary's interpretation because it was reasonable.³¹⁸

The Council also argued that under 42 C.F.R. § 498.3(b)(12), unless a remedy was imposed, no hearing was granted.³¹⁹ If no remedy was imposed, then a nursing home could fail to complete a plan of correction; however, the Secretary could then terminate the facility from Medicare participation.³²⁰ No facility would risk termination to bring a constitutional challenge, so these regulations precluded federal review. The Council contended that this was unconstitutional because

³¹¹ *Id.* at 18-19.

³¹² *Id.* at 17-18.

³¹³ *Id.*

³¹⁴ *Id.* at 19.

³¹⁵ *Id.* at 22 (citing *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 497 (1991)).

³¹⁶ *Id.* at 21.

³¹⁷ *Id.*

³¹⁸ *Id.* at 21 (citing *Chevron U.S.A., Inc v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

³¹⁹ *Id.* at 21.

³²⁰ *Id.* at 21.

the findings are used in later surveys as a means for harsh remedies and are posted on the Internet.³²¹ The Secretary summarily denied these practices and asserted that only minor penalties would be imposed for failing to submit a plan of correction.³²² The Secretary also stated that HHS does not “cause providers to suffer more severe penalties in later enforcement actions based on findings that are unreviewable,” but conceded that the findings of noncompliance remain on the Internet with a place for the nursing home to post a reply.³²³

Based on the Secretary’s representations of the HHS hearing process for nursing homes, the Court reasoned that the HHS hearing process would not absolutely bar nursing homes from obtaining judicial review.³²⁴ Although the Court found that the language of the statute and 42 C.F.R. § 498.3 was not free from ambiguity,³²⁵ the Secretary’s interpretation that nursing homes were permitted to a hearing for findings of noncompliance regardless of the imposition of a remedy was reasonable and legally permissible.³²⁶ The Council also challenged the regulatory procedures that prevented challenges to the level of nursing noncompliance or imposition of penalty.³²⁷ Because the Council brought this suit as a preemptory challenge to the regulations it was unable to provide specific facts to rebut the Secretary’s claims.³²⁸ The Court noted, however, that even if in individual cases the process resulted in a denial of judicial review, the *Bowen* exception was based on preclusion of review for an entire industry rather than the hardship of just one individual.³²⁹ In cases in which the hardship was not industry wide, the Court deferred to the agency process because it provides the agency opportunity to “apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts applying ‘ripeness’ and ‘exhaustion’ exceptions [on a] case by case [basis,]” but the agency can waive steps in the process to reach federal court or the court can “deem them waived in certain circumstances . . . even though the agency technically holds no ‘hearing’ on the claim.”³³⁰

³²¹ *Id.* at 21-22. *See also* 42 C.F.R. § 498.3(b)(12) (2005).

³²² *Ill. Council*, 529 U.S. at 22.

³²³ *Id.* (citation omitted).

³²⁴ *Id.* at 23-24.

³²⁵ *See* 42 C.F.R. §§ 498.3(b)(12), 498.1(a)-(b).

³²⁶ *Ill. Council*, 529 U.S. at 21.

³²⁷ *Id.* at 23-24.

³²⁸ *Id.* at 51 (Thomas, J., dissenting).

³²⁹ *Id.* at 22. Individual hardship is addressed by excusing steps in the channeling process once the individual has presented the case to the agency, which is nonwaivable and nonexcusable. *Id.* at 22-23.

³³⁰ *Id.* at 13, 24 (“holding that Secretary’s decision not to challenge the suffi-

The Court's decision in *Ill. Council* limited the application of the *Bowen* exception to section 405(h) cases in which there was no agency hearing process. Thus, because Medicare regulations mandated a hearing process for a nursing home challenging deficiencies, the nursing home had to present its case to HHS and receive a final agency ruling before submitting a case in federal court. Currently, HHS is not complying with the mandated hearing process of the Medicare regulations. Specifically, the Secretary's interpretation of the regulations that govern the nursing home hearing process, upon which the Court relied, was never adopted by the agency.³³¹ Nursing homes do not have the right to appeal determinations of noncompliance unless a certain remedy is imposed, although they are deprived of Medicare payments in later actions based on these findings.³³² Moreover, the Secretary does not grant nursing homes access to a full evidentiary hearing, thereby leaving nursing homes without the procedural due process rights that the Court relied upon in its ruling. These violations could be resolved if nursing homes could challenge the constitutionality of these practices. Only the federal courts have jurisdiction to hear these issues. However, nursing homes cannot bring these actions to federal court because of the Supreme Court's decision in *Ill. Council*. Nursing homes are barred by 42 U.S.C. §§ 405(g) and (h) from seeking federal court review unless the nursing home presented that case to HHS and received a final ruling. HHS summarily dismisses these cases without issuing a final ruling. The finality requirement is waivable if there would be no further meaningful review,³³³ but HHS will not waive this requirement. Thus, the Court effectively barred nursing homes from any meaningful review.

IV. THE REALITY OF NURSING HOME HEARINGS AFTER *ILL. COUNCIL*: A RIGHT TO NO MEANINGFUL REVIEW, THROUGH WRITTEN SUBMISSIONS

In *Ill. Council*, the Secretary stated that any nursing home dissatisfied with noncompliance findings had a right to a hearing.³³⁴ The

ciency of the appellees' exhaustion was in effect a determination that the agency had rendered a 'final decision' within the meaning of § 405(g)" (citing *Weinberger v. Salfi*, 422 U.S. 749, 763-67 (1975)). See also *Mathews v. Eldridge*, 424 U.S. 319, 330-32 (1976) (invoking practical conception of finality to conclude that collateral nature of claim and potential irreparable injury from delayed review satisfy the "final decision" requirement of § 405(g)).

³³¹ See *Ill. Council*, 529 U.S. at 21.

³³² *Id.*

³³³ See *Salfi*, 422 U.S. at 763-67; *Eldridge*, 424 U.S. at 330-32.

³³⁴ *Ill. Council*, 529 U.S. at 20.

Secretary's interpretations of the regulations in *Ill. Council*, upon which the Court relied in making its decision to bar nursing homes from federal courts,³³⁵ are contrary to the statements made by the Secretary when the Medicare regulations were promulgated in 1994.³³⁶ Moreover, it is not what actually happens within the nursing home hearing process.³³⁷ Nursing homes are prevented from receiving any evidentiary hearing unless HHS imposes appealable remedies or termination. Once a nursing home is granted a hearing, the hearing process is so limited that there is no meaningful review of claims. The ALJs have begun to limit the hearing process to written direct testimony and in-person cross-examination when there are no material facts in dispute. This is contrary to the Medicare Act and regulations, the Congressional intent of the Medicare Act and regulations, and the rules of section 554 of the APA. Hence, as the Council argued in *Ill. Council*, the prohibition of federal review of constitutional challenges prior to presentment and final ruling by HHS amounts to the "practical equivalent of a total denial of judicial review"³³⁸ because federal courts never review these violations.

A. The Right to No Meaningful Review

When HHS finds a nursing home out of compliance with Medicare but does not impose a remedy, it does not provide a hearing to challenge the noncompliance findings.³³⁹ According to HHS, these

³³⁵ *Id.* at 21.

³³⁶ *See generally* 59 Fed. Reg. 56158 (Nov. 10, 1994).

³³⁷ ALJs summarily dismiss nursing home appeals in Medicare noncompliance cases when HHS has not imposed a remedy. *See* Arcadia Acres, Inc., DAB No. 1607 (Dep't of Health & Human Servs. 1997) (final determination); Jacinto City Healthcare Ctr., DAB No. CR627 (Dep't of Health & Human Servs. 1999); Heritage Manor of Franklinton, DAB No. CR666 (Dep't of Health & Human Servs. 2000); Lutheran Home – Caledonia, DAB No. CR674 (Dep't of Health & Human Servs. 2000) (initial determination); Lakewood Plaza Nursing Ctr., DAB No. CR691 (Dep't of Health & Human Servs. 2000); Lakeland Lodge Nursing Ctr., DAB No. CR893 (Dep't of Health & Human Servs. 2002); Southwood Care Ctr., DAB No. CR1029 (Dep't of Health & Human Servs. 2003); Highlands at Brighton, DAB No. CR1104 (Dep't of Health & Human Servs. 2003); Manorcare Health Servs. Sandia, DAB No. CR1255 (Dep't of Health & Human Servs. 2004).

³³⁸ *Ill. Council*, 529 U.S. at 20 (citing McNary v. Haitian Refugee Center Inc., 498 U.S. 479, 497 (1991)).

³³⁹ 42 C.F.R. §§ 488.330(e)(3), 498.3(b)(13) (2005). Nursing homes have a right to challenge any findings of noncompliance at an informal dispute resolution (IDR) process. 42 C.F.R. § 488.331(2). This process is conducted by the state. The IDR process does not provide meaningful review because any decision made during the process is merely a recommendation to CMS. It is within CMS's discretion whether or not to adopt IDR decisions. If CMS choose not to accept the findings of

unreviewable noncompliance findings do not deprive nursing homes of property or cause harm.³⁴⁰ Contrary to HHS's belief, this practice does deprive nursing homes of property, a violation of the Fifth Amendment, and it causes nursing homes financial and reputation harm, a violation of the Medicare Act. Moreover, the fact that HHS denies nursing homes a right to a hearing directly contradicts the statements made by the Secretary in *Ill. Council*.

1. Constitutional Violation

In *Goldberg*, the Supreme Court ruled that the deprivation of property by an administrative agency required due process of law.³⁴¹ According to the Court, due process of law meant that individuals be granted a right to a hearing when deprived of a constitutionally protected right, namely a right to property.³⁴² Nursing homes found out of compliance with the Medicare Act and regulations not provided with a hearing are deprived of property even though no remedy is imposed.

These disputed factual findings serve as the basis for the imposition of remedies for future incidents of noncompliance.³⁴³ HHS regularly uses these findings of noncompliance that are not adjudicated for future actions as mandated by the federal regulations.³⁴⁴ In fact, according to 42 C.F.R. § 488.404, HHS is *mandated* to consider the nursing home's history of noncompliance in determining which remedies to impose.³⁴⁵ Moreover, 42 C.F.R. § 488.438 requires HHS to consider a facility's history of noncompliance and any repeat deficiencies when determining the amount of civil money penalty it will impose.³⁴⁶ HHS also uses the findings to determine Medicare fraud and abuse claims, which result in the loss of Medicare payments and substantial fines.³⁴⁷ There is no opportunity to challenge the facts underlying these unreviewable claims at a hearing.³⁴⁸ Therefore, HHS's practices are depriving nursing homes of the property of Medicare

the state there is still no appeal process.

³⁴⁰ *Ill. Council*, 529 U.S. at 22.

³⁴¹ *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970).

³⁴² *Id.*

³⁴³ See 42 C.F.R. § 488.438(f).

³⁴⁴ 42 C.F.R. § 488.438(f). See also *Arcadia Acres, Inc.*, DAB No. CR887 (Dep't of Health & Human Servs. 2002) (remedies determination).

³⁴⁵ See 42 C.F.R. § 488.404(b)(2).

³⁴⁶ 42 C.F.R. § 488.438.

³⁴⁷ Krause, *supra* note 16, at 55. See also Publication of the OIG Compliance Program Guidance for Nursing Facilities, 65 Fed. Reg. 14289, 14295 n.49 (Mar. 16, 2000).

³⁴⁸ See *Arcadia Acres, Inc.*, DAB No. CR887 (Dept' Health & Human Servs. 2002) (remedies determination).

payments without any form of a hearing, violating the Fifth Amendment. Not only does this violate the Due Process of Clause of the Fifth Amendment, but it also contravenes the rights granted under the Medicare Act because it causes the nursing home injury.

2. Violation of Medicare

The Medicare Act grants hearing rights to nursing homes to the same extent as Social Security beneficiaries have when challenging denial of benefits.³⁴⁹ What this means is difficult to understand, but the meaning was made clear with the Secretary's interpretation in the Medicare regulations. Published in 1994, the final Medicare regulations currently governing compliance for nursing homes addressed the issue of whether a nursing home has a right to a hearing when no remedy is imposed. Specifically, the comments from the nursing home industry and response from the Secretary stated:

Comment: Several commenters wanted a right to appeal all deficiencies, even if no remedy was imposed.

Response: We are not accepting this suggestion because if no remedy is imposed, the provider has suffered *no injury* calling for an appeal. We agree that deficiencies that constitute non-compliance and that result in a remedy imposed are appealable (except for minor remedies such as State monitoring).³⁵⁰

Beginning in 1996, HHS attorneys filed Motions to Dismiss in Medicare compliance cases where the remedy imposed had been rescinded.³⁵¹ From 1996 to 2004, six cases were dismissed by ALJs because a nursing home did not have a right to a hearing under the

³⁴⁹ 42 U.S.C.A. § 405(g) (West 2005); 42 U.S.C.A. § 1395cc(h)(1)(A) (West 2005).

³⁵⁰ 59 Fed. Reg. 56158 (Nov. 10, 1994) (emphasis added).

³⁵¹ See Arcadia Acres, Inc., DAB No. 1607 (Dep't of Health & Human Servs. 1997) (final determination); Jacinto City Healthcare Ctr., DAB No. CR627 (Dep't of Health & Human Servs. 1999); Heritage Manor of Franklinton, DAB No. CR666 (Dep't of Health & Human Servs. 2000); Lutheran Home – Caledonia, DAB No. CR674 (Dep't of Health & Human Servs. 2000) (initial determination); Lakewood Plaza Nursing Ctr., DAB No. CR691 (Dep't of Health & Human Servs. 2000) (initial determination); Lakeland Lodge Nursing Ctr., DAB No. CR893 (Dep't of Health & Human Servs. 2002); Southwood Care Ctr., DAB No. CR1029 (Dep't of Health & Human Servs. 2003); Highlands at Brighton, DAB No. CR1104 (Dep't of Health & Human Servs. 2003); Manorcare Health Servs. Sandia, DAB No. CR1255 (Dep't of Health & Human Servs. 2004).

regulations if no remedy was imposed because there was no injury.³⁵² The first case decided by HHS on this issue was *Arcadia Acres, Inc. v. HCFA*.³⁵³

In *Arcadia Acres*, the nursing home challenged findings of non-compliance based on surveys conducted on November 21, 1995 and January 18, 1996.³⁵⁴ HHS sent Arcadia Acres a letter on March 4, 1996, imposing the remedy of denial of payments for new admissions, which HHS rescinded on April 1, 1996.³⁵⁵ Arcadia Acres timely filed its hearing request, but the ALJ granted HHS's Motion to Dismiss.³⁵⁶ HHS asserted that the 42 C.F.R. § 498.3(b)(13)³⁵⁷ of the Medicare regulations only provided a nursing home a right to a hearing once a remedy was imposed.³⁵⁸ Arcadia Acres contended that HHS would use these noncompliance findings to determine the amount of penalties for future noncompliance findings.³⁵⁹ Arcadia Acres asked the ALJ to proceed "to a hearing on the findings of deficiencies in order to protect against 'injustice' resulting from unjust and inadequate survey results [] and because, '[i]f not in the instant appeal, where else will Arcadia Acres have a forum?'"³⁶⁰ To resolve the case, the ALJ referred to the Secretary's response during the notice and comment

³⁵² See *Arcadia Acres, Inc.*, DAB No. 1607 (Dep't of Health & Human Servs. 1997) (final determination); *Jacinto City Healthcare Ctr.*, DAB No. CR627 (Dep't of Health & Human Servs. 1999); *Heritage Manor of Franklinton*, DAB No. CR666 (Dep't of Health & Human Servs. 2000); *Lutheran Home - Caledonia*, DAB No. CR674 (Dep't of Health & Human Servs. 2000) (initial determination); *Lakewood Plaza Nursing Ctr.*, DAB No. CR691 (Dep't of Health & Human Servs. 2000) (initial determination); *Lakeland Lodge Nursing Ctr.*, DAB No. CR893 (Dep't of Health & Human Servs. 2002); *Southwood Care Ctr.*, DAB No. CR1029 (Dep't of Health & Human Servs. 2003); *Highlands at Brighton*, DAB No. CR1104 (Dep't of Health & Human Servs. 2003); *Manorcare Health Servs. Sandia*, DAB No. CR1255 (Dep't of Health & Human Servs. 2004).

³⁵³ *Arcadia Acres, Inc.*, DAB No. CR424 (Dep't of Health & Human Servs. 1996) (initial determination).

³⁵⁴ *Arcadia Acres, Inc.*, DAB No. CR424 (Dep't of Health & Human Servs. 1997) (initial determination).

³⁵⁵ *Arcadia Acres, Inc.*, DAB No. CR424 (Dep't of Health & Human Servs. 1997) (initial determination).

³⁵⁶ *Arcadia Acres, Inc.*, DAB No. CR424 (Dep't of Health & Human Servs. 1997) (initial determination).

³⁵⁷ This section was redesignated as 498.3(b)(13) in 2000. See 65 Fed. Reg. 18549 (Apr. 7, 2000). Only the imposition of certain remedies grants the nursing home appeal rights. See 42 C.F.R. § 498.3(b)(13) (2005).

³⁵⁸ *Arcadia Acres, Inc.*, DAB No. CR424 (Dep't of Health & Human Servs. 1997) (initial determination).

³⁵⁹ *Arcadia Acres, Inc.*, DAB No. CR424 (Dep't of Health & Human Servs. 1997) (initial determination).

³⁶⁰ *Arcadia Acres, Inc.*, DAB No. CR424 (Dep't of Health & Human Servs. 1997) (initial determination).

period of the Medicare regulations that nursing homes do not receive a hearing when no remedy is imposed because there is no injury.³⁶¹ The ALJ ruled in favor of HHS because when promulgating the compliance regulations the Secretary specifically rejected the claim that any dissatisfied nursing home had a right to appeal noncompliance findings *unless* a remedy was imposed.³⁶²

Contrary to the ALJ's holding in *Arcadia Acres*, this practice is not speculative and does cause nursing homes injury, reputation, and financial harm. Although no remedy is imposed, the allegations of noncompliance remain posted on the Internet.³⁶³ The findings are also reported to the nursing home ombudsman, the physicians and skilled nursing facility administration licensing board, and the State Medicaid fraud and abuse control units.³⁶⁴ This information is used by *Consumer Reports* to publish a report on poor-performing nursing homes.³⁶⁵ As part of the public record, these findings harm the reputation of the facility. No patient wants to stay in a nursing home with a bad compliance record. It also causes financial harm. The findings are used to impose harsher remedies if there are future violations of the Medicare compliance regulations³⁶⁶ and can be used to support Medicare fraud and abuse claims.³⁶⁷ Insurance companies also use the information to determine yearly insurance premiums for nursing homes.³⁶⁸ Hence, nursing homes are harmed by the denial of a right to challenge noncompliance findings when no remedy is imposed. Furthermore, without a right to a hearing to challenge this harm, nursing

³⁶¹ *Arcadia Acres, Inc.*, DAB No. CR424 (Dep't of Health & Human Servs. 1997) (initial determination). (citing 59 Fed. Reg. 56158 (Nov. 10 1994)).

³⁶² *Arcadia Acres, Inc.*, DAB No. CR424 (Dep't of Health & Human Servs. 1996) (initial determination). The ALJ further held that the possibility of HHS imposing sanctions against the facility in the future on the basis of its findings of noncompliance was speculative and outside any definition of "initial determination" entitling the facility to a hearing under 42 C.F.R. §§ 498.3(b)(13) & (d) and 488.330(e)(3). *Arcadia Acres, Inc.*, DAB No. CR424 (Dep't of Health & Human Servs. 1996) (initial determination).

³⁶³ See Medicare.gov, Nursing Home Compare, <http://www.medicare.gov/NHCompare/Home.asp> (last visited Mar. 20, 2005).

³⁶⁴ 42 U.S.C.A. § 1395i-3(g)(5) (West 2005). The information remains posted until the next annual survey is conducted.

³⁶⁵ See Consumer Reports, 2004 Nursing Home Watch List (by state), May 3, 2005, <http://www.consumerreports.org> (search "2004 Nursing Home Watch List"; then follow the first link).

³⁶⁶ 42 C.F.R. §§ 488.404, 488.438 (2005).

³⁶⁷ Krause, *supra* note 16, at 95-98.

³⁶⁸ Currently in many states, such as Texas, Florida and Illinois, many nursing homes are forced to operate without insurance or go out of business because insurance companies are unwilling to offer nursing homes with less than perfect compliance histories reasonable insurance rates. See Anderson, *supra* note 42, at 21A.

homes cannot seek federal review of this unconstitutional practice based on the Supreme Court's decision in *Ill. Council*.³⁶⁹

3. The Secretary's Statements in *Ill. Council*

Six years after the promulgation of the Medicare regulations and four years after the decision in *Arcadia Acres*, the Secretary interpreted the Medicare Act to include a right to a hearing regardless of whether a remedy was imposed.³⁷⁰ When the Supreme Court asked the Secretary in *Ill. Council* what hearing rights were afforded nursing homes under Medicare, the Secretary stated that any "dissatisfied" nursing home was entitled to review any determination that it "failed to comply substantially with the statute, agreements, or regulations, whether termination or some other remedy [was] imposed."³⁷¹ Based on this interpretation, the Supreme Court ruled that nursing homes had to present their case first to HHS and receive a final ruling because HHS's administrative review process did provide meaningful review of claims.³⁷² This practice of HHS does bar the entire industry from obtaining review, because no nursing home has the right to administrative or federal review if a remedy is not imposed. A case presented to HHS is summarily dismissed without the issuance of a final ruling, barring nursing homes from federal review under *Ill. Council*.³⁷³

Hence, the nursing home industry should be allowed to bring cases in federal court for review without having to present claims to HHS and receiving a final ruling from HHS, because just like the physicians in *Bowen*, the nursing home industry has been left without access to any meaningful review. Even when nursing homes are afforded a hearing, the hearing process conducted is minimal at best. In fact, the actual hearing process has been limited to the submission of

³⁶⁹ *Shalala v. Ill. Council on Long Term Care, Inc. (Ill. Council)*, 529 U.S. 1, 22-23 (2000).

³⁷⁰ *Id.*

³⁷¹ *Id.* at 21.

³⁷² *Id.* at 24.

³⁷³ See *Arcadia Acres, Inc.*, DAB No. 1607 (Dep't of Health & Human Servs. 1997) (final determination); *Jacinto City Healthcare Ctr.*, DAB No. CR627 (Dep't of Health & Human Servs. 1999); *Heritage Manor of Franklinton*, DAB No. CR666 (Dep't of Health & Human Servs. 2000); *Lutheran Home - Caledonia*, DAB No. CR674 (Dep't of Health & Human Servs. 2000) (initial determination); *Lakewood Plaza Nursing Ctr.*, DAB No. CR691 (Dep't of Health & Human Servs. 2000) (initial determination); *Lakeland Lodge Nursing Ctr.*, DAB No. CR893 (Dep't of Health & Human Servs. 2002); *Southwood Care Ctr.*, DAB No. CR1029 (Dep't of Health & Human Servs. 2003); *Highlands at Brighton*, DAB No. CR1104 (Dep't of Health & Human Servs. 2003); *Manorcare Health Servs. Sandia*, DAB No. CR1255 (Dep't of Health & Human Servs. 2004).

all direct testimony through affidavits and in-person cross-examination.³⁷⁴ Although the current Medicare regulations that grant nursing homes procedural due process guarantee a right to a full evidentiary hearing on the record,³⁷⁵ ALJs of HHS have seemingly reverted back to the “informal hearing” process used by HHS in 1986, without any formal change in the rules.

B. Full Evidentiary Hearings through Written Submission

Beginning in 2002, some of the eight ALJ’s decided to reconsider what 42 C.F.R. § 498 meant when it said a full and fair hearing must be conducted.³⁷⁶ Three of the ALJs began to require that all direct testimony of witnesses be submitted through written submissions, only allowing the participants to cross-examine witnesses at their full evidentiary hearing.³⁷⁷ These ALJs imposed requirements even though in each case there were issues of material fact in dispute. Now direct testimony is submitted in the form of affidavits.³⁷⁸ The affidavits do not include questions that the witness was asked and there is no means by which parties can object to the statements made in the affidavits.³⁷⁹ The ALJs, employees of HHS, made this modification without issuing any new rulings, regulations, or policy memos justifying this

³⁷⁴ For Initial Hearing Orders that provide a full evidentiary hearing with in-person direct testimony, compare DAB No. C-00-438 (Dep’t of Health & Human Servs. 2000) (initial pre-hearing order) (petitioner’s name concealed) (on file with author), DAB No. C-02-172 (Dep’t of Health & Human Servs. 2002) (initial pre-hearing order) (petitioner’s name concealed) (on file with author), DAB No. C-05-404 (Dep’t of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner’s name concealed) (on file with author), and DAB No. C-06-189 (Dep’t of Health & Human Servs. 2006) (initial pre-hearing order) (petitioner’s name concealed) (on file with author), with Initial Hearing Orders that require written direct testimony in lieu of in-person testimony, DAB No. C-04-401 (Dep’t of Health & Human Servs. 2004) (initial pre-hearing order) (petitioner’s name concealed) (on file with author), and DAB No. C-05-445 (Dep’t of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner’s name concealed) (on file with author).

³⁷⁵ See 42 C.F.R. §§ 498.60, 498.62, 498.66 (2005).

³⁷⁶ According to 42 C.F.R. § 498, which governs the hearing process, in-person witness testimony is a required element of the nursing home hearing. 42 C.F.R. § 498.62. In fact, the regulations state that witnesses will testify at the in-person hearing, without any mention that this testimony is limited to cross-examination. 42 C.F.R. § 498.62.

³⁷⁷ See DAB No. C-04-401 (Dep’t of Health & Human Servs. 2004) (initial pre-hearing order) (petitioner’s name concealed) (on file with author); DAB No. C-05-445 (Dep’t of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner’s name concealed) (on file with author).

³⁷⁸ See DAB No. C-04-401; DAB No. C-05-445.

³⁷⁹ See DAB No. C-04-401; DAB No. C-05-445.

change.³⁸⁰ These changes are arbitrarily applied—not all ALJs prevent in-court testimony³⁸¹—and directly contradict the Constitution, the plain language of the statute and regulations governing nursing home hearings, and the APA.³⁸²

1. Constitutional Violation

In *Eldridge*, the Supreme Court ruled that the amount of procedural due process required by the Constitution to be provided when individuals were deprived of property was proportionate to the harm suffered.³⁸³ To evaluate what process was due, the Court reviewed three factors: (1) the risk of erroneous deprivation of such interest and the reduction of risk, if any, from the addition of procedural safeguards; (2) the private interest that was affected by the official action; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.³⁸⁴ In applying these three factors in *Eldridge*, the Court found that a post-termination hearing held in front of an ALJ with in-person witness testimony was sufficient process.

When *Eldridge* is applied to the arbitrary decision of three of the eight ALJs to hold partial or informal hearings for nursing homes to challenge noncompliance findings, it is clear that this practice does not provide nursing homes with the process proportionate to their harm for two reasons. First, the hearing process used by HHS in *Eldridge* was standard. It did not change from one ALJ to the next.³⁸⁵ The uniformity of the process was significant because the Court found that it reduced the risk of erroneous deprivation of disability payments and thus additional procedural safeguards were not necessary.³⁸⁶ The

³⁸⁰ See DAB No. C-04-401; DAB No. C-05-445; 42 C.F.R. §§ 498.60, 498.62, 498.66 (2005).

³⁸¹ For Initial Hearing Orders that provide a full evidentiary hearing with in-person direct testimony, see DAB No. C-00-438 (Dep't of Health & Human Servs. 2000) (initial pre-hearing order) (petitioner's name concealed) (on file with author); DAB No. C-02-172 (Dep't of Health & Human Servs. 2002) (initial pre-hearing order) (petitioner's name concealed) (on file with author); DAB No. C-05-404 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author); DAB No. C-06-189 (Dep't of Health & Human Servs. 2006) (initial pre-hearing order) (petitioner's name concealed) (on file with author).

³⁸² See 42 C.F.R. §§ 498.60, 498.62, 498.66. See also Dep't Appeals Board, Civil Remedies Division, Dep't of Health & Human Servs., Procedures (providing hearing procedures for the Civil Remedies Division of the DAB) (on file with author).

³⁸³ See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

³⁸⁴ *Id.* at 335.

³⁸⁵ *Id.* at 340, 343.

³⁸⁶ *Id.* at 345, 349.

Medicare compliance hearing process for nursing homes is not standard. Nursing homes are subject to the whims of the ALJ. Some allow a full evidentiary hearing, while others only allow in-person cross-examination.³⁸⁷ This random process does not reduce the risk of the erroneous deprivation of Medicare payments. In fact, it actually increases the risk of erroneous deprivation. There are no means by which a nursing home can challenge the assertions made by HHS witnesses in their affidavits. So the information is placed in the record.

Additionally, ALJs cannot make credibility decisions based on written testimony and not every witness is called for cross-examination. Without hearing the direct testimony of witnesses at an in-person hearing, an ALJ's ability to determine the veracity and credibility of the witness is limited to a few questions on cross-examination and rebuttal.³⁸⁸ If the only testimony heard from the witness is an answer of "yes" and "no," which is usually the only testimony elicited on cross-examination, ALJs will not be able to reasonably determine the veracity and the credibility of each witness. Without first determining the veracity and credibility of the witness, it will be impossible for ALJs to assign the proper relevance and weight to each of the witness's testimony. Because there are genuine issues of material of fact and no admissions of fact in all cases, it is simply not enough that the submissions of direct testimony will be in the form of an affidavit. ALJs must hear witnesses' entire testimony to determine the credibility of each witness and the weight of all the evidence presented to resolve the disputed issues of material fact.

Second, the Court in *Eldridge* found that the harm suffered by Eldridge was minimal because Eldridge could sustain himself by applying for welfare during the reconsideration process.³⁸⁹ Therefore, Eldridge's interest in the continuation of his disability benefits was

³⁸⁷ Compare Initial Hearing Orders that provide a full evidentiary hearing with in-person direct testimony, DAB No. C-00-438 (Dep't of Health & Human Servs. 2000) (initial pre-hearing order) (petitioner's name concealed) (on file with author), DAB No. C-02-172 (Dep't of Health & Human Servs. 2002) (initial pre-hearing order) (petitioner's name concealed) (on file with author), DAB No. C-05-404 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author), and DAB No. C-06-189 (Dep't of Health & Human Servs. 2006) (initial pre-hearing order) (petitioner's name concealed) (on file with author), with Initial Hearing Orders that require written direct testimony in lieu of in-person testimony, DAB No. C-04-401 (Dep't of Health & Human Servs. 2004) (initial pre-hearing order) (petitioner's name concealed) (on file with author), and DAB No. C-05-445 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author).

³⁸⁸ This assumes that the witness will be cross-examined at the hearing.

³⁸⁹ *Eldridge*, 424 U.S. at 340.

outweighed by the government's fiscal interests in protecting the Treasury against erroneous payments and administrative burdens that the additional or substitute procedures would entail.³⁹⁰ In the case of nursing home hearings, the government is not protecting its fiscal interests by denying nursing homes a right to a full evidentiary hearing. HHS is not protecting its fiscal interests by not granting a full evidentiary hearing because once remedies are imposed they continue to incur until the completion of the case, which can range several years. Moreover, the three ALJs are no more administratively burdened by providing a full evidentiary hearing than the five other ALJs that currently provide a hearing. Nursing homes, however, are harmed from the limitation of their hearing rights because they are not afforded a meaningful chance to challenge the remedy imposed or the noncompliance findings. If the ALJ affirms the imposition of a remedy imposed, nursing homes do not have any safety net system from which to draw money. Therefore, the interests of the nursing home to protect its financial solvency are greater than the need of three ALJs to streamline the hearing process.

The Supreme Court ruled that the amount of procedural due process an individual received was based on three factors: (1) the risk of the erroneous deprivation of such interest and the reduction of risk, if any, from the addition of procedural safeguards; (2) the individual's interest; and (3) the government's interest in protecting financial solvency of the Treasury.³⁹¹ When these factors are applied to the limitations placed on nursing home compliance hearings by three ALJs the process provided is not enough. The use of affidavits is not a standard agency practice and was only implemented by three ALJs for judicial economy. But this practice increases the risk of erroneous deprivation because ALJs cannot make credibility decisions based on written testimony essential to fact driven cases. Furthermore, this practice does not protect the government's financial or administrative interests. No money or time is saved by the ALJs using this system because they still must review all the affidavits to make a decision. However, nursing homes are harmed by the practice because they do not receive a full evidentiary hearing in which they are able to challenge the factual findings of HHS. Thus, the ALJs must give nursing homes a full evidentiary hearing to comply with the requirements of the Fifth Amendment. The actions of the ALJs also violate the plain language of the Medicare Act and regulations that provide for a full evidentiary hearing with oral direct testimony.

³⁹⁰ *Id.* at 348.

³⁹¹ *Id.* at 335.

2. Violation of Plain Language of Medicare Act and Regulations

Section 1395cc(h)(1)(A) of the Medicare Act mandates that nursing homes be granted the same hearing rights provided under section 405(b) of the Social Security Act.³⁹² Section 405(b) guarantees a right to:

[R]easonable notice and opportunity for a hearing with respect to such decision. . . . In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence.³⁹³

This was further codified in the Medicare regulations.³⁹⁴ According to 42 C.F.R. § 498.60, the ALJ must inquire fully into all matters at issue and receive into evidence the testimony of witnesses and any documents that are relevant and material at the in-person hearing.³⁹⁵ Clearly, this means that witnesses are required to present their entire testimony at the in-person hearing, because the regulation does not distinguish between direct- or cross-examination of witnesses. This regulation further states that the ALJ decides the order in which the evidence and the arguments of the parties are presented and the conduct of the hearing.³⁹⁶ Although ALJs may decide the conduct of the hearing, this authority is limited by 42 C.F.R. § 498.62, which governs witness's testimony.³⁹⁷ The regulation states:

The representative of each party *is permitted to examine his or her own witnesses subject to interrogation by the representative of the other party*. The ALJ may ask any questions that he or she deems necessary. The ALJ rules upon any objection made by either party as to the propriety of any question.³⁹⁸

Therefore, according to 42 C.F.R. § 498.62, a witness's entire testimony shall be given at the in-person hearing so that the ALJ may ask questions and rule upon objections.

³⁹² See 42 U.S.C.A. § 1395cc(h)(1)(A) (West 2005).

³⁹³ 42 U.S.C.A. § 405(b)(1) (West 2005). Section 1395cc(h)(1)(A) incorporates sections 405(b), (g), and (h) applicable to the Medicare Act. The Medicare Act grants nursing homes the right to a hearing to the same extent as 42 U.S.C. § 405(b), (g). See 42 U.S.C. § 1395cc(h)(1)(A).

³⁹⁴ See 42 C.F.R. §§ 498.60, 498.62, 498.66 (2005).

³⁹⁵ 42 C.F.R. § 498.60.

³⁹⁶ 42 C.F.R. § 498.60.

³⁹⁷ 42 C.F.R. § 498.60.

³⁹⁸ 42 C.F.R. § 498.62 (emphasis added).

If direct testimony is in the form of an affidavit, the ALJ will not be able to ask timely questions regarding the witness's testimony which may serve to clarify some disputed issues of material fact. Furthermore, because the questions asked of witnesses never appear in their affidavit, the opportunity for parties to make objections "to the propriety of any question" as required by 42 C.F.R. § 498.62 is non-existent. Instead of being granted the opportunity to keep inadmissible statements out of evidence, parties are limited to filing broad motions to strike witness statements, requiring the ALJ to review the statement and then determine its admissibility. Moreover, the submission of direct testimony through affidavits violates the requirements of 42 C.F.R. § 498.66.

According to 42 C.F.R. § 498.66, a party must file a written waiver of the right to appear and present evidence to waive its right to an oral hearing.³⁹⁹ In fact, 42 C.F.R. § 498.66 states that an oral hearing must be conducted unless "an affected party wishes to waive its right to appear and present evidence at the hearing" by filing "a written waiver with the ALJ."⁴⁰⁰ Even when a nursing home has not submitted a written waiver of its right to appear and present evidence, ALJs are implementing these policies.⁴⁰¹ This contravenes the plain meaning of the regulation, because in these cases there has been no admission of fact by either party; thus, the ALJ must conduct an oral hearing because it is "necessary to clarify the facts at issue."⁴⁰² These practices not only violate the plain language of the Medicare Act and regulations,⁴⁰³ but they also violate the hearing provisions of the APA.

³⁹⁹ 42 C.F.R. § 498.66.

⁴⁰⁰ 42 C.F.R. § 498.66.

⁴⁰¹ For Initial Hearing Orders that require written direct testimony in lieu of in-person testimony, see DAB No. C-04-401 (Dep't of Health & Human Servs. 2004) (initial pre-hearing order) (petitioner's name concealed) (on file with author); DAB No. C-05-445 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author).

⁴⁰² 42 C.F.R. § 498.66.

⁴⁰³ When HHS wanted to limit an agency's hearing process it was quite clear. For example, when HHS created a hearing process for laboratories under the Clinical Improvement Amendments of 1988 (CLIA) it specifically limited the rights of laboratories. See 42 C.F.R. § 488.201. CLIA made every laboratory in the country that tests human specimens for health reasons subject to federal regulation regardless of whether it participated in a government program or it tested specimens in interstate commerce. See *Granting and Withdrawal of Deeming Authority to Private Nonprofit Accreditation Organizations and of CLIA Exemption Under State Laboratory Programs*, 57 Fed. Reg. 33992 (Jul. 31, 1992). A laboratory dissatisfied with HHS's determination has a right to seek reconsideration regardless of whether a remedy has been imposed. See 42 C.F.R. § 488.201. CLIA laboratories are given an informal hearing in front of a hearing officer. 42 C.F.R. § 488.201. In addition, laboratories are

3. Administrative Procedure Act Violation

Section 554 of the APA provides a hearing in every case of adjudication required by statute to be determined *on the record*.⁴⁰⁴ Before section 554 of the APA can apply, the statute must clearly mandate a hearing on the record. Moreover, the Supreme Court has “also implied that formal adjudication procedures are only necessary when a statute uses the magic words ‘on the record.’”⁴⁰⁵ Thus, HHS is required to provide nursing homes a right to a hearing if the Medicare statute provides a hearing on the record. The Sixth Circuit recently affirmed this proposition in *Crestview Parke Care Ctr. v. Thompson*.⁴⁰⁶

In *Crestview*, a skilled nursing home located in Ohio was surveyed by the Ohio Department of Health on August 12, 1999, and found out of compliance with the Medicare regulations.⁴⁰⁷ The Ohio Department of Health revisited the facility four times before finding the facility in compliance on October 21, 1999.⁴⁰⁸ HHS imposed a \$400-a-day civil money penalty from October 5 to October 21.⁴⁰⁹ On December 30, 1999, *Crestview* sent a letter of appeal to an ALJ challenging the imposition of the \$400-a-day civil money penalty and the facts supporting the penalty.⁴¹⁰ *Crestview* and HHS participated in a pre-hearing conference with the ALJ on September 10, 2001.⁴¹¹ Subsequently, the parties exchanged pre-hearing briefs. On December 12, 2001, the ALJ informed the parties that the case would be resolved

allowed to present witness testimony at the hearing. 42 C.F.R. § 488.205. Although laboratories are afforded these rights, this process is only minimal compared to nursing home hearings. The process for laboratories is entitled “informal hearing” while the process for nursing homes is called a “hearing.” See 42 C.F.R. § 488.205. Second, the hearing process for laboratories is conducted in front of a hearing officer, while nursing homes have the right to present evidence to an ALJ. See 42 C.F.R. §§ 488.207, 498.5. Furthermore, laboratories are limited as to using authorized representatives and technical advisors witnesses, whereas, nursing homes are granted the unlimited option of bringing to the hearing anyone whose “presence the ALJ considers necessary or proper.” 42 C.F.R. §§ 488.207(b)(1), 498.60. Hence, when HHS wanted to limit the due process rights afforded in a hearing it stated so clearly in the regulations governing laboratories.

⁴⁰⁴ 5 U.S.C.A. § 554 (West 2005) (emphasis added).

⁴⁰⁵ *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748 (6th Cir. 2004) (citing *PBGC v. LTV Corp.*, 496 U.S. 633, 654-55 (1990) (affirming agency’s use of informal hearing process without an oral hearing because statute did not require the hearing to be on the record)).

⁴⁰⁶ *Id.* at 743.

⁴⁰⁷ *Id.* at 744-45.

⁴⁰⁸ *Id.* at 745.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

without an in-person hearing because there were no genuine issues of material fact.⁴¹² The ALJ ruled in favor of HHS and the DAB affirmed the ALJ's ruling.⁴¹³ Crestview appealed the case to the Sixth Circuit.

The Court ruled that nursing homes had a right to an in-person hearing based on section 554 of the APA and the Medicare statute and regulations.⁴¹⁴ The Court held that section 554 of the APA provided a right to an in-person hearing if the statute required the agency to grant an opportunity to be heard *on the record*.⁴¹⁵ Because section 1395cc(h)(1)(A) of the Medicare Act guaranteed nursing homes the right to a hearing *on the record* with in-person witness testimony, the Court held that Crestview was entitled to an in-person hearing.⁴¹⁶ Even with this ruling, some ALJs still limit the hearing to in-person cross-examination.⁴¹⁷

When nursing homes are granted a right to a hearing, some ALJs are limiting the formal hearing process to written direct testimony and in-person cross-examination.⁴¹⁸ Section 556 of the APA prevents the

⁴¹² *Id.* at 745-46.

⁴¹³ *Id.* at 746.

⁴¹⁴ *Id.* at 748.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* The court further noted that the Medicare regulations, 42 C.F.R. §§ 498.3(a)(1), 488.330(e)(3)(ii), 498.60-62, and 498.66 clearly provided nursing homes the right to an in person hearing. *Id.* at 749. For further discussion of these regulatory requirements see *supra* Part IV.B.1.

⁴¹⁷ Compare Initial Hearing Orders that provide a full evidentiary hearing with in-person direct testimony, DAB No. C-00-438 (Dep't of Health & Human Servs. 2000) (initial pre-hearing order) (petitioner's name concealed) (on file with author), DAB No. C-02-172 (Dep't of Health & Human Servs. 2002) (initial pre-hearing order) (petitioner's name concealed) (on file with author), DAB No. C-05-404 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author), and DAB No. C-06-189 (Dep't of Health & Human Servs. 2006) (initial pre-hearing order) (petitioner's name concealed) (on file with author), with Initial Hearing Orders that require written direct testimony in lieu of in-person testimony, DAB No. C-04-401 (Dep't of Health & Human Servs. 2004) (initial pre-hearing order) (petitioner's name concealed) (on file with author), and DAB No. C-05-445 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author).

⁴¹⁸ Compare Initial Hearing Orders that provide a full evidentiary hearing with in-person direct testimony, DAB No. C-00-438 (Dep't of Health & Human Servs. 2000) (initial pre-hearing order) (petitioner's name concealed) (on file with author), DAB No. C-02-172 (Dep't of Health & Human Servs. 2002) (initial pre-hearing order) (petitioner's name concealed) (on file with author), DAB No. C-05-404 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author), and DAB No. C-06-189 (Dep't of Health & Human Servs. 2006) (initial pre-hearing order) (petitioner's name concealed) (on file with author), with Initial Hearing Orders that require written direct testimony in lieu of in-person testimony, DAB No. C-04-401 (Dep't of Health & Human Servs. 2004)

use of this informal hearing process. APA § 556 requires ALJs to provide for the exclusion of irrelevant, immaterial, and unduly repetitive evidence and requires the presentation of evidence at an oral hearing.⁴¹⁹ This section explicitly limits the intake of evidence to that which is material to the case. Submitting affidavits for direct testimony negates a nursing home's right to object to hearsay or irrelevant, immaterial, and unduly repetitive evidence. This allows HHS to totally control the case because it will be able to submit surveyors' written direct testimony without allowing a nursing home to object to the relevance or scope of the testimony.

There is no procedure in place for each party to object to statements made in the written direct testimony of witnesses. Thus, if a witness' direct testimony is not given at an in-person hearing, a nursing home will not have an opportunity to object to HHS's written submissions or ask HHS witnesses about disputed facts not covered in their direct testimony. Therefore, simply allowing HHS witnesses to submit written direct testimony without the opportunity for objection to hearsay or the relevance and scope of the testimony violates section 556 of the APA.⁴²⁰

According to the Supreme Court, the Constitution provides an individual challenging the deprivation of property with a right to a hearing.⁴²¹ This hearing can take many forms; however, the type of hearing granted is based on the risk of erroneous deprivation of property and the dictates of the governing statute and regulations.⁴²² Nursing homes are not granted a hearing before they are deprived of property, namely Medicare payments. When no remedy is imposed, nursing homes are summarily denied a hearing, even though they lose Medicare payments by a decrease in admission and Medicare fraud and abuse actions. Furthermore, when nursing homes are granted a right to a hearing, the hearing is so limited it increases the risk of the erroneous deprivation of Medicare payments.

Some ALJs have arbitrarily limited the hearing process to in-person cross-examination directly contradicting the plain language of

(initial pre-hearing order) (petitioner's name concealed) (on file with author), and DAB No. C-05-445 (Dep't of Health & Human Servs. 2005) (initial pre-hearing order) (petitioner's name concealed) (on file with author).

⁴¹⁹ "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C.A. § 556(d) (West 2005).

⁴²⁰ See 5 U.S.C.A. § 556.

⁴²¹ See *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319, 319 (1976) (stating that the Due Process Clause provides individuals with a right to a hearing when they are being deprived of a constitutionally protected right).

⁴²² *Eldridge*, 424 U.S. at 334-35.

the Medicare Act and regulations, the intent of the Medicare Act and regulations, and the APA. This limitation does not allow for either the evaluation of witness credibility or the exclusion of irrelevant, immaterial, and unduly repetitive evidence. These violations could be resolved if nursing homes could challenge the constitutionality of these practices. HHS does not have the authority to rectify these constitutional violations; the federal courts have sole and original jurisdiction to hear these issues. However, nursing homes cannot bring these actions to federal court because of the Supreme Court's decision in *Ill. Council* that nursing homes were prohibited by 42 U.S.C. §§ 405(g) and (h) from seeking federal court review unless the nursing home presented that case to HHS and received a final ruling. Thus, the Court effectively barred nursing homes from any meaningful review. Without access to federal court, the only solution for nursing homes is to hope that HHS changes its policies.

C. Solutions

The denial of procedural due process is a violation of the Constitution, the APA, and the Medicare Act and regulations. Unless HHS imposes a remedy for findings of noncompliance, nursing homes are denied access to a hearing. However, nursing homes are still deprived of property through the imposition of later fines based on these unreviewable findings, Medicare fraud and abuse claims, and increased insurance premiums. This situation could be resolved by the reversal of *Ill. Council*. The Court's decision in *Ill. Council* affirmed the Medicare Act's bar of federal review until a case had been presented to HHS and a final ruling had been issued.⁴²³ The Court ruled in this manner because it relied on inaccurate statements of HHS that nursing homes were provided with meaningful review.⁴²⁴ In reality, HHS does not grant nursing homes any review. Therefore, nursing homes should have a right to challenge this practice in federal court without presenting the case to HHS.

When nursing homes are granted a right to a hearing, HHS should provide them with a full evidentiary hearing that includes witness testimony as mandated by the Medicare Act and regulations.⁴²⁵ This will preserve fairness and due process in Medicare compliance hearings. To ensure timely resolution of cases to protect the lives of nursing home residents and permit nursing homes an opportunity to pro-

⁴²³ *Shalala v. Ill. Council on Long Term Care, Inc. (Ill. Council)*, 529 U.S. 1, 12 (2000).

⁴²⁴ *Id.* at 21.

⁴²⁵ 42 C.F.R. §§ 498.5, 498.60-66 (2005).

tect their financial interests and reputation, HHS should also hire more ALJs to hear cases. If a nursing home is not afforded a hearing, then HHS should post the facility's hearing request on their website along with their alleged non-compliance findings.

Finally, HHS should automatically waive the finality requirement for constitutional challenges so that nursing homes can immediately enter federal court. This would allow HHS to save time and money bypassing menial debates concerning compliance when the nursing home is only challenging the constitutionality of the procedures used. The implementation of these solutions would not entail any additional expense and would actually improve the system for the benefit of the nursing homes as well as the residents. The timely resolution of nursing home compliance hearings ensures that instead of wasting time on fight allegations of noncompliance, the nursing home can focus on the quality of residents.

CONCLUSION

The fundamental requirement of due process is to be heard "at a meaningful time and in a meaningful manner."⁴²⁶ The failure of federal administrative agencies to provide the due process rights guaranteed by the agency's governing statute, regulations, and policy statements contravenes the protections guaranteed by the Due Process Clause: the fundamental right of Americans regulated by the federal government to receive due process of law when deprived of life, liberty, or property. HHS's limitation of nursing homes' hearing rights is one example of this contravention. Understandably, the money spent by HHS justifies rigorous regulation of nursing homes to ensure that residents receive quality care. However, arbitrary and capricious regulation of nursing homes that leaves them without any avenue to challenge the agency's actions violates the procedural due process rights guaranteed by the Fifth Amendment of the U.S. Constitution.

The Supreme Court's ruling in *Ill. Council* upholding the bar to federal review until presentment to HHS and a final agency ruling, even if the claims are constitutional in nature, created a fundamental flaw in the nursing home hearing process. Nursing homes have no right to a hearing to challenge any finding of noncompliance and even when granted a hearing there is no meaningful review. The Due Process Clause of the Constitution requires HHS to provide nursing homes a full evidentiary hearing when they are deprived of property. HHS

⁴²⁶ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

uses these findings of noncompliance to impose fines and deny Medicare payments for new admissions on the nursing home in later surveys.⁴²⁷ These actions deprive nursing homes of property, Medicare payments, and money, with no hearing. These practices also violate the Medicare Act because they harm the nursing home. HHS is required under 42 U.S.C. § 1395i-3(g)(5) to report their findings to the public by posting it on their website. This harms the nursing home's reputation. Additionally, HHS uses these findings as the basis of Medicare fraud and abuse actions. If the survey shows that the nursing home did not provide care, but still received payment for the care, the nursing home committed fraud. If a nursing home is found guilty of fraud, then the facility has to pay HHS back the Medicare payment plus three times that amount. This is financial harm. Nursing homes cannot obtain agency review for these claims and are barred from federal review.

This abrogation of rights has pushed the industry to near collapse because not only do alleged violations of Medicare regulations serve as the basis for Medicaid actions,⁴²⁸ but also insurance companies use these findings in determining yearly insurance premiums for nursing homes.⁴²⁹ Therefore, procedural due process rights, or lack thereof, afforded to nursing homes to challenge alleged violations of the Medicare regulations are paramount to a nursing home's continued operation. To comply with the Medicare statute and regulations, HHS should provide nursing homes with timely full evidentiary hearings and allow facilities with constitutional challenges, that the agency has no authority to decide, proceed to federal court. By putting these solutions in place, HHS can streamline the process so that cases are quickly and fairly resolved, while still protecting the care provided nursing home residents.

⁴²⁷ See 42 C.F.R. §§ 488.404, 488.438.

⁴²⁸ See 77 ILL. ADMIN. CODE tit. 77, §§ 300.200(e)(1) & (f) (2006). See generally 42 U.S.C.A. § 1395i-3(g)(1)(A) (West 2005).

⁴²⁹ See Anderson, *supra* note 42, at 21A. Liability insurance rates, tied to litigation costs and the quality of care, have increased on average 1,000 percent since 1998. *Id.*

