

Exclusion From Medicare: Building a Case for Physicians

I. INTRODUCTION

Recent injustices to physician providers of Medicare have raised anew the question of the level of procedural due process necessary to exclude physicians from Medicare. The level of procedural protection can determine a physician's fate as he or she is summarily denied an evidentiary hearing prior to termination. Unfortunately, the courts' adherence to precedent offers no relief.

If *Goldberg v. Kelly*¹ opened the door to due process litigation in federal agencies, *Mathews v. Eldridge*² should have been the decision that soundly closed the door on the issue of pre-termination hearings, eliminating the need for hearings as requisite for adequate procedural due process.³ The Court, in *Mathews*, established a three-pronged balancing test in which the following factors should be considered: The private interest affected; the risk of erroneous deprivation through procedures used and the probable value of additional procedural safeguards; and the government's interest in affording additional safeguards.⁴ The Social Security Administration and judiciary accept the *Mathews* balancing test as the method of analysis for all types of Social Security cases.⁵ A mechanical application of *Mathews* gives an easy answer to the question of procedural due process in an administrative adjudication.⁶

Despite the seeming "finality" of *Mathews*, the procedural due process issue continues to be raised.⁷ Although the courts adhere to the *Mathews* doctrine in an effort to confirm present procedure as consti-

1. 397 U.S. 254 (1970).

2. 424 U.S. 319 (1976).

3. *Id.* at 328-31. The Court in *Mathews* recognized both a waivable and a non-waivable requirement in order for the district court to have jurisdiction. The waivable requirement is a "final decision" by the Secretary, and under certain conditions, the Court will excuse the exhaustion of agency remedies without a final decision. The non-waivable requirement is the claimant's presentment of a claim to the Secretary.

4. *Id.* at 335.

5. See Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

6. 424 U.S. at 319. The Court held that the due process clause of the fifth amendment of the United States Constitution does not require recipients of Social Security Disability Insurance Benefits (Social Security benefits) to have a right to a full hearing prior to the termination of these benefits.

7. See Mashaw, *supra* note 5, at 29.

tutionally adequate, physicians providing services to Medicare beneficiaries⁸ argue that their interest in providing treatment is being terminated without due process compliance.⁹ By having a property or liberty interest — and in some instances both — a physician suffers substantial loss when excluded from Medicare. Minimal procedural safeguards fail to mitigate the potential harm resulting from erroneous deprivation of a physician from Medicare.

Although physicians challenge present procedure as constitutionally inadequate, the courts unanimously rely on *Mathews* as the cornerstone for analysis, summarily accepting prior decisions, and thus denying physicians a federal forum for review.¹⁰ The result is consistency within the circuits; however, a comparison of the physician-provider cases reveals internal inconsistencies in logic and in the application of *Mathews*.¹¹

Because *Goldberg* afforded due process claimants a full-blown evidentiary hearing, resurrecting *Goldberg* as the rule is impractical, albeit appealing. *Goldberg* recognizes the welfare claimant's property interest and furnishes protection for litigants from procedures that violate due process as guaranteed by the Constitution.¹² Alternatively, predicating decisions on *Mathews* as the only valid approach to the issues of due process is equally inappropriate because it mechanically denies litigants due process protections.¹³

This Note introduces background information regarding the evolution and establishment of the present Peer Review Organization. Further, this Note addresses whether *Mathews* is the proper predicate for sustaining present procedural safeguards in terminating physicians from Medicare, and whether the present exclusion procedure is constitutionally adequate. This Note questions the accuracy and relevancy of the *Mathews* balancing test fifteen years after the Supreme Court's decision, and distinguishes physician-providers from the disability claimant in *Mathews*. Finally, this Note examines the inappropriateness of the blanket application of *Mathews* to judicially frustrated physicians.

8. *Thorbus v. Bowen*, 848 F.2d 901 (8th Cir. 1988); *Cassim v. Bowen*, 824 F.2d 791 (9th Cir. 1987); *Varandani v. Bowen*, 824 F.2d 307 (4th Cir. 1987), *cert. denied*, 484 U.S. 1052 (1988); *Lavapies v. Bowen*, 687 F. Supp. 1193 (S.D. Ohio 1988), *aff'd*, 883 F.2d 465 (6th Cir. 1989).

9. See *Doyle v. Secretary of Health and Human Servs.*, 848 F.2d 296 (1st Cir. 1988); *Thorbus*, 848 F.2d 901; *Cassim*, 824 F.2d 791; *Varandani*, 824 F.2d 307; *Lavapies*, 687 F. Supp. 1193; *Papendick v. Bowen*, 658 F. Supp. 1425 (W.D. Wis. 1987).

10. See generally *Doyle*, 848 F.2d 296; *Cassim*, 824 F.2d 791; *Varandani*, 824 F.2d 307; *Papendick*, 658 F. Supp. 1425.

11. See, e.g., *Lavapies*, 687 F. Supp. 1193.

12. 397 U.S. at 266.

13. See generally *Mashaw*, *supra* note 5, at 58-59.

II. THE ESTABLISHMENT OF PEER REVIEW ORGANIZATIONS

The establishment and evolution of the Peer Review Organization (PRO) provides background for discussing the termination procedure imposed upon physicians. When Medicare was enacted in 1965, legislators gave little attention to regulation of medical necessities, appropriateness of services, or quality of services provided to Medicare beneficiaries.¹⁴ The only legal requirements involved the establishment of review committees to monitor appropriate utilization of services,¹⁵ to oversee state licensure assuring that physicians were minimally qualified,¹⁶ and to guarantee the quality of hospitals in conjunction with the Joint Commission on Accreditation of Hospitals.¹⁷ By the early 1970s, however, abuses within the system made it apparent that further controls were needed to limit excessive use of Medicare.¹⁸

Out of this concern grew the Peer Review Service Organization (PRSO) program, which used regional, nonprofit, independent physicians' groups to review the use of medical services by beneficiaries of federal medical assistance programs, including Medicare.¹⁹ Although the primary emphasis of PRSO was on utilization review in hospitals, the PRSO also conducted Medical Care Evaluation Studies (later called Quality Review Studies) aimed at improving the quality of medical care provided by the physicians.²⁰ The PRSO program was never successful in meeting the objectives of curtailing abuse in the benefits program or in enacting standards upon which to base review of the services provided to beneficiaries.²¹ In 1982, the Tax Equity and Fiscal Responsibility Act (TEFRA) abolished the PRSO program and created in its stead the Peer Review Organization.²²

14. Jost, *Administrative Law Issues Involving the Medicare Utilization and Quality Control Peer Review Organization (PRO) Program: Analysis and Recommendation*, 50 OHIO ST. L.J. 1, 4 (1989).

15. Social Security Amendments of 1965, Pub. L. No. 89-97, § 1861(k), 79 Stat. 285, 318-19 (1966).

16. *Id.* at § 1861(r), 79 Stat. at 321.

17. *Id.* at § 1865, 79 Stat. at 326-27.

18. See *Senate Comm. On Fin., S. REP. No. 1230, 92nd Cong., 2d Sess. 254-69 (1972)*; *Senate Comm. On Fin., Medicare & Medicaid, Problems, Issues and Alternatives, 91st Cong., 2d Sess. 105-09 (Feb. 9, 1970)* (defining utilization as correct and honest use of Medicare funds for hospital services rendered).

19. Social Security Amendment of 1972, Pub. L. No. 92-603, § 249F, 86 Stat. 1329, 1429-45 (1972).

20. Jost, *supra* note 14, at 14.

21. *Id.*

22. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 143, 96 Stat. 324, 382 (1982).

A. *The Present PRO System*

"The PRO [Peer Review Organization] program is the federal government's primary tool for assuring that services provided to Medicare beneficiaries are medically necessary, are of a quality that meets professionally recognized standards of health care, and are provided in an appropriate setting."²³ The power of PRO over Medicare providers, practitioners, and beneficiaries is sweeping. If a PRO determines that medical services do not meet utilization or quality standards, it may retrospectively deny Medicare payment for those services.²⁴ A PRO may recommend to the Office of the Inspector General (OIG) of the Department of Health and Human Services (HHS) that a provider or practitioner²⁵ be fined or excluded from receiving payment under the Medicare program.²⁶

The PRO's immense power is relatively unchecked by any outside authority. More striking than the scope of the PRO's authority is that in many instances PRO decisions are either nonreviewable or are reviewable only after implementation. A hospital or physician, for example, in most cases cannot obtain independent review of the PRO decision to deny payment for a claim from either an Administrative Law Judge (ALJ) or a court — the PRO's decision is final.²⁷ PRO-initiated sanctions and penalties assessed against practitioners are usually not reviewable until months after implementation.²⁸ A 1987 draft report of the Health and Human Services notes that, on average, it takes fifteen months from the date of a PRO sanction recommendation to the Office of Inspector General until completion of the appeal.²⁹

A significant feature of the PRO is that, "despite their substantial, often unreviewable power, [PROs] are private entities that provide services for the federal government on a contractual basis."³⁰ The congressional intent in using private entities rather than government agencies is to

23. Jost, *supra* note 14, at 2 (citing Social Security Act, 42 U.S.C. § 1320c-3(a)(1) (1982 & Supp. IV 1986)).

24. *Id.* (citing Social Security Act, 42 U.S.C. § 1320c-3(a)(2) (1982 & Supp. IV 1986)).

25. Social Security Act, 42 U.S.C. § 1320c-3(a)(1) (1982 & Supp. IV 1986). Under Medicare law, a practitioner is a physician or other individual who provides health care.

26. Jost, *supra* note 14, at 1.

27. *Id.* at 2.

28. Social Security Act, 42 U.S.C. § 1320c-5(b)(2) (1982); 42 C.F.R. §§ 1004.100(b), 1004.130(a)(3) (1987).

29. OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF HEALTH & HUMAN SERV., THE UTILIZATION AND QUALITY CONTROL PEER REVIEW ORGANIZATION (PRO) PROGRAM: SANCTION ACTIVITIES (draft) 16 (Mar. 1988).

30. Jost, *supra* note 14, at 2 (citing Social Security Act, 42 U.S.C. §§ 1320c-1 to 2(b) (1982)).

decrease federal government intervention while maintaining satisfactory peer review.³¹ However, this purpose is defeated because the contractual relationship between the PRO and Health and Human Services raises questions concerning internal pressures from Health and Human Services for the PRO to sanction a certain number of practitioners.

Congress attempted to allay the fear of internal pressure by establishing the PRO program. Replacing the PRSO with the present PRO program was premised on the contractual relationship; Congress believed that the threat of nonrenewal would serve as an effective incentive.³² Some PRO contracts were not renewed after the first contract expired because the PRO failed to meet contract objectives.³³ With the threat of nonrenewal motivating the PRO, the very nature of "peer" review as an unbiased review committee is undermined significantly.

B. Profile of a PRO

Today the PROs process data concerning health care services provided to Medicare beneficiaries and "intervene when these data indicate that services have been provided unnecessarily, inappropriately, or with inadequate quality. Because hospitals consume over two-thirds of Medicare expenditures PROs have focused their review traditionally on care provided to beneficiaries by doctors in hospitals."³⁴

The PRO program varies from state to state because it is contractual, with each contract individualized for the specific PRO.³⁵ Therefore, exact standards and procedures upon which to base a typical PRO, or profile, do not exist. Compilation of several sources, however, provides a generic profile of an average PRO.³⁶ Still, evaluating case law involving the PRO and procedural issues requires careful attention to specific procedure used in each case because of the variance among PRO contract terms and procedures.

The principal source of data for PRO review is the hospital record.³⁷ PROs regularly receive data on bills paid for services rendered to Medicare beneficiaries from fiscal intermediaries.³⁸ The PRO randomly selects a

31. *Id.* at 4.

32. Jost, *supra* note 14, at 16 (citing S. REP. NO. 494, 97th Cong., 2d Sess. 41, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 781, 817; 42 U.S.C. § 1320c-2(c)(7) (1982)).

33. See *Growing Contract Denials Dispirit the Nation's PROs*, in HOSPITALS 1, 28 (May 20, 1986).

34. Jost, *supra* note 14, at 6.

35. *Id.* at 9-11.

36. See generally Jost, *supra* note 14.

37. *Id.* at 7.

38. Intermediaries are the insurance companies and other entities that handle Medicare reimbursement to providers.

sample of these cases for review and requests the corresponding medical records from the hospitals, reviewing them either at the hospital or at the PRO office.³⁹

Certain medical procedures are mandatorily examined, such as obesity treatment, pacemaker fitting, and pacemaker adjustment.⁴⁰ The PRO also randomly samples all discharges, transfers from one hospital to another, and discharges with readmission within thirty-one days.⁴¹ All reviews are retrospective.⁴²

The purpose of reviewing procedures is to identify potential problems with hospital utilization, such as performing unnecessary procedures. Random review also discloses quality problems with physicians. "When reviews indicate that a hospital is committing errors in more than 5% of its cases (or six cases if this amount is greater), the PRO is to intensify review to 50% or 100%, depending upon the problem."⁴³ Records are reviewed by professional reviewers, who identify utilization or quality problems.⁴⁴ Once a PRO identifies a problem or inconsistency through this review of medical records, the case is routed to a physician reviewer.⁴⁵

"If the problem is identified as a utilization problem, the case is considered for a payment denial."⁴⁶ The PRO also continually assembles profile data in an effort to identify aberrant providers and physicians. Profiles are kept on patients, physicians, hospitals, diagnoses, and procedures to monitor PRO impact and to identify problems for further study.⁴⁷

If a quality problem is identified, the case may eventually be referred to the PRO quality assurance system, which can impose various sanctions. The first corrective step recognizes problems and establishes workable solutions.⁴⁸ Serious or recurring problems or failure to implement remedial solutions results in exclusion recommendations.⁴⁹

39. Jost, *supra* note 14, at 7. "The sampling criteria that PROs use for selecting cases for review, and the focus of their review in examining the records, varied over the three contract cycles during which PROs have been in operation. During each contract cycle, the screening criteria and focus of PRO activity have been established by a scope of work." *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 8.

43. HEALTH CARE FIN. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERV., THIRD SCOPE OF WORK § VI, at 16-22 (1987) [hereinafter THIRD SCOPE OF WORK].

44. Jost, *supra* note 14, at 8.

45. *Id.*

46. *Id.*

47. See generally THIRD SCOPE OF WORK, *supra* note 43.

48. Jost, *supra* note 14, at 8.

49. 42 C.F.R. § 1004 (1987).

In the event more information is requested from the doctor, a matched specialist unfamiliar with the case will review the file and the physician's response. At this point, the case could be sent to the quality review committee,⁵⁰ more information might be requested from the doctor, or the case might be dropped.⁵¹ Often PROs send letters to the attending physician's hospital informing it of the problem and the potential sanctions facing the physician.⁵²

PROs have the power and responsibility to sanction providers who fail to comply with federally mandated regulations.⁵³ If, "after reasonable notice and opportunity for discussion,"⁵⁴ the PRO determines that practitioners or providers have "(A) failed in a substantial number of cases substantially to comply" with these obligations or "(B) grossly and flagrantly violated any such obligation in one or more instances," the PRO recommends to the Office of Inspector General that the provider be sanctioned.⁵⁵ "As a practical matter, exclusion from Medicare may make it impossible for a physician to practice."⁵⁶

III. DUE PROCESS AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

Physicians have complained that the procedure afforded them in exclusion from Medicare is constitutionally inadequate. However, the constitutional adequacy of the due process afforded cannot be questioned in a federal court without first considering whether the court has subject matter jurisdiction.⁵⁷ Without such jurisdiction, the courts effectively can be prevented from hearing a valid claim from a litigant who has failed to follow statutory procedure.

Problems with adequate procedural due process warrant looking at the establishment and purposes of administrative agencies. Administrative agencies are established by Congress and are intended to efficiently

50. It should be noted that these PRO regulations are not express, but vary from PRO to PRO. Thus, it can be described in general terms unless a specific case is being discussed. See Jost, *supra* note 14, at 9-11, 19-25 (describing the lack of specificity and uniformity among PROs).

51. Jost, *supra* note 14, at 8.

52. *Id.* at 2.

53. Social Security Act, 42 U.S.C. § 1320-5(1) (1982). The Act imposes on practitioners and providers who participate in the Medicare program an obligation to assure that services they render are provided economically, are provided only when medically necessary, and are of a quality that meets professional standards of care.

54. Jost, *supra* note 14, at 30-31 (quoting 42 U.S.C. § 1320c-5(b) (1982)).

55. *Id.*

56. *Id.* at 2.

57. Power, *Help is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 UNI. ILL. L. REV. 547, 551-58 (1987).

“handle controversies arising under particular statutes.”⁵⁸ The advent of the administrative agency gave rise to a myriad of constitutional questions. Among them were the issues of separation of powers and the judicial role in administrative adjudication.⁵⁹ The controversy continues as the legislative branch contends that it has the unfettered authority to posit the law and to establish the constitutional parameters.⁶⁰ “[T]he term ‘due process’ dictates that individuals be afforded whatever procedures the legislature has mandated — no more and no less.”⁶¹ The judiciary, alternatively, argues that the court is the final authority on questions of constitutionality.⁶²

The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law.⁶³ The doctrine provides that “no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”⁶⁴ The purpose of the exhaustion requirement is to prevent premature interference with agency processes so the agency may function efficiently and to afford the agency the opportunity to correct its own errors.⁶⁵ Further, the courts rely on the exhaustion requirement to promote judicial economy and efficiency and to utilize the experience and expertise of the agency.⁶⁶ Finally, exhaustion allows the compiling of a complete record that is adequate for judicial review.⁶⁷

The doctrine of exhaustion of administrative remedies has presented substantial controversy. In essence, the requirement of exhaustion forces a litigant to remain within the administrative agency until the litigant has exhausted the legislatively mandated procedure.⁶⁸ Only after a litigant has complied with this requirement can judicial review be obtained.⁶⁹ A

58. H.R. Doc. No. 986, 76th Cong., 2nd Sess. 1-2 (1940). The President proceeded with a rather severe slap at the legal profession: “a large part of the legal profession has never reconciled itself to the existence of the administrative tribunal. Many of them prefer the stately ritual of the courts, in which lawyers play all the speaking parts to the simple procedure of administrative hearings which a client can understand and even participate in.” *Id.*

59. Power, *supra* note 57, at 551-56.

60. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 94-109 (1982).

61. Redish, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457 (1986).

62. *Id.* at 463 (citing *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855)).

63. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

64. *Id.*

65. *Parisi v. Davidson*, 405 U.S. 34 (1972); *McKart v. United States*, 395 U.S. 185 (1969).

66. See cases cited *supra* note 65.

67. *Id.*

68. Power, *supra* note 57, at 551-52.

69. *Id.*

federal court is without authority to hear any complaint until administrative procedure has been exhausted fully.

One commentator described the exhaustion doctrine as "an expression of executive and administrative autonomy."⁷⁰ The doctrine of exhaustion serves administrative autonomy by assuring that the courts will not undercut the agency's authority. Hence, the administrative processes are not weakened by encouraging people to ignore agency procedures.⁷¹

The only relief for a denial of claimed benefits under the Social Security Act is predicated on 42 U.S.C. § 405(g),⁷² which codifies the exhaustion doctrine as a jurisdictional prerequisite to judicial review. The statute requires a final decision by the Secretary of Health and Human Services after a hearing. The final decision requirement has two elements: the first, which is purely jurisdictional and cannot be waived by the Secretary, requires that a claim for benefits be presented to the Secretary; the second element, waivable by the Secretary, is that administrative remedies be exhausted.⁷³

Because a federal court's subject matter jurisdiction is contingent upon whether administrative remedies have been exhausted, a court must ascertain whether the two requirements of section 405(g) have been met. The Court in *Weinberger v. Salfi* suggested that under section 405(g), the power to determine when finality has occurred ordinarily rests with the Secretary.⁷⁴ In *Mathews v. Eldridge*, although the non-waivable requirement had been satisfied, the Secretary refused to waive the requirement of exhausting administrative remedies.⁷⁵ In *Mathews*, however, the Court ruled that "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate."⁷⁶ Thus, the final decision requirement is not only waivable by the Secretary, but, according to *Mathews*, is also excusable by the court.⁷⁷

The court will excuse the exhaustion requirement if it determines that the following five criteria are met: first, judicial excuse of the exhaustion requirement is allowed if further review by the Secretary is

70. L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 425 (1965).

71. Power, *supra* note 57, at 555-56.

72. Social Security Act, 42 U.S.C. § 405(g) provides that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision."

73. *Id.*

74. 422 U.S. 749 (1975).

75. 424 U.S. 319, 330 (1976).

76. *Id.*

77. *Id.*

futile and, therefore, not warranted;⁷⁸ second, the claimant's issue is outside the Secretary's authority;⁷⁹ third, the claimant's interest exceeds deference to the agency;⁸⁰ fourth, the claimant's issue is collateral and constitutional, if not colorable;⁸¹ and finally, the claimant will suffer irreparable harm without the intervention of a judicial forum.⁸²

IV. *MATHEWS V. ELDRIDGE*: THE HOUSE THAT *MATHEWS* BUILT

Prior to exhausting administrative procedure, Eldridge, a disability claimant, brought a claim in a federal court alleging that termination procedures were violative of his due process rights.⁸³ Eldridge relied solely on *Goldberg v. Kelly*, which recognized a protected interest and required a pre-termination oral presentation and argumentation as essential to comport with procedural due process.⁸⁴ Eldridge argued that his property right entitled him to a full evidentiary hearing prior to the termination of his benefits.⁸⁵ Both the district court and the court of appeals granted relief to Eldridge based on *Goldberg*.

The Supreme Court reversed, finding no jurisdictional obstacles precluding judicial review.⁸⁶ Deciding that the claim was wholly collateral and constitutional, the Court deemed it futile to require Eldridge to exhaust the agency procedure.⁸⁷ The Court concluded that "it is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient."⁸⁸ Thus, the doctrine of exhaustion did not prohibit Eldridge from obtaining a judicial forum.

The Court distinguished the situation before it from that in *Goldberg*⁸⁹ and established a new test to determine what process is due in the abrogation of a protected property interest.⁹⁰ Consideration must be given to (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 330-31.

82. *Id.* at 331.

83. *Id.* at 325.

84. *Id.* at 325-26.

85. *Id.* at 325.

86. *Id.* at 330.

87. *Id.* at 332.

88. *Id.* at 330.

89. *Id.* at 340.

90. *Id.* at 332-33.

substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal or administrative burdens that the additional or substitute procedural requirement would entail."⁹¹

The preliminary question the Court faced was whether Eldridge had a protected interest.⁹² The Court quickly accepted, and the Secretary conceded, that a property interest in continued benefits existed by statute.⁹³ However, the apparent ease with which the Court found a protectable property interest should have foreshadowed both the Court's undervaluing of that interest and, ultimately, its limiting of traditionally required procedural safeguards.

Next, the Court looked to the procedures used in terminating a disability claimant. The Court considered previous references to due process such as "an opportunity to be heard at a meaningful time and in a meaningful manner"⁹⁴ and that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."⁹⁵ Faced with these nebulous references, the Court deemed due process "flexible"⁹⁶ and found that it calls for such procedural protections "as the situation demands."⁹⁷ Capitalizing on the indefinite nature of the due process concept, the Court had ample opportunity to use *Mathews* as a predicate for preventing full-blown pre-termination hearings in future cases.

Goldberg was an obvious impediment to the Court's desired conclusion. The Court distinguished *Goldberg*⁹⁸ and concluded that there was "less reason here than in *Goldberg* to depart from the ordinary principle that something less than an evidentiary hearing is sufficient prior to adverse administrative action."⁹⁹

Finally, the Court relied heavily on the "fairness" and "reliability" of existing pre-termination procedures.¹⁰⁰ The Court showed deference to the agency, and impliedly refused judicial intervention "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."¹⁰¹ The Court also wanted "to afford the

91. *Id.* at 335.

92. *Id.* at 333.

93. *Id.*

94. *Goldberg*, 397 U.S. at 268-69.

95. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

96. *Mathews*, 424 U.S. at 334 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

97. *Id.*

98. *Id.* at 340.

99. *Id.* at 343.

100. *Id.* at 344.

101. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

parties and the courts the benefit of [the agency's] experience and expertise, and to compile a record which is adequate for judicial review."¹⁰²

The Court concluded that Eldridge's only interest was in "the uninterrupted receipt of this source of income."¹⁰³ This conclusion has been criticized as narrow and oversimplified, and fails to recognize the harm involved in depriving an individual of his property interest.¹⁰⁴ The Court, in finding a constitutionally protected property interest, proceeded to balance the personal interest against the government's interest in preserving the monetary resources and in making accurate termination decisions.¹⁰⁵

In the balancing process, the Court reached three conclusions:

1. The abrogation of the property interest at stake in a disability claimant's claim will not deprive the claimant of his means of existence.¹⁰⁶

2. Medical evidence, unlike evidence used in welfare termination, is not subjective in nature or premised on the credibility of the testimony. The nature of the disability decision is routine, standard, and unbiased.¹⁰⁷

3. A strong presumption is held in favor of the "fairness" and "reliability" of the agency.¹⁰⁸

These conclusions, which form the basis for the Court's denial of a pre-termination hearing to Eldridge, are inaccurate under the present Medicare system and are inapplicable to physicians claiming violation of their due process rights. An analysis of *Mathews* and criticism of the Court's assumptions casts doubt on the conclusion reached in *Mathews*. Further, by reviewing recent decisions denying physicians relief pursuant to the decision in *Mathews*, the error of applying *Mathews* in physician-provider cases is patent.

102. *Id.*

103. *Mathews*, 424 U.S. at 343.

104. Mashaw describes the Court's approach to weighing the private interest as "incomplete" and "problematic." Mashaw, *supra* note 5, at 38.

105. *Mathews*, 424 U.S. at 347.

106. *Id.* at 341. *But see* Justice Powell conceding that although "the potential deprivation here is generally likely to be less than in *Goldberg* . . . the degree of difference can be overstated." *Id.*

107. *Id.* at 343.

108. *Id.* at 349. "In assessing what process is due in this case, substantial weight must be given to the good-faith judgment of the social welfare system that the procedure they have provided assures fair consideration of the entitlement claims of individuals." *Id.*

V. *MATHEWS V. ELDRIDGE*: HOW FIRM A FOUNDATION?

The assumptions that served as the foundation for the Court's ultimate denial of judicial review in *Mathews* are grounded in the conviction that the present procedure offers adequate procedural protections in light of the competing interests involved. The question is no longer whether traditional due process protections have been afforded, but rather whether the elevation of the government's interest overrides the issue of minimal procedural protections abrogating a personal interest.¹⁰⁹ Under the *Mathews* balancing test, "even those procedures once considered essential to rudimentary due process are open to question."¹¹⁰ Hence, this test allows deprivation of a protected interest for which due process safeguards are constitutionally guaranteed when the government's interest outweighs the personal interest at stake.¹¹¹

First, *Mathews'* underinclusive recognition of a protected property interest and complete failure to mention a liberty interest understate the personal interest at stake and the potential for loss. In minimizing the personal interest, the Court overplayed societal interests in maintaining resources. Through balancing the interests, the "*Mathews* balancing test gave rise to a structure within which an individual can possess an undisputed property interest — and thus, a clear right to due process — but have no right to any procedures at all."¹¹²

Second, the Court assumed that the nature of the inquiry is without subjectivity.¹¹³ The Court's statement that a disability claimant's determination was based upon "routine, standard and unbiased medical reports by physical specialists"¹¹⁴ ignores any potential for bias or inherent unfairness within the agency.¹¹⁵ Mashaw has argued that "a procedure that begins with routine medical reports concerning clinical diagnosis and treatment becomes a highly judgmental process,"¹¹⁶ and cannot be void of opinion and bias.

Further, the Court denigrated the need for a disability claimant to make an oral presentation. "While noting that the *Goldberg* decision

109. *Id.* at 340.

110. Redish, *supra* note 61, at 468.

111. See Mashaw, *supra* note 5, at 49. "The due process clause is one of those Bill of Rights protections meant to insure individual liberty in the face of contrary collective action." *Id.*

112. Redish, *supra* note 61, at 472.

113. *Mathews*, 424 U.S. at 343.

114. *Id.*

115. The Court stated that "[t]he spectre of questionable credibility and veracity is not present" in the instant case, as opposed to *Goldberg*. *Mathews*, 424 U.S. at 344 (quoting *Richardson v. Perales*, 402 U.S. 389, 404 (1971)).

116. Mashaw, *supra* note 5, at 41.

had relied on the limited education and deficient writing ability of welfare recipients, the Court did not attempt to distinguish disability recipients from welfare recipients on this basis."¹¹⁷ Instead the Court claimed that the nature of the information required for a disability determination was most easily deciphered if submitted in written form.¹¹⁸ The Court deemed the value of an evidentiary hearing or provision for an oral presentation to be "substantially less than in *Goldberg*."¹¹⁹ In reaching this conclusion, the Court flatly stated that "[n]o attention is paid to process values that might inhere in oral proceedings."¹²⁰

Finally, the Court expressly gave substantial weight to the good faith judgment of the agency.¹²¹ The agency's reliability and fairness underlies the Court's willingness to defer to the function of the agency. One commentator disdains the reliance of the Court on the administrator's good faith, positing that the only accountability of the administrator is through judicial review.¹²² Another commentator wrote:

One way in which a person can challenge the unlawful termination of disability benefits is to claim that the federal or state officials denied him or her due process by terminating benefits without affording them a pre-termination due process hearing. Applicants and recipients of public benefits are entitled under the due process clause to have their claims fairly adjudicated.¹²³

The Court's deference to the agency and to its inherent good faith belies the reality of federal agencies. Many agencies explicitly have announced their intention to disregard judicial precedent, or to "non-acquiesce."¹²⁴ "Although the controversy [of nonacquiescence] has touched a number of agencies at least peripherally, the National Labor Relations Board (NLRB or Board) and the Social Security Administration (SSA) figure most prominently in the battle."¹²⁵ In 1967, the SSA began publishing its formal nonacquiescence decisions as social security rulings; the frequency of SSA nonacquiescence has increased dramatically in

117. *Id.* at 42.

118. *Mathews*, 424 U.S. at 343. The court stated that disability determinations are "more sharply focused and easily documented [than a welfare recipient.]" *Id.*

119. Mashaw, *supra* note 5, at 48.

120. *Id.*

121. *Mathews*, 424 U.S. at 343.

122. Mashaw, *supra* note 5, at 58.

123. Stormer, *Legal Responses to Unconstitutional Termination of Disability Benefits*, 22 IDAHO L. REV. 201, 209-10 (1986).

124. Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471, 473 (1986).

125. *Id.*

recent years.¹²⁶ "Under the policy of nonacquiescence, disability determination examiners are specifically instructed to disregard binding judicial precedents that require improvement in medical conditions before termination of disability benefits."¹²⁷

Although the policy of nonacquiescence does not go directly to the issue of abrogated due process rights because the courts have consistently upheld the agency position, nonacquiescence directly impeaches the good faith and reliability of the SSA. The courts have deferentially relied upon the impartial judgment and uprightness of the agency; meanwhile, the agency has flouted judicial opinions and has proceeded to adhere to contrary internal policy.

The Court's assumption that the agency demonstrates good judgment is not unreasonable on its face: "In a government of laws and not of men, people, including Supreme Court Justices, should be able to assume that decisions by government officials to terminate disability benefits are the considered judgment[s] of an agency faithfully executing the laws of the United States."¹²⁸ With nonacquiescence, it is error to assume the good faith of the agency. In fact, a policy of nonacquiescence by the agency draws into question the accuracy of *Mathews* to the extent that it rests on the premise that the agency acts in good faith.

An agency vested with enormous power, bolstered by judicial deference, hardly can be expected to police itself and eradicate corruption. The courts, in refusing to review agency decisions prior to exhaustion, have left the agencies to their own devices.¹²⁹ By adhering to the *Mathews* balancing test, it is never clear how a claimant would obtain relief because the test refuses to identify any value that can "trump legislative welfare judgments."¹³⁰

Applying the *Mathews* test to any type of benefits claimant has not gone uncriticized. One commentator describes the *Mathews* test as a model of competence.¹³¹ He explains that the Court was seeking to invoke an accurate and flexible standard. The Court's commitment to the "competence" model is erratic and limited, and when it does apply the competence model, its reasoning "sometimes seems to border on the lunatic."¹³² Given the possibility of bias, it would seem that "due process, which is flexible and adaptable to different factual circumstances, should

126. *Id.*

127. Stormer, *supra* note 123, at 212.

128. Kubitschek, *A Re-Evaluation of Mathews v. Eldridge in Light of Administrative Shortcomings and Social Security Nonacquiescence*, 31 ARIZ. L. REV. 53, 59 (1989).

129. *See generally id.*

130. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 152 (1985).

131. *Id.* at 102.

132. *Id.* at 112.

require more in the face of a policy that allows medical evidence to be disregarded, especially where there is evidence that a qualified recipient, unlawfully terminated from disability benefits, may be unable to survive the appeals process."¹³³

VI. *MATHEWS V. ELDRIDGE*: A CONSTITUTIONAL CORNERSTONE?

Mathews is the benchmark decision for excluding claimants from federally funded benefits programs.¹³⁴ The case has been used to deny judicial review to claimants and to affirm procedures as constitutionally adequate. *Mathews* was decided only five years after *Goldberg v. Kelly*¹³⁵ and has been recognized as a response to the escalation of claimants seeking to circumvent the requirement of exhaustion of administrative remedies.¹³⁶ After *Goldberg*, "[t]he Court was prepared to assume a highly interventionist posture. What followed was a due process revolution."¹³⁷

Goldberg's seemingly generous statement acknowledging a claimant's due process right to a full evidentiary hearing prior to exclusion was significantly altered by *Mathews*.¹³⁸ *Mathews* reinstates the policy of deferring to agency authority and reaffirms the Court's unflagging confidence in the agency's good faith.¹³⁹ However, if indeed *Mathews* is applied inaccurately and inappropriately in physician-provider cases, the case loses much of its impact as the cornerstone for denying judicial review prior to exhaustion of administrative remedies.¹⁴⁰

The new balancing test instituted by *Mathews* changed the focus from whether a claim is a constitutionally protected interest¹⁴¹ to a focus

133. Stormer, *supra* note 123, at 212.

134. 424 U.S. at 349. The Court found that due process does not require a pre-termination hearing in disability benefits cases.

135. 397 U.S. 254, 264 (1970). The Court in *Goldberg v. Kelly* recognized that welfare assistance is given to persons on the very margin of subsistence and the "termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." *Id.* (emphasis in original).

136. Mashaw, *supra* note 5, at 29.

137. *Id.* "The landmark case of *Goldberg v. Kelly* in 1970 confirmed the Court's unwillingness to limit its review by traditional notions of property interests." *Id.*

138. 424 U.S. at 349. The Court concluded that an evidentiary hearing is not required prior to the termination of disability benefits and that present administrative procedures fully comport with due process. *Id.*

139. *Id.* at 344.

140. See, e.g., Kubitschek, *supra* note 128.

141. This was the conclusion of *Goldberg*. Upon recognition of a protected interest, the amount of process due was not at issue; instead, the Court found that because of the nature of the interest protected, a full pre-termination hearing was essential. *Goldberg*, 397 U.S. at 267-68.

upon what type of hearing is sufficient to protect the interest.¹⁴² Implied in this is the acceptance that a legally protectable property interest exists. “[I]t became easier for litigants to persuade courts to find property interests in close cases because the necessary consequence of such a finding was no longer a burdensome administrative or judicial hearing.”¹⁴³ However, the new hurdle became finding a standard on which to base the determination of whether adequate due process has been afforded. The *Mathews* test provides an easy answer to the search for such a standard. The nature of the *Mathews* test, however, allows the balancing away of safeguards protecting individual interests when pitted against the nebulous standard of governmental interests. “In other words, balancing can lead to the anomalous result that an individual will have a clear due process right to no process.”¹⁴⁴

Mathews is the precursor for our present system. It is applied to all cases involving agency determinations that exclude beneficiaries who claim that their due process rights have been violated.¹⁴⁵ By statutorily reducing the chances of judicial review, the Social Security Administration retains complete control over sanctioned providers until they have exhausted administrative remedies. “The Court [in *Mathews*] reasoned that disability benefit recipients did not need a pre-termination hearing because they would be able to survive the wait that the appeals process imposed.”¹⁴⁶ In theory, this promotes the policies of the agency, the intent of Congress, and economy in the judiciary. In practice, however, litigants are denied a means of redress outside of the agency’s autonomy.¹⁴⁷

VII. *MATHEWS V. ELDRIDGE*: SHOULD THE WALLS COME TUMBLING DOWN?

Without exception, circuit courts have applied the *Mathews* balancing test to cases involving physicians who claim that exclusion from Medicare,

142. Kubitschek, *supra* note 128, at 55.

143. *Id.* See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1982).

144. Redish, *supra* note 61, at 472.

145. *Haitian Refugee Center v. Meese*, 791 F.2d 1489 (11th Cir. 1986); *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985), *modified*, 781 F.2d 57 (1986); *Rosenthal & Co. v. Commodity Futures Trading Comm’n.*, 614 F.2d 1121 (7th Cir. 1980).

146. Stormer, *supra* note 123, at 211 (citing *Mathews*, 424 U.S. at 342).

147. Judicial review can take up to fifteen months. By this time, often the issue is moot because the claimant has depleted resources to contest the agency action, the claimant has “served” the sanctioning period, or the agency has dropped the case. Therefore, seldom is the issue properly before the court after the claimant has exhausted his administrative remedies. Jost, *supra* note 14, at 2.

absent procedural safeguards,¹⁴⁸ has violated their constitutional rights. Whether it is the appropriate test and whether it is applicable in physician-provider cases are issues that courts have not addressed when deciding a physician's due process rights in a termination proceeding. Each circuit court summarily concludes that *Mathews* is the appropriate starting point and applies the balancing test.¹⁴⁹ Differing interpretations of the test result in different conclusions within each circuit court's opinion. However, these inconsistencies are minimized by express reliance upon other circuits' decisions that previously denied physicians judicial review.¹⁵⁰

Although the Court in *Mathews* easily assumed jurisdiction,¹⁵¹ courts have been slow to accept subject matter jurisdiction, thus creating a serious impediment to physicians obtaining a judicial forum. The *Mathews* Court recognized the agency's lack of authority to rule on a constitutional, collateral issue and unabashedly accepted subject matter jurisdiction.¹⁵²

The circuit courts would agree that they have subject matter jurisdiction if they judiciously and consistently apply *Mathews*. Instead, each court treats the question of jurisdiction differently. For instance, the court in *Ritter v. Cohen* never addressed the jurisdictional question.¹⁵³ In *Koerpel v. Heckler*, the court admitted that the lower courts' struggle to apply *Mathews* resulted in inconsistency.¹⁵⁴ The *Koerpel* court found Dr. Koerpel's claim both constitutional and collateral, but lamented over whether the claim was colorable. It finally concluded that it was sufficiently colorable to vest the court with subject matter jurisdiction.¹⁵⁵

148. *Doyle v. Secretary of Health and Human Servs.*, 848 F.2d 296 (1st Cir. 1988); *Thorbus v. Bowen*, 848 F.2d 901 (8th Cir. 1988); *Cassim v. Bowen*, 824 F.2d 791 (9th Cir. 1987); *Varandani v. Bowen*, 824 F.2d 307 (4th Cir. 1987), *cert. dismissed*, 484 U.S. 1052 (1988); *Koerpel v. Heckler*, 797 F.2d 858 (10th Cir. 1986); *Ritter v. Cohen*, 797 F.2d 119 (3d Cir. 1986); *Lavapies v. Bowen*, 687 F. Supp. 1193 (S.D. Ohio 1988), *aff'd*, 883 F.2d 465 (6th Cir. 1989).

149. See cases cited *supra* note 148.

150. *Doyle*, 848 F.2d at 302 ("We join the other circuits that unanimously have reached the same conclusion."); *Thorbus*, 848 F.2d at 903 ("[F]our of our sister circuits have reviewed due process challenges to exclusion of physicians from Medicare reimbursement."); *Varandani*, 824 F.2d at 311 ("At least three circuits have held that health-care providers . . . are not entitled to an evidentiary hearing before they are suspended from receiving Medicare reimbursements."); *Lavapies*, 687 F. Supp. at 1203 ("Courts which have considered this issue have uniformly held that a Medicare provider is not entitled to a full evidentiary hearing prior to suspension from the program process.").

151. 424 U.S. at 326-27. The Court in *Mathews* found that Eldridge presented a collateral and constitutional claim. Further, the Court found that to exhaust administrative remedies would be an exercise in futility for the claimant who would suffer irreparable harm if required to exhaust administrative remedies. *Id.* at 330.

152. *Id.*

153. 797 F.2d at 121.

154. 797 F.2d at 862.

155. *Id.* at 866.

The court in *Varandani v. Bowen* faced a similar dilemma, but concluded that "even if Dr. Varandani's due process claim is sufficiently 'colorable' to establish jurisdiction, we think it should be rejected on the merits."¹⁵⁶ Thus, the *Varandani* court never expressly answered the question of subject matter jurisdiction.

In *Cassim v. Bowen*, the court approached the question of subject matter jurisdiction differently. The elements it found necessary to waive the exhaustion bar required the claim to be collateral, colorable, and that exhaustion be futile.¹⁵⁷ The court, despite the obvious misapplication of *Mathews*, eventually determined that requiring Dr. Cassim to "exhaust administrative remedies would not serve the policies underlying exhaustion."¹⁵⁸

The court in *Thorbus v. Bowen* deemed the "facts marginal to support a colorable claim."¹⁵⁹ Expressly abstaining from reaching the issue of subject matter jurisdiction, the court looked to the merits and determined that Dr. Thorbus failed to present a valid claim.¹⁶⁰ Conversely, according to the court in *Doyle v. Secretary of Health and Human Servs.*, Dr. Doyle fell within the rule of exhaustion, not the exception.¹⁶¹ Thus, the *Doyle* court found that it lacked authority to hear Dr. Doyle's claim. Similarly, the court in *Lavapies v. Bowen* rejected Dr. Lavapies's claim, finding a lack of jurisdiction based on the exhaustion doctrine.¹⁶²

According to *Mathews*, after jurisdiction is established, the next question is whether participation in the Medicare program is protected by the fifth amendment. As interpreted by the Supreme Court, the fifth and fourteenth amendments do not protect all expectations; they protect only life, liberty, and property interests.¹⁶³ Arguably, although a Medicare beneficiary has a property interest in continued receipt of Medicare benefits, "it is harder to argue that a provider or physician has a property right in a continued contractual relationship with the government to provide services to Medicare beneficiaries."¹⁶⁴

The issue of whether protected interests exist is not consistently decided among the circuits. Physician claimants have argued that they possess both a property and liberty interest.¹⁶⁵ They contend that they

156. 824 F.2d at 310.

157. *Cassim*, 824 F.2d at 795.

158. *Id.*

159. 848 F.2d at 903.

160. *Id.*

161. 848 F.2d at 300.

162. 883 F.2d at 468.

163. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972).

164. *Jost*, *supra* note 14, at 38.

165. *Cassim*, 824 F.2d 791 (assuming a property interest, but failing to expressly acknowledge an existing interest); *Ritter*, 797 F.2d 119 (recognizing an existing property interest).

have more at stake than a disability claimant, whose interest, according to *Mathews*, is solely in the uninterrupted receipt of money.¹⁶⁶ Without the cooperation of the medical profession, the Medicare program would be limited significantly in providing benefits to needy beneficiaries. Arguably, the mutual reliance of the providers and the government constitutes a protected property interest that cannot be terminated without cause.¹⁶⁷

Alternatively, reputational damage and injury to a physician's practice raise a question of an existing liberty interest.¹⁶⁸ The *Koerpel* court denied the existence of a property interest, but found that Dr. Koerpel had a liberty interest in "his good name, reputation, honesty, and integrity."¹⁶⁹ The jeopardy of Dr. Koerpel's reputation coupled with potential harm to his practice, his loss of staff privileges, and the stigma of being publicly sanctioned were deemed protectable as a liberty interest.¹⁷⁰

Still tentative as to the ultimate resolution, some courts refuse to expressly acknowledge a protected interest. Thus, the physician cannot rely on an expressly recognized, protected interest, and the courts have maintained an "escape route" to reach the conclusion desired. "Most of the cases considering PRO sanctions have been willing to *assume* the existence of a property or liberty interest and move on to the next question: What process is due?"¹⁷¹

In *Doyle*, the court held that the Department of Health and Human Services provided Dr. Doyle with the entire process that is constitutionally due, even assuming Dr. Doyle's injury amounted to a deprivation of liberty or property.¹⁷² Likewise, the *Cassim* court assumed a property interest, but refused to expressly recognize its validity.¹⁷³ The *Ritter* court flatly pronounced: "We do not decide this issue."¹⁷⁴ In *Varandani*, because the court determined that the exhaustion requirement had not been fulfilled, the court never discussed the existence of either a liberty or property interest.¹⁷⁵ Similarly, *Thorbus* is silent as to the physician's protected interest.¹⁷⁶ Ironically, the court's refusal to acknowledge a

166. 424 U.S. at 340.

167. See cases cited *supra* note 165.

168. See *Doyle*, 848 F.2d at 302 ("assuming" that a liberty interest might exist); *Varandani*, 834 F.2d 307; *Koerpel*, 797 F.2d at 865.

169. 797 F.2d at 865.

170. *Id.*

171. Jost, *supra* note 14, at 38 (emphasis added).

172. 848 F.2d at 299.

173. 824 F.2d at 796.

174. 797 F.2d at 122.

175. 824 F.2d at 310.

176. 848 F.2d at 901.

protected interest is contrary to *Mathews*, the case upon which each court so firmly relied.

In applying the balancing test, courts have weighed the interests protected to determine the adequacy of the process afforded physicians by the present Medicare system. The courts that "assumed" a protected interest did so to reach the question of the adequacy of the procedural protections afforded the physician. However, the balancing test offered by *Mathews* fails to provide a standard; thus, the weight given to the protected interests is widely varied.

"[T]he courts have tended to minimize the interest of the sanctioned physician, noting that the doctor will continue to be able to serve his non-Medicare patients, that he may even continue to care for Medicare patients without compensation and claim compensation later when vindicated, and that a successful conclusion of a post-termination hearing will restore his reputation."¹⁷⁷

Mathews proposed that the disability claimant would suffer less harm than a welfare recipient because such harm could be easily rectified by reimbursement after a finding of erroneous deprivation.¹⁷⁸ Alternative sources of income such as public assistance, food stamps, or other governmental financial assistance are available for a disability claimant who has been terminated from Medicare.¹⁷⁹ Physicians who claim both property and liberty interests in continuing as Medicare providers have few viable alternatives. Often, over fifty percent of the physicians' patients are Medicare beneficiaries.¹⁸⁰

The present procedure followed by PRO not only eliminates the source of income reimbursed to physicians serving Medicare patients, but it effectively discourages future opportunity for physicians by publishing the sanction in the local newspaper and by notifying the administrators of hospitals where the doctors have privileges and patients.¹⁸¹ After exclusion, physicians are likely to receive fewer referrals from other doctors, to face termination from hospital medical staffs, and to endure investigations by state agencies.¹⁸² Further, legal fees and overhead

177. Jost, *supra* note 14, at 38 (citing *Cassim*, 824 F.2d at 797; *Ritter*, 797 F.2d at 123; *Papendick*, 658 F. Supp. 1431).

178. 424 U.S. at 342.

179. *Id.*

180. *Thorbus*, 848 F.2d at 902 (sixty percent Medicare); *Cassim*, 824 F.2d at 797 (forty percent Medicare); *Koerpel*, 797 F.2d at 859 (eighty-five percent Medicare); *Ritter*, 797 F.2d at 120 (ninety-nine percent Medicare).

181. Jost, *supra* note 14, at 32.

182. *Id.*

maintenance of their practice deplete the physician's already significantly limited income.¹⁸³ "[T]he claimants never will be compensated for the time they have spent waiting and worrying about their lack of funds."¹⁸⁴ In essence, a physician's reimbursement after prevailing on appeal will hardly compensate him or her for the injury suffered.¹⁸⁵

The tendency to trivialize the impact of termination upon a doctor and to embellish the governmental interest is premised upon the *Mathews* balancing test. "The only two governmental interests which the Supreme Court identified were (1) saving public funds by paying benefits to only those people who are actually disabled, and not those who are able to work; and (2) saving administrative resources by not holding hearings in all cases."¹⁸⁶ Physicians' interests are distinct from disability claimants'. The harm to the sanctioned doctor is much greater than the courts have admitted.

The government maintains that its interest is identical to society's interest. "The Supreme Court concluded that the government/public interest in conserving scarce fiscal and administrative resources had to be weighed against the benefit of an additional safeguard to the affected individuals."¹⁸⁷ When a protected interest exists, the government's interest in accuracy or efficiency is irrelevant. The balancing test undoubtedly will favor the government. "[I]n weighing immediately recognizable costs against benefits which, though of substantial importance in the long run, may be more difficult to recognize, this balancing inevitably favors the government."¹⁸⁸ Balancing away a constitutional right encroaches upon the very essence of individual freedoms. "The more important the interest, . . . the greater the procedural safeguards the state must provide to satisfy due process."¹⁸⁹

Undeniably, a physician excluded from Medicare has much to lose. "While an excluded physician may in theory continue to practice, Medicare nationally pays for 21% of physicians services and provides a much higher proportion of the income for some specialists. Secondary effects of Medicare exclusion can, moreover, be even more devastating."¹⁹⁰ The government, representing society's interest, pits the physician's loss against

183. *Id.*

184. Kubitschek, *supra* note 128, at 71.

185. *See Mathews*, 424 U.S. at 350 (Brennan, J., dissenting) ("[I]t is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance.").

186. Kubitschek, *supra* note 128, at 72.

187. *Id.*

188. Redish, *supra* note 61, at 497.

189. *Cassim*, 824 F.2d at 797 (quoting *Haygood v. Younger*, 769 F.2d 1350, 1355-56 (8th Cir. 1985)).

190. Jost, *supra* note 14, at 31-32.

maintaining resources. Society's interest lies on the side of affording fair procedures to all persons, even though the expenditure of governmental funds is required.¹⁹¹

The second conclusion that the circuit courts rely upon in deeming present procedure adequate is the nature of the information used to determine the physician's violation. The Court in *Mathews* found the information on which the determination was based to be objective, standard, and unbiased.¹⁹² Physicians' termination is based upon similar evidence. One can argue persuasively that additional considerations influence decisions — considerations that are subjective in nature. Seldom can determinations regarding the extent of a violation or the physician's ability to perform services be made absent subjective inferences.¹⁹³

Subjectivity is likely to occur in the procedure because of the lack of separation within the agency function. Often the agency serves an investigative role as well as a prosecutorial role. The proceedings in which physicians can provide additional information are not adversarial, but inquisitive.¹⁹⁴ Thus, any opportunity for a physician to present a case is minimized by the fact-finding nature of the hearing. This issue, raised in *Doyle*, was rejected by the court, stating that "there is no *per se* rule precluding one body from performing both investigatory and judicial functions."¹⁹⁵ Whether a "*per se*" rule exists does not negate the potential for bias when a single body is serving several functions. The likelihood of bias is a logical possibility.

Not only is the information used to impose sanctions subjective, but also provider attorneys take issue with the lack of notice and due process, the nature of the proceedings, the disallowance of cross-examination of witnesses, and, most importantly, the "perceived bias of PRO sanction proceedings."¹⁹⁶ "One of the most fundamental rights afforded by due process to a person subject to an administrative adjudication is the right to a hearing before an impartial tribunal."¹⁹⁷ Consider that review by "peers" means review by competitors. It is folly to ignore the potential for bias inherent in a "peer review" setting.

191. *Lopez v. Heckler*, 725 F.2d 1489 (9th Cir. 1984). See also *Boettcher v. Secretary of Health & Human Servs.*, 759 F.2d 719, 722 (9th Cir. 1985).

192. 424 U.S. at 344.

193. *Maranville*, *supra* note 124, at 473.

194. *Id.*

195. *Doyle v. Bowen*, 660 F. Supp. 1484, 1488 (D. Me. 1987), *aff'd in part, rev'd in part sub nom.* *Doyle v. Secretary of Health and Human Servs.*, 848 F.2d 296 (1st Cir. 1988).

196. *Redish*, *supra* note 61, at 32. Physicians persuasively argue that the procedure used to exclude them from Medicare is insufficient and violates constitutionally guaranteed due process rights.

197. *Jost*, *supra* note 14, at 45.

Counsel for physicians ardently contend that the PRO is directly rewarded for sanctioning providers and is threatened with contract termination for not doing so,"¹⁹⁸ which subverts congressional intent and encourages PRO bias against the providers.¹⁹⁹

The court in *Doyle v. Secretary of Health and Human Services* boldly stated that "[t]here is no reason here to think the agency has a closed mind on these matters."²⁰⁰ In reference to deferring to the agency, the courts in *Cassim*, *Thorbus*, *Lavapies*, and *Ritter* also gave credence to the agency's good faith.²⁰¹ Continued application of the *Mathews* assumption that the agency is without bias implicates the courts as improperly evaluating the possibility of bad faith within the agency. Whole-hearted reliance on the agency's good faith is particularly inappropriate in physician cases because the PRO procedure fosters an environment for abuse.

A review of the PRO's responsibilities, its contractual relationship with HHS, and its sweeping authority to sanction providers, reveals obvious points of contention between HHS, as represented by the PRO, and the physician-providers. The lack of specific criteria and potential of internal pressure from HHS for PROs to meet certain quotas have been widely criticized. The jeopardy of the physician's interest in maintaining the physician's status as a Medicare provider is difficult to diminish in light of these issues. The contractual nature of the PRO, discussed earlier, casts doubt on the PRO's ability to remain objective when facing pressure from HHS to maintain certain quotas.²⁰² Doctors Doyle, Varandani, and Lavapies allege the PRO acted as a result of the undue influence of HHS²⁰³ Arguably, even assuming no pressure exists, the PRO, like any good employee, has engaged in questionable sanctioning conduct due to overeagerness.²⁰⁴

The application of the *Mathews* analysis and rationale to a physician-provider is problematic. A physician working within the Medicare system is unlike either a welfare recipient, as in *Goldberg*, or a disability claimant, as in *Mathews*. Only the constitutional claims are similar: each claims a right to an evidentiary hearing prior to termination of a constitutionally protected program; and each argues that the present procedural due process afforded is substantially lacking.

198. *Id.*

199. *Id.* See also Carlova, *Have Peer Reviewers Put a Price on Your Head?*, MED. ECON. (Sept. 5, 1988).

200. 848 F.2d at 300.

201. *Lavapies*, 883 F.2d 465; *Thorbus*, 848 F.2d 901; *Cassim*, 824 F.2d 791.

202. Jost, *supra* note 14, at 46.

203. *Lavapies*, 883 F.2d 465; *Doyle*, 848 F.2d 296; *Varandani*, 834 F.2d 307.

204. Jost, *supra* note 14, at 47.

VIII. CONCLUSION

A blanket application of *Mathews* to physicians terminated from Medicare is inappropriate. The assumptions on which the Court in *Mathews* relied to premise its conclusions raise questions of accuracy when applied to physician-providers. Not only are physician-providers distinct from disability claimants, but physicians' interests are erroneously minimized under the *Mathews* balancing test. The nature of the information used arguably is subject to bias as is the procedure imposed on physicians facing sanctions. Further, the court's deference to the good judgment of the agency flies in the face of reality. In short, the *Mathews* balancing test is inapplicable to determine the adequacy of procedural safeguards in cases in which physicians are excluded from the Medicare program. Procedural safeguards are certain to crumble if *Mathews* is upheld as the foundation for adequate due process for physician-providers.

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