

Opinion of O'CONNOR, J.

SUPREME COURT OF THE UNITED STATES

No. 98–9537

JUATASSA SIMS, PETITIONER v. KENNETH
S. APFEL, COMMISSIONER OF
SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June 5, 2000]

JUSTICE O'CONNOR, concurring in part and concurring
in the judgment.

In most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court. On this underlying principle of administrative law, the Court is unanimous. See *ante*, at 5; *post*, at 1 (BREYER, J., dissenting). In the absence of a specific statute or regulation requiring issue exhaustion, however, such a rule is not always appropriate. The inquiry requires careful examination of “the characteristics of the particular administrative procedure provided.” *McCarthy v. Madigan*, 503 U. S. 140, 146 (1992). The Court’s opinion provides such an examination, and reaches the correct result. Accordingly, I join Parts I and II–A of the Court’s opinion, as well as its judgment. I write separately because, in my view, the agency’s failure to notify claimants of an issue exhaustion requirement in this context is a sufficient basis for our decision. Requiring issue exhaustion is particularly inappropriate here, where the regulations and procedures of the Social Security Administration (SSA) affirmatively suggest that specific issues need not be raised before the Appeals Council.

Although the SSA’s regulations warn claimants that completely failing to request Appeals Council review will

Opinion of O'CONNOR, J.

forfeit the right to seek judicial review, see 20 CFR §404.900(b) (1999), the regulations provide no notice that claimants must also raise specific issues before the Appeals Council to preserve them for review in federal court, see *ante*, at 5 (SSA regulations do not require issue exhaustion). To the contrary, the relevant regulations and procedures indicate that issue exhaustion before the Appeals Council is *not* required. To request Appeals Council review, a claimant need not file a brief. See §404.975. Rather, he can file either Form HA-520, “Request for Review of Hearing Decision/Order,” or “any other writing specifically requesting review.” §422.205(a). Form HA-520, the suggested means of requesting review, provides only three lines (roughly two inches) for the statement of issues and grounds for appeal, and the SSA estimates that it should take a total of 10 minutes to read the instructions, collect the relevant information, and complete the form, see 58 Fed. Reg. 28596 (1993); *ante*, at 8. Moreover, Appeals Council review is plenary unless the Council informs the claimant otherwise in writing, see §404.976(a); as the notice of decision of the Administrative Law Judge (ALJ) to petitioner stated, if she requested review before the Appeals Council, “the Council will consider all of [the ALJ’s] decision Requesting review places the entire record of your case before the Council.” See App. 26–27.

JUSTICE BREYER concedes that these factors “might mislead the Social Security claimant” to believe that issue exhaustion is not required. *Post*, at 5 (dissenting opinion). He nonetheless contends that this is not a problem because the SSA has assured the Court that it “has not invoked [issue exhaustion] in suits brought by claimants who were unrepresented during the Appeals Council proceedings.” Brief for Federal Respondent 41–42. As a matter of past practice, the agency’s statement appears to be inaccurate. See *Owens v. Apfel*, No. 1:98CV1442 (ND Ohio, Aug. 3, 1999), vacated on other grounds, 205 F. 3d

Opinion of O'CONNOR, J.

1341 (CA6 2000). But even if this stated policy were uniformly followed, I think it would be unwise to adopt a rule that imposes different issue exhaustion obligations depending on whether claimants are represented by counsel.

In this case, the SSA told petitioner (1) that she could request review by sending a letter or filling out a 1-page form that should take 10 minutes to complete, (2) only that failing to request Appeals Council review would preclude judicial review, and (3) that the Appeals Council would review her entire case for issues. She did everything that the agency asked of her. I would not impose any additional requirements, and would reverse the judgment and remand for further proceedings consistent with this opinion.