Supreme Court of the United States

OCT. TERM 1968

In the Matter of:

BERNARD SHAPIRO, Welfare Commissioner of Connecticut, et al,

Appellant,

vs.

VIVIAN THOMPSON, et al.

Appellee

Docket No. 33,34 9 et al

Place Washington, D. C.

Date October 23, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

BERNARD SHAPIRO, Welfare Commissioner of Connecticut, Appellant; vs. VIVIAN THOMPSON, Appellee.	:	No. 9
WALTER E. WASHINGTON, et al., Appellants; vs. MINNIE HARRELL et al., Appellees.	:	No. 33
ROGER A. REYNOLDS, et al., Appellants; vs. JUANITA SMITH, et al., Appellees.	:	No. 34

Washington, D. C.
Wednesday, October 23, 1968

The above-entitled matter came on for argument at 12:30 p.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

FRANCIS J. MacGREGOR, Esq.
Assistant Attorney General
State of Connecticut
Counsel for appellant Bernard Shapiro

LORNA LAWHEAD WILLIAMS, Esq.
Special Assistant Attorney General
State of Iowa
Counsel for appellant

ARCHIBALD COX, Esq.
Cambridge, Massachusetts
Counsel for appellees

WILLIAM C. SENNETT, Esq.
Attorney General
State of Pennsylvania
Counsel for appellants

RICHARD W. BARTON, Esq.
Assistant Corporation Counsel
District of Columbia
Counsel for appellants

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 9, Bernard Shapiro, Commissioner of Welfare for Connecticut, appellant, versus Vivian Thompson; No. 33, Walter E. Washington, et al., appellants, versus Clay, Mae, Legrant, et al., appellees; No. 34, Roger A. Reynolds, et al., appellants, versus Juanita A. Smith, et al., appellees.

THE CLERK: Counsel are present.

ORAL ARGUMENT OF FRANCIS J. MacGREGOR, ESQ.

ON BEHALF OF APPELLANT BERNARD SHAPIRO

MR. MacGREGOR: Mr. Chief Justice Warren, may it please the honorable Court: I don't want to rehash the argument that we went into last spring, but I would like to point out some of the rather unfortunate consequences if the lower court's decision is upheld.

One consequence that was not raised last spring would be the very harsh impact on the liberal welfare benefit States by 42 USC 603-D, the 1967 social security amendment, the so-called freeze section. It will limit Federal matching funds that go to the States to the percentage of children under age 18 that are on AFDC to the total under-18 population in the State.

In other words, as of January 1, 1968, if the AFDC population under age 18 increases more rapidly than the under age 18 population as a whole, these liberal welfare benefit

States will not get one nickel more of Federal matching funds to offset this increased burden.

So when you start with the proposition that States like Connecticut, that have decent welfare benefits, get only 46 percent matching funds as against the poor welfare benefit States that get five-sixths, or 83 percent, I think you will agree this is a rather harsh impact, indeed.

It follows an article in The New York Times of October 14, 1968, on page 28, where there was a recent study by the Citizens Budget Commission on what this influx was doing to the liberal welfare benefit States.

For example, in the last eight years, from 1959 to the beginning of 1967, Connecticut's AFDC case load has increased 147 percent. New Jersey's, 287 percent. The 10 most liberal welfare benefit States have found their AFDC case load and cost skyrocketing, while the 10 least liberal benefit States in many cases have actually found their welfare cases decreasing.

This study further point out, I think, a very fundamental thing. It said although persons don't necessarily migrate into liberal welfare benefit States solely to get on the AFDC rolls, it was a prime consideration in their move. To quote: "A humane system of local welfare in reasonably adequate amount of welfare payments was an important consideration in the movement of persons to the liberal benefit States."

I think this observation coincides with the very observation that Mr. Justice Cardoza made back in the early 30's in the Helvering case, where he said "A system of old age pensions has special dangers of its own if put in force in one State and rejected in another. The existence of such a system is a bait for the needy and the dependent elsewhere, encouraging them to migrate and seek a haven of repose."

I think an adverse decision by this court would have the effect of penalizing every liberal welfare benefit State by putting a premium on the poor benefit States to encourage their needy and dependent to migrate to greener pastures.

Q Do you think the States could adopt a rule, just talking about State authorities, saying that welfare payments would not be made to anybody who was not a resident of the State on January 1, 1969?

A You might be able to do that, say "We are going to have a limited amount of money and this is the budget. If it runs out, you won't get any more."

Q Then it becomes true.

A I think when it involves mainly State-raised funds, it should be. These are State programs with some Federal matching funds.

Q What difference does it make if it were Federal funds?

A One of the problems there is, I believe, this

section 17-2d should be found constitutional, Mr. Justice Fortas, because for the court to say that a State can't do that is an invasion, I think, of a very fundamental legislative function; that is, the raising of their own State tax funds and the spending of them.

Q The Constitution did invade States' rights. The Fourteenth Amendment is a substantial invasion of States' rights as I understand it.

A I don't think it was written for that. I think in its historical context, and this court has recently agreed, in McLaughlin versus Florida, the historical context was to say that a person shouldn't be discriminated against on the basis of race.

So if a State had a very poor benefit program and they said we are only going to appropriate a certain amount of money, but it didn't discriminate on the basis of race, then the Fourteenth Amendment would apply.

Q How about the rights of travel? Was that one of the rights that was expressly considered being part of the Fourteenth Amendment guarantees?

A I think there is a little difference, Your Honor, between the right to travel.

Q I am asking you as a matter of fact, as you read the history of the Fourteenth Amendment. Was the right to travel expressly, specifically, explicitly considered in the

Congress as one of the rights protected by the Fourteenth Amendment?

A It was considered a right before the Fourteenth Amendment, Your Honor. You didn't need the Fourteenth Amendment for that.

Q Was it discussed in Congressional consideration of the Fourteenth Amendment?

A It has been discussed in several cases, including the Edwards case, but I don't think it applies here. A right to travel across a State line is a little different than subsidized settlement.

If Your Honor is referring to the Edwards case, I don't think the Edwards case applies here at all. In the Edwards case, Mr. Slaff, who was Edwards' counsel, said the relevancy of the California statute was that it intimidated under threat of criminal prosecution, certainly if you threatened to prosecute a person who is coming across a State line.

It is a considerable difference if you say, "If you come across the State line," as the Connecticut statute says, "and you are not willing to work, or at least trained to work, or have assets to keep yourself for three months, you may have to wait a year before you get welfare."

I think there is a considerable difference in that type of case. In fact, in the Edwards case, Mr. Tolan, for the Select Committee, said that the law shouldn't apply in that

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case to persons who have worked, who are willing to work, and who are able to work in every respect, except they are temporarily without work.

I don't think the facts there fit in this context. Nobody advocated that Mr. Duncan, at the end of the depression, should come in to California, avoid the labor market, and get a welfare check. In fact, I think Mr. Justice Byrnes was specific on that question. He said the ability, the right or obligation of California to support was not involved.

Q Do you have any figures from Connecticut as to how many dependent children there are that come from other states, and therefore are not eligible under the one-year residency requirement?

A I don't, Your Honor. All I know is that their welfare rolls in eight years have increased about 147 percent. I know they have an open-end budget and I would say probably for the size of the State the most liberal in the United States.

Last spring when I was here they had a $40 million deficit, mainly because of AFDC, and now they have a $37 million deficit in welfare early this fall.

Q Am I wrong in my recollection, from the last argument, that the evidence on both sides as to the amount of interstate migration, related to persons who would be eligible or might be eligible for welfare payments showed that the migration was not very big?

A This New York Times study shows considerable, more than 10 per cent of the population have shifted into the 10 most liberal welfare benefit States.

Q What study is that?

A It was a Citizens Budget Commission study in the New York Times of October 14, 1968, on page 28. I gave the clerk's office nine copies so the court could have it available to them.

One of the questions that bothered the court the last time I was here was what good reasons can Connecticut give that their statute, 17-2d, should be found constitutional? The first basis, I think, is there was no competent evidence produced by the appellee in this case, who bore the burden of proof, that the Connecticut Legislature arrived at their decision wholly by caprice and without any reasonable basis.

Secondly, the Connecticut Legislature, as we pointed out in our brief, were concerned with the rising welfare costs, could not give decent benefits to everyone. They had their choice. They could maintain their same high standard with some cut off, or they could lower their standard like the other States.

I think they wisely chose to follow the former.

I think, thirdly, the Connecticut statute, itself, has a very laudable and salutary purpose of encourging people to enter the labor market. The Connecticut statute is unique

and different from the other 40 states in this. Connecticut says, "If you come to Connecticut and you have a bona fide job offer, you are willing to work or willing to train to work and it takes a whole year to train, if something happens to you during that time, Connecticut will give you a high standard."

Mr. MacGregor, in order to save money with the one year, you say, how much has this increased in one year, on the one-year requirement?

A Our deficit?

Q No. How much has the number of people increased and the deficit, too?

A I can't say in a one-year, Your Honor.

Q No; I say since the one-year requirement has been in effect.

A I will tell you, Your Honor. In our appendix to our brief, on 60, Number 60 of the stipulation of facts on page 45A, we show the yearly average per person case load on AFDC from 1960 to 1966, showing how it went up. It went up fantastically every year until they passed the 1965 statute and it became effective. That was the first year we had a drop.

When the Thompson case was decided, I don't have any statistics except general knowledge, the welfare case load -- and it goes to the town; these are the people that go to the towns first for welfare. The towns have found the large

increase of people coming on the welfare rolls. You can only look at the whole picture and there is no question that Connecticut welfare rolls, next to New Jersey and New York, have increase more rapidly than any State in the United States.

Q Why not raise the rule, the residence requirement, from one to five? Wouldn't that help you more?

A I think Your Honor will find that Congress, not in AFDC, but in the aid to disabled and aid to old age, I think, allow five out of nine years.

Q I am not talking about that. I am talking about why shouldn't Connecticut, since all you are interested in is money. Why don't you raise it from one to five?

A I can't speak for what the Legislature did.

Q You have been talking about it. You said that was one of the reasons.

A One of the reasons they didn't raise from one to five is because they wouldn't get any Federal grants under the social security laws which set the maximum at one year, Your Honor. That is a practical reason.

Q My other question is, you think that they can just not eat for a year?

A Your Honor, as a practical matter, in Miss Thompson's case she was able to get by and there was no proof elicited either on the stipulation of facts or any evidence that she suffered. She is now on the welfare rolls again.

Q I assumed she was eating if she was still alive.

A And no evidence presented that any person ever came into Connecticut and starved because of the one-year residency statute. So it would be sheer speculation on the court that a person would starve.

Q The only reason is, that (1) you don't have enough money, and, 2, you want to save what you have, so that is the reason for the one-year requirement.

A Money, and, as I said,I think it has a salutary purpose. It encourages people to enter the labor market. In fact, Congress, in 42 U.S.C. 607, in the work incentive program, is also attempting to encourage people to get in by offering them a better deal.

Q In the one-year requirement, if a man spends 22 hours a day looking for a job, he still won't get anything for a year, unless he got a job.

A I would say this, Your Honor. If he came to Connecticut, he wouldn't have to look 22 hours a day for a job; there are plenty of them there, first.

Q Is this one state in the union with no unemployment?

A I would imagine that any state, where there are plenty of jobs available, a person wouldn't have to worry. But in Connecticut, if he couldn't find a job, they will train him and give him welfare.

Q How soon?

A He has 60 days in which to look for a job. If he can't find a job within 60 days and he goes down to the Welfare Office and says, "I can't find a job because I am not qualified", there is Title V, which is Government Financing, and there are State programs. They say, look, we will train you. If the training program took nearly a year, they would still support him all during that time.

Q What about the one-armed man?

A I didn't get it.

Q A man with one arm.

A We have people working for the State of Connecticut, itself, who come in in a wheelchair every day. In fact, there are enough jobs around in the State training schools for the retarded --

Q Connecticut is one of the few states in the union that has no unemployment?

A A very small amount, Your Honor.

I would like to call the court's attention again to the Edwards case, which I noticed was raised by all the judges in the lower courts and in all the briefs.

One of the strongest arguments, I think, that Edwards should not apply here is, first, our contention that if Duncan came into Connecticut under the same circumstances he came to California at the end of the depression, he would be

immediately eligible for welfare, but the second fact is Sweeney v. The Board of Public Assistance, which was decided by the Supreme Court in the same term as Edwards.

In that case, the plaintiff claimed that the defendant board denied her the right to live where she pleased, and it was a clear restraint on the liberty of movement in violation of the Fourteenth Amendment, the same question as Justice Fortas claimed. The same claim as in the Thompson case.

The District Court in that case, which was upheld on appeals, stated there is no arbitrary restraint on the plaintiffs' rights to live where they please. They went on to say something fundamental in this case, that courts will proceed with great caution before overthrowing the work of such boards, since their investigation and study have best enabled them to determine what regulations will produce the greatest good for the greatest number. That is the fundamental aim of this democracy.

Who should know more about Connecticut's welfare problems than the duly elected subcommittee that recommended 172? 17-2d for the Legislature or a two-man majority of a three-judge Federal Court?

I would like to yield seven minutes of my time to the amicus argument and the remainder of my time to Mr. Sennett, of Pennsylvania, for rebuttal.

MR. CHIEF JUSTICE WARREN: Mrs. Williams.

ORAL ARGUMENT OF LORNA LAWHEAD WILLIAMS

ON BEHALF OF APPELLANTS

MRS. WILLIAMS: May it please the Court: Since we were here in May, there have been some further developments along the lines about which we are again concerned today.

First, we have had three further amicus curiae briefs filed, all in the nature of the same as filed by Legal Aid Societies and OEO attorneys who were here before, and, again, they point out that there is a need, and we all are aware there is a need, for people who are suffering and are in want in our country.

But this is still not sufficient reason to overlook the fact that this particular ADC program is tied to the residency of people within a State. The States have the local authority, the local legislation, the local administrative power to administer the program within their jurisdiction. They can call upon the Federal Government for additional matching funds of certain proportions, if they can qualify by their law to carry out the provisions of the Federal law setting up what they call State plans.

So I again mention, as I did before, that in spite of the three briefs now filed by the people, OEO and Legal Aid, the problem is still before us. It is a legislative problem and not a judicial problem.

There have been also some other developments,

Congress, in its Provision 630 of the Social Security Act, provides in there -- and this is before the amendment which we spoke of briefly last time but now it is in force in Iowa and some of the other States, called the WIN program -- the work incentive program. It is now being operated in the States. It has to be operated by July 1, 1969, in all three phases, or no State can qualify any longer for matching funds.

But the original Act, itself, in 603, reads this way: "Or children or applicants or recipients of aids to dependent children are living to retain or retained capabilities for self-support or self-care, which are prescribed by the Secretary."

In other words, the goal isn't to dangle welfare in front of people as the ultimate goal. The goal is to help people earn their living by their own hard labors, to teach them, to give them training, on-the-job training, vocational training, help them through their local employment services to take a job immediately.

Q Mrs. Williams, our problem is a constitutional problem. May I ask you, suppose a State says, "We will not provide for aid to anybody who is not a resident of the State on January 1, 1969.", thereby excluding anybody coming into the State from other States from access to welfare?

A I think that is arbitrary.

Q You think that is arbitrary?

A I think so, Your Honor.

Q It would be a violation of the Fourteenth Amendment?

A I believe it would be.

Q If I may respectfully suggest, I think in the present situation you do not have as the test residency. You have as the test the residency for one year. Is that right? Those are not the same.

A The two things you pose are not the same, Your Honor.

One is a point of when, times of some other element. But once a classification is made by a State or a county, then there is great latitude when we get into this type of thing since it is not a command upon the States or the Congress to make it a command.

Q Would five years be arbitrary?

A I don't think it would be necessary for the reason that we would know within one year who wants to contribute, who are our people who want to live here. We want to help. It is for the good of our State of Iowa --

Q Your position,I take it, has been that a one-year residence requirement is reasonable and, therefore, supportable under the Fourteenth Amendment. Five years would not be; is that correct?

A This is correct, Your Honor. In other words, this is a program for residents. It isn't for transients where

we have to depend on other welfare laws to take care of that problem. This is the one that is ours. We want them to feel like they belong to us. We want them to join our labor market. This, we have told them, is a very important program.

Iowa, as of October 1st, the money is there waiting, the employment agency is ready, the people on this program are ready to go into these jobs and work on the job training. We are going to offer them so much more through this full program. But it isn't a program that you can offer to someone coming in and then eaving within a few weeks or so.

This is a program designed for permanency, for the people who are going to live there, work there, be in our schools, give their references when they go from job to job, make a change in jobs, right within their lown local communities, where we can keep track of them and they can help us and we can help them.

Q Could the State close its public schools to children of itinerants until the itinerants were there for a year?

A No, Your Honor, but we are not in that problem. The problem of personal liberties --

Q I know this is not the education case, but what is the difference?

A I am glad you asked me, because one is an Amendment 1 right. The other one is not.

Q Or, take fire protection of the house, police protection. What civic services can be withheld?

A I would think that everything that we as people have as our personal liberties are in one category and have to be maintained and retained by State law, Federal law, by all the people.

But when we talk about a right, if it is a right, or privilege or benefit, where there is just a gratuity because we in our hearts want to do it, we make the classification which must be reasonable, we make the classification for the purpose of helping them inthat particular plan. It isn't intended to encompass everyone.

No government, no state, as wealthy as Iowa is with its farm lands, can cover all of these, first, on disabled, second, on old age assistance.

By the way, since I was here before, I now have argued that case to the three-judge case in the Northern District. That is submitted. Also, I have argued in four other cases already submitted to the state courts and one to the Federal court in the Southern District where involved is the type of right that Your Honors are to decide. Everything is hinging on this, residency.

But the other cases also depend on what is the nature of this right. Is it a First Amendment right? If so, it makes a difference. What type of cases am I talking about

and what did Judge Van Osternaut ask in the three-judge panel court the other day? He said, "Isn't this the nature of a right important in this kind of case?"

Here sat the lady on the stand who had been in welfare and she said that she didn't appeal to the Administrative Board. She had been getting three or $400, and I am trying not to remember the amount, but she had been getting welfare. It was cut off. She didn't even come in to the local board and say, "You folks are wrong. I don't have a job where I make that much money."

Well, she must have had a job where she made that much money or she would have come in and protested. But now she wants the county, she wants the State, she wants the Federal matching funds to go ahead and keep paying her that when she doesn't even take care of her own rights and say to the State and the county that "I have to have a fair hearing." "My constitutional rights are infringed upon" is what she is saying. She doesn't do anything to protect herself.

I see that my time is up, too.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Barton.

ORAL ARGUMENT OF RICHARD W. BARTON

ON BEHALF OF APPELLANTS

MR. BARTON: Mr. Chief Justice, and may it please the Court: I am here on the case of Washington versus Legrant, which differs in some respects from the other two cases in that, first, it involves the constitutionality of an Act of the Congress of the United States as distinguished from a State Legislative Act, and at least insofar as Connecticut is concerned, the District of Columbia statute differs considerably in that it imposes a one-year residence requirement across the board to all categories, without respect to how much money you may have had when you came into the jurisdition, or any other contingent provision.

The question presented is, of course, whether or not the provision of the District of Columbia Act violates the equal provision clause of the Fourteenth Amendment made applicable in the District of Columbia through the due process clause of the Fifth Amendment.

That the statute makes a classification is clear. It distinguishes between those who have been in the District of Columbia for one year and those who have not insofar as eligibility for public assistance is concerned.

The question is, of course, whether or not this classification is an invidious classification. I use the word that this court has many times used.

I think in answering that question it is necessary to determine by what standard this classification is to be judged. This Court, over the years, has hammered out a standard and what I would call an exception to that standard, or, if you like, possibly, two standards.

The first standard, which is the traditional standard, the standard which is applied to legislative classifications in the great majority of the cases, provides that the legislative enactment is presumed to be constitutional, that legislatures have a broad scope of discretion in making classifications, that the burden is upon the party challenging or attacking the constitutionality of the classification to show that the classification is totally irrelevant to any conceivable legislative purpose, and that every fact or reason which could support the classification will be presumed, and, further, that whether or not any of these conceivable or possible legislative purposes that may underlie the statute were the ones in fact which prompted the legislature to enact the statute are, to use the words of this Court, of course clnstitutionally irrelevant.

The second standard, or what I would call the exception to the general standard, is that which has been applied in cases where the classification directly infringes upon a preferred freedom protected by the First Amendment or where the classification is based upon race, color, or national origin.

Under that standard, the classification is immediately suspect. I think something very close to a presumption of unconstitionality arises. The burden is upon the Government to show that there is a compelling reason for that classification, and even when the Government can show a compelling reason the statute can go no further than is necessary to achieve the legislative purpose.

I think the answer to the question here depends upon which standard the District of Columbia Public Assistance Act of 1962 is to be judged. If by the first standard, I think it is clearly constitutional. If by the second standard, then it is probably unconstitutional.

That the Court below applied the exceptional standard, the standard which this Court has applied to First Amendment freedom cases and classification is based upon race, is clear, I think, both from the opinion, itself, from the cases upon which the Court relies, and is, of course, recognized by appellees. Indeed, they urge strongly upon the Court that that is the correct standard, and that under that standard the statute is still constitutional, although they do later retreat to the position that even if the general standard is the proper one, it is unconstitutional.

What conceivable legislative purposes underlie this particular classification? The Court below discussed various possibilities. We would submit that there are at least three

which would sustain the constitutionality of classification, not that these are the only ones or that this is exhaustive.

The first of these is to permit the local government to plan its fiscal affairs on a year-to-year basis. That has been argued already before you at some length, but I think that is a proper legislative purpose which would support the constitutionality of this classification.

I might say that I asked the Budget Director of the District of Columbia Department of Public Welfare to prepare some figures on projections as to how the injunction under which the Welfare authorities have been since the latter part of last year was affecting the District of Columbia's welfare program.

The Budget Director took the figures both by an average case load basis and by the monetary sums for the first eight months of 1968 and compared those to the first 10 months of 1967. The figures reflect an increase in the budget of the District of Columbia of about 110 per cent substantially more than doubled. Some of that, of course, may be due to a backlog, but that the abolition of this classification in the District of Columbia, at least, will result in a very substantial increase in the budget is clear.

The District of Columbia would then do either one of two things. It would have to increase its budget, find more money, or cut down the amount of the grants to the individual

recipients.

The second proper legislative purpose which we would say underlies this statute is the protection from fraud, the prevention and detection of fraud.

Appellees, as I understand them, concede that the protection from fraud is a proper legislative purpose. They conede, further, that the one-year residency requirement is an aid in the accomplishment of that purpose. They argue, however, that it is not a particularly effective aid. It is not, in their view at least, the most effective or best means of protecting against fraud.

They invoke again the argument which has been applied by this Court only to cases within the exception, and that is they say that even if this is true, a proper legislative purpose, and that this serves that purpose, it goes beyond what is not absolutely necessary to accomplish that purpose.

That standard applies only to the exceptional First Amendment cases, we submit, not to this type of a case.

Q What do you have to show that one year is just the right figure to prevent fraud?

A I am not sure we have anything, Mr. Justice Marshall. Perhaps nine months would be sufficient.

Q Perhaps one month.

A Perhaps one month. But that is a determination which the Legislature has to make, we submit.

Q And is the other point you have about saving money a proper argument to be made concerning the Government of the most affluent nation in the world today?

A Yes, Your Honor; I would submit it is. The well is not bottomless. The Congress of the United States, of course, in legislating for the District of Columbia, acts as a local legislature. It, of course, acts as a Federal legislature otherwise.

Q Do you want us to note that this Government is unable to pay people enough money so they can eat?

A That would be up to Congress.

Q I mean, do you think we should say that?

A No, Your Honor; I do not ask the Court to say that.

Q Did I understand you correctly, that the only choice you had was to cut down on the amount of money that the others were getting?

A No. Or appropriate or find a source of additional funds.

Q Find a source? Isn't Congress right here? Isn't the Treasury of the United States right here?

A Yes; it is.

Q Define "find the source".

A The money, of course, would be appropriated by the Congress, and by taxing the residents of the District of

Columbia and their property. There are two sources of income so far as the Government is concerned, some from taxes, some from grants or money appropriated by the Congress.

The third proper legislative purpose which we would say underlies this statute relates to the residency, the determination of what is residency or a bona fide resident. I think it is conceded that a State Legislature or the Congress of the United States, acting as such for the District of Columbia, can condition public assistance grants on residency. That is, provide grants only to bona fide residents of the District of Columbia, as distinguished from those who may be temporarily sojourning in the District of Columbia, passing through, visiting friends, relatives and so forth here, or just wandering about the country.

How do you determine whether or not an individual is a bona fide resident of a community? With the normal individual, there are a number of ways or things that you could look to. He buys a house; he opens a bank account; he opens charge accounts. Those, of course, could not generally be applied to the indigent. All you would generally have is their word, "I am here and I intend to remain here indefinitely."

But, by the very nature of their indigency, they come here; they look for a job; if they don't find it, they move on to another city.

Q Doesn't the HEW manual set forth a procedure and text for determining residence as distinguished from duration of residence?

A Yes; it does.

Q That is a little more specific than your last statements indicate. Do you remember them?

A Yes; I do, Your Honor.

There are other standards tha can be worked out, but we would submit that the Congress here has used this one-year residency provision as an objective legislative test for determining residency.

Q Aren't you required under the HEW manual to figure (a) residence; and (b) duration of residence, as separate tests? That is the way it would seem to me, unless I am wrong.

A I think they are overlapping. You would have to determine, of course, residence and then tha duration, if you are involved in the one-year requirement here.

But, under this requirement the intention of the person coming here is immaterial. He may have come here to get higher grants for any one of a thousand things. If he has been here forone year, regardless of why he came here, he is entitled to public assistance. If he has not beem here for one year, then he is not.

It saves the District of Columbia welfare officials

the many difficult problems of determining who is a bona fide resident.

Intent is one of the items, why a person came to a jurisdiction. His purpose in coming here is another factor. Does he intend to remain here indefinitely or permanently? Many indigent people just cannot say that, "I am here and I don't know how long I am going to be here. If I find a good job, I may stay indefinitely. If I don't, I may move on."

To avoid difficulties which would arise from trying to determine each of these cases on an ad hoc basis, the Congress just says, "Here is one standard. Regardless of all else, your purpose, your intention, anything else, if you have been here one year, that is it. You are a bona fide resident. If you haven't, you are not."

Q Is that really what they said? Or did they say you have to be a resident and you would have had to have been a resident for a year? In other words, it is possible for somebody to live here for a year and not have the intent necessary to constitute residence. Perhaps that is theoretical, but as I understand the way the manuals are set up, they do make that distinction.

Are you asserting I am wrong about that?

A At least insofar as the District of Columbia is concerned, as I understand it, as the law is here administered, if you have been physically present in the District of Columbia

for one year, then you are eligible for public assistance, regardless of when you initially came here. If you are physically present here for one year, that is it.

Q Are yougoing to say anything about the right to travel?

A Yes, Your Honor. I think that is an argument which has been advanced by necessity by the appellees because only if the Court accepts their argument that this statute does inrgine upon a constitutionally protected right to travel and their further argument that the right to travel is equivalent or in the same class as the First Amendment preferred rights, and if the Court accepts both those arguments, then the exceptional standard in judging this classification's constitutionality would apply here, and I think we would have to concede it would probably be unconstitutional under that statute.

That this statute, incidentally, and indirectly, may discourage travel I think is apparent, but it is our position that it does not arise to constitutional proportions.

Q Do you mean the right to travel or the extent of the infringement upon it?

A No; the extent of the infringement upon it.

This Court has dealt with the right to travel in the case of Edwards v. California, in the various passport cases, in the case arising in Georgia, and so forth, but in

each of those cases there was a direct infringement upon the right to travel, not as here a mere discouragement.

But let's explore for a minute what would be the effect of holding that this was an unconstitutional infringement of the right to travel. We have State A that has a very low grant. We have State B that has a very generous grant. We have an individual in State B that wants to go to State A. I am discouraged from traveling to State A, says the individual, because if I go there, the grant is only one-quarter, one-fifth of what I am receiving in this state.

Would that mean that the State with the low grant would be constitutionally required to up its grant to that of the most generous State? The amount of difference berween the grants and State to State is tremendous. You can make that argument just as effectively between the amounts of assistance granted as a discouragement to travel, perhaps more so than you could the residency requirement because the residency requirement is all over in one year. The grant of public assistance extends indefinitely, as long as you are in need of it.

Q Do you think the right to travel doctrine puts a limitation upon Congress's power?

A No, Your Honor; I don't think it necessarily is.

Q I mean, of course, in the District of Columbia.

A This is Federal legislation and Congress can

put burdens upon interstate travel. So, insofar as this Act is concerned as distinguished from the State Acts, it would not be unconstitutional for the reason that the Court found the California statute in Edwards unconstitutional as an improper infringement upon interstate commerce. This is an Act of the Federal Legislature.

But the same argument, I think, could be applied and extended insofar as interference with the right to travel by differences in licensure in one state. Here I am a plumber or a baker, a what-not. I am working in this State and I want to travel to another State. Its requirements of licensure are such that I cannot meet it. That would discourage me from travel, but would that make the license statute of the other State unconstitutional?

I might say just a word, if I may, about the applicability of Section 420-b of the Social Security Act to this situation. Appellees, in their supplemental brief, at page 42, suggest that the Congress in enacting this provision, which, of course, provides for Federal grants to State programs but with a condition limiting the residency requirement to one year, they say that the Congress did not face the question whether any period of residence should be required.

That is just plain not true. When the Congress enacted this, it knew, and in fact this was urged on it by those who thought residency requirements were unwise, you can

handle this whole problem by just saying you don't get any Federal grant if you have any residency requirement. Had the Congress seen fit to do that, that would have effectively abolished residency requirements, because while in theory a State could still operate its own welfare program without Federal grants, it would almost certainly not do so since, overall, the Federal grants make up about 57 per cent of the welfare moneys.

If I may say just one word as to the Vera Barley case, which is a case involving a lady who was in Saint Elizabeths Hospital and who applied forpublic assistance, and even though she had been there for years and years under a regulation of the Department, she was found to be ineligible because they would not permit residency in a public institution such as Saint Elizabeths to be counted.

The Court below in Footnote 19 struck down that regulation. We do not challenge their ruling on that, so we don't need to reach the case here, I think, as far as Vera Barley is concerned, as to whether or not one year residency requirement would apply to her.

I will say one word about the various amici briefs that have been filed on behalf of the appellees' position here, and remind the Court what it has so often said before, that our concern here is with power and not with wisdom. I think that bears stressing because I think almost the entire argument in

the amici briefs on behalf of appellees' position and a great deal of the argument of appellees, themselves, go to the question of wisdom and not power.

Thank you.

MR. CHIEF JUSTICE WARREN: Attorney General Sennett.

ORAL ARGUMENT OF WILLIAM C. SENNETT

ON BEHALF OF APPELLANTS

MR. SENNETT: Mr. Chief Justice, may it please the Court: The facts of all three cases are basically similar, and I see no need to review them at this time.

I believe the brief sets forth the legitimate legislative purposes which the States have and which the Federal Congress has in establishing residency requirements.

What I would think is extremely important in this case is that the Legislatures of some 40 States, together with the Congress of the United States, has determined that residency requirements are lawful in welfare situations. I would review with this Court just briefly the types of requirements in the various welfare statutes that Congress has passed.

Our own, of course, the one at issue here, 42 U.S.C. 402, is Grants to States for Aid and Services to Needy Families with Children, which was first enacted with a residency requirement in 1935 and thereafter amended many times without deleting the residency requirement until 1962, through 1962.

In addition to that, in 42 U.S.C. 1202, the Congress

has provided for aid to the blind, originally passed in 1935 with amendments through 1964, and a residency requirement again of one year and five of nine years.

In 1935, Congress passed Aid to Permanently and Totally Disabled. It was amended through 1965, the same residency requirements appear, five of nine and one year immediately preceding.

In 42 U.S.C. 1382, the Congress enacted Aid to Aged, Blind, Disabled and a medical assistance program for the aged. Again, a residency requirement was provided, five of nine years and one year preceding.

In 42 U.S.C. 302, the Congress provided for Old Age Assistance and Mecical Assistance to the Aged. It originally provided for five of nine years and one year preceding, and then in 1960, with reference to medical assistance for the aged, the Congress eliminated the one year residency requirement and later, in 1965, when the Congress passed the Medical Assistance Program, again the Congress eliminated the residency requirement by providing that the States could not have any residency requirement either for the medical assistance program or for the old age assistance program to the aged.

I believe that that is extremely important in the context of this present case, because not only the States, not only the Legislatures of the 40 states who have such a program, but also the Congress has determined that a residency requirement

is a valid requirement in establishing this program.

I think there can be no question but that if this Court is going to strike down the residency requirements under the Fourteenth Amendment of the State statutes, it also has to face very clearly, very specifically, the problem raised since the Congress then acting under Section 420 has also provided, required, the administrator to accept a program with a residency requirement therein.

If the residency requirement is unlawful, as far as the States are concerned, this Court then also has to say that the Federal Act is unconstitutional under the Fifth Amendment.

Now, with reference to the Fourteenth Amendment problem, and whether or not the discrimination in this particular type of requirement is invidious, I believe that the cases clearly set forth the area in which the Legislatures of the various states can go.

Starting with McGowan v. Maryland, this Court determined that certain Sunday closing laws in the State of Maryland, although they were discriminatory against the certain types of stores, were, nevertheless, lawful.

This Court said that when it comes to a consideration of the equal protection rights under the Fourteenth Amendment, the States are allowed a wide scope of discretion in enacting laws which affect some group of citizens differently from others, and that the constitutional safeguards are offended

only if the classification rests on grounds wholly irrelevant with the achievement of the State's objective.

The State Legislatures are presumed to have acted within their constitutional power despite the fact that their laws result in some inequality. A statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it.

McGowan was followed and preceded by a number of cases both in this Court and in some of the Circuit Courts which have also upheld discriminatory state statutes in various areas where the discrimination was not invidious.

For example, in Drueding v. Devlin, the Circuit Court held that the Maryland residency requirement with reference to voters of one year in the State and six months in the county, was not violative of the Fourteenth Amendment.

In Allied Stores v. Powers in 1959, this Court held that an Ohio tax on property in a warehouse which exempted a non-resident was not invidious discrimination since the State was presumed to have acted on a rational basis in setting up its tax statutes.

In Carrington v. Rash, which was, again, a voting case in this Court in 1965, when considering a Texas statute with reference to residency requirements of military, it said you cannot discriminate between residents, ones who are in the military and ones who are not in the military, but you

certainly can establish a residency requirement for voting.

Likewise, back in 1948, this Court in 336 U.S, Railway Express Service v. New York, in considering a New York City traffic regulation which actually forbid advertising on trucks other than that of the owner, said that such discrimination was ot invidious.

Finally, of course, in Flemming v. Nestor, in 363 U.S. 603, this Court actually considered the question involving old age survivorship and disability insurance benefits. There the Congress had actually take away the benefits from an alien who became eligible in 1955 and was deported in 1956 and, as a result of his deportation, benefits were taken away from him.

Q Mr. Attorney General, since you mentioned requirements for voting, is it still true in Pennsylvania that the registration requirement for voting is less than for welfare?

A Yes; I believe that is correct. The residency requirement for voting in Pennsylvania -- no; hat is not correct, Mr. Justice Marshall.

It is a year as far as moving from out of the State into the State. From county to county in the State, it would be 60 days.

Q I thought you said it was the opposite the last time you were here.

A I don't believe so. It is a year.

Q It is a year?

A Moving from outside the State into the State.

Q It is a year?

A Yes, sir.

In Flemming v. Nestor, this Court determined that there was no discrimination in that particular situation where the Congress had actually taken away this type of assistance from an alien who was deported.

This Court established that there are many different requirements in the Social Security Act, that there are no accrued property rights in the system, and that Congress may modify the statutory scheme so long as Congress does not act arbitrarily and so long as due process is not offended.

I think it is noteworthy to indicate that even in the dissent in Flemming v. Nestor, the dissent of Mr. Justice Douglas and Mr. Justice Brennan, there is a clear indication in specific language that Congress could limit benefits to residents.

If I might also consider with the Court briefly the effect of the Congress legislating in this particular type of case and establishing a residency requirement. I submit that following this Court's decision in Bolling v. Sharpe, which affected the segregation in schools in the District of Columbia, and followed Brown v. Board of Education, that in that

case this Court declared unconstitutional, of course, the segregated school case in the District of Columbia, but at the same time this Court said that the Fifth Amendment does not contain an equal protection clause, and that the concepts are not necessarily the same; that equal protection is a more explicit safeguard of prohibited unfairness than due process of law, and that therefore we do not imply that the two are always interchangeable.

But, as this Court has recognized, discrimination may become so unjustfiable as to be violative of due process.

As Counsel from the District of Columbia has indicated, this Court has clearly seen that there is a double standard when it comes to the type of discrimination which the Congress or the State Legislatures may make, depending upon the type of right that is involved.

Bolling.v. Sharpe was clearly a discrimination based on race, and this Court will not tolerate discriminations based upon that particular ground.

The Court's opinion in Bolling v. Sharpe refers back to such cases as Detroit Bank v. the United States, where a Federal tax statute was discriminatory in that it applied to one type of property and not to the other, but, nevertheless, was upheld, and, likewise, to Currin v. Wallace, a 1939 Supreme Court case where the exercise of the Examiner's power, while it was subject to Fifth Amendment principles, nevertheless

could be discriminatory.

So, I think when we consider the basis on which this Court must consider the Act of Congress which is here in question, and I do respectfully submit that there is an Act of Congress in addition to an Act of the State Legislatures, here at issue, and in considering the Act of Congress the Court will consider it in terms of the Fifth Amendnement.

The Fifth Amendment does not contain an equal protection clause. Due process and equal protection are not always interchangeable. Even though discriminatory Federal action may be so unjustifiable as to be violative of Fifth Amendment due process, the test, so far as the Federal action is concerned, is whether the alleged discriminatory feature is reasonably related to any proper governmental objective.

Here the proper governmental objective which the Congress determines was to have a program in which the States would participate. The Congress, in all of the residency requirements, saw fit to encourage the States to establish programs within the limits set forth by the Congress.

Q You are asserting where it is necessary for Congress to hold out an inducement to the States to participate in the program that, of necessity, provides us with a sufficient reason to justify what might otherwise be an unconstitutional discrimination under the Fifth Amendment?

A No, Mr. Justice Fortas.

What I am saying is that what the Congress did here was to establish a program which is, in itself, a valid legislative purpose, and encouraged the states to participate in that program affirms it having established the standards.

Q Why is it a legitimate legislative purpose so far as Congress is concerned?

A Here the legitimate legislative purpose was to have the States provide this type of program.

Q To have them participate?

A To have them participate.

Q Suppose the Congress found it was necessary in order to get the States to participate in a public school program to allow the States to have segregation in the schools: Would that make it legitimate?

A No. That violates the Article I privilege and there is no question but what it would be arbitrary and discriminatory.

Q In every case where it has ever been held that the purpose of Congress was to induce the States to participate provided a lawful legislative purpose was caused?

A I don't believe I have been able to find that type of case, but I think that certainly it is realistic to consider in this case that here the Congress was looking at all of the different State statutes and all of the different residency requirements, some of which went up as high as 15

and 20 years, in different types of programs. Here they say, "In order to get this uniform, we will establish a residency requirement of one year and thereby encourage all the States to come in", and all the States have. At least 40 of the States have responded to the Congress and adopted this type of program.

Q When the Congress directed or authorized the one year, Congress said that a State program which included the one year residency requirements would be acceptable. Now the situation is different, of course.

A I don't believe that is so.

It is my position that Congress has mandated in Section 402 of the Act the one year residency requirement. In order to strike down the residency requirement, this Court not only has to strike down the statutes of the various States, but also the Section 402 of the Social Security Act.

Q New York has no residency requirement at all.

A Some States do not have residency requirements.

Q Congress didn't mandate that. That is my only point.

A It mandated that at the very least there could be a one year residence requirement.

Q It said if the State chooses to include a residency requirement up to one year, that that residency requirement would not preclude acceptance of the plan.

A That is exactly right. But if this Court strikes down the residency requirement, it will be telling the Congress that it does not have the authority to establish a residency requirement.

Of course, as we argued at some length in the last argument, almost all of the arguments which have been made in the lengthy briefs of appellees in this case about the terrible situation of these particular plaintiffs, in that they are not able to obtain care and so on, those arguments should be addressed to the Congress.

If Congress in providing medical assistance has seen to it not to provide the residency requirement, the Congress, in providng other types of welfare, has seen fit not to adopt a residency requirement.

It may be that the Congress, or other States, such as New York, might in the future determine that they will not have a residency requirement. But I submit that it is the Congress which makes that determination and the State Legislatures.

So long as there is a valid purpose, the purpose here clearly as far as the States are concerned has been expalined, as far as the Congress is concerned it is to establish a program in which the States will work, that this Court will not strike down either the State statutes or the Congressional determination.

If I may, I would reserve the rest of my time,

Mr. Chief Justice.

MR. CHIEF JUSTICE WARREN: Mr. Cox.

ORAL ARGUMENT OF ARCHIBALD COX

ON BEHALF OF APPELLEES

MR. COX: Mr. Chief Justice and Members of the Court: Although there are other arguments presented in our brief, I suggest in the final analysis the decisions below can most simply be affirmed upon the basic principle that a legislative classification which discriminates without justification against those who exercise a fundamental constitutional liberty violates the equal protection clause and the due process clause of the Fifth Amendment.

The guarantee of equal protection certainly applies to the grants of benefits and privileges as well as to regulatory taxation. The one year residence requirement here, and Connecticut's requirement, also, divides mothers of children who are identically situated in relation to their needs, their desserts, and in every other conceivably relevant way, into two classes: Old residents,who are granted the benefits, and newer residents, who are denied it, and the discrimination operates in relation to the most fundamental necessities and rudiments of life.

The classification rests not only on an invidious distinctin against newcomers or strangers, but it singles out, as the sole ground for that hostile treatment, the exercise of

a long-recognized constitutional liberty, to leave one residence and to move to another in the search of better opportunities, better association, a better environment, a privilege which has been fundamental, really, to this country's existence.

Finally, I shall show that if one examines the alleged justifications of this discrimination, which is prima facie and invidious for the reasons I stated, he finds that none of them will stand careful examinatin because none of them are reasonably related to any permissible legitimate object in State policy.

Before elaborating those propositions, the heart of the case, as I propose to do, I think it may be hlepful to go back and put the issue in its proper statutory and factual background.

Historically, as the brief for the center of the study of welfare policy in law points out, historically public assistance law goes back to the Elizabethan Poor Laws, if not earlier. And, as the amicus brief traces it down and, indeed, as this Court did in Edwards of California, in the Chief Justice's recent opinion in King and Smith, there was, at that time, in an age when many of the ideas still derived from the feudal system, and in an age when most people, certainly ordinary poor people,were not very mobile, a notion that each vicinage should take care of what Mrs. Williams calls our

people, those who are settled, and that it had no obligation to those strangers, those outsiders who come from somewhere else and whom we don't quite know, we don't quite trust, and we don't quite like, and we don't owe any obligation to.

In the present century, when mothers' pension laws and other forms of social assistance began to be adopted in this country, the combiation of this anachronistic idea, plus a continuing hostility to and distrust of strangers, plus, I suspect, opposition to making any larger expenditures than we could possibly help, combined to produce, in the early stages, extraordinarily strict length of residence or prior residence requirement.

For mothers' aid, many states had laws requiring four or five years residence. For old age, the requirements in various states ran up to 15, 20 and in one state even 35 years prior residence.

That was the situation when Congress considered the Social Security Act of 1935.

As has been pointed out, that statute provided for Federal contributions to approved State plans in a number of categories of assistance, the most important being aid to dependent children, and that clearly is the most important for the purposes of this case, aid to the blind, aid to the aged, and, later, aid to the aged and totally and permanently disabled.

Congress was faced by the duration of residence

requirement, and concluded that they were objectionably long.

With respect to each category of assistance, it imposed a limit on the duration of residence that the State might impose or might require. Taking as an example the ADC program, we quote on page 39 of our brief, Section 42 (b) of the Social Security Act. When I say "our brief", I mean our supplemental brief:

"The Administrator --- shall approve any plan which fulfills the conditions specified in subsection (a), except that he shall not approve any plan which imposes as a condition of eligibility for aid to dependent children a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year or --- (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth."

Our view is that the role of Section 402(b) was to outlaw residence requirements of more than one year, leaving the situation with respect to residence requirements of a year or less exactly where Congress found them. It said more than a year is bad, but it said nothing about the rest one way or the other.

This, I submit, is entirely consistent with the form of the statute and it is entirely consistent with the

basic purpose of the statute which was to set minimum requirements and then leave the rest to the States.

I stress the point, because it means, of course, that the Courts below were right in very largely ignoring Section 402(b). It drops out of the case for two reasons: First, if Congress didn't express any judgment on residence requirements for less than a year, then certainly there is no question of the Judiciary deferring to the legislative judgment, the Congressional judgment, that a residence requirement of one year is a good thing.

Congress didn't have to address itself to that, and, therefore, wouldn't have expressed any such judgment.

Secondly, there is no need for the Court to worry about invalidating any provisions with respect to the law. There is nothing that directs the Secretary of JEW to approve a plan which includes a discrimination which this Court has held to be unconstitutional.

Q Wouldn't you agree, though, Mr. Cox, that if you start with the commerce clause and the right to travel as incident to that, if one likes that particular line of reasoning, then the action of Congress, even on your construction in 402(b) is relevant to the constitutional conclusion.

A Well, no; I think not, because I think Congress wasn't really addressing itself to the question of whether it is "our judgment that these are not inconsistent" with

privileges or immunity test clause. It was simply saying "We don't say anything about it".

But, of course, on the approach that I stated at the outset, I think one doesn't have to concern himself with that question, because one comes back and pitches his case on the equal protection clause, and the provisions of the constitution dealing with -- I don't like to call it the right to travel, because it is the right to migrate and settle in a new place, to seek new advantages -- are important because they show that this is an affirmative constitutional mandate, but we are not concerned with this more technical scope or just what body they apply to or just what technically is the source of the right.

I should remind the Court, as we point out in our brief, that the Administrator of the Social Security, and the Secretary of the Department of Health, Education and Welfare, has often refused to approve State plans violating the equal protection clause in a substantive sense, not because he concluded they violated the equal protectin clause, necessarily, or establishing other inequitable classifications.

The two examples that come quickly to mind are his disapproval of the plan which would have excluded Indians, children of Indians, and his disapproval of a plan that would have excluded illegitimate children. Both of those under the equitable classification clause were disapproved by the

Secretary, even though they are not expressly mentioned in Section 402.

Surely, that same power applies to giving effect to the decisions of this Court with respect to constitutional eligibility.

I would add, although I hope it is unnecessary, that if the Court should disagree without reading Section 402(b), then, of course, we say that Section 402(b) is unconstitutional for the same reason that we say that the State laws and the special statute applicable to the District of Columbia are unconstitutional.

With respect to the District of Columbia, I would have thought it brought it to bear only to the point of saying it is not so bad that we are going to strike it down. I suggest that that is quite different from what a legislative body does when it brings its judgment to bear on the question and says, "We are going to impose it."

Q The District of Columbia legislation is Congressional legislation.

A Excuse me. I am sorry. I jumped to the conclusion you were saying something different that you were. Of course, Congress brought it out. I wouldn't deny that for a minute. Of course. I am sorry.

Under Section 402(b), which I certainly can't argue the one year residenty requirement, about 40 States have

enacted one year residence requirements. Other States, including New York, Rhode Island, and, today, Massachusetts, Maine, Hawaii and a few others, do not have a residence requirement.

A typical residence requirement is the one in the Pennsylvania case,which you will find on page 1A of the Pennsylvania brief. It provides, in the middle of the page:

"Assistance may be granted only to or on behalf of a person residing in Pennsylvania who has revised therein for at least one year preceding the date of the application, or who has resided in a State with which Pennsylvania has a reciprocal agreement, making residence unnecessary."

I mention "or" because I come back to the significance of that alternative later. I think it has a good deal of bearing on what are the purposes of this legislation. The operation of the statute in Pennsylvania, and also it would serve for other cases, is illustrated by its application to the plaintiff, Juanita Smith. Juanita Smith lived in Pennsylvania with a mother and father who had lived there all their lives, and their forbears had lived there earlier, from the time she was one mo h old until she must have been around 15 or 16, so she was old enough to bear children. She then went to Delaware with a man named Painter, where they lived for a few years. She came back with five children at the invitation of her father who had promised to help Painter get a job and to help the family out until Painter did get a job.

So, this was a very real thing of the matter of going back home, if I may use home colloquially in the family sense rather than in a technical sense of domicile. It was rejoining the family, going to the family to get help.

Unfortunately, Painter didn't get a job and went back to Delaware. Then when Juanita Smith's father lost his job, he couldn't take care of her and the five children any more. She was pregnant and sick with a very bad varicose problem and she went to the Delaware people.

The Welfare people, becaue of the residence requirement, had no solution. The only thing they could say was "Well, either go back to Delaware", and she didn't want to leave her family;she didn't want to go backto elaware for another reason, "or we will take your children away from you and provide institutional care which might run anywhere from six months to two years, and this, at least, will provide them with shelter. But there is nothing else under the residence law that we can do."

Mrs. Smith was taken care of by theTravelers Aid Society which agreed to provide a modicum of means until this test litigation could be brought.

The three-judge District Court granted first a temporary injunction against the enforcement of the residency requirement which then did provide the necessary aid. That injunction, as the Court knows,was later made permanent. The

decision below, I may recall, rested primarily on the equal protection clause, and I would also emphasize that the decision in the Pennsylvania District Court was one of what are now many decisions by three-judge District Courts all over the country.

There are at least five major decisions and opinions where the Court seems genuinely to have considered the case, itself, the last since the argument in this case being in the District of Massachusetts, the Court which Circuit Judge Aldridge presided over.

There is also a raft of temporary orders which I don't think I can really claim as authorities because they just follow what has happened before.

Nevertheless, with the exception of one case, there has been an extraordinary uniformity of opinions, to which I should think this Court would wish to give weight.

The District of Columbia statute is a little bit different from that of Pennsylvania, and I want to explain some of the idiosyncracies in its operation. The District of Columbia statute appears on page 2 of the fattest of the briefs, the first brief for the appellees in these cases:

"Public assistance shall be awarded to or on behalf of any needy individual who either (a) has revised in the District for one year immediately preceding the date of filing of the application for such assistance, or (b) who was born

one year immediately preceding the application for such aid, if the parent or other relative with whom the child is living has lived in the District for a year."

Three of the four plaintiffs in the District of Columbia fall into the family -- if one is familiar with these cases -- pattern as illustrated by Juanita Smith, of whom I spoke earlier. That is to say, they are mothers of dependent children without present husbands, who moved into the new jurisdiction either to go back home for the most part or to join their families, or to get help from some person, or perhaps to get a job, and then who are left absolutely destitute when misfortune occurs.

Two of the District cases show what I call the idiosyncracies of this statute. One is the case of Gloria Jean Brown. For the most part, her saga is like that of Juanita Smith. That is to say, she grew up in Washington, D. C. She went out of state with children, and then she came back to a large family -- I mean, her father, brothers and sisters -- which was her family.

When she was coming back, she left the two children she had taken with her to Arkansas for a month or two while she came back and re-established herself before bringing them up. Then when she found she had to apply for assistance and when her oldest child was here and she received assistance, under the residence laws, the other two inthe same family, who

were in the same situation, and who certainly had the same ties to the District of Columbia that she did, were denied the assistance that was given to the oldest child.

Worse than that, the little baby of the family, not being a year old, hadn't resided in the District for a year, so it, too, was held not to have the same connection as its mother and older brother.

Really still more syncretic was the case which I understood counsel to withdraw, the case of Vera Barley, who came to theDistrict of Columbia -- and even if they conceded in this it shows the operation of these laws -- who came to the district of Columbia in 1943. She was coming back to a place where she had lived before, though not for very long even then.

She had the misfortune to become incompetent. She was confined to Saint Elizabeths. She was in Saint Elizabeths for 20-odd years. If public assistance could be provided to her, she was determined by the doctors to be competent to be released. Arrangements weremade for her to live in the nursing home here.

But the District said, "No; she hadn't one year's residence", so she had to stay in Saint Elizabeths.

A good deal has been said about saving money in these cases. It costs roughly three times as much to keepher as Saint Elizabeths as it would have taken to provide the aid

to the permanently and totally disabled, to let her go to a home.

I may say that is also true for many of these children for whom the only future under the one-year residency rule is going into institutional care, which is more expensive per child on the average than under the ADC programs.

Q Have you come across any figures, Mr. Cox, on how much it costs to conduct the one-year investigations? I remember seeing somewhere the cost was extremely high.

A I recall that being stated and argued as a general manner. I will check this afternoon but I believe we have no reliable figure at all on that.

Q Suppose in these cases instead of the appellees asking for relief they ask for the right to vote and were denied the right to vote: How would that appeal to you on the travel argument that you made?

A The argument that I made I would remind Your Honor is composed of three parts: One is the discrimination. The other is discrimination aimed at the exercise of a fundamental right, liberty of travel, and, three, the absence of any justification in State policy.

I think a much stronger case can be made for requiring a period of residence in a State before you are permitted to take part in its affairs, or that you learn what the issues are, learn something about the nature of the community, learn

something about the parties, the candidates, their past record. Therefore, I would think it was a much stronger basis for arguing in that case that the differentiation between old and new residents serves a useful purpose.

I shall argue here, taking them up one at a time, that none of the justifications advanced stand up, that this differentiation not only is arbitrary and capricious, and discourages, penalizes the exercise of the constitutional liberty, freedom of movement, but that it lacks that justification.

In other words, each residence requirement must be looked at in terms of is themsome reasonable basis? I think uour voting case for that reason is quite different.

Q You are not arguing, are you, that a residence requirement, as distinguished from a durational residence requirement, would meet the same constitutional objectives?

A No; you are quite right. I meant to state in the beginning that this divides residence within the HEW definition into two categories.

I would like to call the Court's attention to the Connecticut statute very briefly.

The Connecticut statute is on page 36 of the Connecticut brief. It is a little bit different from the Pennsylvania and District statutes. The difference is worth noticing, along with one matter of fact. The Connecticut statute, the verylast page in the brief, says:

"When any person comes into this State without visible means of support for the immediate future and applies for aid to dependent children" -- you will notice this applies only to AFDC and not to the other categories of assistance -- "within one year from his arrival, such person shall be eligible for temporary aid or care until arrangements are made for his return."

Under the regulations of the Connecticut Welfare Department, the requirement of visible means of support means that you must either have a specific job offer or resources, money, property, that will last you for three months, or, if you are able to get and keep a job for three months, that, too, will satisfy the requirements of the State.

I do not intend to go into the case of the Connecticut Manufactures in any detail. I do want to say just one thing. That is that it was clearly stipulated on page 41A of the appendix in the brief of the appellant, because of her pregnancy and her responsibilities to her son, plaintiff was unable either to seek gainful employment or enroll in a work training program.

So, it seems to me that it is most misplaced in this case to talk about people who are unwilling to enter the labor force. This is a plaintiff who, at the time this claim was made, because of her pregnancy and her responsibilities to her son, was unable to enter the work force or seek training.

Q General, in all of these states is there a comparable linkage, that is to say, comparable to Connecticut in linkage, between the one year residence on the one hand and the expulsion of a person, so to speak, sending this person back to the State of origin?

I do remember, and you just refreshed my memory on that, that Connecticut seems to contemplate as a matter of routine that a person will be expelled from its jurisdiction.

A A number of the States will supply aid if you go back home. Of course, the Court should direct itself to the question of how far does this deter taking up new residence and how far does it penalize one who insists on doing it, which I think is important.

Should one go into that, it is significant that this puts pressure on people to go back to the other State. There is testimony in the medical record, and I have forgotten the figure, that a certain number of people when confronted with this at the initial interview, having nothing else to do, being destitute, are, in effect, pressed to go back where they came from.

I wouldn't want to say his is true of all States, Justice Fortas, but it is characteristic of many of these programs.

Coming back now to my original proposition, I shall direct myself first to the qualified one year prior residence

requirement and then deal with any peculiarities of the Connecticut case further on.

We base our case ultimately, as I said in the beginning, upon the proposition that the one year's prior residence requirement violates the equal protection clause of the Fourteenth Amendment and the due process clause of the Fifteenth, because, without any justification, save prejudice against strangers, against new residents who are poor, it discriminates in relation to the fundamental necessities of life between two groups of persons who are otherwise identically situated, save that one of them has chosen recently to exercise the fundamental liberty to leave an old environment and move to a new residence in search of preferred associations, opportunities or environment.

I would emphasize that that proposition embraces three elements: First, that the one year residence requirement discrimintes in relation to the fundamental necessities of life, between two classes of persons who are identically situated in terms of need, the appropriateness of the remedy that is offered or any other thing of that kind, save how long they had been there or where they came from.

Second, the sole basis of classification is a differentiation between the new and the old resident, the old being granted assistance and the new denied it. But that discrimination against strangers, against newcomers, against

those who Mrs. Williams said during her oral argment "are not our people", which I think is no offense at all by her intended, reveals this sort of rests as a prejudice against outsiders.

It is invidious in that sense, like racial or religious discrimination, but it also penalizes the exercise of what I take to be a liberty, a freedom, an aspect of freedom, which has long constitutional recognition.

And then the third element is that the classification has no substantial relation to the accomplishments of any permissible State policy.

There is a grab bag of justifications that the appellants have put forward here in their briefs. Most of them just amount to the ingenuity of counsel. I think they could be shown really not to stand up by any careful analysis.

I do want to emphasize this: I think one could argue, and as we do argue in some of our briefs, that perhaps some one or two of those three elements in the case would be enough to make out a case for unconstitutionality. But I suggest to the Court that we don't need to go that far, that all we need to say is that adding all three together, the one year's prior residence requirement is unconstituional and is a violation of the equal protection laws.

Let me develop each of the three points, but preliminarily I ought to say that, of course, the constitutional guarantees against hostile or arbitrary, capricious

classifications apply to legislation conferring advantages, opportunities, or privileges just as much as they do to legislation that regulates or taxes.

The obvious example would be a State grant aid program that discriminates on grounds of race or on grounds of religion, as in Sherbert and Verner. There are many cases, if you read them carefully, which restate this proposition, the Girard College case, Evans and Milton, the Fourth Circuit case in which this Court denied certiorari.

And, again, Sherbert and Verner. I think also there is something new in this suggestion.

Now, on the first of the three elements, we suggest, as I say, that the one year prior residence rule discriminates in realtion to the minimum essentials of life, betwsen persons whoare identically situated except for their residence. The proposition is perfectlysimple and I don't think anyone is going to dispute it. Quite frankly, I am a little worried because of its simplicity. Its importance may be overlooked.

That is one reason I stress the fact that this is a discrimination between people who are identically situated in relation to the fundamental necessities of life.

Q Quickly,would you tell us about Point 3 and say a discrimination which has no basis --

A I am just taking them one at time.

Q I say right there you have to do it, don't you?

Well, I would like to dispose of a couple of little points first, Mr. Justice.

Q You can do it any way you want to, but I mean to say that obviously that is an essential part of the argument on that point because the response to it otherwise would be too easy, which is to necessarily ask for some sort of a discrimination between the two.

You will agree that the State may constitutionally take a reasonable amount of time to investigate the newcomer.

A I am not suggesting that all classifications are invalid. I am suggesting really two thigs. Perhaps I didn't state them very well. I will try to do it more simply.

I am suggesting that this isn;t a discrimination or like one between a business that may claim it is entitled to a subsidy of five million dollars, and that that is unfair as compared to another one getting a subsidy of $20 million. This is something that operates in relation not only to the rudiments of existence in a monetary sense, but in relation to such things as keeping families together.

The answer to Juanita Smith was:

"Theonly thing you can do is put your children in institutional care".

In relation to Vera Barley, the discrimination p operated literally in relation to human liberty. I think those aspects of it are important.

Then the other thing that I was seeking to emphasize along the way is that these people are identically situated in relation to need and all other things that are relevant from the standpoint of the purposes of this legislation.

Q General, may I just point to the category of old age pensions?

Do you think that the State has no valid interest in saying to a person who has spent his whole life up to 65 years of age in a State where they have a $16 old age pension and then at the age of 65 moves to a State where they have over a $100 pension and without any intention of contributing anything to the economic life of the State he is immediately entitled to go on old age pension?

A As soon as he becomes a resident, we so contend, yes.

Q Which can be the first day he arrives there?

A Under the HEW definitions, as soon as he arrives and begins to reside there with no intention to leave, no intention to immediately leave. I would say that the distinction is an invalid one, subject to the matter of the amount of time in which he is a resident.

I would say that the State has no sufficient justification for discriminating against anyone.

I would also argue, and I would like to postpone this until tomorrow when I get a little farther along in my

argument, I would also argue, Mr. Chief Justice, that even if it be assumed for the purposes of this case that I am wrong in saying that it has no power to take any steps, I will argue that this statute is overly broad for reasons I will explain later in my argument.

If I could take theone minute left, I was emphasizing that these plaintiffs are identically situated with respect to need and anything that might be thought relevant to determining need or desserts or the suitability of a particular kind of remedy.

The reason I stress that is because it seems to me that theCourtmight feel legitimately concerned if we were pressing it to pass upon the reasonability of categories of aid as between the deaf and the dumb and the blind, or as betweenthe widows of veterans and the widows of civil service employees.

But this distinction clearly has nothing to do with deciding how to solve one problem or how to solve another problem, or with determining what is the nature of the problem; the nature of the problem is identical in the case of the new residents and the old residents.

Then I do go on, Mr. Fortas, in the morning from there.

THE CLERK: The honorable Court is now adjourned

until tomorrow at 10 o'clock.

(Whereupon, at 2:30 p.m., the Court recessed, to reconvene at 10 a.m., Thursday, October 24, 1968.)