In the

Supreme Court of the United States

ROBERT B. CARLESON, etc., et al.,
Appellants,
vs.
NANCY REMILLARD, etc., et al.,
Appellees.

No. 70-250

Washington, D. C.
April 10, 1972

Pages 1 thru 42

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v.	:	No. 70-250
NANCY REMILLARD, etc., et al., Appellees.	:	

Washington, D. C.,

Monday, April 10, 1972.

The above-entitled matter came on for argument at 2:10 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JAY S. LINDERMAN, ESQ., Deputy Attorney General of California, 6000 State Building, San Francisco, California 94102; for the Appellants.

MISS CARMEN L. MASSEY, Massey & Peppard, 3615 Bissell, Richmond, California 94805; for the Appellees.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-250, Carleson against Remillard.

Mr. Linderman, you may proceed whenever you're ready.

ORAL ARGUMENT OF JAY S. LINDERMAN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LINDERMAN: Mr. Chief Justice, and may it please the Court:

This case presents the questions of whether the Social Security Act requires California to grant welfare benefits to children whose fathers are out of the home on active duty in the military service. Specifically, the question is whether, under Title 4 of the Social Security Act, the Aid to Families with Dependent Children Program, a military orphan who is otherwise needy -- in other words, the income standards of the family are sufficiently low that they qualify under the State standard, need standard -- whether that child is a "dependent child" under Section 406(a) of the Federal Act.

Q Is the entire group excluded, or just case-by-case, child-by-child?

MR. LINDERMAN: The entire group of military orphans, Your Honor?

Q Yes.

MR. LINDERMAN: Servicemen's children? The entire group is excluded, as are the children of a father who is

employed away from home in a civilian capacity. In other words, the exclusion under the California statute or regulation is that if there is a breadwinner in the family, but out of the home, the child, be it a military or civilian employment situation, the child is ineligible as to --

Q And that's true regardless of whether or not the father was drafted or volunteered?

MR. LINDERMAN: That is correct.

Q And regardless of the nature of his service, and regardless as to his rank or grade?

MR. LINDERMAN: That's correct, Your Honor.

Q Now, let me --

Q And regardless --

Q Go ahead.

Q -- regardless of whether he's sending any part of his income home, and regardless of whether he is a prisoner of war?

MR. LINDERMAN: The assumption, Your Honor, is that the child is needy; where he may be sending some money home, but it's inadequate in terms of the need standards under California law.

Q Well, would it be difficult -- would it be impossible or very difficult for California to determine how much of an allotment of a drafted man, we'll confine it to that, a drafted man in the service, how much he is sending home on

the allotment, and then at least give the benefits to the extent of the difference? Would that be, administratively, a difficult thing to do?

MR. LINDERMAN: Is Your Honor questioning the administrative burden?

Q Yes.

MR. LINDERMAN: I am not certain that I can answer it. I assume that it would be relatively difficult, in that, presumably there would be a fluctuating amount of income --

Q Not if he's a lower class -- that is, in the first few grades, there's a fixed allotment sent home.

MR.LINDERMAN: There is, but then the question is that the State would have to ascertain, on a month-by-month basis, that in fact that amount did get there. So that I believe the answer to Your Honor's question in terms of the administrative effort is that it would have to be an on-going month-to-month determination or verification of the precise amount that did actually end up in the hands of the family.

Q Well, Mr. Linderman, I gather that under the California practice, where the absence is due to imprisonment or medical treatment or parental separation, that inquiry is made on an individual basis.

MR. LINDERMAN: That's correct, Your Honor.

Q Well, then, what's the distinction between those classifications and this across-the-board as applied to

children of fathers absent under military orders?

MR. LINDERMAN: The distinction, I believe, Your Honor, is that California concedes, in the instances that you have mentioned, that the Federal law requires the granting of assistance.

We view or acknowledge that the situation of an imprisoned father or a deported father or dissolution of the marriage, and so on, that that type of child is clearly within the scope and purpose of the Social Security Act.

Q And yet the guideline -- all of these are based on the same guideline, aren't they? That's 3422.2?

MR. LINDERMAN: That's the HEW --

Q That's what I mean.

MR. LINDERMAN: Yes.

Q And that one, within this interpretation of continued absence,"the State agency in developing its policy will find it necessary to give consideration to such situations as divorce, pending divorce, desertion", all the way down the line, "service in the armed forces or other military service", and makes no distinctions of the kind that California draws, does it?

MR. LINDERMAN: No. HEW merely requires, as the regulation says, that the State will find it necessary to give consideration to these groups in the process of the State defining its own eligibility policy. This has been the

traditional approach.

Q Well, of course, but -- "find it necessary to give consideration" -- may it distinguish in the way it gives consideration under that regulation?

MR. LINDERMAN: Distinguish in the sense, yes, that you can find one group eligible and another group ineligible.

Q Yes, but that's not what the problem is. The problem is that you treat each case on an individual basis in all categories except service in the armed forces.

MR. LINDERMAN: No, that's not correct, Your Honor.

Q It's not?

MR. LINDERMAN: In the categories of, say, desertion, or imprisonment --

Q Yes.

MR. LINDERMAN: -- as a group the children are eligible. Provided that they then meet the need standard as well.

In other words, as a group, California determines the child of an imprisoned father to be eligible provided that there is a sufficiently low amount of income, which undoubtedly there's going to be with the father in prison.

But, as California makes group determinations of eligibility, both with respect to "Yes they are eligible" or "No they are not" --

Q Does that suggest, Mr. Linderman, that the

Court of Appeals is wrong? Of course, I'm reading, in cases of a father's absence due to imprisonment, temporary medical treatment, or parental separation, California considers each applicant's situation individually.

MR. LINDERMAN: Yes, Your Honor, we submit that the District Court --

Q That's wrong?

MR. LINDERMAN: -- is wrong.

Q I see.

MR. LINDERMAN: And have specifically so said in our brief. We do challenge that; that that is a misstatement of what California does do.

I think the question here, though, is not whether California administratively could do this or whether, in terms of social policy they should do it; the question is, has Congress compelled California to do it now.

And our position is that it has not.

Congress has defined the group of eligible children to be those that lack the support of a parent due to death, incapacity, or continued absence.

This case specifically is the question: what does Congress mean by continued absence?

At the time that the case was argued below, all we had was the HEW regulation that Mr. Justice Brennan has just referred to, that left it to the State to determine what

continued absence meant, within the scope of HEW's interpretation, which was a substantial severance, economic and socially, within the family. And cited as their example, HEW cited as their example, the situation where the father simply deserts the family and disappears. The mother knows not where he is or when he will be home or if he will be home.

A complete destruction of the sociological and economic ties between the father and the child. That's the example that HEW gives.

There is, we submit, nothing more than that in the Act itself, and thus, given the 35 years that HEW has had this policy, and the fact that over the years the States have exercised the option, with Congress doing nothing to disapprove this, and with the result that there's a roughly 50/50 split between the States in terms of which ones do and which ones do not grant aid, that we think that the State should be continued the option of defining their own eligibility policy.

The question of course then arises of what impact on this past pattern does the Court's recent decision in the Townsend case have on this case?

Townsend of course is the Illinois AFDC case, in which the State of Illinois had defined an eligible student to be one who was enrolled only in a vocational school, excluding those that were enrolled in academic institutions, colleges, universities, non-vocational.

The Court, in Townsend, held, found that Congress had explicitly defined what it meant by a student, the Federal Act itself specifically said that a student was any child up to the age of 21, enrolled in any educational institution. And, furthermore, that Congress had made clear that it intended that the States must grant assistance to all types of students. Therefore, the Court held that Illinois obviously could not define "student" in a fashion that directly conflicted with the definition provided by Congress.

I would submit that, on its facts, Townsend is completely distinguishable from this case, in that there is neither the precise Congressional definition of continued absence nor is there any indication, legislative history-wise or otherwise, that Congress intended that the States have to grant assistance in all types of continued absence or that there had to be a nationally uniform definition to the term.

Assuming, for the sake of argument, that we have misread the Townsend case, and that it does mean, in the Court's view, that there must be nationally uniform standards for all aspects of the AFDC program, and that Congress or HEW, presumably HEW, must give contents to the vague term used by Congress. We would submit, then, that the definition should be held to be of ineligibility for servicemen's family, for the following reasons:

In the case of King vs. Smith, this Court traced the

legislative history and outlined, delimited the contours of the AFDC program, as the Court perceived it, which was that Congress was not intending to aid all needy children, but, rather, that it was endeavoring to provide financial assistance to States for the purpose of aiding children who lacked a breadwinner.

I think a reading of the King case makes clear that it's a lack of a breadwinner and not merely a wage-earner who can't bring home enough bread. In other words, that AFDC is not designed to be a subsidy for low-paying employers, be it the United States Government or otherwise.

Q Well, let me ask you on that score, suppose the ostensible breadwinner, the father, was handicapped and worked at the Good Will, and because of his handicap could make only $118 a month, would that automatically make them ineligible for Aid to Dependent Families, Children?

MR. LINDERMAN: Unless that particular father, Your Honor -- I'm assuming full employment, in terms of number of hours.

Q Yes.

MR. LINDERMAN: He's fully employed, but --

Q He's blind or whatever, some disability so that -- well, let's not make it blind, because then he'd be getting some income under Social Security. But he's got some handicap, maybe just basic intelligence, but he works at full capacity

and makes this nominal amount.

MR. LINDERMAN: Ans is living in the home with the family?

Q Oh, yes. He's trying to win the bread for the family.

MR. LINDERMAN: I do not believe that that family would be eligible.

Q Under the Federal statute or the regulations of California?

MR. LINDERMAN: Under the Federal statute. Because he is an employed breadwinner living in the home. Now, --

Q Unless it could be shown that he was physically or mentally --

MR. LINDERMAN: Incapacitated. But again, then, I believe he has to be out of -- no, they might qualify under that provision. I'm not completely clear on that.

Q Continued absence from the home or --

MR. LINDERMAN: Yes, that's right.

To be utterly honest, I'm not completely clear whether, in that instance, there would be eligibility or not. But I think then --

Q Well, assuming for the moment that there would be eligibility --

MR. LINDERMAN: Would?

Q Would be. -- and this $118 a month does not bar

eligibility.

Now, then, a Private First Class, lowest grade, married, with dependents, is permitted, I understand as a matter of regulation, perhaps statute, $118 a month allotment for his family. Could you conceivably have an arguable equal protection argument if the man at home earning $118 was treated in a different way from the drafted soldier earning enough so that there was $118 a month allotment?

MR. LINDERMAN: I suppose, conceivably -- I'm assuming now that you're talking not in terms that California makes a decision on its own, but that Congress --

Q No, I'm just saying, is there arguably an equal protection problem there?

MR.LINDERMAN: I suppose that it's conceivable that there is, Mr. Chief Justice. But I think the equal protection question that the appellees in this case purport to raise is a completely different type of situation from the one that Your Honor is hypothesizing.

But again I believe that it's correct to say that in the example proposed, that the handicapped father, that situation, the child would not be eligible.

We would submit that, again referring to the King case, that Congress recognized and the Court recognized in the King case that the problems posed by and the solution for unemployment and underemployment are drastically different, and that

AFDC was designed to aid not the underemployed breadwinner.

Q Well, really, it's not the underemployed breadwinner, either, was it? It was designed to aid children in families where there was no -- where one of the parents was not there. Isn' that it?

MR. LINDERMAN: That's correct. But it subsequently has been expanded to include the unemployed, AFDC has now been expanded to include the unemployed father in the home.

But not the underemployed.

Turning then to the equal protection question, which the appellees raise, which again dovetails, I believe, with our suggestion or our contention that if there must be a uniform standard vis-a-vis servicemen's families, that it should be ineligibility, that for the same reason it's not a denial of equal protection to deny benefits to servicemen's families when at the same time, granting them to families of, for example, prisoners.

It's axiomatic, I believe, that the equal protection clause does not require States or the Federal Government to treat classes that are in fact different, legally differently.

And I would submit that the situation, the economic situation and the sociological situation, posed by a serviceman on one hand, a prisoner or a deportee on the other, are dramatically different.

First of all, the imprisoned father can offer no

economic security to his family. The serviceman --

Q Well, suppose he were a millionaire, a Leopold or a Loeb?

MR. LINDERMAN: Mr. Justice Blackmun, then I think we're not talking about the income-generating capacity or the sociological impact, in terms of the intrafamiliar strains that imprisonment would cause; but of course if he's a millionaire, and the money is available to the child, --

Q But the child --

MR. LINDERMAN: -- the child is not going to be eligible. No matter whether the father is a millionaire PFC or whether he's a millionaire prisoner.

Q Or whether he's away from home or not?

MR. LINDERMAN: Or whether he's away from home. The child is not needy then. Which is the second facet of eligibility, which is not present in this case.

We are assuming that the child is needy ir this case, and the State has conceded that the plaintiffs, the appellees in the case, the named plaintiffs are needy and, by definition, the class represented by the named plaintiffs are those families that are needy.

So that aspect of eligibility is not in issue in the case. It's strictly a question of dependency or whether the father is continuously absent.

Again, then, the economic implications are different.

The imprisoned father, the deported father can offer no economic security to the child, and sociologically we believe that there is a substantial difference, both in terms of the disruptive influence in terms of the family ties of military service and imprisonment, with a superimposition of a social ostracism that goes with imprisonment or deportation, which we think in the normal situation, anyway, is totally lacking in the case of military service.

Q Well, now, does the legislative history of the Act of Congress make these distinctions you're talking about, or are these just advanced as your considerations?

MR. LINDERMAN: We view the legislative history of the Act as supporting these contentions, and, furthermore, this Court's tracing and delimiting of the Act's scope in King vs. Smith as erecting these kind of limits around the program.

As I read King, the suggestion is there that Congress was concerned in the AFDC program with a limited class of children, and the Court says in King specifically that the Act is not designed to aid all needy children; but the class is only those that lack the breadwinner. And the Court talks in King about the lack of the likelihood of any economic security inuring to the child in the King case from the mother's paramour, who owed the child no duty of support.

It's from that that I draw the economic aspect, that there is a lack of likelihood of economic protection for

the child from the father. And that meshed with the economic problem is the social impact, the destruction of the family ties through death, divorce, continued absence from the home.

But that that analogizing the continued absence facet of eligibility to the other facets, death and incapacity, desertion, and so on, I think it's from that that I would draw the sociologic or intrafamiliar disassociation that I'm referring to.

I don't think it's of my imagination, but I think it's clearly as Congress has limited the program.

Now, the District Court adverts briefly to the possibility that my characterization of a less severe dislocation occurring in the service situation as opposed to the imprisonment is perhaps overstated. Well, it may very well be that in certain service situations, service-connected absences, that there is indeed a severe dislocation.

Assuming that nothing else happens, though, in terms of a breakup of the marriage, the fact that in certain military situations there may be severe dislocations does not mean that there is a violation of the equal protection clause. As the Court has pointed out on numerous occasions, that clause does not require an absolute, mathematical, precision in drawing the classes, and some inequity is all right.

But, furthermore, if in the situation of the service-connected absences, other factors of dislocative significance,

that is, a divorce occurs as a result of the father being drafted, the child would then become eligible. California's position is that military absence by itself is insufficient, but if the other factors, such as a divorce, a breakup of the marriage, occur, then the family would be in the situation which we believe Congress intended to cover by AFDC.

But in the normal situation, where the only thing that exists to arguably give rise to eligibility is the father's absence by reason of his employment, be it military or civilian, then California does not grant assistance, and we do not believe that either the Social Security Act or the Fourteenth Amendment requires that result.

I have a few moments left, Mr. Chief Justice, I'd like to reserve them for rebuttal.

MR. CHIEF JUSTICE BURGER: You may do that.

Very well.

Miss Massey.

ORAL ARGUMENT OF MISS CARMEN L. MASSEY,

ON BEHALF OF THE APPELLEES

MISS MASSEY: Mr. Chief Justice, and may it please the Court:

The issues that are presented for this Court in this case, and the structures within which they are presented, are straightforward.

The Federal Social Security Act of 1935 provided for

the implementation of the AFDC program. Under that statute, States which provide financial assistance to families with what are called dependent children may be provided Federal matching funds -- will be provided Federal matching funds.

The Federal Social Security Act further defines a dependent child as one "who has been deprived of parental support or care by reason of the death, continued" --

Q May I interrupt you there, Miss Massey?

MISS MASSEY: Yes.

Q Where is it that -- does the statute expressly leave to the States the definition of "continued absence from the home"?

MISS MASSEY: Our argument is that it does not.

Q Yes. The District Court suggested that it did. I just wonder what provision, they don't cite anything that they refer to when they say that.

MISS MASSEY: Your Honor, I think the District Court opinion is somewhat ambiguous on that subject.

However, in light of the rest of the opinion, I think what the District Court was saying was that the State must determine on an individual basis as to whether or not continued absence exists in a particular case, including in the military service case. And it cannot --

Q Now, there isn't any doubt, I gather, that HEW Regulations suggest that States do have discretion in the

definition of continued absence from the home. Is that so?

MISS MASSEY: That is correct.

However, in light of the Townsend case, which expressly disapproved of HEW's, what is known as the condition X.

Q Yes.

MISS MASSEY: I think that is no longer a proper interpretation by HEW.

Q Is 3422.2, is that condition X?

MISS MASSEY: Pardon?

Q Is that -- is the one that deals here with the interpretations, HEW Regulation, the one I was talking about, is that condition X?

MISS MASSEY: I think it is, Your Honor.

Q I see.

Q It is one of them.

MISS MASSEY: I believe that it is a part of the condition X, which was expressly disapproved by this Court in Townsend v. Swank.

The court below found that -- well, California has further defined the term "dependent child" by providing that when a needy child is deprived of parental support or care by reason of the continued absence of a parent, and that absence is occasioned by his military service, there is no continued absence such as to give rise to dependency and AFDC eligibility.

The court below found this State regulation invalid on two grounds: one, that the Social Security Act mandate that all eligible individuals be granted AFDC benefits with reasonable promptness; and, No. 2, that the Department of Health, Education, and Welfare, in its implementing regulation, mandated that the States, in developing their policy as to what constitutes continued absence from the home, must take into consideration military absence. And the court further read this to provide that the States must consider each case on its individual merits and not on the basis of the group to which the case belongs.

I would add at this point that the Department of Health, Education, and Welfare, through the Solicitor General, has filed a brief in this case, indicating that it agrees with appellants' argument, that the States are free to define continued absence from the home as they choose, but indicating that it disagrees with appellants' argument that military orphans, as we have called them, are not federally eligible for AFDC benefits.

And it is the second argument that I would like to address myself to first.

We submit that when the Congress used the word "continued absence from the home", that it meant exactly what the plain English definition of those words is. When Congress said "continued absence from the home", it meant those

situations in which a parent is not physically present in the home and this non-presence can be expected to continue for a certain length of time, which it called continued.

I would point out, as an example of what continued absence means, the situation of the Remillard family in this case. Mr. Remillard was in Vietnam for over a year. During the time he was in Vietnam, he was not allowed to return to his family, his family was not allowed to go and visit him. By Army Regulation, the family was not even allowed to move to a point where they would be near him. I mean, certainly in this case, whatever "continued absence" might mean, it was present here, and I would point out that the State has stipulated that there was continued absence in this case.

Q What if he had been over there as our Ambassador to South Vietnam?

MISS MASSEY: And if his family had been free to join him?

Q No.

MISS MASSEY: All right. If Mr. Remillard had been the Ambassador, and if his family were not free to join him, and if, by some chance, that family were also needy, that is, according to the California definition, "unable to provide the basic necessities of life", then I would say yes, that family would be eligible for AFDC benefits.

Of course, in the case of an Ambassador, it is highly

unlikely that the family would be financially needy.

Q Well, while I've interrupted you, is there anything nowadays in the military service that requires the serviceman to make an allotment to dependents?

MISS MASSEY: In four grades, E-1, E-2, E-3, and E-4, the regulations provide that the serviceman may initiate the basic allotment, which consists of the basic allowance for quarters, which is called the BAQ and which is separate from the serviceman's pay, and which also includes $40 per month, which is taken out of the serviceman's pay.

Now, if the --

Q You say he may do that; right?

MISS MASSEY: Well, the regulations provide that he may; but they further provide that if he does not, and if the wife objects, that certain procedures will be followed to insure that she does receive her allotment.

Q From his pay or from some other?

MISS MASSEY: From the same sources. The $105 for grades E-1, E-2, and E-3, slightly more for grade E-4, which comes from outside his pay and $40 which comes from within his pay.

Now, there is also a provision in the allotment system that the serviceman may voluntarily add more to this allotment, but we are here concerned with cases where the amount of money that is coming from the serviceman is inadequate

to care for the basic needs of his family.

Q In every case, when the parent is absent, the constant factor is a demonstration of need, is it not?

MISS MASSEY: Yes.

Q So that no benefits could be paid if the man were employed at a substantial income, no matter how long he was absent?

MISS MASSEY: And if that money were actually coming in to the child; that is correct, Your Honor.

The Department of Health, Education, and Welfare interpretation of the term "continued absence" follows this common-sense approach as to what the term means. The Department of Health, Education, and Welfare, in its Section 3422.2 of the Handbook of Public Assistance Administration, Part IV, has defined "continued absence from the home" as: "One, when the parent is out of the home." That is the clear situation here.

"Two, when the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child." And I would point out here the Department of Health, Education, and Welfare is concerned not only with the fact that the father is not able to adequately support his family financially, but with the fact that the father is not presently in the home to provide the kind of physical care and

emotional nurturance that the child needs.

HEW has one further consideration: "When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child."

That is certainly also the situation we have here. Gregory Remillard was in Vietnam for a year. During that time he was not available to help take care of the child, to make plans concerning her future.

The long-standing interpretation of HEW is that military orphans are federally eligible for AFDC benefits.

Q Are?

MISS MASSEY: Are; yes, Your Honor. For at least 25 years, Federal matching payments have been made to those States which do grant AFDC benefits to needy military orphans.

Q But they have also made them to States -- matching -- that don't grant them?

MISS MASSEY: That's correct, Your Honor. I think there are two different issues here. The first one is: are the children federally eligible; and the second is, if the children are federally eligible, then may the States deny them these benefits?

Q And about half the States deny them?

MISS MASSEY: That is correct, Your Honor. There are some 20-odd States, plus the District of Columbia, which

do grant benefits to all needy military orphans.

Q So if we affirm here, those States that are not now doing it will have to?

MISS MASSEY: Yes, Your Honor.

The States also make some further distinctions. For example,at the time we filed this case there were two States, and there is now one State that gives AFDC benefits to the needy children of draftees but not to the needy children of enlistees.

There are two further States which grant AFDC benefits to the needy children of draftees or men who have enlisted in order to avoid the draft, but not to the needy children of men who have enlisted.

Q You mean the very -- the needy children of really patriotic soldiers don't get it?

MISS MASSEY: That's right.

Q How was this -- during World War II, when there were literally millions of men, many of whom were fathers, in the armed services, was the division among the States about the same as it is now?

MISS MASSEY: I do not know the answer to that question, Your Honor. I only have the current --

Q This law goes back to about -- to 1935, doesn't it?

MISS MASSEY: That is correct. I don't know what the

division of States was at that time.

The AFDC program focuses on the child. This was stated by this Court in the case of King v. Smith and has been reiterated several times. What is important is the status of the child, not the legal status of the parents.

Now, a regulation such as California has can lead to certain very absurd results. As an example of this, I would point out the situation of the intervenor in this case, Joyce Faye Dones. Prior to intervention in this action, Joyce Dones and her husband and her two children were living together; she was also expecting a third child. Mr. Dones was working full time and supporting his family.

Mr. Dones was then ordered to submit to induction into the Army, and he was then sent to his basic training. By Army Regulation, his family was not allowed to join him at the site of the basic training.

Now, if Mr. Dones, instead of submitting to induction, if he had refused induction and then subsequently been arrested, convicted, and sentenced for this unlawful act, there is no question but that in California his children would have been eligible for AFDC benefits.

Now, as far as the child is concerned, there probably wouldn't have been much difference. In each case the father would have been gone for a certain length of time; if he was in jail, she would more likely be able to visit the father.

And if he was in jail, he probably didn't have as many chances of being killed; but yet, in one case, the child is eligible for AFDC benefits and in the other case the child is not eligible.

Q Well, the father isn't making much in prison; that's one fundamental difference.

MISS MASSEY: That is correct, Your Honor, except for the fact that in this case need is not in question. By the standards developed by the California Department of Social Welfare, our class is composed only of needy children, children who aren't getting anything.

And I would further point out that in the case of Nancy Remillard, when we first filed this action, she wasn't getting anything, either; she wasn't getting any allotment.

Q Well, what if he was living at home when he was in the military? And he was not making enough to satisfy the standard of need?

MISS MASSEY: We do not contend that the family would have been eligible for AFDC benefits, under this --

Q But it would be just as irrational, wouldn't it?

MISS MASSEY: We are dwelling here on the statutory argument --

Q Well, I understand that, but you are also arguing about other situations that you claim, in comparison,

are rational. Well, I --

MISS MASSEY: Okay. If the father were living at home, there are of course certain economies of living, of maintaining only one household; and also the father would be available to help with the physical care of the children. He would be available to provide guidance and possibly, in some situations, he would be able to take a second job.

Q Well, if he's in prison, there's one less mouth to feed, too, though, isn't there?

MISS MASSEY: Yes.

I would like to point out that in California, if a husband is sent to jail and if he is released under the work furlough program, which is a procedure whereby the husband goes to work and then returns to jail for the night, or for the day if he happens to be working the night shift, even in a case like this where the husband is employed, the family will be granted AFDC benefits, based upon his absence, if the family is in fact needy.

And I think this is very close to the servicemen's situation.

Q Has there been any congressional -- any proposals in the Congress to have a statutory definition of continued absence that would bear on this situation?

MISS MASSEY: No, Your Honor. I would only point out that Congress is currently considering and has been considering

for some time the Family Assistance Program, and one of the provisions in that program is that the families who are assisted must be in fact families living together, and --

Q But in the past, there haven't been some proposals to provide a national standard for aid to military people that have either been adopted -- well, they haven't been adopted, obviously, but they've been rejected. There haven't been any proposals like that during any session?

MISS MASSEY: I don't know of any proposals that deal specifically with the military problem. I would note that Congress has seemingly acquiesced in the HEW definition, which does include military orphans.

Q And under which definition the States can do it either one way or the other?

MISS MASSEY: Well, we maintain there are two parts to that definition. The first part is that they are eligible, and the second part is what we maintain has been --

Q Well, HEW certainly doesn't think its definition requires the State to give aid, at least that's what their brief says.

MISS MASSEY: That's correct, Your Honor. At this point we are only dealing with whether or not they are federally eligible. And the second part of the argument is concerned with whether or not this case is outside the scope of Townsend v. Swank.

Q I notice HEW suggests that this whole problem might perhaps more appropriately be handled as a responsibility of the Military Pay and Allotment System.

MISS MASSEY: Your Honor, we would agree that the Military Pay and Allotment System could be much more equitable.

Q Well, I take it that there must be some situations where even if 100 percent of the soldier's salary were remitted home under an allotment, it still wouldn't be enough to meet the family standard of need, would it?

MISS MASSEY: Oh, yes, Your Honor, that is absolutely correct. And there is also the problem that even if the soldiers' pay were raised to $10,000 a year, there are always going to occur situations like Nancy Remillard found herself in. She wasn't getting any money. Somehow the allotment system had broken down, and she didn't have any money, not even this very low sum that the military does send normally.

Q Well, would it be so difficult -- I'll put the question to you I put to counsel for the State -- to administratively determine what was the difference between the fair allotment, the maximum allotment that could be made and the amount that the State could pay?

MISS MASSEY: Your Honor, our contention is that this would be very simple to administer. And I would compare it to the situation where you have parents who are separated by agreement.

In that kind of a situation, you frequently find a father who is absent but who returns to the home, to visit the children, to see his wife, for whatever reason; and there's a real administrative problem for the department to determine whether he's in or whether he's out. Let alone how much money he's giving her, when his payments vary.

But in the military situation, it's very easy to check that he's out, and it's easy to check when he's going to be coming back. And it's also very easy to check what the allotment is going to be, because the regulations are so standardized that once the welfare worker knows what his level in the service is, she can determine how much money the family is going to receive.

Q But if he's then stationed near home, and living off the base, the welfare would stop?

MISS MASSEY: Each case would have to be determined on its merits. That's all that we're arguing here today, is that each case must be determined on its merits.

I would say that if he was living off the base, the family was there, then, no, he would not be eligible for benefits.

Q Although if they switched him to Seattle, they would get welfare, even though he was sending them all the allotment that you could expect?

MISS MASSEY: Your Honor, that's the point where you

have to determine each case individually, because there might be certain situations where the family could not live with him in Seattle. There might be other situations where the family could.

I believe the District Court pointed out this kind of a problem.

Q Incidentally, Mr. Linderman suggested that the District Court was wrong in saying that there were other classifications than absence from the home that California handles on an individual basis.

This is the group basis, but I think he said the children of prisoners are handled as a group, not on an individual case basis.

MISS MASSEY: Well, I would disagree with that. Even in those categories the families have to be treated on an individual basis. It may be that one person goes to jail for a day, and that doesn't qualify his family for AFDC assistance. It may be that another father goes to jail for a year, and his family would be qualified. In each case you have to determine whether or not the parent is actually continually absent from the home. That's all we're asking in this case, that our clients be given the chance to show that there is an actual non-physical presence of a father in the home.

Q Well, I understood Mr. Linderman to say that California treats fathers who are absent from the home, either

because they're employed away from the home or are seeking employment away from the home, just as it does military personnel; that it excludes them as a group. Did I misunderstand that?

MISS MASSEY: No, I believe that is correct. I was answering the question as to whether all groups are considered as a group or whether, within certain groups, the individuals are allowed to present their cases individually.

Q But at least that group of fathers employed in a civilian capacity of one kind or another away from home, or who are seeking employment, civilian employment, non-military employment away from home, are excluded as a group from parents absent, continually absent from home. Is that correct?

MISS MASSEY: That is correct, Your Honor.

Q Just as military --

MISS MASSEY: As military men are.

The second part of California's argument is an attempt to distinguish this case from the Townsend case. Now, in the Townsend case, this Court further enunciated the principle of King vs. Smith, which was that at least in the absence of congressional authorization for the exclusion, clearly evidenced in the Social Security Act or its legislative history, a State eligibility standard that excludes person eligible for assistance under federal AFDC standards violates the Social Security Act.

Now, I don't think we have anything in the record to show that Congress meant to exclude needy military orphans from the coverage of the AFDC Act.

Q Your conclusion from that is that continued absence must have one definition countrywide?

MISS MASSEY: Yes, Your Honor.

Q Yes.

MISS MASSEY: And if there is ambiguity in this definition, that it must be supplied by the Department of Health, Education, and Welfare, subject to reinterpretation by the court system.

Q Well, that means -- that would mean that any -- any State plan that, for which Congress provided matching funds, would mean that those children for which it matched funds were eligible, and every other State would have to conform to the State that had the highest level of eligibility in its plan?

MISS MASSEY: That is correct, Your Honor.

I would compare this case to the King case. In the King case this Court was concerned with, what does the word "parent" mean?

Now, the word "parent" is certainly as ambiguous as the term "continued absence from the home", yet in that case this Court looked at the legislative history and at the Act to determine what "parent" meant. And once it determined what

"Parent" meant, it held that the States were bound to provide AFDC benefits to all children who fell within the definition.

Q Well, that doesn't help you much in this case, does it?

MISS MASSEY: Your Honor, I believe --

Q Because here you'd have to look and find legislative history or something in the Act to show that Congress meant to include military people.

MISS MASSEY: Yes, Your Honor, that was the first part of the argument, and we used, to support that claim, the interpretation of HEW and the plain English language of the words --

Q Yes, but if you're wrong on that, is that all you have to rely on?

MISS MASSEY: Your Honor, if we are wrong, and Congress meant --

Q But HEW certainly doesn't think that it used any words in the regulation that support your view?

MISS MASSEY: Your Honor, it does as far as the initial issue, which is whether or not these children are federally eligible. That is, if California chose to provide benefits to these children, are federal matching funds available?

And the position of HEW is quite clear: federal matching funds are available.

Q Because they provide some 20 to 25 States now?

MISS MASSEY: That is correct. Plus the plain language of the regulation that you read from.

Q Do you raise any constitutional questions?

MISS MASSEY: Yes, Your Honor. We believe that the court below quite properly decided this case on statutory grounds. However, we did argue below, and we argue here, that if -- that the California regulation does deny Nancy Remillard and the members of her class the equal protection and due process of the law, as guaranteed by the Fourteenth Amendment.

We would point out that California provides AFDC benefits to children in which a parent is absent from the home because of divorce, desertion, separation, incarceration, deportation, hospitalization; it does not provide benefits for the child whose parent is separated from the home because of military absence.

Q Nor for the child whose parent is away for civilian employment.

MISS MASSEY: Or for a child whose parent is away for civilian employment.

Yet, in a program where the focus is on the child, the situation of the child is the same in any of these cases.

The California exclusion, it cannot be viewed as simply a case where the State would not provide benefits if

the absence is voluntary, because the State provides benefits in the case of the voluntary divorce and voluntary separation. It cannot be looked at as a case in which the absence is going to be for a known time rather than an unknown time. Because the State does provide the AFDC benefits when a parent is absent from the home for as little as 30 days because of incarceration.

And it further cannot be looked at as a general exclusion from the AFDC program of children who have some money coming in to them, in the case of divorce or desertion. There may be regular child support payments coming in.

But if the difference between the child -- but the State will pay the difference between the child support payment and the standard of need as determined by the State.

That's all that we're asking that the State do in this case. That it pay the difference between what the child is getting and what the State says that child needs to live on.

Q Well now, if Congress had said specifically in the Act, "continued absence, but the States have the discretion of whether or not to include military people", would you be here?

MISS MASSEY: Yes, Your Honor, --

Q On the constitutional argument?

MISS MASSEY: Yes --

Q Not on the statutory argument?

MISS MASSEY: That's correct.

Q But even though on the statutory argument if half the States covered military people and half the States didn't, military people are eligible?

MISS MASSEY: Yes.

Q Which is the way it is now?

MISS MASSEY: Yes.

Your Honor, I would point out that Congress, in enacting the AFDC-U program under Section 407 of the Act, it specifically provided that the States would define the term "unemployment". It did not do that in the case of "continued absence".

Q Well, I take it that HEW's position is that by using this general term, and against the history, the 35-year history, that it's just as though the Congress had said expressly that the States may have discretion, and even -- and thus, even though military people, children are eligible, it doesn't mean there's a violation of the Act in those States where they are declared ineligible?

MISS MASSEY: Yes, Your Honor, --

Q That's basically their position?

MISS MASSEY: -- that's the position of HEW and of the State. We feel that that ignores the plain holding and the plain language of the Townsend case, in which this Court

expressly repudiated the position of the Department of Health, Education, and Welfare, that it could delegate to the States the decision whether or not to participate in certain programs.

As far as the constitutional argument is concerned, we further maintain that the State, by its conclusive presumption, that a parent is not absent from the home when everybody admits the father is absent from the home, has denied to the appellees the due process of the law.

I would emphasize at this point that we are not stating that in every single case where there is a needy child and where there is military service that that family is eligible for AFDC benefits. We are only stating that, or we are only asking that this Court hold that the State of California cannot, by a conclusive presumption, prevent the members of this class from proving what everybody knows is true.

MR. CHIEF JUSTICE BURGER: Thank you.

You have about three minutes left, counsel.

REBUTTAL ARGUMENT OF JAY S. LINDERMAN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LINDERMAN: May I just refer briefly to the Townsend decision, to respond to what Miss Massey says that the decision holds; and I don't mean to be presumptious in telling the Court what it held in that case. But I believe that it's difficult to read the decision as having any applicability here, in that in Townsend Congress had very

clearly defined what a student was, in terms of who, as a student, was going to be eligible.

The Court then said that Congress, having squarely made the person eligible, the State can't say that the person is ineligible; and it's only in that context, I believe, that the Court struck down HEW's condition X. And condition X is merely the deference, the deferential policy of HEW in this case and in any other case of allowing States to define eligibility for that State's program.

Now, I don't believe that the Court in Townsend struck down condition X in all instances.

Now, that's my point, that in this case the Court may want to -- in the Remillard case, the Court may choose to say that there must be national standards. And in this case may disapprove in toto condition X, but it did not do so, we would submit, in the Townsend case.

One final point. That the Administration's Welfare Reform Bill, H. R. 1, which is now pending and has been for some time, one of the most highly touted aspects of that bill is that it establishes nationally uniform standards, one of the things lacking in AFDC.

So I would submit that clearly AFDC does not -- under the Social Security Act does not require national standards, particularly in this case where Congress has used the vague term "continued absence" and deferred to HEW for 35

years in allowing the States to set their own definitions.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Linderman.

Miss Massey, you acted at the request of the Court and by appointment of the Court in this case.

MISS MASSEY: That's right.

MR. CHIEF JUSTICE BURGER: And we wish to thank you for your assistance, of course, to the class you're representing and your assistance to the Court.

MISS MASSEY: Thank you.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 3:07 o'clock, p.m., the case was submitted.]

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