In the

Supreme Court of the United States

LAVERN CARTER, et al.,
Appellants,
v.
WAYNE STANTON, et al.,
Appellees.

No. 70-5082

Washington, D. C.
November 8, 1971

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LAVERNE CARTER, et al., Appellants, v. WAYNE STANTON, et al., Appellees.	No. 70-5082

Washington, D. C.,

Monday, November 8, 1971.

The above-entitled matter came on for argument at 2:09 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
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

JON D. NOLAND, ESQ., 1313 Merchants Bank Building, Indianapolis, Indiana 46204, for the Appellants.

MARK PEDEN, ESQ., Deputy Attorney General of Indiana, Indianapolis, Indiana, for Appellee Sterrett.

ROBERT W. GEDDES, ESQ., Smith and Jones, 2470 Indiana National Bank Tower, Indianapolis, Indiana 46204, for Appellee Stanton.

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 in No. 5082, Carter against Stanton.

Mr. Noland, you may proceed.

ORAL ARGUMENT OF JON D. NOLAND, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This case is here on direct appeal from a judgment of a three-judge District Court for the Southern District of Indiana, which dismissed appellants' complaint for failure of federal jurisdiction.

The issues involved are jurisdictional questions pertaining both to the jurisdiction of this Court to hear the appeal under Section 1253 of the Judicial Code and to the jurisdiction of the three-judge district court.

The plaintiffs in this action were mothers of dependent children who, at the time of filing their complaint in the district court, had been denied either the right to file an application for Aid to Families with Dependent Children or had been denied assistance under that program.

The jurisdiction below was founded on Sections 1343 (3) and (4) of the United States Code, and the action was brought under Section 1 of the Civil Rights Act of 1871.

Plaintiffs brought the action on their own behalf and

as a class action on behalf of other mothers similarly situated.

The Social Security Act defines a dependent child as a needy child who has been deprived of parental care or support by reason of the continued absence from the home of a parent.

Plaintiffs allege that they were entitled to assistance under this provision because their husbands and the fathers of their children had deserted the home.

Plaintiffs also alleged in their complaint that aid under this provision was denied pursuant to Indiana Regulation 2-402(b), which is set forth at the bottom of page 5 of Appellants Brief. This regulation states:

"When the continued absence is due to desertion or separation, the absence shall have been continuous for a period of at least six months prior to the date of application for assistance ... except that under exceptional circumstances of need and where it is determined that the absence of a parent is actual and bona fide an application may be filed and a child may be considered immediately eligible upon a special finding of the county department of ... welfare ..."

A three-judge court was convened to hear the plaintiffs' allegations that this regulation was not only unconstitutional but was also contrary to the provisions of the Social Security Act.

Q Is this a class action?

MR. NOLAND: Yes, it was brought as a class action, Your Honor.

Q The class being parents whose spouses had not been absent for six months or more?

MR. NOLAND: That is right. Mothers who had been denied welfare benefits under this regulation because the husbands had not been away from the home for a period of six months.

Following the convening of the three-judge court, each of the two appellees, the county department of public welfare and the State department of public welfare, filed motions to dismiss the complaint. These motions were based primarily upon two grounds: one, a failure on the part of the plaintiffs to exhaust their State administrative remedies; and, secondly, the failure of the complaint to raise substantial constitutional questions.

The three-judge panel then convened a combined hearing, both on the motions to dismiss and on the merits of the case. Evidence was heard from approximately 16 witnesses, and at that point the court adjourned the hearing and granted the motions to dismiss.

The court's entry appears at page 210 of the Appendix, and on page 212 of the entry, the entry demonstrates that the decision of the court was based (1) upon the court's finding that each of the plaintiffs had failed to exhaust her State

administrative remedies; and, secondly, the court held: We have examined the pleadings before us and find no substantial federal question involved, nor do we find federal jurisdiction under 28 U.S.C. Sections 1343(3) and (4).

It is apparent to the appellants from this entry that the district court resolved none of the conflicts in testimony which became evident during the course of the hearing. Rather, it made its sole finding that the plaintiffs had failed to exhaust State administrative remedies and then, on the basis of the pleadings, and solely on the basis of the pleadings, it found that no substantial federal questions were presented for decision.

Before turning to the correctness of the decision of the district court, the appellee, the State department of public welfare, has raised a threshold question in this case pertaining to this Court's jurisdiction under Section 1253 of the Judicial Code. As we understand the argument, the appellee's contention is that in failing to find substantial federal questions the three-judge panel, in effect, dissolved itself, and that therefore the final entry should be construed as having been the decision of a single district judge.

In support of that position, the appellee relies primarily upon two per curiam decisions of this Court, Mengelkoch vs. Wilson -- Mengelkoch vs. Industrial Welfare Commission and Wilson vs. Port Lavaca.

Without repeating all of the argument set forth in Appellants Reply Brief, we believe that this case is significantly different from those decisions, in that here there was no express finding by the three-judge panel that it had been improperly convened. The final decision, in fact, was entered by all three judges.

In addition, it is apparent from the entry that, in large part, the decision of the district court was based upon a failure to exhaust State administrative remedies. And as we read this Court's decision in Idlewild Liquor Corporation vs. Epstein, that is a consideration which could be properly made only by the three-judge court and not by a single district judge.

Furthermore, the court here convened a hearing on the merits as well as on the motion to dismiss, and took extensive evidence from approximately 16 witnesses. Again we submit that this is a procedure which could be followed only by the three-judge court.

Q Couldn't that also mean that having heard 16 witnesses, conceivably they considered that there was no problem for a three-judge court? I'm not suggesting it was, but could that not also be an explanation?

MR. NOLAND: It's certainly conceivable, Mr. Chief Justice, that the three-judge panel could have heard witnesses and decided on the basis of the testimony adduced that the

complaint failed to raise substantial constitutional questions and dissolved itself, and then left the final judgment for a single district judge.

By not doing so, we believe the district court here recognized the fact that it was not making a determination within the meaning of, for example, Ex parte Poresky, that the complaint failed to raise substantial constitutional questions; but made that decision on the basis of a finding of a failure to exhaust State administrative remedies.

We submit that what has happened here is the district court has taken this Court's decision in King vs. Smith and turned the formula around and said, in this case substantial constitutional questions are not raised because there was a failure to exhaust State administrative remedies.

And we submit that that is a determination which could be made only by the three-judge court.

In support of appellants' position on this point, we believe the recent decision of this Court, on October 12th of this year, in the case of Hicks vs. Pleasure House, Inc., is instructive. For in that decision the Court characterized the Wilson decision and the Mengelkoch decision as holding that an appeal may lie to a court of appeals from certain action of a single district judge in a case required to be heard by three judges; and again here we have no action of a single district judge, but a final appealable judgment entered by the

three-judge court.

Q Well, what if the three-judge court is convened and they examine the pleadings and then dismiss and say that the constitutional issues in this case are frivolous?

MR. NOLAND: We believe that this Court has jurisdiction over that direct appeal, Your Honor.

Q You say that that's appealable here?

MR. NOLAND: As we understand the decisions of this Court, following Wilson and Mengelkoch, there are four decisions cited in Appellants Reply Brief in which that procedure was followed and in which this Court took jurisdiction on direct appeal.

Q But there are also cases where the three judges found that there wasn't a substantial federal question, dissolved itself, and then one judge rendered opinion, all on the same day.

MR. NOLAND: That is the Mengelkoch case, Mr. Justice Marshall.

Q Well, I was thinking of another one, but I mean that was not -- that one was a single-judge action.

MR. NOLAND: The three-judge court found --

Q Dissolved itself.

MR. NOLAND: Dissolved itself, and final judgment was rendered by a single district judge.

Q And all joined in the same proceeding.

MR. NOLAND: That is correct.

Turning now to the precise nature of the attacks on the regulation below, appellants have attacked the regulation at the bottom of page 5 of their brief, both on constitutional and statutory grounds. Two attacks are made, on the basis that the regulation is unconstitutional on its face.

The first attack relates to the requirement that where the separation has been for a period of less than six months, exceptional circumstances of need must be shown in order to secure a waiver.

We see no rational basis for saying that if the separation had been for less than six months, a child must be exceptionally needy; while if the separation has been for more than six months, mere need is sufficient.

Therefore, we argued below that this particular provision of the regulation constituted a denial of equal protection under the Fourteenth Amendment.

We do not believe that this question is rendered insubstantial or frivolous by the Court's decision in Dandridge vs. Williams. We have an entirely different factual situation, a different type regulation in this case, a regulation under which the appellants and other applicants have been denied all aid. We do not have here a maximum-grant type regulation where the families are already receiving some type of assistance, and a maximum level is established.

Secondly, the appellants have attacked the regulation on its face as granting a standardless and arbitrary discretion to the Administrator.

As pointed out, in order to secure a waiver of the six-month requirement, a special finding must be made by the county department of public welfare.

Two of the plaintiffs in this case alleged in the complaint that no investigation had been made into their circumstances, upon which such a special finding could be based.

On this basis we believe the Administrator has discretion as to whether to conduct an investigation in any particular case, a discretion which is not guided by any standard.

Furthermore, where there is a failure to conduct an investigation, the regulation in effect enacts a conclusive presumption that an absence for less than six months cannot be a continuous absence. In these particular cases, therefore, we have a rigid six-month waiting period, and the same type of regulation or statute which was involved in the Damico case and in the Minnesota case of Doe vs. Hursh.

Q What were the periods in those cases?

MR. NOLAND: Both of those periods were three-month periods, Your Honor.

Q Both were shorter than six months, then.

MR. NOLAND: Both statutes were struck down as being

contrary to the Social Security Act, although each court conceded that the constitutional claims raised were substantial.

Q You're not claiming that any time period would necessarily be violative of the statute or the Constitution, would you?

MR. NOLAND: We believe that any time period --

Q I mean, conceivably, a man could leave in the morning at 7:30 and three or four hours later his wife could go in and apply for assistance, saying, "My husband left this morning and, for all I know, he's not going to come back."

MR. NOLAND: That is correct, Your Honor. Obviously situations will vary. In some cases the Administrator may be able to reach a determination that an absence is continued two or three days after the husband departs. In other cases it may take longer to arrive at that determination. We do believe --

Q Are you suggesting that 30 days would be unconstitutional?

MR. NOLAND: I am suggesting -- no, Your Honor, that it would not be unconstitutional, but anything above that would be a violation of the Social Security Act.

Q At least so far as it were an almost conclusive presumption?

MR. NOLAND: That is correct.

Q Is that what you mean?

MR. NOLAND: That is correct.

I think our primary problem with this regulation is relating the exceptional circumstances of need requirement to a durational requirement. We can see no rational basis for saying that even though it may be difficult to arrive at a determination of continued absence, that a waiver will be granted only if exceptional circumstances of need are present. We believe that violates the Social Security Act, which speaks of needy children and not exceptionally needy children.

In addition, the appellants have alleged in their complaint that there is a Statewide policy and practice under this regulation of requiring applicants to file for legal separation or divorce in order to secure a waiver of the six-month period.

The testimony before the three-judge panel on this question was directly conflicting. There was evidence on behalf of plaintiff that such a practice had been engaged in, at least in their cases, and in other cases. The Administrators, on the other hand, denied the existence of any such practice.

As we think is apparent from the court's entry, the court made no fact-finding as to whether this practice did or did not exist. It apparently assumed the existence of this practice and yet, nevertheless, found that the constitutional issues raised were insubstantial.

Appellants urge that such practice, if it exists as alleged, constitutes denial of the First Amendment, and the

equal protection clause of the Fourteenth Amendment.

Turning now to the question of exhaustion of administrative remedies, we think this is the primary basis for the decision of the district court. As appellants have read the prior decisions of this Court, there is an absolute exemption from any exhaustion requirement for actions brought under the Civil Rights Act.

This has been established both by Damico vs. California and King vs. Smith.

We submit that there is important policy justification for such an exemption.

Cases such as this under the Civil Rights Act, and particularly welfare cases, involve essentially or primarily questions of federal law, whether it be constitutional law or statutory law.

We see no need, therefore, for the State Administrators to consider State law, to make any fact-finding based on the record before an administrative agency, or to apply their expertise or discretion. The regulation here is being attacked both on its face and as applied, and we believe these issues can properly be determined by a federal court without exhaustion.

In addition, if exhaustion is to be required in certain cases, we submit that this is not such a case, because the administrative remedy is inadequate. There is no identical

administrative remedy in Indiana. That remedy is solely individual in nature. There is no class action procedure before the administrative agency.

In addition, an administrative appeal does not result in any decision of general applicability throughout the State.

Now, the appellee, the State department in this case, has devoted a large portion of its brief to arguing that full discovery rights are available in administrative proceedings in Indiana. The appellants do not dispute that proposition as a matter of statute book law. However, the very record in this case demonstrates that any pursuit of discovery before the administrative agency would be entirely futile.

The plaintiffs below filed both subpoenas and motions to produce, to obtain copies of case files and other documents pertaining to the application of the challenged regulation. Both the State department and the county department resisted any motion to produce on the basis that the records requested were confidential in nature. And, in a letter to the court and to counsel, dated November 5, 1970, the State welfare department stated: "I specifically request that you obtain a court order to require Mr. Sterrett to produce these files at the time of his proposed examination."

The county welfare department said essentially the same thing in an affidavit filed in support of their objection.

That it is essential in a case such as this that the plaintiffs have access to the documents in order to establish their constitutional allegations that this regulation has been applied in such a manner as to be contrary to the equal protection clause.

Yet the appellees have told us in this very case that they will require a court order in order to produce the documents requested. Appellants know of no procedure in Indiana whereby a court order can be obtained without filing a lawsuit. Therefore, we submit, we're back right where we started from: the appellants would receive none of the documents in an administrative proceeding and would be required to file the very lawsuit which is now before Your Honors.

An additional basis for the decision of the district court appears to have been a reliance upon Mr. Justice Stone's distinction made in Hague vs. C.I.O., that no jurisdiction lies under the Civil Rights Act where the complaint raises only questions relating to property rights and not to personal rights incapable of valuation.

We believe that the prior decisions of this Court have satisfied this question, that jurisdiction does lie under Section 1343(3), where there is a denial of welfare benefits, since it has been recognized that such a denial does involve important aspects of personal liberty.

Therefore, we urge that the district court erred in

dismissing the complaint on this ground.

Q Does your -- I can understand your argument about three-judge court jurisdiction, but how about federal jurisdiction at all? How about jurisdiction of the federal courts? Are you under 1983, is that what you're --

MR. NOLAND: Yes, the action was brought under Section 1983.

Q And 1343(4)?

MR. NOLAND: 1343(3) and (4), both, were invoked to support the jurisdiction.

Q And in terms of federal jurisdiction at all, the other side simply claims 1983 doesn't reach this kind of suit?

MR. NOLAND: That claim was made in brief filed before the district court, Your Honor, primarily upon the basis of the case of McCall vs. Shapiro.

Q Well, the lower court ruled that it didn't have jurisdiction under 1343(3) or (4), and I wonder what the basis for that three-judge court's ruling was.

MR. NOLAND: We find the entry to be rather opaque on that ground, Your Honor.

Q Could it have been the Hague finding?

MR. NOLAND: As far as we are able to determine, that is the only ground it could have been, Mr. Justice Brennan. The Hague issue was briefed to the court.

Q It's in the Second Circuit cases that followed,

then.

MR. NOLAND: McCall vs. Shapiro was the primary case relied upon by the defendants below. At that time the Second Circuit --

Q Is that in the Second Circuit?

MR. NOLAND: That is a Second Circuit case which took --

Q Was that here?

MR. NOLAND: I do not believe so.

Q It was not?

MR. NOLAND: The Second Circuit in that case took a very restrictive position in applying the Hague vs. C.I.O. distinction.

Since then, for example in the Eisen case, Mr. Justice Friendly has recognized that welfare actions do involve important aspects of personal liberty --

Q That was in dissent, wasn't it?

MR. NOLAND: No, sir.

Q Judge Friendly was not in dissent?

MR. NOLAND: I do not believe so.

Q What's that citation?

MR. NOLAND: That's the Eisen case, Eisen vs. Eastman, in 421 Fed 2d. Certiorari was denied in 400 U.S.

Q Thank you.

MR. NOLAND: In addition, another three-judge panel in the Second Circuit, in Johnson vs. Harder, in 438 Fed 2d,

did recognize that jurisdiction does ex ist under Section 1343 in welfare actions.

Q Which one was that?

MR. NOLAND: That was Johnson vs. Hardex, Mr. Justice Brennan, in 438 Fed 2d.

Q That's also in the Second. You have them both cited?

MR. NOLAND: Yes, sir.

We see no other basis for the district court's decision on the 1343 point other than the Hague vs. C.I.O. distinction.

On these grounds, therefore, we believe that this Court properly has jurisdiction over this appeal under Section 1253, that the complaint did raise substantial constitutional questions which were neither frivolous nor patently absurd on the basis of this Court's prior decisions, that the plaintiffs were not required to exhaust their State administrative remedies and that the district court had jurisdiction under Section 1343.

For these reasons we urge that the decision of the lower court be reversed and that the case be remanded for a full trial on the merits.

I would like to reserve any remaining time for rebuttal, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Peden.

ORAL ARGUMENT OF MARK PEDEN, ESQ.,

ON BEHALF OF APPELLEE STERRETT

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

We believe that this appeal belongs in the Seventh Circuit. What happened in this case was that the single judge convened a three-judge panel, who heard the case, and dismissed it entirely. There was nothing remaining to be done by a single judge in this case.

We rely on the two cases discussed by Mr. Noland, Wilson vs. City of Port Lavaca, and Mengelkoch vs. Industrial Commission.

In those two cases the three-judge panel dissolved the case and sent it back to the single -- dissolved their own panel and sent it back to the single district judge for resolution. In those cases the single judge dismissed the case and this Court held that the appeal properly went to the Seventh Circuit -- or to the Circuit Court of Appeals.

Q Well, are you arguing that this, then, was in fact -- the action was legally the action of a single judge even though three purported to take part in it?

MR. PEDEN: Yes, sir. It's our opinion that the --

Q How would you identify which one of those three judges, then, was the single judge?

I'm not sure that's crucial here.

MR. PEDEN: We wouldn't be able to. The fact that we are going on here is that to remand this back to a single district judge would be a pedantic and useless act, a pointless formality, where there's nothing left to be done by a single judge. The three-judge court has dismissed the case in its entirety.

Q Well, that was a judgment, was it not, by the three-judge court, on the merits of the case?

MR. PEDEN: It was a judgment that they had no jurisdiction.

Q Yes, that's on the merits.

MR. PEDEN: And where a three-judge court dismisses for want of jurisdiction, the appeals court --

Q Well, they may have been correct, and they may have been incorrect. But, in any event, it was a judgment on the merits of the complaint, was it not? By the three-judge court.

MR. PEDEN: Yes, as was the judgment in Wilson and Mengelkoch, and more recently in --

Q In that case there was a remand to the single-judge court; that is the difference.

MR. PEDEN: That's a factual difference.

Q You say it's just a technical difference?

MR. PEDEN: I think it's a difference without any consequence, and to make the jurisdiction of this Court under

Section 1253 depend on a simple formality is gratuitous --

Q Well, Congress may have done exactly that. It's not for us to make the jurisdiction, Congress did it. It said -- gave us jurisdiction of direct appeal from an action of a three-judge court.

MR. PEDEN: Yes, it did.

Q Certain actions of a three-judge court.

MR. PEDEN: And that arose because in 1875, after federal courts were given jurisdiction over this type of a case, were given the power to enjoin State statutes, federal judges quite freely exercised this injunctive power; and public resentment reached quite a peak, especially after the decision of this Court in Ex parte Young in 1908, where the powers of federal judges to enjoin State regulatory schemes was upheld. The injunctions were often granted simply on a basis of affidavits in ex parte proceedings.

The public resentment was such that Congress in 1910 passed the three-judge Act, so that it now requires three judges before a State statute can be struck down. And they further protected the State interests by providing that any appeal should go direct to the Supreme Court. So that the whole impetus for the three-judge Act was to protect State interests from interference by the injunctive power of federal courts.

It was not to protect parties such as the plaintiff

in this case.

Q Well, they gave a direct appeal to this Court from a judgment of a three-judge court, either granting or denying an injunction, didn't they?

MR. PEDEN: Yes, an order granting or denying. It is mutual in that sense. But we submit that the thrust of the Act did not encompass situations of this type.

Q Suppose the order had said the motion of the defendant to dismiss this complaint is hereby granted. Would that be all right?

And signed by the three judges.

MR. PEDEN: I state, Your Honor, that that would be close to what happened here.

Q Well, would that be all right?

The only thing I left out was "for failure of a federal jurisdiction"; that's all I've left out. But you apply for an injunction and they grant, dismiss your complaint, they thereby deny your injunction --

MR. PEDEN: Well, --

Q -- and you say that that is not grounds for appeal to this Court?

MR. PEDEN: Your Honor, in a recent case, Goldstein vs. Cox, this Court held that where a motion for summary judgment was denied, the plaintiff's motion for summary judgment was denied, even though they had asked for an injunction, the

appeal still lay to the court of appeals. That was Goldstein vs. Cox.

Q Well, that's not this one. They had a hearing with how many witnesses? 16 witnesses. That's not summary judgment.

MR. PEDEN: Well, the hearing was held for the purpose of determining jurisdiction.

Q And that was the case, wasn't it?

MR. PEDEN: Yes, they determined they did not have jurisdiction, and they --

Q No, they said the complaint is dismissed for failure of federal jurisdiction. Why isn't that an effective order of a three-judge court?

MR. PEDEN: Why isn't the effective --?

Q Why isn't that just as effective as granting an injunction and find the jurisdiction and granting an injunction?

MR. PEDEN: Well, Section --

Q What is the difference between finding jurisdiction and granting an injunction, on the one hand, and not finding jurisdiction and not granting an injunction, or denying an injunction, on the other hand? What's the difference?

MR. PEDEN: The practical difference is not that great. But under Section 1253, that's a technical enactment, and it's to be construed very narrowly. And this Court has said that several times. If the plaintiff cannot show that the

action that the court below took in regard to his case was such as to constitute an order denying or granting injunctive relief, and come within that language very literally, then he's out of the ballpark as far as 1253 goes. Even though it may be that he's asked for an injunction and he hasn't gotten it. So the practical effect is that he's lacking his injunction. But he has to come within the literal strictures of 1253.

Q Oh, you mean the court has to say: the motion for the defendant to dismiss the complaint for failure of federal jurisdiction is hereby granted and the application for the injunction is denied?

Would that be okay?

MR. PEDEN: If the thrust of the decision was the decision on the merits of the case, appeal would go to the Supreme Court under Section 1253.

Q Well, suppose he said: the injunction for -- the motion for an injunction is denied because of failure of federal jurisdiction? Would that be all right?

Aren't you just quibbling about words?

MR. PEDEN: Words are the essence of 1253 jurisdiction. I refer back to Hague.

Q Well, perhaps we're spending too much time on it, counsel, but it seems at least that Judge Kerner thought that it was important enough to have three signatures on the disposing order, because he authorized one of the other two

judges to sign for him. So at least at that stage it would look as though the judges were thinking that they were a three-judge court, and not that one of them could dispose of the case.

But maybe you'd better get along to the merits of your argument.

MR. PEDEN: We believe that the Indiana six-month requirement is not violative of equal protection because it's founded in rationality. In the previous case the court had difficulty in distinguishing between the college student and the vocational student, but there can be no doubt that under a six-month requirement the standard of the continued absence is going to be a lot more clear the longer the parent is absent from the house.

The six-month requirement is founded in the common-sense belief that when a father leaves a family it will be very likely that the standard of need, soon after the father leaves, is not as great as it will be later.

The regulation also contains a clause which states that in cases of exceptional circumstances, aid may be available. This clause means that when -- since the standard -- the evidence below indicated that the standard of need that would qualify a family for aid after six months was the same as used by welfare departments in a determination of who met exceptional circumstances before six months. The basis of the ruling is that when a man leaves the house there will be

some money, or the family will be able to at least subsist for a length of time, and that it's necessary, in order to prevent fraud, in order to insure that the continued absence is real.

Now, it's our position that this doesn't violate equal protection, because, under the Dandridge case, the Court noted that the test of such a regulation is whether or not it's reasonable, and whether or not it's free from invidious discrimination.

The AFDC program was described as a program of cooperative federalism. The States have leeway, and under the statutory argument, aside from the equal protection argument, it's our position that 406, as a definition, is not mandatory and binding upon the States. This was already brought out in the last case to quite a bit of extent.

We feel that the requirements that are binding upon the States, as suggested by the Solicitor General, are in Section 402. These requirements have been saddled with effective dates, whereby, in order to meet these requirements, the States have to comply by a certain date. Whereas Section 406, the definitional section, there are no effective dates.

This envisages, then, that the real requirements of the Act, the ones which would require the States to perhaps enact legislation that will enable them to meet the requirements, that Section 402 is the section which actually establishes binding requirements on the State. The legislative

history of this Act fully supports this. All the remarks in the Senate Reports, cited by the Solicitor General's brief in this case, amply supports the view that Section 406 estsblishes the outer boundaries of State participation, for which federal funding will be available. And that Section 402 is the only section of the Act which is mandatory upon the States.

Section 402(b) states that the Secretary will approve any plan which complies with that section, meaning 402, and the requirements in 402(a). It does not say that the Secretary will refuse to approve plans because they fail to meet the definitional requirements of Section 406.

So we submit that on the basis of the Dandridge case there is no conflict with equal protection under this six-month rule, and that upon the basis of the legislative background, and the internal consistency of the Social Security Act, there is no conflict with that Act either.

Thank you.

The rest of the time will be taken by my partner, Mr. Geddes.

MR. JUSTICE DOUGLAS: Mr. Geddes.

ORAL ARGUMENT OF ROBERT W. GEDDES, ESQ.,

ON BEHALF OF APPELLEE STANTON

MR. GEDDES: Mr. Justice Douglas, and may it please the Court:

With the limited time, I'd like to make it perfectly

clear to the Court that appellee Wayne Stanton, his position is that we shouldn't be in the federal court, period.

Not whether or not we should be in this Court so much, but whether or not we should be in the federal court, if the doctrine of abstention or the doctrine of exhaustion of administrative remedies has any meaning under this type of case.

With respect to the merits of this case, it's fully covered in our briefs, it's fully covered with case law. There were charges in there that the applicants or the claimants says we could not file an application unless we sued for divorce, unless we file for legal separation. The evidence is clear, in fact two of the claimants alone received benefits less than three months after their husbands separated, and they never filed for divorce.

There was a witness Smith, she testified that she filed her application immediately and within a month she received aid; she never filed for divorce.

There was a witness Blankenbackler, she received aid in two months after separation, and never filed for divorce.

So, as far as this six-month requirement under Indiana regulation, all the six months is is a guideline; in other words, after six months there's a conclusive presumption. But if the need is there, and the absence is actual and bona fide, the regulation says that the person can receive aid immediately. That distinguishes this case from the Damico and

all the others, where it was a three-month situation, sue or starve.

Q Now, did the district court hold what you've just told us?

MR. GEDDES: The district court held, Your Honor, Mr. Justice, that there was no substantial federal question, and the claimants did not exhaust their administrative remedies, and therefore they said there was no federal jurisdiction.

Q They held that on the pleadings there was no substantial federal question.

MR. GEDDES: Yes, Your Honor, that is correct.

Q Now, certainly the pleadings, the complaint alleged the existence of this six-month rule, did it not?

MR. GEDDES: The pleadings alleged the regulation which says six months or --

Q Yes.

MR. GEDDES: -- unless there's an exceptional circumstance.

Q You mean in the absence of exceptional circumstances?

MR. GEDDES: That is correct, Your Honor.

What the court did, at least in my opinion, they had the pleadings in front of them, they had the motion to dismiss and they heard 16 witnesses to determine whether the court should take jurisdiction to hear the case -- fully hear the case

on the merits. There was about ten hours of testimony involved. And after concluding that, and after hearing the evidence, then they made their conclusion: no substantial federal question on the pleadings, and the parties failed to exhaust administrative remedies.

But this -- excuse me, Your Honor.

Q They didn't refer, however, to the evidence, except insofar as the failure to exhaust administrative remedies?

MR. GEDDES: That is correct, Mr. Justice.

Q They didn't in any way decide that this alleged six-month rule really didn't exist, or I mean really wasn't an arbitrary or conclusive presumption, did they?

MR. GEDDES: No, Your Honor.

Q They didn't decide that.

MR. GEDDES: No, Mr. Justice, they did not.

Q All right.

MR. GEDDES: This case is the only case I could find and the only case I know of where this Court is faced now with the decision to make with respect to administrative remedies.

Now, the appellents have cited King, they have cited Damico, they have cited Houghton, McNeese, but each of those cases, if you look at the merits of those cases, the administrative remedy involved there was either not adequate, it was not speedy, or it would have been futile.

For example, in McNeese, I believe the parties would have to go back and get -- it was a segregation case, they would have to get ten percent of the vote, or so many people, and then --

Q But did what the court said in McNeese turn on those facts?

MR. GEDDES: No, Your Honor. They just said that there was -- that under 1983 you did not have to exhaust administrative remedies.

What has been causing confusion with the federal courts is whether this -- the confusion is if you make a claim under 1983, does that give you an absolute right to bypass all administrative remedies; and that's really the question before this Court today.

Q But I gather, for what it's worth, what McNeese said indicated that that was the case, that you need not if you had a 1983 to exhaust State administrative remedies; was it not?

MR. GEDDES: That is correct, Mr. Justice.

Q So, really, I gather what you're suggesting is that we ought to review McNeese?

MR. GEDDES: No. McNeese -- McNeese did say this, though, they did say in there, and I forget the exact words, but they said more or less that if the administrative remedy there is futile or if it wouldn't do any good, you don't have

to exhaust administrative remedies.

Q Meaning that the implication was that if it was an adequate administrative review, then you did have to?

MR. GEDDES: That is my opinion, Your Honor, and our opinion.

Q What specific administrative review would allow you to raise the question of the unconstitutionality of that statute as being in violation of the equal protection clause of the Fourteenth Amendment?

MR. GEDDES: All right, Your Honor, in answer to that question: The administrative procedure set up in Indiana has a number of means under which you can appeal. Administratively you --

Q Where can he raise that question and have it decided by a competent body?

MR. GEDDES: Well, it says -- one of the means -- it says if the applicant believes his civil or constitutional rights have been violated, he can appeal administratively; and under Indiana --

Q Where does he first run into a lawyer to decide his question?

MR. GEDDES: All right. The Administrative Procedure Act in Indiana provides that he may have anybody represent him --

Q No, no. I mean, who decides it?

MR. GEDDES: Oh, who decides this? This is a welfare administrator, the person --

Q Is he a lawyer?

MR. GEDDES: No, he is not.

Q Well, how can he decide the constitutionality of an Indiana statute?

MR. GEDDES: He can make a finding --

Q That it's constitutional?

MR. GEDDES: He can make a finding whether --

Q Could he make a finding that it's unconstitutional?

MR. GEDDES: Yes, he can.

Q How? Under his oath.

MR. GEDDES: Pardon?

Q Doesn't he take an oath to support the laws of Indiana?

MR. GEDDES: I don't know what oath he takes, Mr. Justice, but under the regulation if the person believes his constitutional or civil rights have been violated, he can appeal administratively.

Now, if the Indiana regulation was a flat six-month rule, where there was no leeway for aid immediately, then I would say that any decision --

Q Well, he doesn't raise that; he just says the statute is unconstitutional as in violation of the Fourteenth Amendment.

Now, what administrative agency in Indiana is capable of deciding that?

MR. GEDDES: The administrative agency cannot make that decision.

Q Well, isn't that the one point he's asking for in this case?

MR. GEDDES: Yes, he is. But when he filed his complaint with the federal court on that, the federal court, as I interpret the entry, says there is not a substantial constitutional question raised by this regulation and therefore the parties must exhaust their available or administrative remedies.

Q Well, that's what we're passing on now, aren't we?

MR. GEDDES: That is correct, Mr. Justice.

It's our position that what they have alleged, the applicants alleged here, there's an entire administrative process established in Indiana to handle it. For example, one of them, if the application is denied, you can administratively appeal it. If it's not acted upon in a reasonable time, you can administratively appeal it. If your aid is revoked or modified, you can administratively appeal it.

If you go to a caseworker and he refuses to accept your application, you can administratively appeal it.

Q Is that decision subject to a court review?

MR. GEDDES: The first step, Mr. Justice, is the State department of public welfare, --

Q Yes.

MR. GEDDES: -- and if the party is still dissatisfied, then it's reviewed by the State board of public welfare upon his request. And then the applicant can go into either the State or the federal court, depending on his own choice.

Q How long does that --

Q Which court? Which court? The State court?

MR. GEDDES: Either; of his own choice.

Q Well, if he brings a new action, is it de novo, is it a review on an administrative record?

MR. GEDDES: It's our opinion, Your Honor, with the available discovery, the entire record can be brought into the federal court or the State court.

Q I know, but would the State court be limited to the administrative record, or would it be de novo?

MR. GEDDES: No, it would be de novo; a new trial.

Q And similarly in the federal court?

MR. GEDDES: That is correct, Mr. Justice.

Q Well, that doesn't sound like much of an administrative proceeding, then, does it? If you really aren't reviewing the administrative decision on the administrative record.

MR. GEDDES: It could be both, Mr. Justice. In

Indiana we adopt the federal Rules of Civil Procedure on Discovery. So you have your request for admission, your depositions, your interrogatories, everything. You could obtain your entire record administratively by the way which would only take five weeks; and with the request for admissions alone you would establish a record which the federal court could review and possibly avoid a two, three, four-week trial.

Q What's the history of the time it takes to complete the administrative review you've described for us?

MR. GEDDES: It takes three weeks -- two to three weeks to have a hearing, once you've asked for appeal. And then there's two weeks for a decision.

Now, one important thing about this administrative review is once the applicant files his appeal or asks for appeal, there's nothing formal about it, it's all informal, the county is mandated -- mandated -- to review the situation. In other words, if you've got a disgruntled welfare applicant who says "they won't accept my application", which they said here, but which was incorrect; if that happens, all he has to do is informally ask for appeal and the county has to review it.

Q At that time wouldn't it be moot? Wouldn't it take six months to get there?

MR. GEDDES: No. If the --

Q I thought you said five months a minute ago.

MR. GEDDES: No. I'm sorry, Mr. Justice, --

Q Well, when do you exhaust your administrative remedies, how long does that take?

MR. GEDDES: Five weeks.

Q How long does it take to exhaust all the way up through that -- two State boards?

MR. GEDDES: No. Five weeks entirely, from the -- you go to the State board of public welfare -- you go to the State first; that takes five weeks, and then --

Q You mean you can get a complaint all the way through the Department and to the final agency in the State of Indiana in five weeks?

MR. GEDDES: Yes, Mr. Justice, that is correct.

Q I've never seen a State like that before in my life!

[Laughter.]

MR. GEDDES: Mr. Justice -- and I don't have the pages right in the appellant's brief, in their Appendix, on the appeal section under the Indiana procedure, you will see --

Q Well, I'm not saying it's possible, but I'm saying does it happen?

MR. GEDDES: It does happen, and it's been mandated to happen.

Q Five weeks!

MR. GEDDES: Five weeks, that is correct, Mr. Justice.

This was a lawsuit of the lawyers, not the applicants. Some of the applicants testified in court that when they went to the lawyers, or the lawyers called them, they thought they were administratively appealing. They got involved in a federal lawsuit which took a year, practically, to be heard just on this question. Where they could administratively had that out of the way in five weeks.

Q Well, doesn't the standard change after six months as to whether a person can get relief?

MR. GEDDES: Yes, Mr. Justice.

Q From exceptional need to just need?

MR. GEDDES: Yes. The testimony shows --

Q Did any of the -- was there any application here for the emergency relief during the six months?

MR. GEDDES: There was. All the applicants --

Q Was there an attempt to show exceptional need?

MR. GEDDES: I don't understand your question, Mr. Justice.

Q Well, the statute permits, or the regulations permit relief within the six months, before the six months expires, in the case where there is extraordinary need.

MR. GEDDES: Yes, that is correct.

Q Was there any attempt here to get that kind of extraordinary relief?

MR. GEDDES: That is -- yes, there was.

Q And it was denied?

MR. GEDDES: No, it was granted. Dorothy Enoch, one of the claimants who said, "I couldn't get it waiting six months"; she received benefits in two months after her husband left the house.

Q But all of them didn't?

MR. GEDDES: No. Lucille Hall received it in a few months. Brenda Steele, who was one of the claimants, said -- she said, "I didn't even have any need problems; I was living with my folks." But this six months is only a conclusive presumption.

In other words, if the need is there, and the absence is actual and bona fide, you can get it immediately. And the evidence showed that.

Q Well, that would mean there isn't any -- really isn't any case for controversy here, if --

MR. GEDDES: That is correct, Mr. Justice.

Q -- if you're really saying that -- that's a rather strange way of writing a regulation, of putting in a regulation a requirement of six months' separation and then saying it doesn't mean anything.

MR. GEDDES: No. It's given the caseworker, you see, a conclusive presumption if it is over six months. In other words, continued absence, you've got to have a certain period of time; the question is how long. Is it a day, a week, a month,

or whatever.

Q But you still have to show need after six months, don't you?

MR. GEDDES: You still have to show need. And the evidence showed, and which we've pointed out in our brief, the testimony showed that the standard of need actually applied was the same if it was less than six months or over six months.

Q Right.

MR. GEDDES: So this equal protection argument is saying that you're depriving somebody less than six months, over six months, was completely refuted.

Q Well, that's the standard of need is the same, but it doesn't -- it's not the finding that there's only one parent is the same. You've already told us that after six months there's a conclusive presumption that one parent has left; before six months there is no such presumption.

MR. GEDDES: Before six months, if it's shown that it's actual, bona fide separation, and the need is there, immediately eligible. And that's all that the Social Security Act requires.

Q Well, maybe this doesn't -- what is involved here is perhaps not technically exhaustion of administrative remedies, but rather your claim that in the actual administration of this rule it doesn't mean what it seems to mean. Is that what you're saying?

That in the actual administration of welfare in Indiana, or in Marion County, Indiana, that this six-month rule is not administered so as to make it mean what it seems to mean. Is that what you're telling us?

MR. GEDDES: Possibly that could be correct.

Q And therefore, had they proceeded to seek relief under the administrative procedures available they would have found that this rule was no barrier. Is that it?

MR. GEDDES: That is correct, Mr. Justice.

Here we have the situation where it's a built-in administrative procedure, and if you can bypass it here, and under any 1983 claim, then what you're having happen is the federal courts in reality are becoming the welfare administrators to review every welfare claim.

Q Is the evidence of 16 witnesses in the record here, do you know?

MR. GEDDES: Yes, there is; that is correct, Mr. Justice.

Q Well, are you suggesting -- these 16 witnesses, were they all welfare claimants?

MR. GEDDES: No. Part of the witnesses --

Q About how many?

MR. GEDDES: There were -- five, seven, eight, nine -- I believe there were nine witnesses for the claimants and the remaining -- or ten witnesses possibly, and the remaining

witnesses were --

Q And how many of them were deserted mothers?

MR. GEDDES: Counting the witnesses we put on there were 11.

Q And did each of them testify -- was there evidence from each of them, or some of them, that she in fact got the assistance after two months or one month, as you've been telling us?

MR. GEDDES: Seven of the witnesses who testified -- talking about who were deserted -- received aid, --

Q In less than six months?

MR. GEDDES: -- and I believe it was in less than six months. I know claimant Enoch --

Q Hall?

MR. GEDDES: I believe that is correct, Mr. Justice.

Q But didn't they come from some trustee or somebody?

MR. GEDDES: No. No. Before they received aid from the --

Q Oh, I thought --

MR. GEDDES: -- they were receiving interim benefits from the trustee. They were -- because in Indiana you can get immediate benefits from the trustee, as soon as you walk in.

Q Oh, I see.

MR. GEDDES: So you don't have situations with children.

Thank you, Mr. Justice.

MR. CHIEF JUSTICE BURGER: Mr. Noland, as long as we've gone over, we'll let you finish tonight. You have about six minutes left.

REBUTTAL ARGUMENT OF JON D. NOLAND, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. NOLAND: Yes, Your Honor.

Q How about this? Is that the fact?

MR. NOLAND: No, the fact is, Mr. Justice Brennan, that several of the witnesses did testify that they received aid within the six-month period. Two of the witnesses -- two of the claimants -- excuse me. One of the claimants or plaintiffs, and one witness were denied aid until the full expiration of the six-month period.

This is set forth on page 8 of appellants brief. The claimant Bowman filed four applications --

Q And this, I gather, is a class action?

MR. NOLAND: That is correct.

Q So I suppose your position is that if one of them -- the case as to one is that she was denied for six months, that gives you standing in the class action then.

MR. NOLAND: That would be our position, Your Honor.

Q And did she get -- did that one get aid after

six months?

MR. NOLAND: The plaintiff Bowman did receive aid after six months. The witness Luke was denied aid for six months and she began receiving assistance automatically upon the expiration of the six-month period.

Q In other words, if the administrative proceedings had not been completed in six months, then they're bound to get their payment?

MR. NOLAND: Unless circumstances have changed. One of the witnesses, for example, had found a job in the interim period and did not pursue it any further after the six-month period.

Q That was an eligibility question.

MR. NOLAND: That is correct.

With respect to the time requirement for the administrative proceedings, as brought out by Mr. Justice Marshall, the record is very sparse on this question. There is no doubt but what the statute and regulations require that hearings be handled very expeditiously.

However, the two-week period, even from the limited evidence in this record, is obviously not followed. On page 28 of the Appendix, for example, in response to an interrogatory, Mr. Sterrett, the State administrator, stated that an appeal was held on December 19, 1969, and the decision was released on April 9, 1970; substantially more than a two-week

period.

Similarly, the only witness who took an administrative review testified, at page 110 of the Appendix, that the decision was rendered by the State on December 29 -- or September 29, 1970, and the hearing was held on August 27, 1970. Again substantially more than two weeks.

Q What would happen if the statute said that there had to be a showing that the spouse had left without any idea of ever returning, period? Would there be anything wrong with that statute?

MR. NOLAND: If Congress desired to enact such a statute, we would find no quarrel with it. The point is --

Q But I do see some merit in the argument that this is really not six months, that if you go in there and say that "My husband left last night with a one-trip ticket to -- a one-way trip ticket to Moscow," she'd be eligible. That's what I understand is the State's position.

MR. NOLAND: I would think the State or the administrator would find that to be a continued absence.

Q Well, what's your problem now? Is it that you just object to showing it?

MR. NOLAND: No, Your Honor. We object to showing exceptional circumstances of need, which we believe constitutes a denial of equal protection and also contrary to the Social Security Act.

Q Is it really -- you have to show the need even after six months.

MR. NOLAND: That is correct. But you do not have to show --

Q So in other words --

MR. NOLAND: -- exceptional circumstances of need.

Q That's right. But that's where you are on that one --

MR. NOLAND: Whatever that requirement means, it certainly must mean more than plain need.

Q Yes. I understand.

MR. NOLAND: And we object to it on that ground.

Furthermore, with respect to the doctrine of exhaustion of administrative remedies, appellants would again urge that the administrative remedy in this case was not adequate. We heard talk again of discovery, and yet the record in this very case shows that any discovery effort at the administrative level would be futile because the State department has already told us that we must obtain a court order in order to obtain the documents requested.

If, as stated in Monroe vs. Pape, and the McNeese case, Section 1983 does truly constitute a remedy supplementary to any State remedy, then we believe that that must be construed as granting an exemption from exhaustion either of administrative or of State judicial remedies.

In addition, of course, there are important federal questions involved in this case. We're talking about essentially the federal program under the Social Security Act, and we're talking about challenges to the State regulation, as being invalid on its face and as applied; and we believe it is appropriate in a case of this nature for those decisions to be made by an impartial tribunal, and we see no need to exhaust State administrative remedies in such a case.

Thank you.

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

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:10 p.m., the case was submitted.]