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SUPREME COURT, U. S.

In the

Supreme Court of the United States

UNITED STATES,)
)
Appellant,)
)
vs.) No. 71-749
)
ROBERT WILLIAM KRAS,)

Washington, D. C.
October 18, 1972

Pages 1 thru 47

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UNITED STATES, Appellant	:	
v.	:	No. 71-749
ROBERT WILLIAM KRAS	:	

Washington, D.C.

Wednesday, October 18, 1972

The above-entitled matter came on for argument at 10:44 o'clock, a.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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

EDWARD R. KORMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. for the Appellant.

KALMAN FINKEL, ESQ., The Legal Aid Society, Civil Appeals Bureau, 267 West 17th Street, New York City, New York 10011, for the Appellee.

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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. 71-749, the United States against Kras.

Mr. Korman, you may proceed whenever you are ready.

ORAL ARGUMENT OF EDWARD R. KORMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KORMAN: Mr. Chief Justice. May it please the Court:

The United States appeals from a judgment of the District Court for the Eastern District of New York striking down as unconstitutional an act of Congress which required the payment of a $50 filing fee as a condition to a grant of a discharge in bankruptcy.

The District Court held that the statute and the orders in bankruptcy promulgated by this Court which provide that the filing fee may be paid out over a period of nine months -- up to nine months in installments after the filing of the petition -- were unconstitutional as applied to an assetless debtor who alleged that, due to his poverty, he was unable to promise to pay the filing fee, even in installments.

Although the District Court ordered that the discharge be granted, he indicated that the obligation to pay the $50 filing fee should survive the discharge and be paid when and if the petitioner in bankruptcy was able to afford it.

The District Court also held that the Federal In Forma Pauperis Statute, 28 United States Code 1915(a) was inapplicable here since Congress plainly manifested its intent to abolish In Forma Pauperis proceedings in bankruptcy and substitute in its place a system of installment payments.

The United States intervened in the District Court to defend the constitutionality of the statute and the District Court granted a stay of the order of discharge pending the resolution of this appeal.

The briefs and the opinions below understandably dwell on what it is that this Petitioner in bankruptcy has been deprived of as the result of his inability to pay the $50 filing fee, but I think it is important that the issues -- I think that the issues raised here can be seen in their proper perspective only by first examining what it is that Congress has given an indigent, assetless Petitioner in bankruptcy despite his inability to pay this $50 filing fee.

Initially, it must be observed that no longer as far as an indigent debtor is concerned, this is no longer a filing fee that we are talking about.

Under the statute, the Petitioner in bankruptcy may file his petition without paying any fee at all, provided that he indicates how he proposes to pay that filing fee in installments for up to six months and the period may be extended for yet an additional three months.

Now, that filing of the bankruptcy petition carries significant legal consequences. He is automatically adjudged to be a bankrupt and as a result, all of his earnings following the filing of the petition are exempt from his creditors and so what Congress has, in effect, said to an assetless debtor, said, "If you feel that you have earnings that you want to immunize from the reach of your creditors, you can file your petition. You will have up to nine months to pay and as those earnings which you expect and anticipate come in, you will pay up this $50 filing fee over a period of up to nine months."

And I should point out that in actuality, the filing fee, as far as assetless debtors go is really $40. $10 goes to the Trustee and since there is an assetless debtor, there is no need for a Trustee.

On the other hand, if -- as this Petitioner alleges -- he does not anticipate any income; he doesn't anticipate sufficient income to pay out this $50 or $40 at a sum of about a dollar a week, then Congress may rightly inquire why it is that he needs this discharge to begin with.

That is, the discharge becomes meaningful only when the possibility of additional assets and income becomes a reality and when those additional assets become a reality, then the $50 filing gee does not present any impediment at

all to such an assetless debtor.

Q This man was on Welfare, right?

MR. KORMAN: That is correct.

Q And if I understand Welfare correctly, you get enough money to live on, period.

MR. KORMAN: That is correct.

Q Well, where is he going to get $60?

MR. KORMAN: What I am saying, Justice Marshall, if he doesn't, as he says, expect to get any income, his Welfare benefits are exempt from his creditors so that what he is saying is, "I want a discharge." The reason a person wants a discharge is so that any future earnings, nonexempt earnings --

Q Some time after six months.

MR. KORMAN: Well, what, in effect Congress is saying is that when you need it, come and we will let you file your petition and when those earnings that you expect and want to immunize become a reality, as those earnings come in, you can pay us out this $40 over a period of six to nine months.

On the other hand, if he appears on January 1st and he says, "I don't expect to have any income for the next six months," why is it, the Congressman may rightly ask why it is that this gentleman needs a discharge to begin with.

Q On the other hand, why is the reason he can't

get it?

MR. KORMAN: Congress has decided --

Q Because he doesn't have $50, period.

MR. KORMAN: Right --

Q That is the only reason.

MR. KORMAN: That is correct.

Q That is the only reason.

MR. KORMAN: Correct. Congress has decided that those who benefit from the operation of the bankruptcy system ought to contribute a small portion of the cost of operating it. As a matter of fact, while the Congress initially intended that the bankruptcy system be self-sufficient and self-supporting, because of the increased costs and the failure of Congress to increase the fee, the bankruptcy system is now running at a deficit.

But nevertheless, Congress has a legitimate interest

Q The deficit is around a million dollars a year. It is a great big deficit, isn't it?

MR. KORMAN: That is correct.

Q That's a big one.

MR. KORMAN: It is.

Q But for many years it did --

MR. KORMAN: It did operate up until I believe 1968, it operated at a substantial surplus. At the moment it is operating at a deficit and Congress is, in fact,

considering now that it is operating at a deficit, perhaps repealing it. But this decision to abandon In Forma Pauperis petitions in bankruptcy which was made in 1948 was based on a Congressional finding of what happened during the years when their In Forma Pauperis applications were available.

What had happened was, in those years, while you couldn't get In Forma Pauperis treatment in bankruptcy, the referees were paid and received their salary only out of the fees that they actually collected. The referees, then, would allow the petitioner to file his petition but simply refuse to grant them the discharge until they were paid.

What Congress found is that in almost every case, given a period of time in which to pay out the filing fees, they were almost invariably paid and so Congress said, that seems to us to be a much better procedure for handling these In Forma Pauperis petitions. Let the petitioner in bankruptcy file his petition. We will give him up to nine months to pay and then he can obtain his discharge.

In essence, this was really a reasonable substitute for the In Forma Pauperis proceedings and, in practice, it does not operate harshly. In practice, the only test of whether you get a discharge or not is need.

That is, if you need the discharge because you expect income, you can file your petition without paying

anything and as that income which you anticipate comes in, you can pay out this filing fee.

On the other hand, if you as the petitioner, do not expect to have any income to pay this $50, then you really don't need the discharge and, in effect, Congress is really saying our bankruptcy courts are overburdened as it is. When you need the discharge we will give it to you.

Now, I think this legislative program is a perfectly reasonable effort on the part of Congress to compromise between on the one hand, the indigent debtor and on the other hand its desire to see that those who benefit from a particular legislative program contribute to its cost.

I think, clearly, there is a rational basis for this classification and, certainly, no basis to strike it down on equal protection grounds as the District Court apparently did and as a matter of fact --

Q Did you say that the District Court -- and I just reread it, sort of glanced over its decision again -- I can't find it in here -- that the District Court held that the $50 fee was not itself dischargeable in bankruptcy and would remain --

MR. KORMAN: That is correct.

Q -- the liability of the debtor?

MR. KORMAN: That is correct.

Q I just didn't see that in its opinion.

MR. KORMAN: I think it is near the last page or two in its opinion -- which the District Court said that. I think that is an implicit recognition of the reasonableness of the statute and, indeed, I don't think that it is clear that the District Court did not find that this statue and this classification was unreasonable and I don't understand my adversary here to argue that with me.

Q Well, it is just a question then of when the discharge comes, before or after the payment?

MR. KORMAN: That is correct.

Q But sooner or later he is going to have to pay.

MR. KORMAN: That is correct, although I don't know where the District Court thought he had the power to so provide.

Q I wonder, since you have now been interrupted, since Congress has left it up to this Court in its general order in bankruptcy to deal with the problem of installment payments, whether or not an amended general order, a new general order could deal with this problem in this case or at least go far toward it?

MR. KORMAN: I -- I don't think that is the case because I believe the statute provides that you don't get the discharge until you actually pay the fees out in installments.

Q I thought you were talking about the statute enacted in -- what year?

MR. KORMAN: The 1946 statute which I believe appears at page 30 of our brief which provides that the Court shall grant a discharge unless satisfied that the bankrupt has failed to pay the filing fees required to be paid by this type of court.

Q Provided, however, that in cases of voluntary bankruptcy --

MR. KORMAN: No, provided the fees may be paid in installments but the first --

Q If so authorized by general order of the Supreme Court of the United States.

MR. KORMAN: That is correct. What I think the Court can do is extend the period of time, make it a year for the installments, but I don't think the court --

Q Could make it ten cent a year, I suppose.

MR. KORMAN: Well, I suppose that is so. There is no limitation as I see it in the statute on the time allotted for the petitioner to make the payments.

Q But you don't think that the court would have power under this statute by general order to say that there could be discharge prior to the payment of the whole $50?

MR. KORMAN: No, I wouldn't think so in the

particular portion of the statute that I refer to, the Section 14C8 which appears right at the top of page 30.

Q Yes. But if you string out the time for paying the installments and keep the injunction against suits in force, you really, in effect, have a discharge.

MR. KORMAN: That is correct and in effect, what Congress, as I tried to point out earlier, in effect, Congress is giving the indigent, assetless debtor the benefits of the discharge while he pays out the money that is involved here, a rather small sum.

Q Well, is this case really worth arguing much about?

MR. KORMAN: Well, I think there is --

Q I mean, if you can collect the fee some time, or if you can extend the time and, in effect, get a discharge by -- you give him two years at ten cents a week before he gets his discharge.

MR. KORMAN: Well, I think what we are arguing about here is whether or not the Congress is going to be struck down as unconstitutional. I think that is a serious question. I realize that conceivably under the orders of this Court the period of time in which a person has to pay it out could be extended for quite a lengthy period. Nevertheless, there may be a purpose on the part of Congress as a matter of social policy merely to say that before you

get this particular benefit you muct contribute to the cost of the operation of the bankruptcy system and, of course, there is an incentive where the petitioner is getting income to get his discharge ultimately and I don't think that if he actually has the money and the income is coming in, he is not going to deliberately stall the payments of the money and, of course, the court has discretion under this to put a stop to any efforts on the part of the debtor where it appears that he is deliberately stalling and delaying the payments.

Q As a practical matter, aside from these constitutional questions, when and if -- as Justice White has suggested -- the creditors are off of this man's back, is it economically feasible to pursue a $50 item?

MR. KORMAN: Well --

Q On behalf of the government?

MR. KORMAN: I think at the moment that is precisely what Congress is studying, whether that is economically feasible. It is not economically feasible in the sense that we can go out and check each and every case to determine whether the petitions that are filed that are requesting In Forma Pauperis treatment are true. In effect, in almost every case we have to accept all these allegations as truthful.

Q If you know, would you refresh my recollection

on either policies or regulations of the Department of Justice with respect to claims under certain amounts. In times past, has the Department not had a cut-off and said we will not concern ourselves with claims under $100 or under $200 or some fixed amount?

MR. KORMAN: That may be, but I am just not certain, your Honor.

The District Court held -- did not hold, nor does my friend here argue that this classification is unreasonable or that it involves invidious discrimination. What the District Court held is that the government was required to meet a compelling interest standard, relying on cases such as Shapiro versus Thompson and we submit that those cases are wholly inapplicable here.

Those cases employ the compelling interest standard where a particular classification infringed upon a fundamental constitutional right. We are not dealing here with any fundamental constitutional right. Congress could repeal the entire bankruptcy statute tomorrow or the discharge provisions tomorrow without raising so much as a constitutional ripple.

What we have here is simply a benefit that is provided by Congress and it is clearly improper to hold that Congress must meet a compelling interest standard.

Q Of course, no state is constitutionally required to have statutes permitting divorce, I suppose.

Isn't that true?

MR. KORMAN: Well, I would qualify that by saying that after Boddie and perhaps Griswold versus Connecticut, a state might not be able to wholly, arbitrarily deny a divorce. I would think that they --

Q I don't think there is anything. I don't remember anything in Boddie offhand that said a state has to have provision for dissolution of marriage.

MR. KORMAN: Well, --

Q I remember that one state -- I think it was Mississippi -- for years did not have any divorce laws. You had to -- maybe in South Carolina, one of those states -- you had to get a special act of the state legislature to have a divorce and I don't know that anybody ever attacked that situation from a constitutional point of view. It was a good many years ago.

MR. KORMAN: I think that is true. I think in Boddie there is a rather lengthy discussion of what is involved in a divorce.

Q Yes.

MR. KORMAN: As Justice Harlan pointed out --

Q Yes, you know what it involved in a divorce.

MR. KORMAN: -- you know it involves the dissolution of a rather fundamental human relationship.

Q It does indeed and a state might determine

that it is not going to permit the dissolution of that fundamental human relationship.

Q Was it not central to Boddie that this was a relationship which could not be dissolved in any other way excpet by judicial action?

MR. KORMAN: That is correct. I think there were two aspects of the Boddie holding, as there must be, since Boddie was due process, was decided under the due process clause of the Fourteenth Amendment which, of course, provides that no person shall be deprived of life, liberty or property without due process of law. Due process required in court, /a hearing in court, as Mr. Justice Harlan held for the Court, then it must have been because he decided that the right to the dissolution of this fundamental human relationship was of liberty within the meaning of the Fourteenth Amendment's due process clause and we have the liberty within the meaning of the due process clause and the state saying that the only way you can get this essential liberty is to come into the courts. You can't write your spouse a letter and say we are divorcing. You can't agree to it.

So, in effect, what the state was saying in divorce cases is that in order to get this fundamental interest, this liberty under the Fourteenth Amendment, you must come into our court, said Justice Harlan. Under those circumstances the state could not condition the right to this

fundamental -- right to dissolve this fundamental human relationship.

Q The debtor and the creditor can --

MR. KORMAN: That is correct. The debtor and the creditor can. Theycan get together and compromise the debt. The debt can be simply discharged by operation of the statute of limitations where there is no action taken to enforce it and that is not a wholly unlikely situation. Nobody is going to go after an assetless debtor. They are not going to waste as much as a nickel to attempt to enforce their claim against him and as I read the petition in bankruptcy, he doesn't really allege that anyone has threatened suit against him, that he is being harassed -- he does say he is being harassed by his creditors, but the harassment that he speaks of is simply in the way of references with respect to his character rather than any legal proceedings against him. So that --

Q Do you assume that people on welfare are not harassed by creditors?

MR. KORMAN: No, I am not assuming that people on welfare are not. I am assuming that people who are assetless and who have as little as this petitioner claims that he has -- it would be somewhat foolish of a creditor to waste his money in an attempt to invoke the judicial process to obtain funds.

Q I didn't say "judicial process;" I said "harassment," telephone calls.

MR. KORMAN: That may be true but I --

Q Lawyers' letters, everything you can name. Welfare people are always harassed by creditors. You recognize that or not?

MR. KORMAN: Yes.

Well, the harassment that I was speaking of was the real situation of whether it would be likely that a debtor -- a creditor would bother, in effect, to go after him in a judicial proceeding and attempt to get any money from him since he is not working and he obviously has no assets.

And as a matter of fact, I think one of the major debts about which this petitioner complains is a $1,000 debt to the Metropolicat Life Insurance Company which he claims they say he stole from them and therefore they have an action of conversion against him.

Now, the New York statute of limitations for actions in conversion is three years. According to the petition, this conversion, act of conversion alleged act took place in May of 1969. Probably he has been discharged already by the operation of the statute of limitations so that, unlike Boddie -- and I think there are two essential distinctions here, both crucial points in Boddie. In the first place, the state has not monoploized the means of dissolving this

debtor-creditor -- this particular relationship. It can be dissolved by the parties themselves. The debt can be compromised and, indeed, it could be discharged simply by inaction of the creditor over the period of time until the statute of limitations runs out.

And in the second place, as far as an assetless debtor goes, certainly the right that is involved here hardly approaches the importance and significance, the right of an individual to decide whether he is going to live with another person in the institution of marriage and, indeed, the right to remarry again and so that on those two essential grounds, we feel that Boddie is inapplicable here and, indeed, I would point out that the District Court, although it decided Boddie a good deal, did not really rely on the language in Justice Harlan's opinion but relied instead on the concurring opinions and on Justice Black's dissent from the denial of certiorari in the Garland case, which was a case in which the First Circuit upheld the $50 filing fee and this Court denied almost immediately after the decision in Boddie and this opinion of Mr. Justice Black of the District Court I believe decided, in effect, unequivocably stated that he objected to the reasoning of the majority opinion in Boddie. And I think that it is quite clear that there is very little in Boddie when it is sounded in the context of this case that supports Petitioner's contention -- the

Petitioner of bankruptcy's contention here.

Q Mr. Korman, on page 5 of the Appendix, as I read the Respondent's affidavit, he does state that one of the reasons he wants to be able to file a petition is to relieve creditor harassment so I suppose you would have to concede that there is harassment in fact and contend that it may be a diminishing factor and at any rate it could be settled in some other way.

MR. KORMAN: I think it is a diminishing factor. I think when read in context, when you look at the next sentence that follows that. The kind of harassment he was talking about is the fact that Metropolitan Life Insurance Company, whenever he gives that company as a reference to seek employment, says to the prospective employer that this fellow was a thief. Now, how a discharge in bankruptcy is going to help him, I don't know but if you look at page 13 of the brief, what it says is that since Metropolitan -- now, if he gets the discharge, says he, it is true that Metroploitan will still continue to tell the prospective employers that he is a thief, but, says he, since Metropolitan did not appear before the referee to contest the debt, Appellee's discharge in bankruptcy will not only erase this debt but will hopefully remove the unwarranted stigma that operates as an albatross around his neck because, he says, Metropolitan will have to explain why it is they did not appeal

in the bankruptcy court to contest the discharge. I think that is just plain silly.

Q Mr. Korman, on that point, you said about when he gets the money, that is when he could pay the $50 and he should not file bankruptcy until he gets the money.

MR. KORMAN: Until he anticipates getting it.

Q Now, on this Metropolitan thing, assume it is not barred by the statute and assuming Metropolitan next year reduces that to a judgment, what can he do about that 20 years later when he gets enough money to go into bankruptcy?

MR. KORMAN: Well, as soon as he gets a job or is offered a job he can come in and file his bankruptcy petition and that will, in effect, immunize his earnings after the petition is filed.

Q How can he get a job with a $1,000 judgment on him?

MR. KORMAN: Well, I assume that -- thinking about it as a practical matter -- if an employer was offering him a job and said, "Well, you have this $1,000 judgment against you, I'm not going to hire you." He can say, "Well, if that is the only impediment, I'll file a bankruptcy petition tomorrow and that will resolve the problem."

Q I see.

Q Mr. Korman, the petition states that the

Petitioner was falsely discharged by the insurance company. Does the record show whether or not he brought any action against the insurance company?

MR. KORMAN: No, it doesn't.

Q For false discharge?

MR. KORMAN: No, it doesn't.

Q Is that listed as a contingent asset in the list of assets in bankruptcy?

MR. KORMAN: Well, it was listed as a debt that he wanted to have discharged.

Q Well, I know it could have cut both ways, couldn't it? Couldn't it have been an asset in terms of a damage suit against the employer alleged falsely to have discharged him?

MR. KORMAN: Well, I don't know, Mr. Justice Powell, if New York allows such a course of action.

Q I don't know, either.

Q There is nothing in the record on it.

MR. KORMAN: I am not familiar enough, quite frankly, with whether under the bankruptcy law such a contingency would be considered an asset for the purposes --

Q There is nothing in the record on it, I take it?

MR. KORMAN: No, there is not.

Q But he probably couldn't pay the filing fees

to bring such a law-suit, anyway.

MR. KORMAN: Well, as I recall, there is a general and former corporate statute. We are dealing here with an exception to that statute which is based on a Congressional finding that there is simply another and a better way to deal with the problem of In Forma Pauperis applicants in bankruptcy proceedings and that better way is simply to have the assetless debtor file his petition and pay it out in installments, that the filing of the petition is based on the need for the discharge, it is based on the assumed expectation of earnings.

For these reasons, we would ask that the judgment of the District Court be reversed.

Q Was the issue here whether the District Court could require repayment or prepayment?

MR. KORMAN: The District Court said that the general and formal --

Q Well, what precipitated the argument, the case? Was there a demand that he prepay the fees?

MR. KORMAN: Yes. You can't get the discharge in bankruptcy until you pay the fee.

Q I know, but I thought the question was the problem was precipitated when he wanted to file his petition?

MR. KORMAN: When he filed, right and he said that --

Q Well, do they have -- is it the practice in the District to require prepayment --

MR. KORMAN: Either prepayment or --

Q -- to take the petition?

MR. KORMAN: That is correct, either prepayment or a statement of indigency with a plan to prepay the --

Q Well, he filed the petition saying he was an indigent.

MR. KORMAN: That is correct.

Q And the District Court would have demanded that, except for its holding of unconstitutionality, would have demanded prepayment -- wouldn't have taken the petition at all, is that it?

MR. KORMAN: No, it would have demanded prepayment or a statement of how he proposed to pay in installments. He said that he could make no promise to pay in installments.

Q So the actual rule is, you may file and if you propose installments, you may file and have the process go forward, but before you get your discharge, you have to pay.

MR. KORMAN: That's right, and you get all of the advantages.

Q You have the injunction in it.

Q Mr. Korman, you have not, unless I missed it, dealt with the argument under the Statute 28, United States

Code, Section 1915(a).

MR. KORMAN: The reason that I had not, Mr. Justice Stewart, is because I don't believe that it is that the holding of the District Court is contested. The legislative history is rather clear on the issue. It clearly indicates the intent of Congress to abolish In Forma Pauperis proceedings for bankruptcy. Every court --

Q And that law was enacted when?

MR. KORMAN: 1946, I believe.

Q And when was 1915(a) last addressed by Congress, do you know?

MR. KORMAN: I don't know. I know that there was a general In Forma Pauperis statute in effect in 1898, when Congress initially provided for In Forma Pauperis treatment in bankruptcy and I think probably the fact that Congress felt it needed a special statute for the Bankruptcy Act initially would indicate that congress was not of the view that the In Forma Pauperis statute applied to bankruptcy proceedings. But as a general matter, it is quite clear from the legislative history and every court, Mr. Justice Stewart, even the courts that have struck the statute down, have held that the general In Forma Pauperis statute --

Q I know, that has been the holding, but wouldn't you agree that the plain language of 1915(a) covers this?

MR. KORMAN: Yes, I would have to agree that the

plain language does seem to cover it if you don't consider the particular legislative history involved here.

Q Well, the general or at least the old-fashioned way of statutory construction was that if the plain language was clear, that was the end of it, you didn't look at the legislative history.

MR. KORMAN: Well, there was the --

Q I grant you, that is a little bit out of style.

MR. KORMAN: Well, but the language of the statute clearly indicates that Congress did not want the discharge to be granted until the filing fees were paid. That is the legislative history and the rules of this Court, I would add, the Orders in Bankruptcy, which were based on the statute, so read. It said, "No discharge until the filing fees are paid," and the legislative history clearly --

Q But that assumes the ability to pay.

MR. KORMAN: Well, it assumes --

Q And the 1915(a) assumes the existence of a pauper who is not able to pay.

MR. KORMAN: The rules assume -- do not assume an ability to pay initially, that is --

Q No, but -- an ultimate ability to pay.

MR. KORMAN: -- in fact, you have to show you are a pauper in order to get this benefit of installment payments and I think Congress clearly would be somewhat-- it would be

somewhat silly for Congress to say, you have to show you are a pauper.

Q Well, it would not be the first time that Congress had done a silly thing, would it?

MR. KORMAN: Well -- ah -- no, it wouldn't. I'll -- but it would, in any event, be somewhat silly for Congress to say that you have to file a -- you have to make a statement of indigency before you can get the benefit of an installment payment and then, on the other hand, contemplate that a general In Forma Pauperis statute would apply and you wouldn't have to do anything except file the petition and the affadavit of indigency.

Q How broadly has 1915(a) been applied in the District Courts, do you know? I don't, really. We see it in criminal cases. I wondered if in bringing or defending civil cases --

MR. KORMAN: I think it has been applied broadly except in this area where all of the lower courts almost unan -- I don't know if the decision is the other way -- have held that the general In Forma Pauperis statute is inapplicable here.

Q Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Finkel.

ORAL ARGUMENT OF KALMAN FINKEL, ESQ.,

ON BEHALF OF THE RESPONDENT

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

It is ironic, considering the broad purposes of the Bankruptcy Act, that Appellant would argue that Mr. Kras was just a little too poor to be entitled to a bankruptcy discharge.

I would like to briefly focus on Mr. Kras' financial plight and its relationship to the Bankruptcy Act. Mr. Kras can be characterized as a man who is down on his luck. He was last steadily employed in 1969 for an insurance company. Premiums that he had collected were stolen from his home. Basically, he was discharged from his job and he was basically accused of stealing the premiums.

Each time he went to apply for employment, bad references of the insurance company followed him. Meanwhile, his debts began to accumulate. He was harassed by creditors. He found himself of public assistance and his wife was home taking care of a handicapped child.

This is a man who could be characterized as completely frustrated and a failure. He sees no way, other than a discharged in bankruptcy, to extricate himself from his present plight. This man is a natural candidate for bankruptcy discharge. Congress, in enacting the Bankruptcy

Act, understood that one of the most fundamental liberties an individual has is his right to earn a livelihood and they recognized that on some occasions a man becomes so overwhelmed by debts, so harassed by creditors, that he becomes immobilized, that he has nowhere to turn.

Congress enacted the Bankruptcy Act, not in the narrow reading of what Appellate says, not merely as economic relief. The interest of society at large is at stake. They wanted not only to relieve the man of his debts, freedom from creditor harassment; they were interested in emancipating him from his debts and giving him an opportunity to start afresh.

Q Well, isn't he emancipated when the injunction is entered at the filing of the petition?

MR. FINKEL: Well, your Honor --

Q For all the -- on the pragmatic aspect that you are now presenting to us?

MR. FINKEL: Well, as a practical matter, perhaps, but I would like to point out at the outset that this individual would not have been allowed to file his petition but for the District Court declaring it unconstitutional because there was no way for Mr. Kras to promise that he would be able to pay in six months, $40 or $50. That petition would have been dismissed immediately. There would have been no stay. The only reason there is a stay in this case

is that the United States District Court declared the fee unconstitutional.

Q would you assume or do you know whether some bankruptcy petitioners file there petition, file a statement that they will pay $1 a week or some such thing and then, in fact, not be able to live up to that?

MR. FINKEL: Yes, there are situations where, perhaps, that has happened, but in this particular case and in many other cases where we represent clients, they cannot make that promise and there is an initial fee of $10 that they also do not have, that has to be paid immediately.

Q Well, more accurately, I suppose what you mean is, they can't make the promise with any reasonable expectation of performing it?

MR. FINKEL: Well, they don't know. These are people who are, you know, with debts and creditor harassment and they need something dramatic to give them a chance and that dramatic gesture is what the purposes of the Bankruptcy Act is, to tell them that he is discharged. The man is -- personally has another chance. The United States Government makes a laughing matter of it, but he has a chance to somehow be personally vindicated.

He has been accused of being a thief. If -- and as happened, the insurance company does not come into the bankruptcy court, that debt will be discharged. Personally,

he will feel vindicated. Now, in fact, he may still receive bad references from Metropolitan but that personal vindication will have huge psychological implications for that individual, his ability to earn a living, to become rehabilitated and perhaps a productive member of society and the mere stay just does not accomplish that result.

Q And the discharge won't decide whether or not he was a thief, will it? Or have any bearing on it?

MR. FINKEL: Well, it will in one sense because if the insurance company had any evidence whatsoever that he committed a fraud, that debt would survive the discharge in bankruptcy and, therefore, had they come into the bankruptcy court and proved their claim, that would survive. The fact that it does not survive now gives him a sort of personal vindication.

Q How much was involved in the loss of premiums?

MR. FINKEL: $1, 016.

Q About $1,000. Now, do you suppose the Metropolitan Life is going to pursue a man after the injunction period and treat him as an ordinary debtor in these circumstances?

MR. FINKEL: I have no way of knowing what Metorpolitan will do, but it wouldn't seem surprising.

Q The generality of creditors don't waste their time on such claims with people of that kind. Isn't that true?

MR. FINKEL: I don't know. I would say no, your Honor, it is not because the majority of bankruptcies that we have today are individuals and that is the reason there is a huge financial deficit in the system -- are individuals with incomes of less than $4,000 who are subjected to creditor harassment and creditors do go after them and after judgments. Some of them, by the way, are the full judgments. That, today, the reason that the system is not any longer self-sufficient -- self-sufficient since 1969 is that, if not a majority, many petitioners are people with gross income of less than $4,000. Consumers. The bankruptcy court has now become what it was hopefully designed to be, a court for consumers also, not only for business people and these consumers have less than $4,000 in gross assets and they are harassed, there are judgments against them, even though the creditor should know that these people do not have huge sums of money.

In fact, I should also point out that Congress never intended -- there is no evidence at all -- that Congress intended that an individual such as Mr. Kras should be denied a bankruptcy discharge or that he was too poor.

What happened, under the In Forma Pauperis provisions, basically, the referees were extorting money from the indigents. They were making these people pay / because that went into their fees. Where they got them, some couldn't pay and they

didn't get the discharge. Others paid and Congress, in order to eliminate this inconsistent and unjust result, set up a system of installment payments. But there is no legislative finding or Congressional finding that an individual who is too poor for discharge is now entitlted to a statutory right to a discharge. There is no such finding in Congress.

In fact, today there are many people that we have to turn away because they do not have the filing fee and Legal Aid does not have any funds for it and they cannot promise. Prior to this case, we turned away many people in our trial office before this suit was brought because there was just no funds available and there was no way that they could promise to pay within six months and then you have to get another extension for three months, so it is not quite nine months.

But this individual is caught in a vicious cycle and because he is so overwhelmed, so harassed, he has nowhere to turn, it is difficult for him to seek employment. He is defeated and that is exactly what the bankruptcy law was designed to do, was to say, forget the debts, forget the creditor harassment. Now we are giving you an opportunity to start all over, to rehabilitate yourself, feel free. And maybe then not only will his debts be forgiven, but they will be forgotten. He will forget all of the -- you know, the hardships that he had and he will be able to uplift himself

and try for a job.

Q What was the nature of his employment?

MR. FINKEL: He was a salesman for the insurance company and after that he was only able to find --

Q Odd jobs?

MR. FINKEL: Odd jobs equalling about $600.

Q Except for this psychiatric overlay, or psychological overlay, is he ablebodied?

MR. FINKEL: Yes.

Q Does the record show whether he has tried to get employment?

MR. FINKEL: Yes, the record indicates the Petitioner has, that he has applied not only within New York City, but he has gone outside the city to seek employment and the bad reference of Metropolitan, he claims, have followed him outside New York City.

Q Of course, that is going to follow him after bankruptcy, isn't it?

MR. FINKEL: Yes, it probably will follow him but once it is discharged, there is -- I think he has a better chance of bringing a civil action against them and he has a better chance of explaining it to an employer that Metropolitan didn't see fit to come into court and protect that interest and really prove their case and that maybe it is a false accusation.

Q You feel that an employer will be impressed with that approach?

MR. FINKEL: I think it may. I just don't know. But I think it has -- I think personally his personal sense of vindication -- that is very important -- will have an impact on his ability to perceive and obtain employment.

Q Of course, what you are arguing is psychology, here.

MR. FINKEL: No, your Honor, I am arguing that the individual, that there is a procedural bar, that individual statutory discharge, and that procedural bar violates his constitutional right to be heard and has to be struck down.

Congress set up a bankruptcy act. A man cannot get into court unless he pays a fee. That fee, as applied to indigents is unconstitutional. It does not matter how reasonable the filing fee is. In some places, Connecticut, the filing fee was very reasonable, but not as applied to indigents.

Here, too, the bankruptcy installments fee may be a very reasonable fee, but not as applied to Mr. Kras.

Q Well, as I recall, the fee in Boddie was higher than the fee here.

MR. FINKEL: It was a little higher, but the fee here, your Honor, is higher than --

Q So wouldn't you say that if it is reasonable in

Boddie, then it is reasonable here?

MR. FINKEL: No, it's not. The fee may be reasonable. A state may set up a filing fee system that is reasonable but if it works to preclude indigents access to court, on balance it becomes unconstitutional and unreasonable when applied to that indigent. That is what happened in Boddie. It was not the amount in controversy.

The fee here is much larger than the former Pauperis application of the trial or the appellate court, under 1915. Their fees are only $15 and $25 for a poor person and here we have a much greater check on the man's actual poverty in the form of Pauperis 1915 there is hardly a check to determine whether the man is truly an indigent.

Q Have you given any thought to whether or not this Court, in a general order, solved this situation, as authorized by Congress?

MR. FINKEL: I gave it a thought about 20 minutes ago when your Honor asked that question. I would say that regardless of how small the fee is, which is the only power this Court would really have, because I think the statute mandates a certain fee prior to discharge and regardless of how long the period will be, it will still be insufficient and contrary to the real purposes of theBankruptcy Act. The man should have his discharge if he cannot pay it without any payment because he is being denied his opportunity to be

heard.

Now, in Boddie, if I could just address myself --

Q While I have interrupted you, I am curious, are you In Forma Pauperis in this Court?

MR. FINKEL: Yes, sir.

Q I was just curious. You have a very nicely printed brief here and I wondered where the money came from to print that?

MR. FINKEL: Yes. It comes from the United States Supreme Court.

Q Very good.

MR. FINKEL: We are In Forma Pauperis in the United States Supreme Court.

Q Do you attack the District judge's indication that the fee may be collected later?

MR. FINKEL: No, your Honor, we don't know where this authority is, but we have no trouble with it because as long as --

Q So he comes out of the bankruptcy with this debt?

MR. FINKEL: He comes out with this debt and he comes out with some debt to the Federal Government of $150 in taxes and a few other debts, but he comes out with complete discharge.

Q All right. Okay. Whatever his discharge

covers, he has got it?

MR. FINKEL: Right.

Q But it doesn't cover this debt?

MR. FINKEL: Well, we did not object to that part of the order. It was inserted and we didn't object to it. I don't know, upon consideration, we might in the future, but as of now we have accepted that it would survive as long as he has the discharge papers.

Q Mr. Finkel, one other question, does your argument carry us logically to the conclusion that there should be no fees -- maybe no fees constitutionally imposed in every or any assetless estate?

MR. FINKEL: Your Honor, I would say that, taking Boddie, this case can be distinguished from all filing fee cases that come within Boddie because this individual, although it is not an absolute monopoly, the state has interposed a statutory fee and there are no realistic alternatives for Mr. Kras. He cannot offer anything except for his claim.

With respect to the broader question, your Honor, I would answer you, yes, unequivocally, that I feel that all filing fees that bar indigents access to court in the first instance, should be struck down as relatively depressive.

I don't say that is to be found in the narrow reading of Boddie but I do say it is to be found in the substance of due process on the right to be heard and that that individual's

right goes back thousands of years. On the Roman law there was a waiver of filing fees. Almost 500 years ago in the statute of Henry the VIIth there were provisions for waiver of filing fees for indigent plaintiffs in civil cases.

There were also provisions for counsel. On the criminal side we feel there is much more that will bear access. We have allowed them -- we have given them all of the intrumentalities necessary to vindicate their legal rights, from counsel through transcript of the minutes.

On the civil side, what we are basically talking about is get access to court which I feel -- and I think the Constitution mandates -- is part of the substance of depressive and even though the common world, they never moved up, there was disparity between the ideals and realities of the system of justice, as Professor McGuire pointed out in his classic article almost 50 years ago, most of the problems were administrative. The courts had no way to ferret out the meritorious from the frivolous claims, no way to determine who was really an indigent, who was more affluent.

Today, we don't have that problem administratively. Many courts already have waiver of filing fees.

Administratively, there can be a provision, perhaps, an affadavit of merit. If the indigent is represented by counsel, that affadavit can be more thorough and more extensive. There are provisions for recoupment in case of

recovery. There are provisions that the debt can survive. There are penalties for perjury that the cost will not be that high.

But, your Honors, regardless of what the cost is, I ask your Honors to consider the other side of the coin; the cost in loss of personal freedom for an individual that does not have his day in court is immeasurable. The social costs to a society where there is no lack of respect for the judicial system is staggering. It is the civil courts of the United States that an individual has the right to defend his all things that are dear to him,/life, liberty and property and part of our Anglo-American heritage of fairness and equal justice under the law is that it should be a meaningful concept and not a mockery.

I think the time is ripe for this Court to declare that a man's right to be heard should not be dependent upon the size of his pocketbook. And I would ask that the Court consider going beyond a narrow reading of Boddie and a broader reading of the due process clause for initial access to the Court, to strike down all filing fees that stand in the way of the indigent's right at least to get into court as a first solution.

Q Mr. Finkel, you have emphasized now in this last -- these recent observations at least three or four times the initial access -- barrier to initial access. There

is no barrier to initial access in bankruptcy, is there?

MR. FINKEL: Yes, there is. There is the barrier that a man will have to sign an affidavit that he will promise to pay $50 in six months that he may not be able to pay.

Q If he is in court -- he is in court and has access when he signs that affidavit, isn't he?

MR. FINKEL: He is in court when he signs that affidavit but it would be totally meaningless. It will be an empty promise.

Q It may be meaningless, but you really haven't denied him access. You have furnished him a way, just as in Boddie the access was conditioned on an affidavit. And in all the courts an affidavit of the proper posture.

MR. FINKEL: Well, your Honor, I define access to mean that the individual is in court and the relief he seeks he can obtain without any financial barriers. That is the way I would define initial access to court. The fact that he is in and he cannot receive any relief is to me, meaningless. First, he is not really in. The petition will not be considered at all unless he makes that promise and I am not sure that there are very few debtors that will be willing to sign a sworn affidavit that in six months they know they are going to have $50 to pay.

Q Well, isn't the history of it in fact, though, that most indigent applications -- petitioner in bankruptcy

do sign the affidavit now, the overwhelming majority of them?

MR. FINKEL: No, your Honor, we don't know -- and I checked with our offices, the thousands and thousands of people that are turned away. You can only see the petitions before the court, the ones that the people promise, but the thousands of poor people who are turned away by legal services offices because they don't know that they will have a job and refuse to sign that and there is no other way it could be paid and they just don't receive their discharge.

Once you are in court that is only a minor amount that the people who need a bankruptcy discharge -- there are thousands of other people who need the discharge but do not receive it.

Q Well, isn't the very fact of the deficit that is being incurred a result of the nonpayment by people who promised to pay.

MR. FINKEL: I would say no, your Honor, I think it is just the added expenses. It is$4.5 million in 1971, $2.5 million a few years ago. I don't think it has anything to do with it or not that much.

Q You don't think that posture contributes to that?

MR. FINKEL: Contributes, but negligible, and not to override the individual's,you know, right to be there.

There are no statistics at all from the government

showing in any way what the loss would be. There are none whatsoever. We have waited for those statistics and every one of the briefs to show us in documentation. What they have argued is that everybody who pays an installment will now come under In Forma Pauperis. That may not be so.

In fact, in the companion case in the Southern District that we brought, after we lost, the referee decided against us, the individual obtained employment and now he has promised to pay the fee.

Thank you.

Q Mr. Finkel, would you agree that your client probably cannot force Metropolitan to come in and defend the merits of its accusations against him in the bankruptcy court if Metropolitan does not present evidence of fraud, that debt would be discharged along with all the others, but Metropolitan's failure to appear at all wouldn't, for example, be res judicata against it in an action by your client, say, for slander or some action of that sort.

MR. FINKEL: Absolutely not, the fact that -- that is one of the factors that will be looking forward. If Metropolitan has not come in -- we did have our meeting of creditors and the creditors, and the creditors did not show up. The only thing that now stands in the way of the discharge is the fee. We've gone through the entire period and the individual is unable to pay the fee. Either he gets

discharged or his petition gets dismissed. That is the state we are in right now in this law suit and therefore, when he -- the fact that Metropolitan did not come in and this debt is discharged will give Mr. Kras an opportunity to possibly turn around and positively sue them and use this as part of his proof.

Q But it is not an adjudication on the merits?

MR. FINKEL: No, that is not adjudication on the merits except that it has been discharged and they did not come in to prove fraud. That is the most, I think, we can say about it.

Q I think you haven't, at least in your brief, didn't place any reliance at all on this statute.

MR. FINKEL: Well, in the lower court we did, your Honor. It was rejected.

Q And the lower court turned you down?

MR. FINKEL: We feel that although 1915 is very broadly construed, there is -- where there is a specific government statute versus the general statute -- the specific one covers it and we do acknowledge that they did specifically overrule, abolish In Forma Pauperis statute.

Q Which statute came earlier? I know the In Forma Pauperis statute goes way, way back but --

MR. FINKEL: Well, in 19 --

Q -- in fact, there was a bankruptcy law back in

the early 18th or 19th century.

MR. FINKEL: Yes, but at the time they abolished In Forma Pauperis for bankruptcy in 1946 and 1948, there already was 1915 on the books and they passed what would be installment fees which the lower courts have considered it and I thought they were right, held that that covered the point and therefore, bankruptcy is not within 1915.

Q You are in a better position than I am to know this, has 1915(a) been given very generous application in the courts generally?

MR. FINKEL: Yes, 1915 -- other than the bankruptcy discharge, I know of no other federal filing fee that doesn't come within 1915.

Q You mean, both as a plaintiff and as defendant?

MR. FINKEL: Both as plaintiff and defendant, on appeal, both civilly and criminally.

Q In any kind of a proceeding --

MR. FINKEL: In any kind of --

Q -- obtainable in a federal court?

MR. FINKEL: Yes, we've received it many times in various cases, from Social Security to constitutional attacks and the whole spectrum of cases, we've received poor person relief under the 1915.

Q Have you referred in your brief, Mr. Finkel, to any of the studies made as compared to the studies made of

filing fees generally, tracing the developments from the time the filing fees in the aggregate were a real important part of the support of the court system, down to the present day where it is negligible, chiefly because the fees have remained static in a period of rising costs?

MR. FINKEL: No --

Q Have you any of that in here?

MR. FINKEL: No, we don't. I don't have any of that in the brief. The only thing that I refer to is the amicus curiae brief of the NLADA in Boddie versus Connecticut in which they have the breakdown of the final fee costs of all the states. I mean, which states have waivered filing fees. I have been unable to find -- the classic article is 50 years old, McGuire's, and since then, the updating articles, I have been unable to find the real statistical breakdown. But the amicus brief that we cite to in Boddie details what every state has done with respect to waiver of filing fees and most states have given that relief, either by constitutional law, common law or statute or their own discretionary powers.

Q I suppose it is a matter of common knowledge that a $50 filing fee might have supported a particular clerk's office 50 or 100 years ago and wouldn't pay for the lights under present conditions.

MR. FINKEL: Today the bankruptcy deficit is so

enormous -- I was about to say that it is negligible to the relationship to the $50 fee. It is $4.5 million and in 1969 it was self-sufficient, so it is over the last four years that there has been this increased deficit and the filing fee I don't think is the responsibility because people have been paying the $50 or else they haven't been getting in, so they have collected their fee and those who haven't paid just didn't get into court until, you know, a few district courts declared the statute unconstitutional.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Finkel. Thank you, Mr. Korman.

The case is submitted.

(Whereupon, at 11:39 o'clock a.m., the case was submitted.)