In the

Supreme Court of the United States

John Lascaris, Etc.

Appellant

v.

Sylvia Shirley, Etc., et al — No. 73-1016

and — NO. 73-1095

Abe Lavine, Etc.,

Appellant

v.

Sylvia Shirley, Etc., et al

Washington, D. C.
December 18, 1974

Pages 1 thru 49

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JOHN LASCARIS, ETC.	:	
Appellant	:	
v.	:	No. 73-1016
SYLVIA SHIRLEY, ETC., ET AL	:	
and	:	
ABE LAVINE, ETC.,	:	
Appellant	:	
v.	:	No. 73-1095
SYLVIA SHIRLEY, ETC., ET AL	:	

Washington, D. C.

Wednesday, December 18, 1974

The above-entitled matter came on for argument at 10:04 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:

ALAN W. RUBENSTEIN, ESQ., Principal Attorney, State of New York, The Capitol, Albany, N. Y. For Appellant

APPEARANCES [Continued]

DOUGLAS A. ELDRIDGE, ESQ., Syracuse, N.Y.
[pro hac vice]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 73-1016, Lascaris against Shirley and 73-1095, Lavine against Shirley, consolidated.

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

ORAL ARGUMENT OF ALAN W. RUBENSTEIN, ESQ.,

ON BEHALF OF APPELLANT

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

These are consolidated appeals which present fundamental issues basic to the Aid for Dependent Children Program.

Broadly stated, the issue is, can a parent or caretaker-relative refuse to cooperate in state efforts to obtain support for a child from its father where that child is receiving AFDC benefits and the further question is, can that parent still claim benefits as a parent or relative upon her refusal to so cooperate?

The decisions of the lower courts, starting with Doe against Shapiro, a Connecticut Federal District Court case in 1969, has consistently held that where a mother and child have been denied assistance by states, for the mother's failure to cooperate, assistance may not be terminated to the mother and child.

This Court, in three summary affirmances, affirmed the principle enunciated in Doe against Shapiro, that early case. These are Doe against Swank, Meyers against Juras, and Taylor against Martin.

Of course, the summary affirmances didn't deal explicitly with anything, they were just that and I didn't mean to convey anything else.

State attempts to discontinue grants of the mother only were invalidated by federal courts in Connecticut in Doe against Harder, the successor to Doe against Shapiro, in which the State of Connecticut had amended its regulations to cut off benefits to the mother only.

Commissioner Harder was held in contempt. He appealed to this Court but pending appeal, he was purged of contempt by changing the regulations and the Court has dismissed that appeal for want of jurisdiction.

It had dismissed the appeal in Doe against Shapiro, the earlier case, for late docketing,with two justices dissenting.

Also, other courts in Pennsylvania, Iowa and New York have followed the lead of the Harder court and held that assistance may not be denied to the mother for the failure to cooperate in state efforts to establish paternity or to secure support for her child.

The result of these decisions halting state efforts

to terminate the grant of the mother for her failure to cooperate have been that the state has been unable to comply with the provisions of the Social Security Act, that the intent of Congress to require such parental cooperation has been frustrated, that the AFDC system has been turned upside down, putting the mother in the driver's seat rather than the state agency, that people who should contribute to AFDC support, thereby reducing need, are not contributing and that the ancient duty of parents to support their children has been shifted to the state and to the local social services district, contrary to the provisions of the Social Security Act.

Now, New York's interest in this litigation and that of its social services district is legitimate and substantial.

The place of residence of AFDC fathers in New York State is unknown to the case worker, it is believed, in something over 50 percent of the cases.

It is anticipated that the state locals and local shares combined for fiscal year 1974, under the matching formula for AFDC will amount to something more than $700 million in New York State and we submit that the state should have every opportunity to reduce what is becoming a staggering cost and has been a staggering cost for a number of years by pursuing every avenue open to them to require these

fathers to contribute to the support of their children.

Now, as originally instituted, this case involved claims of the mothers that the county agency had required them to cooperate in instituting and prosecuting nonsupport proceedings under a state departmental regulation requiring that they furnish pertinent information in the location and prosecution of a deserting or abandoning parent, that the noncooperative parent was inelegible for public assistance but the grants for her children were continued.

It was only the mother who was discontinued.

While in appeals pending to this Court from the order of the -- on the original hearing which declared the state regulation violative of the Social Security Act to the extent that it requires parents or relatives to institute and prosecute nonsupport actions, New York Social Services Law Section 101-A was amended to insert therein a new subdivision 2 and 3.

Now, these require that a recipient of public assistance -- it is not limited in its application only to Aid to Families with Dependent Children. It is a statue of general application but, obviously, in this case, we are talking about Aid to Families with Dependent Children.

The statute requires that the recipient of public assistance assist and cooperate with a social services official in obtaining support or support contributions from

the other parent by furnishing of the social services official with appropriate information, including the location of the other parent or spouse by filing a petition and furnishing evidence in a proceedings for paternity and support or for nonsupport.

But if the applicant fails to file the petition, nothing happens except that the social services official is required to do so.

Then, if the applicant fails to furnish evidence necessary to support a petition for paternity and support or for nonsupport in a marital situation, or if the person fails to furnish information relative to the location of the other psrent, her maintenance can be discontinued for her wilful failure to do so so long as she fails to assist and cooperate as required by the statute and only so long as she fails to assist and cooperate.

The children's grant continues.

Now, because of the amendment to Social Services Law Section 101-A, this Court remanded for further consideration and after remand, the original plaintiffs below moved to reconvene the three-judge court to amend the complaint and for intervention by an unwed mother.

There had been no unwed mothers in the case before that time.

The three-judge court permitted intervention and

amendment of the complaint. The amended complaint, however, dealt only with the claim of the intevenor-unwed mother, who had refused to tell a social services official where the known father of one of her children was, within a geographical area.

They knew who he was. She had told them that but she said, "I won't tell you where he is in this town in Western New York," and the amended complaint -- I have to talk about this just for a moment. It is not the stated claim for the original plaintiffs and since the Court had remanded, we were not frankly sure whether this Court would still consider the original plaintiffs to be viable appellees on this appeal.

In any event, it appears that the intervenor is an automatic appellee here and counsel has quite correctly included her in the title of his papers as an intervenor appellee but we did not amend the title of the action because the court below didn't and this was a matter which we must leave entirely to the Court, of course.

The three-judge court, after the remand, in its memorandum decision and order, declared Section 101-A as amended, of the New York Social Services Law, void, unenforceable and without effect insofar as it makes recipient cooperation in a paternity or support action against an absent parent a condition of eligibility in AFDC

and the Court below enjoined the defendants in that case, the state and county officers, from terminating assistance to the intervenor for her minor children for failure to cooperate in obtaining support.

The order on the second argument did not act upon the original plaintiffs at all.

Now, if the original plaintiffs for whom no claim was stated in the amended complaint -- which was actually an intervenor's complaint, we believe, deemed by the Court to still be in the case, the question presented is whether an AFDC parent or caretaker must assist or cooperate in an nonsupport proceeding instituted by a social services official.

As to the intervenor, the question presented is whether she may be required to furnish the location of the father of one of her children to the social services official and as I say, prior to the intervention of this unwed mother, we had no paternity aspect of this case whatsoever but as it stands before the Court now, it has both nonsupport and paternity support aspects depending upon the court construction of its own remand.

Now, we contend that the New York statute furthers the provisions of the Social Security Act. It is as simple as that. The Appellees contend that the statute creates a condition of eligibility not provided for in the Social

Security Act and to that we answer, we don't think it does but even if it does, the Social Security Act not only allows for state efforts to abstain support and establish paternity but requires such action and that the statute is within the legitimate sphere of state administration and is necessary to the proper administration of the AFDC program.

The state statute does not violate any specific provision of the Social Security Act, but rather is friendly to and furthers the provisions of the Act.

This Court discussed the statutes, the provisions of the Social Security Act that are involved on this appeal in its decision in King against Smith when it was in connection, of course, with the Alabama Man-in-the-House Rule.

The Court set out these statutes, federal statutes to which I'll allude in a moment, and said -- this is at 392-U.S. 332 -- "The pattern of this legislation could not be clearer. Every effort is to be made to locate and secure support payments from persons legally obligated to support a deserted child."

And later on in the same page, "The provisions seek to secure parental support in lieu of AFDC support for dependent children."

That is exactly what New York is trying to do.

New York's Social Services law, Section 101-A

2 and 3 implements the provisions of Section 402-A, 17, of the Social Security Act. It implements the provisions of Section 402-A 7 of the Social Security Act.

Section 402-A-17 requires -- I am reading from page 46 of my brief, the Appendix -- that a state plan must provide for the development and implementation of a program under which the state agency will undertake, one, in the case of a child born out of wedlock who is receiving Aid to Families with Dependent Children to establish the paternity of such child and secure support for him and, two, in the case of any child receiving such aid who has been deserted or abandoned by his parents, to secure support for such child from such parent or from any other person legally liable for such support, utilizing any reciprocal code agreements adopted with other states to obtain or enforce court-ordered support.

And Section 7 -- 402-A 7 provides that the state, in determining need, shall take into consideration any other income and resources of any child or relative claiming Aid to Families with Dependent Children.

Now, subsequent --

QUESTION: Well, could you -- could New York disqualify this child for this reason?

MR. RUBENSTEIN: No, in fact, the statute does not provide for that, sir.

QUESTION: You mean, your statute?

MR. RUBENSTEIN: That is right.

QUESTION: But what if it did? Would that pass muster?

MR. RUBENSTEIN: Well, I think we would have a difficult time establishing that.

QUESTION: Wouldn't you run into the cases that say that a state can't establish any additional qualifications?

MR. RUBENSTEIN: Well, we'd run in -- perhaps we--

QUESTION: At least for the child.

MR. RUBENSTEIN: At least for the child. The child is not really involved and, of course, the statute says, in the case of a child born out of wedlock who is receiving assistance -- so, I -- I wouldn't care to speculate -- if your Honor will permit -- as to --

QUESTION: Well, how do you handle the cases that say these states may not establish additional requirements for eligibility?

MR. RUBENSTEIN: Well, this Court, in Dublino and in Townsend against Swank, laid down various ground rules. If the statute is within a legitimate sphere of state administration, as long as it doesn't conflict with any substantial provision of the Social Security Act, the state's provision is all right.

If it doesn't -- and isn't that basically it, Mr. Justice White?

This is an area where the statute expressly provides the state shall have a program for determining the paternity of children and getting their support.

QUESTION: So you are saying that the condition of the state law is either expressly or impliedly found in the Social Security Act itself?

MR. RUBENSTEIN: Absolutely. We say we are authorized to do it and we are required to do it.

QUESTION: Are you suggesting that this is comparable to a state provision that if employment is offered which does not interfere with child care that the mother must take the employment?

MR. RUBENSTEIN: Well --

QUESTION: In order to continue her benefits, not the child's benefits.

MR. RUBENSTEIN: Well, it is along that same general line of reasoning, that a person, as this Court sam said in Wyman against James, a person should not be able to get ADC on her own informational terms and that, I think, is what we are talking about.

This woman --

QUESTION: Is that the one where she refused the interview?

MR. RUBENSTEIN: The home visitation, yes, sir. And that, I think, is where we are at. The statute provides that we have to have this program for developing and implementing a program to get this support and to establish paternity and the woman -- what happens is, the woman baulks and won't give you the information.

Now, she is the only one who has this information and, certainly, in paternity cases, it is very difficult to establish paternity by any testimony other than the woman -- by any evidence other than what she might give and it is very difficult if the father has run off, as has happened in so many agency cases, to locate -- to obtain support unless the mother will cooperate in your efforts to do so and this, it seems to us, is the same type of situation as the Court ran into in Wyman against James and Wyman against James has been the -- has troubled many courts because it went on constitutional grounds.

It went on the Fourth Amendment grounds. There have been a substantial number of cases in this area of non-support and Wyman against James went on constitutional grounds and it wasn't until the Court's decision in Dublino that the Court said that that type of activity was within the legitimate sphere of state administration and had the courts known -- the lower federal courts known at the time that they were deciding these cases, that the Court was

ready to say that in Dublino, perhaps the decisions would be wrong. We are in a difficult situation.

We come in here with the status of the case law based upon this Doe against Shapiro concept that this Court has never been adopted -- that it has never adopted -- that the only conditions of eligibility are need and dependency.

We come in with a series of cases where the judges have been troubled by Wyman against James by the court's holding and Judge Clary in Doe against Shapiro was troubled by it. He thought it was square authority for discontinuance of the mother and the child and Judge Markowitz, I think in Doe against Swank, was troubled with it and Judge Meacham, in Saiz v. Hernandez, the only case at the federal level that I know of that went with us, was troubled by it and that case was vacated and remanded on appeal because the Appellate Court held there should be a three-judge court and on remand, they followed this Court's affirmances in Taylor against Martin and Meyers against Juras and the like and they held the states could not do it and this has been a constant source.

In the New York case of Lascaris v. Wyman in 67 miscellaneous, a very early case involving a completely different factual situation, the court held that this disagreed with Doe against Shapiro and followed the teaching of Wyman against James that this type of activity was

permissible and the only other case that I know of that I haven't cited because I haven't been able to find it, is a State of Washington case cited in paragraph 1240 of the Commerce Clearinghouse Poverty reports, a Superior Court case in Kings County, Doe against Smith, back in 1970 which was on our side of the fence.

But our point is, sir, that the statute is clear that the states have to do something about this problem of illegitimacy and about this problem of nonsupport.

QUESTION: You said it is some $700 and some-million a year that is --

MR. RUBENSTEIN: Well, it is estimated that -- the state department social service estimates that its -- that the cost -- I have to say that the AFDC program is not budgeted in the New York State budget as separate public assistance items.

New York has other public assistance programs and it has a total budget for the programs, as I understand it, but the Department estimates that the cost to the State of New York during fiscal year 1974 and '75 will be $358 million.

Now, the cost of that is doubled because the local shares are equal to the state shares so the counties and the cities pay another $358 million. That's an awful lot of money.

And New York is -- back in 1972 added this Section

101-A to attempt to -- I believe the memorandum in support of it is attached to the Appendix B in my brief on the premise that federal law permitted this type of action.

QUESTION: How many other states have an analog to 101-A?

MR. RUBENSTEIN: Oh, I don't know if I can answer that.

QUESTION: I don't care about precisely, but do most of them? Or do --

MR. RUBENSTEIN: Well, there has been --

QUESTION: -- a handful of them, or what?

MR. RUBENSTEIN: Well, 101-A -- all that I know about is Connecticut, Pennsylvania, Iowa, New York and there was a recent case out in Utah, Rose against Bampton, I believe, in June of 1974 which I just found the other day and those are the only ones I know about and Rose against Bampton has followed the teaching of the Shirley court that you couldn't do this and we believe that the Social Security Act specifically gives us authority to do it.

Now, the Federal Secretary of Health, Education and Welfare has filed a regulation supporting our right to do this which is cited in our brief.

QUESTION: That was done after you did it, wasn't it?

MR. RUBENSTEIN: That was done later, yes, after

the court's remand.

QUESTION: And at your behest.

MR. RUBENSTEIN: No.

QUESTION: Not yours personally, but at the Commissioner's behest, wasn't it?

MR. RUBENSTEIN: Let me say this. I believe that Oregon filed an objection.

Of course, there was proposed rule-making as in every case and a notice and the State of New York filed objections. Iowa filed objections and I believe Oregon filed objections, maybe California, as to what happened up in -- there had been representations in the briefs that we requested that -- I -- don't think that I have any right to talk about that because I wasn't privvy to those conversations.

Of course, the states deal with the administrators all the time and I wouldn't -- I think that is an unfortunate characterization in counsel's brief, but I don't think I could comment on it.

Have I answered your question, sir?

QUESTION: Well, or at least explained why you couldn't answer it.

MR. RUBENSTEIN: Now, the Federal -- we think the Federal statutes and regulations and the state statute are recognition of the basic and primary duty of the parent duty

to support his child.

And we think what is wrong with the whole picture is, that when you don't give recognition to that duty, it turns the situation around so that the state is required to support the child and determine its support when the parent should be doing so and we don't think that Congress has ever expressed an intent that this should happen and we think that the statute itself is evidence that the intent was to the contrary.

QUESTION: How long has this been your policy?

MR. RUBENSTEIN: Well, the regulation -- I don't know when that was adopted. The statute was adopted in 1972. It was enacted in '72, the one that we are upon now.

QUESTION: And prior to that?

MR. RUBENSTEIN: It would have been some time after 1970, your Honor.

QUESTION: Yes. Well, you didn't impose this condition prior to 1970, or '72?

MR. RUBENSTEIN: I do not -- it was in a state regulation but I do not believe there was any provision in the state regulation to impose such a condition prior to Lascaris against Wyman in 67 miscellaneous.

QUESTION: Was this state condition a policy contrary to HEW regulations prior to the amendment of the HEW regulations?

MR. RUBENSTEIN: HEW had taken the position that had spoken to the provisions of 402-A(11), the NOLEO requirement, the notice to law enforcement officers requirement and it had taken the position there that it had advised the states against establishing --

QUESTION: A condition.

MR. RUBENSTEIN: -- a support requiring cooperation as a condition because of the wording of the statute that a child has received ADC but it did not.

I believe it is part 8149 of the Handbook. It did not say you can't do it. It just advised against it. But I should mention that these provisions were held in the Doe against Shapiro to have been superceded by the provisions of 602-A -- 402-A(17) enacted in 1917 and I don't believe that the Secretary has spoken to that provision prior to --

QUESTION: The amendment of his regulations.

MR. RUBENSTEIN: The amendment of his regulations. There have been two regulations, part 220 -- I believe -- .48 leading to the establishment of paternity which was recently revised in July of 1974 in the Federal Register.

QUESTION: Well, under the new regulations, New York's regulation is permissible.

MR. RUBENSTEIN: Yes.

QUESTION: And yet the district judge held it, and I guess -- or, it was held, wasn't it -- invalid?

MR. RUBENSTEIN: Yes, he did.

QUESTION: Because it was inconsistent with the statute. I have nothing here from HEW from the government, except urging us to take the case at the time the appeals were filed. They haven't given us anything else, have they?

MR. RUBENSTEIN: No, I don't believe they have.

QUESTION: They haven't addressed this holding that the amendment was invalid?

MR. RUBENSTEIN: Well, other than in their brief on the jurisdictional question I haven't seen anything from them.

Now -- and by the way, I should tell the Court that the provisions of the state law relating to the NOLEO provision, 602-A(11), 402-A(11) found in Social Services law 111 352 and 352-A and 372-A also has some involvement as do part 347 of the state department regulations.

MR.CHIEF JUSTICE BURGER: You are now using whatever time you may want to reserve for rebuttal.

MR. RUBENSTEIN: Well, in that case, I think I'll have to stop and just say to the Court that -- that we don't think that the statute was ever intended to enable this woman to come in on her own terms and get assistance, that she has a duty to help us determine the resources, that Congress has always spoken in terms of support as a resource, as in our brief and there is only one other word that I

want to throw out. As I was reading my brief last night, talking about the legislative history of 602-A(17), I found I was reading about two separate but fairly similar bills that were before the Congress and I hadn't realized that and I want the Court to know that.

Thank you. I'll reserve the remainder.

MR. CHIEF JUSTICE BURGER: Mr. Eldridge.

ORAL ARGUMENT OF DOUGLAS A ELDRIDGE, ESQ.,

ON BEHALF OF RESPONDENTS

QUESTION: Mr. Eldridge, this may be premature but I hope that at some point in your argument you may say something about whether -- if this HEW amendment were valid, whether you have any case --

MR. ELDRIDGE: There are two HEW regulations, Mr. Justice Brennan.

QUESTION: Well, I am speaking of the one --

MR. ELDRIDGE: That coexists at this point.

QUESTION: Yes.

MR. ELDRIDGE: This latest regulation, which is 233.90(B)(4) I believe.

QUESTION: Well, wait a minute. These numbers get me all confused, 233.90 is the one that was adopted on May 3, '73. Is that it?

MR. ELDRIDGE: That is correct.

QUESTION: Where are these pages?

QUESTION: Page 28 of the jurisdictional statement in the Lavine case.

MR. ELDRIDGE: Thank you.

QUESTION: 1095.

MR. ELDRIDGE: That purports to allow a state to exclude a mother if she fails to cooperate in the prosecution.

QUESTION: Then aid is denied to the uncooperative caretaker of --

MR. ELDRIDGE: That is correct. There coexists with that regulation another regulation of HEW, 233.90 -- is that it? Let me see?

QUESTION: Now, where can we find that one?

MR. ELDRIDGE: Okay.

QUESTION: Well, I thought this amendment was an amendment to 23390.

MR. ELpRIDGE: 235 page 70, which still exists. It is referred to in the brief -- in my brief at page 2 and page 21. I don't believe that it is fully set out there, however.

QUESTION: Is it set out in the jurisdictional statement on behalf of Appellant Lavine on page 28 under V. It says Section 233.90 is amended by adding to paragraph V a new subparagraph 4 as set forth below and then B, is that it?

MR. ELDRIDGE: Let me see. Page 3, is that?

QUESTION: Page 28 of the jurisdictional statement on the part of Lavine. Go down toward the bottom of the page and the smaller print. It says Section 233.90 is amended by adding to paragraph B a new subparagraph 4 as set forth below. Is that what you are talking about?

MR. ELDRIDGE: Yes, that is the change of 235.

QUESTION: And it says a child may not be denied AFDC initially or subsequently.

Then, moving over to -- and then it says, 4, a child may not be denied AFDC either initially or subsequently -- I am on page 29 now --

MR. ELDRIDGE: Right.

QUESTION: Because a parent or caretaker relative fails to assist in the establishment of paternity of a child born out of wedlock or in seeking support from a person having a legal duty to support the child. Is that what you are talking about?

MR. ELDRIDGE: Nonetheless, there still exists 235.

QUESTION: I know that.

MR. ELDRIDGE: Which says that it is not legal.

QUESTION: I know. So what do we -- how do we reconcile this?

MR. ELDRIDGE: Well, I submit to you that HEW, in promulgating this regulation did so without the authority

of the Congress. I think the intent of Congress --

QUESTION: Well, you mean both regulations or what?

MR. ELDRIDGE: The first regulation -- perhaps we can deal with it in subject matter terms -- said that you cannot cut off a parent or a child.

QUESTION: Right.

MR. ELDRIDGE: It is not a condition of eligibility for AFDC.

QUESTION: The original 233.90?

MR. ELDRIDGE: That has been the view of HEW since 1951 when this first started.

QUESTION: It wasn't in that first regulation, was it?

MR. ELDRIDGE: There was no condition of eligibility ever in a regulation of HEW until 1973.

QUESTION: I see. Until this amendment.

MR. ELDRIDGE: That is correct. And this amendment came suis ponte from the HEW segment. It did not come from any Congressional --

QUESTION: Which amendment are you talking about? This is very confusing.

MR. ELDRIDGE: I'm sorry.

QUESTION: Because there are two inconsistent ones.

MR. ELDRIDGE: The latest amendment, the 1973 amendment, which purported --

QUESTION: What number has that one got?

MR. ELDRIDGE: That is 233.90(B)(4).

QUESTION: The one we just read part of.

MR. ELDRIDGE: That is correct. That is correct.

QUESTION: And what about that one?

MR. ELDRIDGE: 233.90 purported to allow a condition of eligibility.

QUESTION: Right.

QUESTION: For the parent.

MR. ELDRIDGE: For the parent only.

QUESTION: Not for the child.

MR. ELDRIDGE: Not for the child. But it did so without any Congressional encouragement to do that. There had been no legislation passed --

QUESTION: But isn't that true of all regulations? I mean, they are made by the agency, not by Congress.

MR. ELDRIDGE: That is right. I believe that is correct, Mr. Justice Rehnquist. But they have authority only if they comport with the intentions of Congress.

QUESTION: But what about --

QUESTION: Well, it is expressed in statute.

MR. ELDRIDGE: As expressed in the statutes and in this -- in the Social Security Act, there is an extensive scheme, the NOLEO scheme, set out to achieve support for AFDC children and parents but in that scheme, there is no

condition of eligibility.

QUESTION: What about Justice Brennan's question? Let's assume this regulation is valid.

QUESTION: Which regulation?

QUESTION: The Amendment.

QUESTION: The Amendment, the one -- the B(4) --

QUESTION: The B(4) that we have just referred to.

MR. ELDRIDGE: Okay. All right.

QUESTION: Suppose that is valid. Now, let's assume that is valid.

MR. ELDRIDGE: Then there is a constitutional question, an --

QUESTION: That is what I am trying to get to.

MR. ELDRIDGE: -- equal protection problem. It has not been dealt with in any of these cases heretofore because of the Court's teaching --

QUESTION: But the issue here then would be decided against you, the statutory issue.

MR. ELDRIDGE: I don't believe that there is support in the statute to decide it against me. If you decided that the regulation was proper --

QUESTION: Yes.

MR. ELDRIDGE: -- that it reflected the intent of Congress --

QUESTION: Yes, yes.

MR. ELDRIDGE: -- then you could carve an exception to the Townsend versus Swank approach that need and dependency are the conditions of eligibility because --

QUESTION: Well, I don't know that that is an exception, but, assuming the regulation is valid, the statutory issue would be decided against you, I take it.

MR. ELDRIDGE: The statutory issue would then -- what would remain would be the constitutional issue, the equal protection issue.

QUESTION: And so the case does pose the validity of this regulation.

MR. ELDRIDGE: Yes, it does.

QUESTION: And, as a matter of fact, I expect it does, although the government is not represented here, in light of the holding of the District Court, that the amendment was invalid.

MR. ELDRIDGE: The District Court said that the amendment was not a guidepost to be followed judicially.

QUESTION: Well, I thought it went beyond that. It said, "As for the department's new interpretation, certainly may not be termed settled or consistent nor may it be said that the agency was never of a contrary opinion," and it goes on and says, "The unbroken line of court decisions construing these provisions and the absence of any Congressional corrective action persuade us that the agency's

new interpretation is in error and not a guidepost to be followed judicially."

MR. ELDRIDGE: Yes.

QUESTION: Isn't that a holding that it is invalid?

MR. ELDRIDGE: I believe it is, yes.

QUESTION: Because it is not a -- well, it affects -- as the statute does not otherwise permit a condition of eligibility.

MR. ELDRIDGE: That is correct and that is --

QUESTION: But we have to reach it although the government is not here.

MR. ELDRIDGE: Well, they were invited by this Court to speak to the issue. They presented --

QUESTION: All they did was say we ought to hear the case. They didn't come in -- they never came in on the merits. At least, I have nothing here from it.

MR. ELDRIDGE: I can't explain their absence, Mr. Justice Brennan.

As we can see, though, the law has been settled. There are 20 federal district courts that have decided on this statutory ground.

There are three affirmances of this Court. I think, to paraphrase Justice Brandeis, not only is the law settled, it is settled right.

QUESTION: Did they all relate to taking the support

away from the mother or the child?

MR. ELDRIDGE: They -- initially -- well, actually, each one of them varied. There were different ambiences to each one. I think the issue was really the same but I think the distinction between --

QUESTION: The cases were not the same issue as we have got presented here though, were they?

MR. ELDRIDGE: Well, in the three affirmances of this Court, in Meyers v. Juras, the mother was, I believe, cut off. The mother and the children were terminated in Meyers versus Juras.

In Taylor versus Martin, the child was ineligible.

In Doe versus Swank, the mother was terminated.

So they varied.

No, they did not cut the mother in Doe versus Swank, they cut the child in Doe versus Swank. They cut the child in Doe versus Swank because the grandmother would not sue her daughter for nonsupport. The daughter was the mother of the child but the grandmother was the caretaker for it so we move around in circles of consanguinity here.

I would submit though, Mr. Chief Justice, that the distinction between terminating a mother and a child is really a chimera.

What you have as a result of cutting any one member of the unit is a net reduction in welfare. The

mother is, by terms of the AFDC statute, a caretaker. In order for her to continue to take care, she has to maintain herself.

In other words, she has to eat and she has to have a bed and that money has to come from somewhere and it is a ruse, I think, really, to say that you have only cut her off when you have deprived the family of four of one-quarter of their income.

QUESTION: That would also be true in the case where the mother was cut off for refusing to allow visitation, would it not?

MR. ELDRIDGE: Visitation? You are referring to Wyman versus James? Well --

QUESTION: I am referring to the general problem of which Wyman/James is just one example.

MR. ELDRIDGE: That is a very real aspect of the problems presented by Wyman versus James. On the other hand, Wyman versus James was decided by this Court before it affirmed Townsend versus Swank and Meyers versus Juras -- not Townsend versus Swank, Doe versus Swank, Meyers versus Juras and Carlson versus TAylor.

I think that Wyman versus James is a constitutional case. I don't think that it deals specifically with the question of whether there may be a condition of eligility outside the Social Security Act.

I think, in fact, Mr. Justice Blackmun said that this was -- was countenanced within the Social Security Act but the NOLEO scheme does not countenance the condition of eligibility. There is an extensive section of the Social Security Act, starting in 602-A(7). It goes through Section 11 where the state is required to report a grant of assistance to families with abandoning parents to local law enforcement officers. That is the way it is supposed to go. The report is supposed to go to the local law enforcement officers.

The state is required to develop a program in Section 17 to establish paternity and to secure support and that is not something that we quarrel with. We agree with the desirability of securing support for --

QUESTION: And NOLEO means notice to the Office of the local enforcement --

MR. ELDRIDGE: Notice to local law enforcement officers. The state is required to develop this program but it does not say that it is required or even allowed to establish a condition of eligibility. It is supposed to establish a single unit in the state responsible for administering this program.

Section 18 says-- admonishes the states to cooperate with the state departments of social services -- cooperate with the courts and the law enforcement officials, even

to entering into some sort of financial arrangement with the law enforcement officials.

Section 21 requires reporting to HEW quarterly the name, the social security number, the last known address of abandoning parents with outstanding orders against them who are not paying.

It is allowed to use the social security records to pursue these abandoning spouses or putative fathers.

Section 6010 -- 610 of the Social Security Act has IRS tracing abandoning relatives.

Section 22 under 602(A) requires cooperation with other states in locating the parents and enforcing the order.

But throughout all of that, there is no discussion of a condition of eligibility and from the very inception, HEW has said that it was not a condition of eligibility. I refer you to the third section of my brief which deals with that extensively. I think --

QUESTION: That is a policy position of the department.

MR. ELDRIDGE: I think it was a policy position which was a lens to the Congressional intent. I think they were following what Congress had indicated because they talk there, Mr. Chief Justice, in terms of social work, acknowledging that this is a difficult time for a family when a spouse has abandoned and they talk about the need to counsel

mothers with abandoned children during such a stressful time in order to achieve what is best for the family.

It may not be immediately best to sue an abandoning spouse. The effect of time often helps to heal these conditions.

QUESTION: Mr. Eldridge, would this be a convenient time for you to summarize New York law with respect to the obligation of a father to support his children whether wed or unwed?

MR. ELDRIDGE: A father who is acknowledged to be the father of a child, the natural father, wed or unwed, has the obligation to support his child until 21.

QUESTION: Whether wed or unwed.

MR. ELDRIDGE: That is correct. The natural father has the obligation to support his children.

QUESTION: Once he is identified as the father and there is a proceeding for identifying him as the father, i.e. a paternity proceeding, right?

MR. ELDRIDGE: That is correct, Mr. Justice Stewart, and that proceeding may be brought by the Commissioner of Social Services for any county.

It never was until this litigation began.

QUESTION: It is difficult to maintain that kind of litigation without the cooperation of the mother, is it not?

MR. ELDRIDGE: It may be, but by and large,

Mr. Chief Justice, people cooperate.

We have an amicus here from Californa who ran the figures through. In California the Department of Social Services, because they had not followed previous orders of the court, are now required to tell recipients specifically that they do not have to cooperate in this proceedings.

And yet, in California, 50 percent of all the applicants for welfare do cooperate.

QUESTION: We are not concerned in this case, are we, with situations where they cooperate? We are only concerned in ones where they do not.

MR. ELDRIDGE: But the point -- the magnitude of the problem -- by and large, people do cooperate; in 67 percent of some counties in California, people do go along with us.

Most people do go along with it and I submit, the people that refuse, refuse for legitimate reasons.

If we take the main plaintiffs in this case, Jane Doe refused to institute a paternity proceeding because she had already instituted a paternity proceeding. She had instituted one in the fall of 1971 when she applied for welfare.

In December of 1971, the welfare department said, you have to sue again.

She said, I already did.

They said, we are not going to give your daughter, in this case, any public assistance until you sue.

They refused -- they denied her public assistance until she brought another action, notwithstanding the fact that there was a previous action existent in the family court in Onondaga County.

QUESTION: May I ask, Mr. Eldridge, is there any statutory amendment to which this regulation amendment of '73 is hooked?

MR. ELDRIDGE: The federal regulation?

QUESTION: Yes.

MR. ELDRIDGE: No.

QUESTION: There is none.

MR. ELDRIDGE: There is none.

QUESTION: That is the distinction between this case and Dublino, I gather.

MR. ELDRIDGE: That is exactly correct. In Dublino in 19 --

QUESTION: Well, the WIN program, the 1967 amendment added a condition of eligibility.

MR. ELDRIDGE: In 1967 there were two amendments up for consideration. One was amendments to the NOLEO section which added four or five of the sections that I have adverted to in the NOLEO scheme and the WIN program.

In WIN they specifically said that there shall be

a condition of eligibility for non-cooperation in the WIN program.

In the NOLEO section, they specifically left it out.

QUESTION: But they did -- that was when they did add the requirement that the states have a special unit to pursue the support obligations of parents.

MR. ELDRIDGE: That is correct.

QUESTION: And required the states to have that kind of a scheme.

MR. ELDRIDGE: That is exactly right, but they did not say that that scheme could encompass a condition of eligibility and there had been, since 1951, a scheme which did not include conditions of eligibility.

QUESTION: I gather that is the reasoning of the district court.

MR. ELDRIDGE: I believe that that is why they granted no credence to the --

QUESTION: Well, why they held that there was nothing comparable to the WIN addition of a condition of eligibility in regard to NOLEO.

MR. ELDRIDGE: That is correct and I think that that is why Dublino is not dispositive or is really relevant to this case. Dublino dealt with a specific allowance of a condition of eligibility, thework rules, the WIN program.

QUESTION: Well, I expect, though, we'll have to look at both the statute and the legislative history under the Townsend/Swank test to determine for ourselves --

MR. ELDRIDGE: I think that is exactly the test that should be supplied here. The third section of my brief indicates that.

The last brief I received from the Appellant deals with what he calls legislative history. It deals with a bill that is in the House in a conference now.

I don't really think that that is fair to judge, but that bill does specify a condition of eligibility. It says, in the Senate report to accompany that --

QUESTION: Is it a pending bill now?

MR. ELDRIDGE: This is a bill that passed the Senate, passed the House.

QUESTION: How long ago?

MR. ELDRIDGE: It is HR 3153.

QUESTION: How long ago?

MR. ELDRIDGE: It has been bottled up in conference since 1972.

QUESTION: Yes, but how long ago did it pass the House and Senate?

MR. ELDRIDGE: 1972. In October it passed the Senate in 1972. In November it passed the House. It has been in conference since.

QUESTION: And unless it comes out today, it will lapse, won't it?

QUESTION: 1973.

MR. ELDRIDGE: It's 1973. I'm sorry. Did I say 1972? 1973.

QUESTION: And unless it comes out today, I gather, it will lapse, will it?

MR. ELDRIDGE: I think it is dead, really.

But it did specifically set a condition of eligibility. In the Senate report to accompany that, the report says, at page 49 --

QUESTION: Is that in your brief?

MR. ELDRIDGE: No, this is something that was just adverted to by my opponent in his last brief.

QUESTION: The reply brief?

MR. ELDRIDGE: Yes, it is Senate Report 93 553 to accompany HR 3153. At page 49 it said --

QUESTION: Is that report number 93?

MR. ELDRIDGE: 553.

QUESTION: 553.

MR. ELDRIDGE: It says, "The committee bill would make cooperation in identifying the absent parent a condition of AFDC eligibility."

They didn't say it would reaffirm that condition of eligibility. They didn't say it would make the condition

of eligibility clearer. It says that they would make a condition of eligibility.

QUESTION: The existence of that statute doesn't mean that the state didn't have the power previously.

MR. ELDRIDGE: I would submit to you -- [?]

QUESTION: Statements are frequently passed to clarify ambiguous situations.

MR. ELDRIDGE: Throughout the legislative history they do not talk about the ambiguity of the situation. They talked about the fact that the states are not pursuing their remedies under the situation and they say that stronger legislation is required.

That is exactly what they said in this report and they say, "However, the committee feels it may be desirable to offer a mother a financial incentive to cooperate. Now, there you have Congress talking about giving a mother a financial incentive --

QUESTION: Should she cooperate. In this case, isn't she offered a financial incentive?

MR. ELDRIDGE: They draw a distinction there. They say that you may keep -- as the WIN program does, as the work rules do -- you may keep a greater portion of the support payment that you receive.

Right now, in New York, if you get a support payment, the same amount is subtracted from your regular

welfare balance, so people who receive support and people who are receiving straight ADC without any support are at the same level. There is no financial incentive to pursue the support.

Congress, I think, has been very concerned throughout the history of the NOLEO question as to the level of effort being put in by the state.

And, again, in the Senate Report to accompany HR 3153 at page 40 they say, and I quote, "The enforcement of child support obligations is not an area of jurisprudence about which this country can be proud," end quote.

They refer to the "thousands of unserved non-support warrants," and they say the blame must be shared by judges, prosecutors and welfare officials alike.

QUESTION: Well, is it possible that Congress is now considering action in order to force recalcitrant states and administrators to take steps?

MR. ELDRIDGE: Certainly --

QUESTION: In other words, make it a condition of the grant.

MR. ELDRIDGE: Certainly this was what was under consideration at 3153. As you say, the 3153 is probably dead as of Friday, when Congress adjourns.

They have been considering it and I would submit that this is a matter for Congressional consideration. I do

not think that --

QUESTION: Isn't it quite a different thing to make it a condition of a grant by the Federal Government to the state, the matching grant, and the state's making it a condition to the noncooperating parent?

MR. ELDRIDGE: Those are quite different things, yes. One requires the state to act. The other requires the parent to act.

QUESTION: So that the reason for passing the legislation -- if they do pass it -- or considering it, really doesn't have very much relevance, it seems to me, to what New York is doing with reference to the non-cooperating mothers here.

MR. ELDRIDGE: I think it has relevance in that it indicates that Congress has never countenanced what New York is doing to non-cooperating relatives.

QUESTION: As a condition of eligibility.

MR. ELDRIDGE: As a condition of eligibility.

QUESTION: Which under Townsend/Swank you suggest is the test.

MR. ELDRIDGE: Exactly the test.

QUESTION: And if we can't find, either in the Act itself or in the legislative history that they did intend to authorize the states to attach it as a condition of eligibility, Townsend/Swank says the states can't do it.

MR. ELDRIDGE: That is correct, Mr. Justice Brennan. It starts in Kate versus Smith, it goes in Townsend v. Swank and it is reaffirmed in Carleson versus Remillard, all of which were unanimous opinions of this Court.

QUESTION: And if the dockets are told that it isn't forbidden and it is a reasonable regulation, it is permissible, is it not?

MR. ELDRIDGE: Well, under Dublino, there was discussion of what a reasonable regulation might be. They said if there was a conflict of substance -- it is footnote 34, I believe, in Dublino -- that there was a conflict of substance between the Social Security Act and the administrative regulation, then, obviously, the Supremacy Clause operated and the federal statute was supreme and the administrative regulation could not exist.

I think any time you have a condition of eligibility, that is a substantial conflict -- a condition of eligibility not set forth as need and dependency or within the legislative history of the Social Security Act and that is what we have in this case.

I would say that this is outside the legitimate sphere of administration. This goes beyond. This gets to the heart of who can get AFDC.

QUESTION: Well, then, if Congress passes this pending legislation that you have been talking about there

probably would be a question raised by someone at some time whether it is permissible for Congress to attach a condition to its grant of $358 million annually to the State of New York that they pursue.

MR. ELDRIDGE: But that has been the nature of categorical grants from the inception. Perhaps revenue-sharing has changed the approach.

QUESTION: But if it is reasonable, then there -- perhaps there is no constitutional question.

MR. ELDRIDGE: That may be, but --

QUESTION: But I thought you had virtually conceded its reasonableness in terms of --

MR. ELDRIDGE: The reasonableness of what? I am sorry, Mr. Chief Justice.

QUESTION: Of the categorical grant by the Federal Government to the state.

MR. ELDRIDGE: There are lots of ways to examine the reasonableness.

In the instance of federal revenue-sharing at this point, they aren't as reasonable as the categorical grants because there is less money in them for the states.

I really am not supporting that at this point in this case. I think what we really have to talk to is the statutory conflict here.

Congress has been very upset, as I was saying,

about the states' efforts in this area.

They say -- in the Senate Report to accompany HR 1, which is 92-1230 --

QUESTION: What relevance is HR 1 and this Senate Report?

MR. ELDRIDGE: Well, it is really not good legislative history because it is not legislation that is ultimately passed but they were upset, there again, about the failure of the states to pursue support.

The latest GAO survey indicated that 72 percent of people who had support orders against them entered by a court or who had agreed to pay support, 72 percent of those parents were not in substantial compliance with the orders.

I submit to you that that is the problem. The problem is --

QUESTION: Part of it is that you can't get blood out of a turnip, isn't it?

MR. ELDRIDGE: I tried to say that in family court, Mr. Justice Rehnquist and the response I have is that "I do not see a turnip standing here in front of me, Mr. Eldridge. I see a man and he is capable of going to work."

Well, certainly it is true. In many cases, poor people don't have any money or they don't have enough money to pay a support payment.

All right. There are people who do have an ability to pay and certainly they should be pursued and made to pay their statutory obligation. I think that it may even go beyond a statutory obligation.

The reason that the state -- that it is so anxious, and we have heard here from California, Iowa, as well as New York. There were 19 other states. One of the Justices asked the question, how many states had rules like this?

There had been 19 other states who had rules that were knocked down. I think the rest of the states are waiting for your action today to determine whether they are going to continue to enforce the rules.

QUESTION: Do you think the remainder of the states do have such rules?

MR. ELDRIDGE: I am sure that not all of them do.

QUESTION: But most --

MR. ELDRIDGE: I don't know. It has been a very prevalent practice of late.

QUESTION: And 19 of them so far have been invalidated, of 19 separate states.

MR. ELDRIDGE: Of 19 separate states.

QUESTION: In --

MR. ELDRIDGE: There have been several regulations in several states. In New York, for instance, in 1969, there was a regulation that was withdrawn.

QUESTION: When you say invalidated -- by a three-judge court?

MR. ELDRIDGE: Yes, they were all three-judge courts with the exception of one that -- Judge Gerfein in the Southern District threw out because he was going to do it on the statutory basis and he felt no need to convene three judges.

QUESTION: Mr. Eldridge?

MR. ELDRIDGE: Yes, Mr. Justice Powell.

QUESTION: The memorandum filed by the Solicitor General on page 4 states that the -- that HEW has advised us that 10 states, which include Iowa and New York, containing more that one-third of the AFDC recipients require such parental cooperation as a condition to their eligibility.

MR. ELDRIDGE: That must be accurate for that time, but over the past -- since 1969 when Doe v. Shapiro was brought, there have been 19 states that have had their regulations thrown out by federal district courts; three states having their regulations thrown out by this Court and I submit that they were all the same essential regulation. They required an illegal condition of eligibility for AFDC.

Thank you, your Honors.

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

I think you have used your time -- no, you have

about one minute left.

REBUTTAL ARGUMENT OF

ALAN W. RUBENSTEIN, ESQ.

MR. RUBENSTEIN: I'll just say, your Honor, that last Saturday's press carried an item that the Committee on Finance had approved a new bill on this subject of HR 3153 which had been in conference.

I don't know where it is going. I haven't had time to check it but I give that to the Court.

I call the Court's attention to Wyman against James and Charleston against Wohlgemuth, where the Court approved situations where the grant to the entire family was cut off for failure to give a lien or cooperate.

Giving a grant to the mother in 1950 was intended to accomplish an equitable result. There is no question about that and that is when she was included.

QUESTION: If this new bill passes --

MR. RUBENSTEIN: Pardon me, sir?

QUESTION: If this new bill passes -- and at least on the face of it, that would make New York's regulation valid, have these mothers been paid up to date because they won below?

MR. RUBENSTEIN: Oh, as far as I know. There is no reason to believe they haven't. We have been under a stay -- oh, the intervenor -- counsel will have to tell you

if the county has paid her. I don't know.

I don't know. But we have been under a stay for a class action in this case in the --

QUESTION: Well, I wondered if the new statute passed what would be left of this case.

MR. RUBENSTEIN: I don't know. We'd have to see that, sir, and check it.

QUESTION: Well, I thought the district court refused to find there was a class action or refused to certify it as a class action.

MR. RUBENSTEIN: Because there was pending in the Southern District of New York, I believe, a case before Judge Bryant, Lewis against Lavine, where there was a class action order made.

QUESTION: So you mean you understay in another case?

MR. RUBENSTEIN: We are understaying in another case.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:05 o'clock a.m., the case was submitted.]