IN THE SUPREME COURT OF THE UNITED STATES

PAUL R. PHILBROOK, etc., Appellant, v. JEAN GLODGETT, et al., Appellees.	No. 73-1820
-- and -- CASPAR W. WEINBERGER, Secretary of Health, Education, and Welfare, Appellant, v. JEAN GLODGETT, et al., Appellees.	No. 74-132

Washington, D. C.,

Tuesday, March 25, 1975.

The above-entitled matters resumed for consolidated argument at 10:08 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

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll resume arguments in No. 73-1820, Philbrook against Glodgett, and the related case.

Mr. Kohn, you may proceed.

ORAL ARGUMENT OF RICHARD S. KOHN, ESQ.,

ON BEHALF OF THE APPELLEES

MR. KOHN: Thank you, Your Honor.

Good morning, Mr. Chief Justice. May it please the Court:

The issue presented by this case is whether children were in need due to the unemployment of their fathers can be denied assistance under the Unemployed Fathers program, solely because their father is eligible for an amount of unemployment compensation, no matter how small.

The district court applied the plain meaning of Section 607(b)(2)(C)(ii) of Title 42, and held that the statute only applies to actual receipt, and that the father has an option of declining to accept his unemployment compensation and accepting ANFC-UF if those benefits are higher.

Just a few days ago this Court, in the case of Alcala vs. Burns, applied the ordinary language rule, and we ask the Court to do that in this case and affirm the judgment of the district court.

First of all, the language of Section 607(b)(2()(C)(ii)

is absolutely clear. It refers to receipt of unemployment compensation benefits as working the disqualification. There is substantial evidence in other provisions of the same statute that if Congress wanted to say eligibility for receipt, they knew how to do so.

In the statute -- in a section of the statute immediately preceding the one at issue here, (b)(1)(C), the court had to -- the Congress referred to eligibility requirements for AFDC, and in the course of that statute which is enacted on the same day as 607(b)(2)(C)(ii) the court used the language "qualified to receive", and refers to another section of the statute which defines that as being eligible for the receipt of benefits upon the filing of an application.

So it's perfectly clear that if the Congress had intended to refer to eligibility for receipt in the subsequent section they could have done so by referring to section (b)(3).

Also, in section 602, which, as this Court knows, from the Alcala vs. Burns case, has to do with the requirements of State plans, which must be included if HEW approval is to be obtained. There's a section 602(a)(12) which has to do with receipt of Old Age Assistance, and that provision says that if a family receives -- or if a recipient in a household receives Old Age Assistance, during the period that he does so the family is disqualified, or that person cannot be included

within the assistance group.

The legislative history of 602(a)(12) which is found in 1950 U.S.Code and Congressional Administrative News at page 3479 -- this is not cited in my brief -- indicates that with respect to that Old Age Assistance provision, the Congress was clearly concerned about double benefits, that a family should not be able to receive both.

And since the Congress used the language "is receiving" is that section, and "receives" in the section before the Court, we think that that is evidence that when Congress was concerned about double benefits, that was the language they used.

Also in section 602(a)(15), which has to do with providing advice to recipients of AFDC about birth control, the Court specifically -- the Congress specifically used the language "eligible for receipt or receiving".

So it's perfectly clear from related provisions of the Act that when Congress wanted to refer to "eligibility to receive", they could do so and they did on several occasions.

QUESTION: Do you have any specific legislative history that supports your reading of the statute?

MR. KOHN: Your Honor, the -- I find the legislative history very confusing. I can't say that it supports me. I can't say that it goes against me. I think it's silent on the point.

The only time that the Congress referred to this, the

disqualification of unemployment compensation benefits was in a different context. They were concerned about the situation where a family was receiving unemployment compensation, it ran out in the first week of the month or the second week of the month, and under the 1967 statute the family was then disqualified from receiving any AFDC for the entire month.

And that was the question that Congress addressed in the legislative history.

I asked the Court to apply the rule that where the legislative history would tend to confuse the issue, or sheds no light on it, that the plain language of the statute should be followed.

It's important to recognize that until -- from 1935 until 1961, there was no unemployed fathers program. In 1935, Congress created the program, it was an optional program to be applied by the States if they desired to, and they also made it optional in the States as to whether they wanted to supplement inadequate unemployment compensation benefits with AFDC payments. And of the 22 States that had the program, all but three permitted supplementation of benefits.

And the obvious reason for doing this was the gross inequity of having certain children who may have received 20 or 25 dollars of unemployment compensation and then, in comparison with other families, it could have received several hundred dollars in terms of AFDC.

Now, there's no question that in 1967 -- I might add that at the time the 1960 amendment was enacted, the country was in an economic recession, and at the same time that Congress enacted this provision, they also enacted the temporary extended unemployment compensation Act. So it's clear that while Congress may have regard unemployment compensation as the first line of defense, after '61 it was not the exclusive line of defense.

And Congress recognized the unemployment compensation, which is not designed to satisfy the needs of the family, might be inadequate.

In 1962, Congress had the opportunity to revoke the legislation, or not renew it, and yet they decided to continue it for another five years.

There's no question that in 1967 Congress made a change. They no longer provided for the supplement. But the big question is whether they intended to bar all those families that were receiving unemployment compensation from any assistance, or whether they were going to permit the family an option.

Now, we argue that the Congress must have intended an option, not only because the plain language says so, but the equity -- equity demands it. And we argue that this is not -- this doesn't undercut the unemployment compensation system, and that it certainly is designed to make sure that all children

who are similarly situated are treated alike.

QUESTION: Mr. Kohn, has there ever been a time when the amount of unemployment compensation approximated the amount of benefits?

MR. KOHN: Yes, Your Honor. There's no question that in -- depending on a particular situation the amount of unemployment compensation may exceed the amount of AFDC, and in that situation --

QUESTION: Even now?

MR. KOHN: Yes, Your Honor. Because unemployment compensation depends entirely on the amount of money that the wage earner earns, and if you have a wage earner who is making a good income, with a small family, the amount of unemployment compensation, which is set at one-half his average weekly earnings, could very well exceed the amount of AFDC.

But our point is that for low income families and for the AFDC population, it's highly unlikely that unemployment compensations would exceed AFDC.

Now, the State has argued that Congress may have intended that unemployment compensation benefits in an inadequate amount could be supplemented with general assistance, which is a wholly State-funded program, I would refer the Court -- and that that general assistance could bring the family up to the State needs standard. In our -- in the Appendix, on pages 29 and 63, the Court will find

certain interrogatories that we served on Bert Smith, who is the Director of AFDC in Vermont, and his answers to the interrogatories. The answers are on page 63.

And in numbers 8 and 10 he was asked specifically whether general assistance would bring the family up to the State needs standard. And he responded that it would be highly unlikely. General assistance is intended as a short-term resource to deal with emergency situations, it pays the rent, it pays the oil bill, but it's highly unlikely that it would bring the family up.

And as a matter of fact, each of the named plaintiffs in our case did receive a stipend of general assistance at some point, when they were receiving unemployment compensation. In each of those cases the amount of the joint benefits was below what they would have received under AFDC.

QUESTION: What would be the situation, Mr. Kohn, hypothetically, if a man unemployed, receiving unemployment compensation insurance or having taken whichever option he wanted, then on reporting his offered employment that's suitable employment but refuses to accept it, would that -- that would affect his unemployment compensation payments, I take it?

MR. KOHN: Yes, Your Honor.

QUESTION: What effect would it have on the welfare payments?

MR. KOHN: Exactly the same.

QUESTION: The same in each case?

MR. KOHN: Yes, Your Honor. A recipient of AFDC-UF is required to actively seek employment; if he refuses to take it, the family would be disqualified.

That's my understanding.

QUESTION: That puts a hardship on the family as a consequence of the conduct of the father, does it not?

MR. KOHN: That's true, Your Honor.

But it's my understanding that that's how the program operates.

QUESTION: Exactly the same criteria?

MR. KOHN: I believe so.

QUESTION: For AFDC-UF, unemployed father, --

MR. KOHN: I believe so. In other words, a father cannot accept assistance from the State and yet refuse to go to work if the work is offered.

Also there is a provision of the AFDC statute which is designed to encourage the man to go to work, so that if he works under 100 hours a month he can -- the income he earns is deducted from the AFDC grant, but his family still receives benefits as long as his earnings are below the State needs standard.

But I believe if he refused to accept suitable work, there would be a disqualification.

QUESTION: Of course if he then just left his family,

his children wouldn't suffer because they would continue to get AFDC under a different part of the program --

MR. KOHN: That's correct. And, as a matter of fact, that would be a consequence of the -- of interpreting this provision as a mandatory bar. Fathers are actually encouraged to leave their families so that the remnants can receive AFDC under section 606, and the father can continue drawing his unemployment benefits.

QUESTION: Unh-hunh.

MR. KOHN: That would be an absolutely absurd result.

QUESTION: Unh-hunh.

MR. KOHN: Also, the children who are hurt are children whose fathers have been laid off for -- or who are eligible for unemployment compensation. The paradox is that if a father quits his job without good cause or for some reason is uneligible for unemployment compensation, his children are actually benefitted because they receive more money.

And that's an incredible result.

QUESTION: I suppose there's some difficulty in making comparisons because the unemployment compensation is a terminal kind of payment and the welfare payment is open-end, is it not?

MR. KOHN: Well, I'm not sure --

QUESTION: Very largely open-end.

MR. KOHN: I'm not sure that's true with respect to

the UF program, Your Honor.

The UF program is designed to deal with the needs of children who are deprived of parental care or support due to the unemployment of the parent. Like unemployment compensation, the objective is to try to get the parent back to work. And if there is suitable employment available, then, once a father goes back to work, if he's working over 100 hours a month, the grant would cease.

And it's the same with unemployment compensation. The big difference in the programs is that one is based on the actual needs of the family, and the other isn't. The father could have a marginal job, earning $100 a week, and if he becomes unemployed, it's entitled to a maximum of $50 a week in benefits, while the family under AFDC could be eligible,depending on its size, for many hundreds of dollars.

QUESTION: More than the father earned when he was working at $100 a week?

MR. KOHN: Well, that would depend on the size of the family and other factors, Your Honor. I suppose it could be more.

QUESTION: Well, surely from what you've just said, I would gather that's true.

MR. KOHN: I would expect in some situations it might be true. If the family meets the eligibility criteria for AFDC, then the amount of the grant depends on the size

of the family and the amount of rent they have to pay, and that sort of thing.

And in some cases, I suppose it could exceed his earnings.

Now, if the Court agrees with us -- it is a fact that since 1968 when this legislation was amended, HEW, even though its regulation says that it is the receipt of benefits that works the disqualification, the Secretary has interpreted this to mean eligibility for receipt.

And the State and the HEW has argued that this interpretation should be given great weight by the Court.

We would ask the Court, first of all, if it agrees with our -- and if it agrees with the district court that the statutory language is plain, then, under Shea vs. Vialpando, there would be no reason to consider the Secretary's opinion on the matter.

At any rate, his interpretation is at clear variance with his own regulation, which does speak in terms of receipt of assistance.

The -- in footnote 4 of its brief, HEW has suggested that one reason why Congress would not have used the language "eligibility for receipt" would be that they were concerned about the gap between the time the father applies for unemployment compensation and the time that it is granted, with the implication that AFDC benefits should be available to the family

within that period.

This may be true in some circumstances, but I think it would be a fairly rare situation. Unemployment compensation benefits are available after a one-week waiting period. This is true in Vermont, and I believe it's true in most other States.

Under HEW regulations, the State has 45 days in which to give an eligible person his AFDC money. In Vermont it's a 30-day waiting period, and in Vermont, if there is any kind of gap between the time the man applies for his unemployment benefits and the time he gets them, that is taken care of by general assistance to tide him over.

But it's certainly not the general rule, that any problem would be created by that hiatus in time.

Now, we have asked the Court that if it should reverse the district court on the statutory ground, that it should reach and decide the constitutional question; and the -- it's true that the district court did not reach that question. However, it was fully briefed and argued downstairs -- unlike the Alcala case, it has been briefed in this Court, and we would argue that the exigencies of the economic situation require the Court to go ahead and decide that issue.

The case will affect 25 States that have the UF program, and there are many thousands of children who would be affected.

We believe that the standard of review is that that was enunciated in the Marino case. Now, some have argued that that is sort of a strict rationality standard, and that the government must show that whatever objective the provision serves must be furthered by the statutory classification, and it's our contention that this statutory classification serves no government purpose.

It certainly doesn't serve the purposes of the AFDC-UF program, which was designed to take care of needy children, and even if you -- even if one of the objectives was to try to make parents self-supporting and get them back to work, that's taken care of by provisions within the AFDC statute.

The government has argued that one rational basis would be that there has been a historic reliance on unemployment compensation as the first line of defense for unemployment.

I would say that for purposes of this argument we would concede that Congress does not have to enact the UF program if they choose not to, and that there are distinctions that could be drawn between that and the situations described in section 606.

But once Congress has recognized the problem and enacted an Unemployed Fathers program, it can't then divide that class of children into subgroups, based on whether the father receives a source -- some income from a certain source. And that that is as irrational if they excluded red-headed

families from that group.

Also, as the legislative history shows, while at one time unemployment compensation was considered the first line of defense, it certainly could not longer be said that that was true after 1961, when Congress specifically recognized that unemployment compensation could be supplemented.

QUESTION: The UF is optional for the States, is it not?

MR. KOHN: I'm sorry, Your Honor?

QUESTION: The UF program is optional with the States?

MR. KOHN: Yes, sir.

QUESTION: Explicitly so.

MR. KOHN: Yes, sir.

QUESTION: How many States have it?

MR. KOHN: At the present time, 25 States, Your Honor.

QUESTION: About half. Exactly half.

MR. KOHN: That's correct.

QUESTION: Unh-hunh.

While I've interrupted you, you remember yesterday from the other end of the bench there were stirrings about the possibility of this not being appealable, this case not being appealable to this Court.

MR. KOHN: Yes, sir.

QUESTION: Have you given that any thought?

MR. KOHN: Yes, I have, Your Honor.

In my judgment, the appeal is properly here on direct appeal from the three-judge court.

Some members of the Court yesterday referred to a prior decision of the Court involving the supremacy clause, and it was suggested that this issue had been settled many years ago. I think the Court was referring to the Swift vs. Wickham case.

QUESTION: That was the case.

MR. KOHN: Well, a few weeks after Swift was decided, the Court decided Brotherhood of Locomotive Engineers vs. Chicago, Rock Island, Pacific Railroad, 382 U.S. at 423, and unlike Swift, which dealt solely with the preemption issue, the Brotherhood of Locomotive Engineers case involved an attack based both on a preemption issue and a constitutional ground.

The three-judge court was convened, they did not decide the constitutional ground, they only decided the preemption issue, and an appeal was taken directly to this Court from that judgment, and the Court held that it had jurisdiction. And specifically distinguished the Swift case on the grounds that in that case no constitutional issue had been presented.

QUESTION: In the Second Circuit, we have a case -- I guess it's going to be heard either -- well, tomorrow. The Second Circuit, as you know, perhaps has dichotomized --

MR. KOHN: Yes, sir.

QUESTION: And if the district court decides a case such as this only on the statutory ground, preemption ground, if you will, --

MR. KOHN: Yes, sir.

QUESTION: -- it goes to the Court of Appeals, even though jurisdiction of the district court is purely pendent because of -- by reason of the constitutional claim. And if the court decides it on constitutional grounds, it comes directly here. We have, as I say, a case to be argued tomorrow involving just that kind of procedure that's been developed in the Second Circuit.

MR. KOHN: Yes, sir.

QUESTION: And that would suggest, I suppose, that if this were in the Second Circuit, at least, this case, as decided by the district court, would have been appealable to the Court of Appeals and only to the Court of Appeals.

MR. KOHN: Well, --

QUESTION: If it were heard by a single judge?

MR. KOHN: Yes, sir.

QUESTION: The statutory issue could be heard by a single judge.

MR. KOHN: Well, I don't think there's any question that if the three-judge court in this case had dissolved itself and sent this back to be decided by a single judge, that the appeal would have --

QUESTION: On the statutory grounds.

MR. KOHN: Yes, sir. Then the appeal would have gone to the Court of Appeals.

QUESTION: Unh-hunh. And that is the Second Circuit premise, right?

MR. KOHN: Yes, sir; that's correct.

But if this Court were to decide that a direct appeal can be taken to this Court from a three-judge court only when the three-judge court has decided the constitutional issue, that would be a radical departure from prior decisions of the Court.

QUESTION: Unh-hunh.

MR. KOHN: In Hagans v. Lavine, this Court had dictum which states precisely the contrary. In the case of Gonsalez vs. Automatic Employees Credit Union, which I believe was the most recent case to deal with it, the Court expressly said -- that had to do with a case where the three-judge court had denied injunctive relief.

QUESTION: Yes.

MR. KOHN: And --

QUESTION: On other than constitutional grounds.

MR. KOHN: That's correct.

And -- but the Court expressly said that the decision would not have an impact on cases where the Court grants an injunctive relief. And just as a practical matter it seems to

me that the whole policy of the expedited appeal procedure is -- if a lower federal court has decided a case, issued an injunction which arguably paralyzes a federal statute and arguably is against the expressed intent of Congress, then it's important that the issue be resolved immediately.

Whether the Court does that on constitutional grounds or statutory grounds, I find very -- I have a difficult time understanding why that should make a difference.

QUESTION: This could always be dealt with by a stay, could it not?

MR. KOHN: By the State?

QUESTION: By a stay of the action.

MR. KOHN: Well, it could be, Your Honor.

QUESTION: And frequently is, is it not?

MR. KOHN: Well, I'd like --

QUESTION: Or a single judge does act and there is no direct appeal.

MR. KOHN: That's correct, Your Honor, but, as in this case, where the court -- the district court applied the ordinary language rule, it seemed absolutely clear that what Congress's intention was. Now, under those circumstances, why should the order be stayed pending an appeal through the Circuit and to the Court of Appeals, which may take a year and a half?

I might say that in our case --

QUESTION: But you have to remember that you're sort of in federal court at all by virtue of pendent jurisdiction.

MR. KOHN: Yes, sir.

QUESTION: On that. And that that's not a -- the court isn't obliged to undertake that kind of a --

MR. KOHN: There is a discretionary aspect, Your Honor, I understand that.

QUESTION: And so that you may be in federal court by suffrance, anyway. Unless you can come under 1331, which you don't say you can.

MR. KOHN: Oh, I do, Your Honor. I've alleged this.

QUESTION: Then you don't even get into this argument.

MR. KOHN: Quite possibly. We've -- I've briefed these issues, Your Honor. I've argued jurisdiction on many alternative grounds. I think we can come here on 1331.

I should say, just on this point, that after the district court made its decision in this case, which essentially provided the family with an option, the -- on the agreement of the parties, the State moved for a stay, as was just suggested, the court was unwilling to do that and the parties agreed that instead of the option, pending the appeal, unemployment comp benefits would be treated like any other resource. And since January of '74, in the State of Vermont,

if a family becomes eligible for unemployment compensation, he goes over to the welfare office and they give him a supplement up to the state needs standard.

If the Court had not granted a conditional stay and just said, No, we've made our decision, and the option is going to apply now; I think the government would argue that that would be a catastrophic result.

And this is the problem when the appeal has to wend its way through the Court of Appeals in a situation like this.

Also, there are great public-interest ramifications. There are 25 States involved. In every State but Vermont right now any child whose father is eligible for unemployment compensation is being denied benefits. And that's an issue that should be resolved.

QUESTION: Has this been litigated in any other State, this precise issue?

MR. KOHN: There's only one other case pending that I know of, Your Honor, in the State of Maryland; and my understanding is that it has been stayed pending a decision on the merits in this Court.

QUESTION: Stayed in the district court?

MR. KOHN: Yes, sir.

QUESTION: No decision yet in the district court?

MR. KOHN: No decision, and I don't know whether injunctive relief has been granted, but I doubt it.

The final question that I'd like to address, if I have a moment, is a mootness question. The class action in this case was not certified as a formal class action by the district court.

And when the Erznoznik case and the Jacobs case came out, I wrote a letter to the Clerk, I advised him of this, and also filed an affidavit by one of our named plaintiffs, a man named Sarazin, who is presently receiving unemployment compensation under this so-called Glodgett plan.

I believe that that saves the case from mootness.

And I would also argue that even if it doesn't, and even if Mr. Sarazin should go back to work within the next month or so, that this is the type of problem that's capable of repetition, yet evading review.

When a man becomes eligible for unemployment and starts drawing it, one of two things will happen. Either he will go back to work, long before the issue could be resolved in the Supreme Court, or he'll exhaust his benefits. And, as was brought out yesterday, with the emergency situation because of the recession, the benefit period is 39 weeks, with the emergency legislation passed by Congress it's up to 52. But it's highly unlikely that a case could come to this Court in that period of time.

QUESTION: Of course, Erznoznik gives you a remedy for that in a class action.

MR. KOHN: Yes, Your Honor. That's true. But it's my feeling that the named plaintiff has a right to vindicate his claims, and that -- I'm not sure that simply because he is permitted to bring a class action it would affect other people, that that would undercut the exception to the mootness doctrine.

QUESTION: Well, I think we said in Erznoznik that if it wasn't moot as to the named plaintiff, there is no problem. But if it's moot as to the named plaintiff, --

MR. KOHN: Well, Erznoznik only dealt with a class action situation, Your Honor, and it didn't get into the exception to the mootness doctrine that this Court enunciated in Southern Pacific vs. ICC and Moore v. Ogilvie, where you were dealing with a specific named plaintiff.

QUESTION: And there was a possibility of repetition as to him.

MR. KOHN: Yes, sir.

And we would argue that the families that we represent are locked in a cycle of poverty. It's highly likely that they will be off and on this program for the foreseeable future, particularly with the recession.

And we have some figures which, at this time, are not a part of the record of the Court, but I'll be glad to file it, showing the history of each of these families. These are figures that were compiled by the Department of

Social Welfare in Vermont. And you will see that in fact there were periods of unemployment, they would go off unemployment, go to work for several months, and then they would be back on again.

And it's certainly the situation of Mr. Sarazin, who was unemployed from January '74 until June of '74, worked from June of '74 until November of '74, and since that time has been unemployed and is receiving assistance.

QUESTION: What is this so-called Glodgett plan?

MR. KOHN: The Glodgett plan is a plan that was formulated in Vermont, Your Honor, after ths district court's decision. Under the Glodgett plan, instead of the option taking effect, a family that's eligible for unemployment compensation is permitted to accept those benefits and then go over to the Welfare Department where he gets a supplement to bring him up to the State needs standard.

QUESTION: With a pro tanto reduction?

MR. KOHN: That's correct, Your Honor. It's --

QUESTION: Then it's just an interim plan pending the final --

MR. KOHN: Pending the --

QUESTION: -- decision of this litigation; is that it?

MR. KOHN: That's correct.

And the effect of it is to do exactly what would have been done had the Court resolved this case on constitutional

grounds. All they're doing is teating unemployment compensation as a resource, the same way they would workmen's comp or veterans benefits or anything else.

QUESTION: As other resources.

MR. KOHN: Right. Or anything else.

QUESTION: Unh-hunh.

MR. KOHN: I think that's all I have.

Thank you.

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

Mr. Patton, do you have anything further? You have about three minutes left.

REBUTTAL ARGUMENT OF WILLIAM L. PATTON, ESQ.,

ON BEHALF OF APPELLANT WEINBERGER

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

The only point I want to respond to is the question of whether the appeal lies to this Court or the Court of Appeals.

At the time we filed our Jurisdictional Statement, we relied on a statement in Hagans v. Lavine which is properly characterized as dictum, but which we believe reflected the law as it then stood.

If the Court -- and I think it's obvious -- does wish to reconsider those cases, we'd like permission to file a supplemental brief, and we request thirty days in which to

file it, because it presents a number of questions of -- that are important to government's litigating policy, that I'm not in a position to answer at this time.

QUESTION: Would your brief be in support of the position that this case is appealable directly to this Court?

MR. PATTON: I'm not sure, Mr. Justice Stewart, because, actually, as a practical matter, we would have preferred to go to the Court of Appeals in this case, because we think we could have resolved the statutory problem there. And as a general matter, the government doesn't have a preference as to which court to go to, as long as it knows where it's going to go.

QUESTION: Unh-hunh.

MR. PATTON: But we do think there's some things that we ought to consider.

For one thing, the rule ought to be the same as to State and federal defendants; otherwise, we'll end up with a situation where, when joined in the same action, the State defendants go to this Court and the federal defendants go to the Court of Appeals.

And there are questions about expedited review, where an injunction has been granted. And those are the kinds of things that we'd like to consider and submit in our supplemental brief.

MR. CHIEF JUSTICE BURGER: Would you need thirty days

for that, counsel, if you can submit it in less than printed form, fully printed form?

MR. PATTON: I wouldn't think so, Mr. Chief Justice. We want to confer with the States, and we also want to talk to some of the federal agencies, to get their views on the question. I would think -- well, I think fifteen days would be sufficient, if we can dispense with printing.

MR. CHIEF JUSTICE BURGER: Very well. We'll expect it in fifteen days, and if Mr. Kohn wishes to respond, he may do so in that time.

QUESTION: Mr. Patton, this doesn't come as a surprise to you, does it? We postponed jurisdiction in your case.

MR. PATTON: It came as a surprise to me yesterday afternoon, Mr. Justice Blackmun, because --

QUESTION: But that was on a different point, wasn't it?

MR. PATTON: We had anticipated that jurisdiction was postponed on the pendent parties doctrine, and we didn't think that this question was foreshadowed in Gonsalez. Though we now recognize the issue, and will respond to it.

QUESTION: We had MTM this morning that adds a little --

MR. PATTON: Yes, sir.

QUESTION: -- fuel to the fire on it.

MR. PATTON: Yes.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:39 o'clock, a.m., the case in the above-entitled matter was submitted.]

- - -