In the

Supreme Court of the United States

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RICHARD A. BATTERTON, ETC., ET AL.,

PETITIONERS,

V.

No. 75-1181

ROBERT FRANCIS, ETC., ET AL.,

RESPONDENTS.

Washington, D. C.
April 19, 1977

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v.	:	No. 75-1181
ROBERT FRANCIS, etc., et al., Respondents.	:	

Washington, D. C.,

Tuesday, April 19, 1977.

The above-entitled matter came on for argument at 2:02 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOEL J. RABIN, ESQ., Assistant Attorney General of Maryland, 1100 N. Eutaw Street, Baltimore, Maryland 21202; on behalf of the Petitioners.

C. CHRISTOPHER BROWN, ESQ., University of Maryland School of Law, 500 W. Baltimore Street, Baltimore, Maryland 21202; on behalf of the Respondents.

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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 75-1181, Batterton against Francis.

Mr. Rabin, I think you may proceed.

ORAL ARGUMENT OF JOEL J. RABIN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. RABIN: Thank you, Mr. Chief Justice.

May it please the Court:

This litigation began almost six years ago and has been before the Court on two previous occasions. Despite its complex course through the federal judicial system, there is only one clearcut issue now facing the Court at this time. And that is: whether the present version of the regulation of the Secretary of Health, Education, and Welfare, 45 C.F.R. 233.100(a)(1) is valid under the grant of rule-making authority contained in Section 407(a) of the Social Security Act.

So what we are arguing today is an administrative law case. One concerning the proper scope of agency rule-making.

By its petition for certiorari, Maryland seeks reversal of an order by a three-judge district court, affirmed by the Court of Appeals for the Fourth Circuit, denying Maryland's motion to vacate an injunction previously entered by the district court.

That denial was based on the holding that the HEW regulation was invalid under Section 407(a).

Before stating the facts, it might be helpful to briefly outline the statutory framework. The AFDC-UF program, unlike the regular AFDC program, authorizes benefits to two-parent households where the need or deprivation of the children in the family arise from the unemployment of the father. The program was first enacted in 1961 as the Unemployed Parent Program, and covered need or deprivation arising from the unemployment of either parent.

In its original form, Section 407 provided for coverage of children who are needy as the result of the unemployment of a parent "as defined by the State".

In 1968, substantial amendments were made in the program, and the language of Section 407 was changed from unemployment as defined by the State to "unemployment as determined in accordance with standards prescribed by the Secretary."

After passage of these amendments, HEW prescribed the predecessor version of 233.100(a)(1), which mandated an hours-worked criterion for State definitions of unemployment. All persons who worked less than 30 hours per week.

The regulation also permitted coverage for persons who worked up to 35 hours per week. That was the regulation which was in effect when this litigation began in 1971.

The claimants in this case all applied for Maryland AFDC-UF benefits after applying for and being denied Maryland

Unemployment Compensation benefits.

Claimant Robert Francis, a laboratory technician, was denied unemployment insurance because he was participating in a strike which resulted in a work stoppage at his plant.

Claimant Edward Wright, who intervened in the Francis case, was disqualified because he was fired from his job as a carpenter for excessive absenteeism, and the Maryland Unemployment Insurance Agency determined that that conduct constituted gross misconduct.

Claimant Barry Bethea, who filed a separate action which was consolidated with the Francis case on appeal, was disqualified from Unemployment Compensation when it was determined that he had voluntarily left his job as a truck driver/delivery man without good cause.

All these claimants were then denied AFDC-UF benefits in Maryland, pursuant to the Maryland Social Service Regulation 7.02.09.10A(2), which provides that "A grant may not be paid from AFDC-E" -- which is the Maryland label for AFDC-UF -- "to meet need due to being disqualified for unemployment insurance."

The three-judge district court, which was convened in the Francis case, determined in its first decision -- which we describe in our brief as Francis I -- that this Maryland regulation did not violate the Equal Protection Clause, as claimants had alleged, but that it did violate the predecessor

version of 233.100(a)(1) in that, in the court's view, that regulation did not permit the States to consider any factors other than hours worked in determining unemployment. As a result, the district court subsequently enjoined the enforcement of the Maryland regulation.

When that injunction was appealed by the State to this Court, the Solicitor General advised the Court that HEW had always interpreted the statute and its own regulation to permit other State eligibility factors, such as contained in the Maryland rule.

However, since HEW had decided to amend its regulation, to expressly permit regulations such as that of Maryland, the Solicitor General recommended summary affirmance, and this Court took that action.

Thereafter, HEW did amend the regulation as the Solicitor General had indicated, and the regulation now requires that States pay benefits to those persons who worked less than 100 hours per month, except that States are permitted to deny benefits to persons engaged in a labor dispute or engaged in conduct resulting, or which would result, in disqualification under the State's Unemployment Compensation laws.

After that regulation was amended in that manner, Maryland filed a motion to dissolve the injunction in Francis I, but the district court in the Francis II decision held that

the Maryland regulation was still invalid on the ground that the amended HEW regulation now violated Section 407(a).

The decision in Francis II not to vacate the previously entered injunction was based on the theory that Section 407 relates to unemployment of a father, and a father who is discharged for cause is unemployed; and HEW, by regulation, cannot permit States to deny benefits to persons who fall within this ordinary meaning of the term.

With regard to persons out of work as a result of a labor dispute, the district court held the amended regulation did not establish any standards for the States, it did not prescribe standards as the statute provided, since it granted discretion to the States to deny or to pay such benefits.

The separate district court decision in the Bethea case adopted the same reasoning as the Francis II decision did, with regard to misconduct. The Bethea was was the one which involved persons who had voluntarily quit without good cause. The court there held, as in Francis II, with regard to misconduct, that such persons were in fact unemployed and, under the statute, the federal agency had no authority to deny benefits to such persons.

The Court of Appeals affirmed those two district court decisions in a per curiam decision, adopting the reasoning and conclusions and not offering any rationale of its own.

As I indicated earlier, the State believes that the basic issue in this case is the scope of HEW's rule-making authority.

We contend that the issue is not whether AFDC-UF benefits should be paid to misconducts, to strikers, or to persons who have voluntarily quit their jobs; rather, the question is whether the statute gives HEW the authority to allow States to choose to pay such benefits.

Our position, stated very briefly, is that the statute constitutes a very broad grant of legislative type of rule-making authority to HEW, and that the regulation constitutes a reasonable exercise of that authority.

There obviously can be no question that the language of the statute expressly grants broad rule-making authority. We believe that those statutory words falls within the label that Professors Jaffe and Davis have devised, namely legislative type of rule-making; other commentators refer to them as prescriptive or substantive rules.

And it is well-established that such rule-making is to be given substantial deference by the courts. As this Court stated in Citizens to Preserve Overton Park, the ultimate standard of review is a narrow one, the Court is not empowered to substitute its judgment for that of the agency.

Thus, the HEW regulation, we contend, is valid and should be upheld, if it is reasonable under the statute, even

if the Court favors a different result.

Claimants and the district court avoided the issue of the broad scope of rule-making authority contained in Section 407 in two ways:

First, as I indicated, they argue that the regulation was invalud because it excluded from the persons -- from the program certain persons who fell within the ordinary meaning of that term.

While we respectfully contend that that reasoning begs the question, the purpose of the statutory words was to give the rule-making authority to HEW, and for HEW to give content to the term "unemployment". The term has never been self-defining in the statute. It was not self-defining in 1961, and it is not self-defining after 1968.

Reliance on a dictionary meaning cannot answer such a question, as this Court has so recognized in the Burns v. Alcala case, which concerned the meaning of the term "dependent child".

While the district court and the claimants choose to rely on the dictionary meaning of the term "unemployment", of course they choose to ignore totally the dictionary meaning of the words "in accordance with standards prescribed by the Secretary".

The district court also avoided the question of the scope of rule-making authority contained in 407 by holding,

with regard to persons who are participating in a labor dispute, that the section mandated a uniform national definition of "unemployment".

Therefore, the district court reasoned that the limited grant of discretion to the States with regard to such persons disqualified for participation in labor disputes was improper.

I do want to mention at this point that Maryland agrees with the point raised by the Solicitor General in his memorandum that the Court does not have to get to the question of the validity of the regulation in connection with persons participating in a labor dispute, because, in Maryland, all the claimants and the Maryland rule only operates against persons who are disqualified from unemployment insurance. It so happened that the leading named plaintiff was a person who was participating in a strike, but he was denied benefits because of -- under the Maryland rule he was disqualified from unemployment insurance.

QUESTION: Now, you told us that the dictionary meaning of "unemployment" is basically irrelevant; is that it?

MR. RABIN: We think it's not the test for determining --

QUESTION: You mean it's not dispositive?

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

QUESTION: But you would concede, I suppose, that it's

relevant if it said -- in looking at the regulations you have to have some rational relationship to the word "unemployment", do you not?

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

That's correct. And it's our contention that the HEW regulation and the Maryland rule thereunder are reasonable under that word, under this --

QUESTION: The "unemployment"?

MR. RABIN: That's correct.

QUESTION: But, I just want to be sure, you don't say that the statutory phrase is irrelevant, --

MR. RABIN: No, I don't think --

QUESTION: -- it all depends on what the regulations say.

MR. RABIN: And we would not contend that HEW could not look at the dictionary meaning when it --

QUESTION: Well, it must not look at the ordinary meaning of the word, then defining by regulation what it means, in giving it precise regulatory definition.

MR. RABIN: That's correct.

The legislative history with regard to Section 407 has been set out at great length in our brief, in claimants' brief, the Appendix, and the decisions below, and I will not try to repeat it.

It is true that there are phrases in the Committee

Reports that talk about a national definition of unemployment.

On the other hand, it is also true that other reports talk about the statute as "authorizing" a national definition; and sometimes it's the same report that uses the phrase, "a national definition". And it is also true that those reports at some points use the actual statutory words; namely, "as determined in accordance with standards prescribed by HEW".

It would have been very easy for the Congress to mandate a national definition with regard to a uniform national definition. All they would have had to do in 1968 would have been to substitute the word "Secretary" for the word "State" in the statute. This fact was recognized by the district court in its Francis I decision. But, as that decision points out, Congress chose instead to use new words which do not mandatorily require the Secretary to require each State to adopt the same meaning of the word "unemployment", but instead merely authorize the Secretary to prescribe a national meaning if the Secretary so desires.

The many statements as to the intent of the 1968 change must be considered in connection with the actual words used in the statute. As this Court has recognized, the most persuasive evidence for the purpose of a statute is the words by which the Legislature chooses to give expression to its wishes.

We think that when one considers the legislative

history behind the 1961 statute, behind the 1968 amendments, and looks at the words of the statute themselves, it is clear that Congress contemplated that the Secretary of HEW was free to allow the States limited discretion -- limited discretion -- to vary the coverage in response to their differing needs in policies.

Thus, under the broad authority granted by this section, the federally prescribed standards could take the form of a national definition, but they could also grant the States some discretion in specific areas, as in fact the regulation has done.

Assuming that to be the case, HEW's regulations still must meet the test of reasonableness under the statute or the courts must set it aside. We think it is clear that 233.100(a)(1) does meet that test in connection with the purposes of the AFDC-UF program as set out in the statute and the legislative history.

When the program was first adopted, President Kennedy indicated that it was intended for unemployed workers, and he gave the example of a person who had exhausted his unemployment compensation. We have quoted at length in our brief from the statements by Congressman Byrnes, one of the co-sponsors of the original legislation, which makes clear that Congress did not intend that the program provide benefits to persons who were voluntarily unemployed.

And, as originally adopted in 1961 and as amended in 1968, Congress made clear that the program was intended to provide assistance to persons in connection with employment not covered by the existing unemployment compensation program, that the program was not designed to substitute for that already existing nationwide program.

Furthermore, as amended, the program is very similar in operation to unemployment compensation, in that it's an income maintenance program designed to assist those who are unemployed not as a result of their own conduct.

In light of the similarity of these purposes, namely to pay persons who are involuntarily unemployed, we think it is clearly not unreasonable to attempt by regulation or to permit by regulation a State to harmonize the operation of these two income maintenance programs; namely, not to pay benefits under one scheme for conduct which results in a disqualification under the other.

We note that the district court, in dismissing the claimants' constitutional claim, recognized this harmonization purpose as a rational basis for the regulation. And the court held that -- the court upheld the argument that rationalization of these two programs, which are both part of the scheme of cooperative federalism described by this Court in the King case, established by the Social Security Act, was a proper rational basis, although the district court did not necessarily agree

with that basis.

It is certainly not unreasonable to grant States limited discretion contained in 233.100(a)(1) in one of the public assistance programs created by the Social Security Act, when the statute permits such a grant of limited discretion. The basic purpose of the statute is to extend assistance to a group of needy persons -- and this is true of all the public assistance programs -- by making partial federal reimbursement available to those States which meet certain substantive federal requirements.

Now, unlike the other public assistance programs, 24 States have not joined the AFDC-UF program; although, as indicated in our brief, three States have joined in the last two years, and one State has dropped out of the program.

As shown by the Solicitor General's memorandum, a significant number of States -- nine if you include Maryland -- have restrictions -- actually there's more than nine, because the Solicitor General classified eight States with regard to cause and then eight States with regard to strikers; so that the total number of States who might be interested in this type of a restriction would be greater than nine.

It's difficult for Maryland to see how the prohibition against such State discretion will encourage the general purpose of the program -- of the statute, through State participation in this program which is designed to

assist needy, laid-off workers, and unemployed through no fault of their own.

We think that perhaps the best proof of the reasonableness of the grant of discretion found in the regulation is the approach taken by the federal government itself in connection with --

QUESTION: But the statute doesn't induce that element which you just mentioned, "through no fault of their own"; the neediest people may be the children in the homes of unemployed people who are unemployed because of fault of their own.

MR. RABIN: Well, you're correct, Mr. Justice Stewart, that it doesn't use that phrase, --

QUESTION: The statute.

MR. RABIN: The statute. But it does in other ways make clear that persons who, through their own conduct, are not active -- for example, not actively seeking employment, are not entitled to benefits.

QUESTION: But there are other forms of welfare benefits to take care of needy children, needy people, besides just the ones we're talking about here.

MR. RABIN: That's correct, if you're talking about the medical assistance program.

In addressing Mr. Justice --

QUESTION: But this is AFDC-UF.

MR. RABIN: Right.

We think the legislative history shows that the program was not designed to assist those who were voluntarily unemployed.

QUESTION: Well, it was designed to assist children, was it not?

MR. RABIN: That's correct. But we -- that's right. And we don't contend -- it's not Maryland's position -- that the States that have chosen not to adopt the restrictions that Maryland has chosen are doing something illegal --

QUESTION: No, I understand that. The question is whether this regulation is permissible.

MR. RABIN: That's correct. And we think that when you look at the total statutory framework, there is a requirement for job registration. There's a denial of benefits for refusal to accept a suitable job offer.

QUESTION: Now, this is statutory? Or --

MR. RABIN: These are all statutory, and they are contained in Section 407.

We think, taking those requirements with the legislative history, it seems clear that the thrust of the program was to help those who are involuntarily unemployed.

QUESTION: But the States are not compelled to participate in this program, are they?

MR. RABIN: That's correct, Your Honor, and 24 States

have not participated, although a few have because of the recent economic conditions in the last few years, that three have joined the program.

QUESTION: But in those States the families and the children of those families in these circumstances must depend upon other --

MR. RABIN: That's correct, Your Honor. They receive no assistance of this type at all. And it's our contention that it's reasonable for the Secretary of HEW to look at what he can do to encourage those States to participate in the program in prescribing his regulations. And that, we think, in fact supports this particular regulation, which gives States the choice, it doesn't mandate that they make the payments, and it doesn't prohibit that they make the payments.

QUESTION: Yes. And the fleixibility to permit variations from State to State were contemplated by Congress to take into account different forms of industry and occupation among other things, were they not?

MR. RABIN: We think so. And we think that this Court made clear in the Dableno? decision that in connection with the welfare cases, the welfare programs, the courts are to give considerable latitude to the differing State interests, so that the programs can be developed in a flexible manner to meet the needs in particular States.

The Congress is clearly aware of the issue of coverage of strikers in this particular program. That's shown by the colloquy between Congressman Byrnes and -- excuse me, Congressman Mills and Dominick, which is cited in claimants' brief.

So Congress knew, when this program was originally adopted in 1961, that it was not mandating or not prohibiting -- in fact, the colloquy goes to the effect, Congressman Mills indicates that if States chose, they could make the payments to strikers.

We think that, as I was saying, the example by the federal government in connection with the State-administered Unemployment Compensation program, we think is a good example of the reasonableness of the Secretary's regulation. Congress has been aware for years, and the federal agencies have been aware for years, of the fact that some States paid unemployment -- a few States pay unemployment compensation benefits to strikers, and many States do not pay unemployment compensation to strikers.

However, with regard to that particular program, which is administered by the States, and is financed through State taxes, Congress has decided to leave that discretion to the States.

We think that that approach is no less reasonable when taken by the Administrator of a program who is charged with

broad authority, to implement and supervise the program, no less reasonable than it is when it's taken by the Congress.

Claimants contend that the HEW regulation is invalid under the State eligibility decisions by this Court in recent years in the welfare field, including the most recent formulation in Burns v. Alcala, the 1975 decision I referred to previously, concerning whether unborn children are necessarily covered under the AFDC program.

However, contrary to their contention, it's our view that that decision really supports the validity of the HEW regulation.

In Burns, the Court stated that a participating State may not deny aid to persons who come within the statute, in the absence of a clear intent that the Congress meant the coverage to be optional.

Well, there is such an indication in this case; it's right in the statute. Congress provided that the Secretary of Health, Education, and Welfare had the option to extend or restrict the coverage of the statute and also to grant a limited discretion to the States.

We think that even more appropriate in support of the HEW regulation is the reasoning of the Dableno? decision, to which I referred to previously. We also think that the Lewis v. Martin case, which upheld HEW's broad rule-making authority with regard to the AFDC program, supports this case.

And we think that the decision by this Court recently in Abel v. Hein, which upheld the regulation by the Secretary of Agriculture, also supports the regulation. That decision cautioned the courts to defer to the informed experience and the judgment of responsible administrative agencies, even if they might favor a different result.

The decisions below interpret the statutory language, "unemployment as determined in accordance with standards prescribed by the Secretary", which is an express grant of very broad rule-making authority, to mandate coverage for persons disqualified from unemployment compensation because they were fired for misconduct or because they voluntarily quit their jobs.

And also to bar any grant of discretion to the States, as to payments to strikers.

In effect, they say that HEW has no broad authority with regard to that first category; and that with regard to the second category, HEW must either mandate a national -- mandate payments on a nationwide basis or prohibit payments on a national basis.

We respectfully contend that that is not a reasonable interpretation of the statutory language or of the legislative history.

As Maryland the Solicitor General have demonstrated, the regulation which HEW has promulgated under these statutory

words, we think, is a reasonable regulation, and the Maryland regulation which authorizes it, are valid and the decisions below should be reversed.

I would like to reserve the remainder of my time.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Brown.

ORAL ARGUMENT OF C. CHRISTOPHER BROWN, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

This case basically involves a question of whether or not the Secretary of HEW has followed the power that he was given by Congress in a specific statute, 42 U.S.C. Section 607.

The statute reads, as is pertinent to this case, in defining who can get this certain kind of welfare benefit for families that do have children, that it must go to needy children whose "father's unemployment, as determined in accordance with standards prescribed by the Secretary", then so forth and so on, with other preconditions.

So we're talking about unemployment in accordance with standards prescribed by the Secretary.

The Secretary, in attempting to define "unemployment", has done so in various ways.

First of all, the Secretary has defined unemployment in terms of hours worked, which we have no quarrel with whatsoever. That is the most common-sensical way in which to define whether or not a person is unemployed or not. There may be other ways. It may be whether or not he has a contractual duty or right with respect to an employer. It could also perhaps be defined with respect to the rights that he has, seniority rights perhaps, to an old job. Very many other aspects of what an employee might have to expect in a specific case.

But the Secretary of HEW hasn't defined the term "unemployment" in that way. Instead, the Secretary has basically defined the term by the legal consequences of the way in which a person lost his last job.

So, in addition to defining employment in terms of hours worked, the Secretary also allows the States, at their option, if they so choose, to choose a definition of unemployment which turns on two things: one, whether or not that person is eligible for unemployment insurance; and, secondly, whether or not that person has been involved in a labor dispute.

It's our contention, Your Honors, that the latter definitions or attempted definitions by HEW are null and void, as the judges that have heard this case thus far have found.

As a prelude, I'd like to say that we agree with the

State. The issue in this case is that part of the HEW regulation dealing with giving the States the power to disqualify people from AFDC-UF, this welfare program, who have in turn been disqualified by those States for unemployment insurance.

I don't think, the Solicitor General doesn't think, and the State has conceded it does not think, that we are talking about the part of the HEW statute dealing with striker disqualification.

The State hasn't acted on that basis. It merely disqualifies people who are disqualified in turn for unemployment insurance, and, as a consequence, I cannot see how there's a case or controversy before this Court on that second part of the HEW statute, dealing with striker disqualification.

QUESTION: Is your quarrel with the mechanism or with the substance of it?

MR. BROWN: I'm not --

QUESTION: Suppose the State of Maryland had enacted its eligibility qualifications in precisely the same terms, but in a separate statute or regulation. I'm trying to get at just the focus of your objection to it.

MR. BROWN: Objection to the definition itself, or my objection to what's at issue in this case?

I was saying that the --

QUESTION: Well, I think the two are quite similar.

MR. BROWN: Well, I don't think that the issue in this case is that part of the HEW regulation dealing with strikers, per se, labor disputes, per se. I think, and Maryland concedes and the Solicitor General states, that what is at issue here is that portion of the reg, the HEW reg, which deals with disqualification from unemployment benefits.

Now, it so happens that Maryland, unlike other States, -- few other States, admittedly -- happens to also disqualify strikers from unemployment insurance. So, in that sense, it is relevant, but it's very indirectly relevant.

Now, the case seemingly can be resolved without specifically asking the question of whether the Secretary has the power to define unemployment in terms of people who are involved in labor disputes or aren't involved in labor disputes.

Now, there seem to be two separate, different kinds of questions. And I don't think -- I can't see, another party seemed to come up with a way to see it can be a case or controversy with respect to the labor dispute portion.

We all admit that there is with respect to the unemployment insurance disqualification portion.

Our major controversy, Your Honors, with the Secretary's definition, allowing States to disqualify people if they in turn have been disqualified for unemployment insurance, is this: The statute gives the Secretary the

power to define "unemployment", not the way in which you lost your last job -- a person can be unemployed now for various different reasons that brought him into that position. Unemployment, in the common-sensical term, means your status right now: do you have a job or don't you have a job? Are you getting money or aren't you getting money?

QUESTION: But the statute in question was enacted to give the Secretary authority to make rules relating to supplementing State unemployment compensation plans, wasn't it?

MR. BROWN: Your Honor, I remember nothing in the legislative history which has that concept --

QUESTION: In other words, you don't think that any of this statutory language can be related to disqualifications in State plans by virtue of the fact that the federal legislation had in mind the State plan?

MR. BROWN: State welfare plan or unemployment insurance?

QUESTION: No, State -- yes, State unemployment compensation plan.

MR. BROWN: The Act did have in mind the State unemployment compensation plan to a very large extent, and mentioned --

QUESTION: Well, might not --

MR. BROWN: -- those five or six times in the

specific section of the Act.

QUESTION: Well, as you're aware, and as I'm sure your colleagues, your opponents are aware, the typical State unemployment compensation plan provides four or five disqualifications and that sort of thing, the kind of labor dispute type of thing you've been talking about.

MR. BROWN: That's correct.

QUESTION: Isn't it at least inferable that Congress, when it used the term "unemployment", was using it in the sense of unemployment as that term would be used to define eligibility for State unemployment compensation?

MR. BROWN: Well, that is a possible explanation. There is not one word in the legislative history that I have found --

QUESTION: Well, if that's a possible explanation, isn't that enough for the Secretary to go forward on and promulgate a regulation?

MR. BROWN: I don't think so, Your Honor, because it's such an unusual explanation. "Unemployment", the first thing that pops to my mind in trying to define an unemployed person is not to define the legal consequences that he may be suffering from another benefit program. That doesn't necessarily -- let's take this case for example. A person who has allegedly committed misconduct in a job, and therefore is now out of work. The Secretary in essence is trying to

make that person, who has no employer, who has no money and who is out of work, somehow not be unemployed.

Now, it seems to me the Secretary is standing the definition on its head.

Now, you can do that in certain situations. Certain Acts, for instance, the NLRA, which has been talked about here, it defines "employee" in ways in which the common person wouldn't really define "employee"; and there are many statutes which do that.

But there's no indication whatsoever in this case that the Congress intended the Secretary to come up with a term of art kind of definition as opposed to the common-sensical definition of what an unemployed person is.

And, indeed, if there's any hint to be had from how the Congress interrelated this program into the unemployment insurance schemes that went on in the private States, in each State, it would be, I think, that they didn't intend to disqualify this sub class of people; otherwise they would have said so.

QUESTION: Why did they leave the -- why did they authorize the Secretary, then, to make regulations defining the term?

MR. BROWN: It's my guess, Your Honor, that the primary motivation was -- the legislative history shows, for example, Arizona, at one point in time, had 16 families on

this program; neighboring Utah or Colorado, I forget which, had 1200 or 1600, something like that. Each State had its own different terms. Congress wanted to unify things. Legislative history is replete with comments about a national uniform standard across the country.

QUESTION: You mean that in an absolute sense?

MR. BROWN: Well, I'm sure not in an absolute sense, but in a much better sense than what existed at that point.

QUESTION: Well, if Congress wanted to have it absolutely uniform, it would have defined -- done all the defining itself, would it not?

MR. BROWN: That would have been one way of accomplishing the task. My guess is this --

QUESTION: Well, they very carefully refrained from doing that and explained that they wanted to leave the States some flexibility.

MR. BROWN: Well, not that they wanted to leave the States flexibility, but that they wanted to leave the definition of "unemployment" to the Secretary, who would be in a better position to define normally, we would think, what "unemployment" actuall means. And my guess is that they would want the Secretary to define it in terms of hours, as the Secretary originally did.

The Secretary has come up with his new way of defining "unemployment" as a result of this lawsuit.

Now, this is a way to get around this, the earlier victory that plaintiffs had in this lawsuit.

But my guess would be that Congress said: Secretary, you pick the hour number. And the Secretary had two different -- originally it was 30 hours a week, now it's 100 hours a month, which is the cutoff limit. If you work more than that, no AFDC. You are not unemployed.

Congress most rationally could have thought: Let the Secretary pick the hour amount. Or perhaps let the Secretary define another way, in terms of existing contract with an employer, the amount of money the person earns as opposed to the amount of hours a person works. There are many other ways to do it.

There is no indication in the legislative history whatsoever that Congress contemplated the Secretary doing this.

If anything, Congressman Mills, at one point in the legislative history, has said, in response to a question asked on the Floor -- and Mills, of course, is sort of the father of this legislation -- he said that labor, that strikers could be given AFDC-UF benefits, if the States so desired.

This was back in the days when the States had full definitional ability, and the federal government, HEW, did not.

Now, I think in all but two States strikers are ineligible for unemployment insurance. It would be very strange if Congressman Mills felt that unemployment insurance

disqualificants couldn't get this program benefit, and he would say something like that about strikers. It's totally inconsistent.

Another thing which was very inconsistent with that is that the Act mentions unemployment insurance five or six different times in one section of the Act. It talks about how it interrelates with the AFDC program, and, for example, it used to be that if you were receiving unemployment insurance you couldn't get this program; Congress has recently amended that Act to slightly change your Glodgett v. Philbrook case of a couple of years ago. But still they talk about unemployment insurance time and time again in the statute, but they don't say what the State is trying to get this Court to say, namely, that Congress intended that those who could not get unemployment insurance a fortiori then could not get this welfare program.

QUESTION: Well, that's -- you're overstating it. Not that Congress intended that those who could not get unemployment insurance could not get this welfare, but whether or not a State was permitted to so determine.

MR. BROWN: I think that's correct.

QUESTION: Or, more accurately, whether the Secretary was --

MR. BROWN: Well, what the Secretary is permitted to give the State.

QUESTION: -- was entitled to put in a definition

that would permit the State their option to do it.

MR. BROWN: That's correct. I see nothing in the legislative history which points in that direction.

Another thing which points against that direction is this very significant concern that, if you acquainted yourself with the legislative history, you'd see is very sparse -- the legislative history almost says nothing in this case. But one thing that it does say is that we want uniform national definitions, set by the Secretary. We want the Secretary to say what you can do, States, and what you can't do.

What the Secretary has done in this case, in essence, is to say that if you want to, you don't have to but if you want to, you can disqualify people who can't get unemployment insurance.

Now, each State has its own different system of unemployment insurance. This book, a publication by the U. S. Department of Labor, talks about all the differences in all the State programs on unemployment insurance. If the State is correct, and the Secretary properly can allow States to exclude people who can't get unemployment insurance compensation, you're going to have a different AFDC-UF program in every single State, almost by definition. I would think that would be the case. Because each State has a different unemployment insurance system.

And then, also, the States don't necessarily have to disqualify people who can't get unemployment insurance, the Secretary gives them the option of doing that or not doing that.

It's sort of confusing. The Secretary is allowing us to define these people as unemployed if we want to, or as not unemployed if we, a State for instance, don't want to. You can't have it both ways. It's got to be one way or it's got to be the other way.

I think that's one of the problems. If the Secretary -- the Secretary would not be in as much danger in terms of invalidity of his regulation if he had said: It has to be this. States, you do this and you do this and you do this.

And that's what you have to do. The Secretary, for various reasons, I think, tried to play it both ways. And a person in this category, these people in this class are either unemployed or they're not unemployed. But they can't be both ways.

Another aspect which I think makes it very -- I think it's reasonable to assume that the kind of people who get AFDC-UF, this class of people here, are in many ways very different than the class of people who get unemployment insurance. And, as a consequence, it's not at all unusual for Congress to allow the children of these parents to get this

kind of benefit, whereas they will allow the States to disqualify their parents from getting unemployment insurance.

Now, they are two different kinds of programs, they are very much interrelated, but this welfare program primarily is for children. You can't get this kind of welfare unless you have a child.

On the other hand, unemployment insurance is for parents. The fact that you have children or don't have children really makes little difference as to what kind of benefit amount you can get.

Unemployment insurance is for parents; AFDC is for children, basically.

Unemployment insurance gives money based upon employers' contributions; welfare, AFDC, gives it based upon tax revenues.

I can very well see a rational Congress saying: If this man committed misconduct, his employer shouldn't have to pay his keep on unemployment insurance for 13 weeks or 26 weeks or whatever, after he has been kicked off the job. That makes sense.

Welfare program, though, is for children.

Incidentally, also, welfare programs have very few fault concepts in them. Normally speaking, we don't try to blame the child for something his father did. It may be that the fathers in this case are bad fathers, because they didn't

handle their work job in a correct fashion. But, typically, the welfare programs in this country and the federal program specifically haven't been concerned with fault in that sense. Unemployment insurance programs has -- have.

QUESTION: Well, isn't it true that unemployment insurance programs are not based upon proof of need --

MR. BROWN: That's correct.

QUESTION: -- a person is eligible if he's unemployed. No matter if he has ten million dollars in the stock market.

MR. BROWN: That's absolutely correct.

QUESTION: Whereas, welfare programs are based upon need, alone upon need; isn't that correct?

MR. BROWN: That's true. That's true, Mr. Justice Stewart.

QUESTION: Didn't we hold in the Java? case that it's a partial substitute for the earnings that have terminated?

MR. BROWN: In essence, that's what it is. And the typical case, somebody gets laid off their job, there's a 30-day waiting period in this case, incidentally, --

QUESTION: Yes.

MR. BROWN: -- you have to wait thirty days before you can apply to this program. And most States also require you to go to the unemployment line first, to get unemployment compensation. Once you've gotten that, you can come back and

try to get AFDC, if you're eligible for it.

But there are very different -- there are similar programs, but they have significant differences.

QUESTION: But there are limitations even on the unemployment insurance, are there not?

MR. BROWN: There are time limitations, --

QUESTION: That is, you must accept -- you must report regularly, you must accept employment if it meets the standard.

MR. BROWN: That's correct. And those same -- those limitations on unemployment insurance are the same in this program also. The men in this class have to report regularly, have to take jobs if they are offered jobs, and have to, in essence, be willing to work.

There's a little bit of legislative history that says this is not for the involuntarily unemployed. And I think that the brief points it out quite clearly, that, in essence, what they're saying is that they have a bona fide -- you cannot reject a job, bona fide job offer, and still stay in this program. To reject it, there's a 30-day disqualification period.

So if one of the fathers in this case, Mr. Francis, the striker, for example, if he rejected another job that the State offered him, he will be disqualified from receiving -- having his children receive these benefits for thirty days.

QUESTION: But not after that?

MR. BROWN: But not after that, unless he rejects another one.

QUESTION: Unless he does it again.

MR. BROWN: Unless he does it again.

Some argument was made in essence by, I think, the Chamber of Commerce that somebody who is on strike is in essence rejecting a job. Well, he may -- even assume that he did reject the job, but there's a 30-day waiting period anyway. So there would be an overlap between the disqualification period and the 30-day wait.

If there are no further questions, I have nothing further to suggest.

MR. CHIEF JUSTICE BURGER: Very well.

MR. BROWN: Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Rabin?

REBUTTAL ARGUMENT OF JOEL J. RABIN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. RABIN: Just a few remarks, Mr. Chief Justice.

I think I should point out to the Court that, although the Solicitor General is correct that the Maryland rule operate on the basis of disqualification of unemployment insurance, it's also true that the reasoning that applies to that part of the regulation would probably have an impact as

to the validity of the second part of the HEW regulation on disqualification, namely, participation in labor disputes. And, in fact, if the Court upheld the HEW regulation, that would, I think, would dispose of the issue entirely.

There was a pending regulation by HEW which, in light of the lower court's decision, proposed mandating payments to persons who are disqualified from unemployment compensation, except those persons who were participating in a labor dispute. But the Secretary chose to hold up action on that regulation, pending the outcome of this case.

I do want to indicate my agreement with the major thrust of Justice Rehnquist's question, and point out that in the legislative history it's quite clear that Congress was thinking about the unemployment compensation scheme because, in fact, President Kennedy, in his statement proposing the program, used as an example a person who had exhausted his unemployment compensation benefits.

It is true that there are certain differences between these two types of programs. But it is also true that the programs are very interrelated, and there is a substantial overlap.

For example, there is a substantial work experience requirement in the AFDC-UF program, which, in most cases, under many State laws, would make the person eligible for unemployment insurance.

It's also true that in many States, including Maryland, the benefits you receive under unemployment compensation are affected by the number of children in your family; that is what is called a dependency allowance. So I don't think that you can say that the programs are unrelated, or that they are totally different. They are both income maintenance programs designed to assist persons who have a substantial connection with the work force and who are now unemployed, and it's our contention that their major thrust is to assist those persons who are unemployed as a result of no fault of their own, involuntarily unemployed as the Java decision itself pointed out.

Therefore, we contend it is reasonable to permit the States to do, in the similar program, what the States have already done in the other program; namely, decided not to encourage or not to at least pay benefits to certain persons for conduct which they considered operates contrary to the basic thrust of the program.

I do also want to mention that I think that word of art is a good phrase, used by my colleague, which is exactly what the Congress had in mind when they passed the statute. That is why they gave legislative type of rule-making authority to the Secretary.

In fact, the rule-making authority given to the Secretary under Section 407, it is my understanding, is much

broader than the authority that the National Labor Relations Board has under the National Labor Relations Act to define employees.

But the opinions of this Court make clear that he does have broad authority to define the word "employee" in that scheme. And we think that with a much more direct grant of authority in this case, the Secretary -- the agency woudl have even greater authority and even greater deference should be paid to his judgment, unless it is arbitrary and capricious and beyond the bounds of the regulation.

I have no further remarks, unless there are any questions.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:50 o'clock, p.m., the case in the above-entitled matter was submitted.]

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