ORIGINAL

In the

Supreme Court of the United States

ARTHUR F. QUERN, ETC., ET AL.,

PETITIONERS,

V.

VENUS MANDLEY, ET AL., — No. 76-1159

RESPONDENTS.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, — No. 76-1416

PETITIONER,

V.

VENUS MANDLEY, ET AL.,

RESPONDENTS.

Washington, D. C.
November 30, 1977

Pages 1 thru 59

Hoover Reporting Co., Inc.

Official Reporters
Washington, D. C.
546-6666

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JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, Petitioner, v. VENUS MANDLEY, ET AL., Respondents.	No. 76-1416

Washington, D. C.,

Wednesday, November 30, 1977.

The above-entitled matter came on for argument at 10:40 o'clock a.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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

GEORGE W. LINDBERG, ESQ., Deputy Attorney General of Illinois, Chicago, Illinois; on behalf of Petitioners, Arthur F. Quern, Etc.

KEITH A. JONES, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner, Joseph A. Califano, Jr.

MICHAEL F. LEFKOW, ESQ., 109 North Dearborn Street, Chicago, Illinois 60602; on behalf of 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 76-1159, Quern, Etc. v. Venus Mandley, and in 76-1416, Califano v. Mandley.

Mr. Lindberg, you may proceed wheneveryou are ready.

ORAL ARGUMENT OF GEORGE W. LINDBERG, ESQ.,

ON BEHALF OF PETITIONERS, ARTHUR F. QUERN, ETC.

MR. LINDBERG: Mr. Chief Justice, and may it please the Court: I represent the Illinois State defendants in this cause and I intend to argue for approximately fifteen minutes.

I will argue the position that Illinois can maintain a special assistance program for emergency needs under its regular AFDC special needs program. Mr. Keith Jones. the Deputy Solicitor General, represents the Secretary of Health, Education and Welfare, also a defendant in this case. He will argue the balance of the time and specifically address the subjects of the basic statutory scheme underlying the AFDC and emergency assistance programs. He will distinguish the two programs one from the other and he will argue why the Social Security Act does not impose mandatory eligibility requirements on the state in that regard, and he will establish why after the Mandley decision in this case, the first Mandley decision, the case became moot.

This case arose when the plaintiffs filed a complaint alleging that the Illinois emergency assistance program

violated section 606(e) of the Social Security Act under which Illinois operated the program. The Illinois plan for emergency plan for emergency assistance covered essentially four kinds of emergency needs for AFDC eligible individuals: homeless due to damage of the structure, homeless due to partial damage of the structure, and the court-ordered evictions except for the non-payment of rent, and there was a provision for AFDC applicants who have not yet obtained eligibility or have been established eligible, that they could have food, clothing, household goods and equipment.

The plaintiffs' allegations in attacking the plan allege that the Illinois emergency assistance program as then operated did not address the emergency needs of all destitute children. The plaintiffs in the case, the individuals were persons who had applied for and been denied emergency assistance in that their particular need was not one of those met by the criterion that I mentioned a few moments ago.

These attacks were all principally made in count one of the complaint. Count two then went on to address allegations that the Illinois plan violated the Fourteenth Amendment of the Constitution, the Equal Protection Clause, because it did not provide emergency assistance to all persons facing destitution.

The District Court found for the state defendants and for the Secretary of Health, Education, and Welfare. That

is, he did not find a violation of the supremacy clause and he did in fact find that the Illinois plan under 606(e) did not violate 606(e) of the Social Security Act.

The plaintiffs appealed to the Seventh Circuit Court of Appeals, which reversed the District Court and found that the Illinois plan more nearrowly defined eligibility than is permitted in the court's opinion under 606(e) of the Social Security Act. This has been referred to as the Mandley I decision because there is a second appeal which I will address in a moment.

The case was remanded to the District Court for further proceedings consistent with the court's holding. The defendants then made a motion to dismiss the case as moot for the reason that the State of Illinois had withdrawn its emergency assistance program under section 606(e) and instead opted to operate an emergency needs program under the regular AFDC special needs program.

The plaintiffs' answer to that motion said that Illinois was continuing to operate its emergency assistance program and not under section 606(e) but under section 402. And of course, it is correct that they were, Illinois was operating a program of emergency assistance under its AFDC provisions.

The District Court offered the plaintiffs ample opportunity to amend its complaint and address the new program under

section 402 of the Social Security Act. The plaintiffs refused to amend its complaint and some months later the District Court granted the defendants' motion and dismissed the case as moot. The plaintiffs again appealed to the Seventh Circuit and the Court of Appeals again, having a second opportunity at this case, concluded that the District Court erred, the case was not moot, and, most importantly, the Seventh Circuit Court of Appeals found that 606(e) is now the exclusive channel, statutory channel to receive federal reimbursement for the operation of an emergency assistance program.

Again, the decision was sent to the District Court and the court entered an order that was offered. The state and the Secretary filed a petition for a writ of certiorari which was granted.

The result of the second Seventh Circuit holding in Mandley II is that states now can only look to section 606(e) of the Social Security Act to operate an emergency assistance program for needy children.

It is the position of the State of Illinois that there is no support anywhere in the Act, in the legislative history, in the administrative interpretation of the decisions of the Act or the decisions of this Court that support the holding of the Seventh Circuit, and in fact what is available suggests just the opposite conclusion, that 606 is not the exclusive mechanism for the operation of emergency assistance program.

The Social Security Act establishes the basic framework supporting the operation of the AFDC programs by the states, and the regulations of the Secretary perhaps as far back as 1949 recognize and authorize a special needs program under the conventional AFDC program operated by the states. Specifically, I would draw the Court's attention to section 233.20 of the Code of Federal Regulations, if you will look in the yellow copy, which is the original brief of the state petitioners, on A9, you will see the language, quoting, this is 233.20(a)(2)(v):

> "If the State agency includes special need items in its standard, (a) describe those that will be recognized, and the circumstances under which they will be included, and (b) provide that they will be considered in the need determination for all applicants and recipients requiring them."

Now, this is the Secretary's acknowledgement that special need items are permissible under the regular AFDC program, and it is the position of the State of Illinois that for many years emergency needs, non-reoccurring needs of AFDC recipients have been in fact met under that provision of special needs, and it has been, of course, as I have indicated, regognized by the Secretary.

QUESTION: Mr. Lindberg, is there any further definition of "special need items" in the regulations or anywhere else? It is only an historic understanding upon which you are relying,

as I understand it, rather than a -- special need items doesn't translate freely into emergency --

MR. LINDBERG: No. I am referring to the statute or the Secretary's regulations.

QUESTION: What I am asking is is there anything anywhere defining "special need items" except the definition of historical experience?

MR. LINDBERG: I believe that what you have said is correct, there is no question but that it is a generally accepted -- it is an understood term, term of art in the field.

QUESTION: To cover or at least to include the emergency -- what is the term?

MR. LINDBERG: Well, non-reoccurring needs. Mr. Justice, it is most frequently referred to in connection with a state's AFDC program, where the Secretary has recognized that there are special needs from time to time. These are non-reoccurring, these are in addition to the regular established monthly grants, for example, that a family may enjoy.

QUESTION: Special need items doesn't freely translate into emergency assistance, does it?

MR. LINDBERG: Only by use and application.

QUESTION: And you say in your State of Illinois the history has been that these payments do include the same payments that would have been provided under the other program?

MR. LINDBERG: That is correct.

QUESTION: And do you know whether the experience or history in other states --

MR. LINDBERG: Yes, I understand that there are 27 states that have special need items attached to their AFDC programs, and I am also to understand that 5 or slightly more of those states do meet emergency needs under their special needs item under their AFDC program.

Fundamental to our --

QUESTION: Mr. Lindberg, may I just be sure I am following this. You call our attention to 233.20. That is the regulation relating to the emergency program, is it?

MR. LINDBERG: Yes, that is correct, special need items.

QUESTION: Well, that is AFDC.

MR. LINDBERG: Yes.

QUESTION: That is AFDC, rather than emergency.

MR. LINDBERG: That's correct.

QUESTION: Okay.

MR. LINDBERG: Yes.

QUESTION: So that your point is that it did expressly authorize emergency assistance?

MR. LINDBERG: Well, my point is that there is a Secretary's regulation indicating that it is legal, regular authorized for an AFDC program to have a special needs provision. The next step then, I presume, and Justice Stewart's question is

does special needs include emergency assistance, too, and, of course, our position is that it does because there was nothing in the 1968 amendment which gave rise to 606(e) as a new program to include a new class of people whose emergency needs could be met immediately. There was nothing in that language that rejected what the Secretary had been doing and approving all these years of what other states had been doing.

Now, I cite that section only to indicate that special needs are recognized by the Secretary.

QUESTION: But the question -- perhaps I am repeating what Justice Stewart asked, but I want to be sure I follow it. The question that I wasn't sure of is how much of what the states had previously been doing, although it was special, could properly be classified as emergency? And how do we know how much there was of that character?

MR. LINDBERG: I'm afraid we don't know.

QUESTION: The record really doesn't tell us?

MR. LINDBERG: No. We can indicate that there were man-made catastrophes and natural catastrophes --

QUESTION: I suppose the inference Mr. Justice Stewart may have been drawing is that since Congress thought that we needed another statute to deal with this problem, that perhaps it is reasonable to infer that it was not adequately dealt with before.

MR. LINDBERG: Well, I think in part that is part of

the rationale of Congress. First of all, they were concerned that there are needy children out there who have not already been prequalified for AFDC, but they have a need today, tonight, so they authorized this new program in 1968, saying regardless of AFDC eligibility, for one time a year, in other words they had some fiscal concerns, once a year you can meet the needs of a needy child without worrying about whether he is AFDC qualified.

QUESTION: For not longer than 30 days.

MR. LINDBERG: For not longer than 30 days in one year. And that was the objective of that provision. Congress obviously wanted to go beyond what was already being done, and we have no argument with that. Our position is that both programs coexist.

QUESTION: Well, the question which has aroused by Brother Stevens interest as well as my own is whether or not special need items which you tell us is nowhere defined includes the very specific definitional emergency assistance appearing in 606(e)(i) and reproduced on page A6 of the appendix to your brief, the term "emergency assistance to needy families with children" means any of the following, furnished for a period of not in excess of 30 days in any 12-month period, and so on, which is very, very specific, and it does deal with emergencies which, as I say, doesn't translate freely into special need items.

MR. LINDBERG: Well, very honestly, Mr. Justice, that is a difficulty. We can search the statutes backward and forward and just cannot find that type of support, nor is there any evidence to the contrary.

MR. CHIEF JUSTICE BURGER: Mr. Jones.

ORAL ARGUMENT OF KEITH A. JONES, ESQ.,

ON BEHALF OF PETITIONER, JOSEPH A. CALIFANO

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

The Solicitor General authorized the filing of a petition for writ of certiorari in this case on behalf of the Secretary of Health, Education, and Welfare, because it was believed that the decisions below are counterproductive in terms of the legislative purpose of encouraging emergency assistance and also in terms of the interests of the very welfare recipients whom the Court of Appeals thought it was assisting.

The legal implications of the decision below are that the federal government may no longer reimburse statement payments of AFDC emergency assistance; second, that states that wished to make federally reimbursable payments to AFDC recipients in order to alleviate the hardship that may result from emergencies must do so not under an AFDC plan but under an EA plan; and, third, that all state EA plans, whether newly created or preexisting, must afford relief to all needy families with

children. They can't just carve out certain groups who would be eligible. And they must provide need not in just certain enumerated emergencies but in all circumstances entailing the risk of destitution.

The foreseeable practical consequence in the implication of this decision, we believe, would be that many states that now provide EA or AFDC emergency assistance would be required to simply abandon emergency relief altogether because they simply could not afford the extensive program devised by the Court of Appeals. In our view, this disruption of state welfare plans and policies is not required by the Social Security Act, and the burden of my argument here is that decisions below rest upon a misreading of the scope of the AFDC and EA programs under that Act.

I will begin with the AFDC program which is by far the larger and more important of these two programs. Under AFDC, the federal government reimburses a portion of state payments of aid to families with dependent children, and section 402(a) and (b) of the Act defines a dependent child roughly as a needy child who has been deprived of parental support or care as a result of the death, absence or disability of a parent.

In order to qualify for federal rimbursement for AFDC payments, a state must submit a plan to the Secretary that satisfies the requirements of section 402(a) of the Act, and if the Secretary approves the plan, state payments are

reimbursed according to the formula set forth in section 403(a)-(1) of the Act under which, as a practical matter, the federal reimbursement ranges from 50 percent to 65 percent. Alternatively in some cases the state may elect to have reimbursement determined under section 1905 of the Act, and under that provision federal reimbursement will range from 50 percent to a maximum of 83 percent.

The normal mode of assistance contemplated by AFDC is regulated by regular monthly payments based upon continuing need. But the Secretary consistently and from before the enactment of the EA program has approved state plans that provide for supplemental payments to meet special non-recurring needs, and at least some states have included within their AFDC plans, have included within the special non-recurring items emergency needs arising from, for example, natural or man-made disaster.

Now, unfortunately, as has been pointed out, in part because of the manner in which this litigation has proceeded, the record is not satisfactory with respect to prior administrative practice, and the Secretary has never formally defined the special need items for which since 1949 if not before the states have been entitled to reimbursement.

But in answer to your questions, Mr. Justice Stewart, it is clear that the states have included emergency items within their state AFDC plans. The booklet which I hold here and to which the respondents have referred in their brief --

QUESTION: When you say states have, do you mean all states have them?

MR. JONES: No, not all states. Some states don't include special needs at all. Some states have no provision for special needs.

QUESTION: In any case, your colleague said that there were 27 states, does that figure apply --

MR. JONES: I think that is not accurate. I think that a total of 45 jurisdictions, that includes not only states but certain territories, include some kind of special need item in their AFDC plan. Unfortunately, although I would have thought at the outset of this litigation we could have identified the precise count of the number of states that provide emergency assistance under their AFDC plans. In fact, the state plans are not sufficiently specific to permit us to tell the Court exactly the number of states. But just to give the Court an idea, I will read to you from this booklet a description of two state plans which I have selected at random just here at the argument.

Michigan has a special circumstance item which is described as follows: "Provisions for medical transportation, excess shelter when required to preserve equity in home or because of family size or other unusual circumstances." And that is all it says, and I cannot determine from that whether it covers the kinds of emergencies with which we are concerned

here.

But let me read you another one from the State of New York. It covers provisions for supplies for college or training school, attendant care, camp fees, life insurance premium, home delivered meals, replacement of clothing lost in fire, flood or other catastrophe, purchase of essential furniture required for establishment of a home, repair of essential heating equipment, cooking stoves and refrigerators -- and I will skip some of the items -- restaurant allowance, temporary shelter and hotel, allowance to meet increased needs of pregnant mothers. There are a variety of special needs there but it is clear that some of them include emergency needs that arise from fire or other catastrophe.

QUESTION: Well, I suppose the best test of the administrative interpretation of special need items is your standing here on behalf of the agency telling us that they do include what Illinois is now doing.

MR. JONES: Well, there is little more in the record. Actually there is very little, if anything, in the record of this case which establishes prior administrative practice. Perhaps one reason why there has been little emphasis on the special items in the past is that since AFDC provides for regular monthly payments, in many cases an emergency, emergency needs can be promptly translated into a decrease in assets or an increase in expenses and therefore are reflected in the

changing calculus of monthly benefits, for that or some other reason.

It is true that the Secretary's construction of the Act has not been widely publicized, but there can be no doubt that the AFDC program in fact has been construed as permitting reimbursement of AFDC emergency benefits.

QUESTION: Mr. Jones, could I ask you a question that you can cover as you go along. Just looking at it rather broadly, if the EA program allows 50 percent reimbursement and the AFDC program allows a larger percentage of reimbursement, and if the state could be covered under either program, why would it ever elect to be under the EA program?

MR. JONES: Well --

QUESTION: It can give to broader categories.

MR. JONES: That's correct, Mr. Justice Stevens. It is --

QUESTION: But Illinois doesn't give to broader categories.

MR. JONES: Well, that's right, and I think frankly one of the mysteries in this case is why Illinois ever chose to have an EA program rather than an AFDC emergency program.

QUESTION: And that is the only legitimate source of funds?

MR. JONES: Well, there are some minor differences between the two programs that I will reach in a moment, and I

have no independent knowledge of whether those differences affected the state's decision. It may be that the state was simply ill-advised. On the other hand, I should point out that the State of Illinois at the present is at the 50 percent level in its AFDC reimbursement. The formula under which federal reimbursement is calculated depends upon a ratio in part at least of per-capita income in the state, per-capita income in the nation, and right now that works out so that Illinois receives the minimum reimbursement under the statute. So for Illinois, in terms of the direct monetary reimbursement, there was probably no difference.

QUESTION: It was not true at the time of the program involved here, too?

MR. JONES: I do not know, Mr. Justice Stevens. I know that since 1975 that has been the case. At any rate, our submission is that the remedial purpose of the AFDC legislation and its broad language compels the conclusion that the Secretary is authorized to reimburse the states for their emergency payments under that program.

Now, whereas the AFDC program is designed to meet the needs of statutorily defined families with dependent children, that is of one parent or no parent families, the EA program is designed to afford short-term assistance to a much broader category of families, without regard to the requirement of dependency that is the lynch-pin of the AFDC program.

As is the case with AFDC, a state must submit to the Secretary an EA plan that satisfies the applicable requirements of section 402(a) of the Act in order to qualify for federal reimbursement.

Some of the requirements of section 402(a) do not apply to the EA plans, however, and in particular the requirement in section 402(a)(10) that benefits be paid to all persons who satisfy the federal definition of eligibility by its terms applies only to AFDC plans and not to EA plans. Instead, the Secretary has indicated by regulation that the states may set their own EA eligibility conditions and they specify the particular emergency needs that their EA plans will meet.

Now, a major difference between EA and AFDC, as we have already discussed, is the difference in the applicable formulas that determine federal reimbursement. EA is always at 50 percent, whereas, depending upon the formulas that apply, AFDC reimbursement may be from 50 to 83 percent. And in this connection I would like to point out a correction that we have made in our brief.

In Footnote 16, at page 27 of our brief, we had indicated that in some circumstances the formula for determining EA and AFDC reimbursement may be the same. That statement is incorrect. We pointed out in a letter to the Clerk last August, which I understand has been distributed to the Court, that different formulas always will apply to these two programs.

Now, there are other significant --

QUESTION: There is some other little typo or something in there in this, is that right?

MR. JONES: That's correct.

QUESTION: Right.

MR. JONES: That's right, Mr. Justice Stewart.

Now, there are other differences between the AFDC and the EA program in addition to those relating to the kinds of families who are potentially eligible and the rate of federal reimbursement. One of this has already been alluded to, whereas AFDC assistance may be continuous, that emergency needs may be met whenever they arise, EA assistance is available only, as the statute says, for a period not in excess of 30 days in any 12-month period. In other words, under EA, a family is limited to one emergency per year, and there is no similar limitation under the AFDC program.

And there are other differences, as we point out in our brief at pages 23 to 27, relating to work requirements, age limitations, living arrangements within the family, and family income.

With this statutory background in mind, it is somewhat easier to understand the inception and to follow the progress of this lawsuit. In 1973, as has been indicated, the State of Illinois adopted an AFDC plan and the Secretary approved that plan. Excuse me, the State of Illinois adopted an

EA plan and the Secretary approved it. The EA plan covered only AFDC beneficiaries and provided benefits in certain enumerated circumstances.

As I have indicated, it is not entirely clear why the state chose to provide EA coverage since it could have simply amended its AFDC plan to cover the same beneficiaries. Nevertheless, the state did adopt an EA program and this litigation resulted.

The respondents have challenged that EA program on two related grounds. First, they claim that the state's plan is too narrow and should be extended to all needy families with children. Second, they contend that the state should provide assistance whenever necessary to avoid destitution and not just in certain enumerated emergencies.

Our position in essence is that these contentions fail to make out a cause of action. The respondents have been unable to point to a source of positive law that entitles them to the extended EA coverage which they seek. Their claim is that section 406(e), which defines emergency assistance to needy families with children, constitutes a federal definition of eligibility, EA eligibility, and that section 402(a)(10) of the Act makes that definition mandatory upon the states.

But section 406(e), the definition does not purport to establish eligibility. It does no more than define the outer perimeter within which the Secretary may make reimbursement.

Now, in doing so, section 406(e) does define in a general way a class of potentially eligible EA recipients. But section 402(a)(10) does not require a participating state to make EA payments to everyone who is eligible to receive them. As the Court of Appeals recognized and as the parties here now apparently agree, 402(a)(10) by its terms is limited just to AFDC plans, not to EA plans.

Accordingly, insofar as it rests upon the statute at all, the respondents' argument boils down to an inference from section 402(a)(10) that Congress intended to impose mandatory eligibility standards upon state EA programs as well as upon state AFDC programs.

This argument has, we believe, three separate and independently conclusive answers. First, the logical inference to be drawn from the statutory text is just opposite to that that the respondents would draw. Since Congress explicitly made 402(a)(10) applicable only to the AFDC program, it must be inferred that Congress intended that that provision would not apply to the EA program.

Secondly, the respondents' argument in this case is inconsistent with this Court's reasoning in New York Department of Social Services v. Dublino. In that case, the Court determined that in the absence of a clear manifestation of congressional intention, section 402(a) of this Act, this very section, would not be read as restraining the considerable latitude that

the states must be allowed in setting their own welfare policies.

Here there is no such clear manifestation of legislative intent, and the respondents' argument by implication does not remedy that deficiency.

And third, the task of interpreting and applying this statute has been delegated in the first instance to the Secretary, and the Secretary has construed the Act as granting the states leeway to set their own EA eligibility standards, and that construction should be accorded deference in the absence of compelling legislative intent, legislative history to the contrary, and there is none here.

In this regard, I would like to dispel any confusion that may have been created by the respondents' claim that the Secretary's regulations have been superseded. The respondents in their brief contend that the so-called Townsend regulations, which the Secretary adopted in the wake of this Court's decisions in King v. Smith, Townsend v. Swank, and Carleson v. Remillard, supersede the specific EA regulations.

But the Townsend regulations do no more than acknowledge the Townsend line of decisions which were that 402(a)(10) imposes mandatory federal eligibility requirements on AFDC programs. All the regulations do is say in effect that the states must abide by the requirements of the statute, the regulations do not go further and attempt to define those requirements. In particular, they do not purport to require the states

to abide by a mandatory federal EA eligibility requirement. Accordingly, the Townsend regulations have not superseded the Secretary's more specific regulations relating to the EA program.

For all of these reasons, we submit that the Court of Appeals erred in its first decision in this case. States participating in the EA program are not required to pay benefits to every needy family with children in every circumstance presenting the risk of destitution. Instead, they may set their own eligibility, their own reasonable eligibility standards, and limit relief to those circumstances and emergency needs that they deem most compelling.

QUESTION: That was the Court of Appeals first decision that you say was erroneous?

MR. JONES: That's correct, that is the so-called Mandley I decision.

QUESTION: Right.

MR. JONES: And we believe all Illinois attempted to do here is to set reasonable eligibility standards and limit relief, tailor relief to those circumstances that met its own local needs.

In any event, once the state ended the EA program that was the subject of this lawsuit, the case was moot. It makes no difference that the state then amended its AFDC plan, which it could have done from the outset, to cover special emergency

needs. As I have explained at some length --

QUESTION: Mr. Jones, is it truly moot, because if we should buy your argument that you have made thus far and let the state know that it has the option to reinstate an EA plan, is it not something that might be likely to reoccur? If the law were clarified in their favor, is it not a very realistic possibility that then they would say we will reinstate our old plan?

MR. JONES: Well, that may very well be. One of the ironies of my situation is that if I convince you, as I think is correct, that there are substantial differences between these two programs and you determine that once the state shifted to AFDC, the particular complaint that the respondents made is moot, then there would be no occasion for you to reach the underlying issue that the lawsuit originally involved.

QUESTION: That is what I was going to ask you. How many of these issues do we need to take on?

MR. JONES: Well, I have addressed them in reverse order, Mr. Justice Stewart. I think that, as a practical matter -- well, let me forget about practicality -- as a jurisprudential matter, I would assume that you would first determine whether according to the allegations of the state and the Secretary and the District Court this time around, the lawsuit had become moot. If it had become moot, then there would be no occasion for you to address --

QUESTION: That is the end of it, isn't it?

MR. JONES: That is the end of it.

QUESTION: And in order to --

MR. JONES: And all of my efforts with regard to the rest of the case will have been wasted. But as I say, as a jurisprudential matter, the first issue that is before the Court is that of mootness. And for that reason, Mr. Justice Stevens, although had you given an opinion with regard to the scope of the EA program, the state might have been able to take advantage of it and the litigation could have resumed.

QUESTION: Mr. Jones, under the normal test, if the litigation is the real life controversy when the complaint is filed and when the District Court first decides the merits, then the defendant abandons what is held to be an illegal activity and resorts to some other program, that normally doesn't moot a case, does it, as long as the defendant can go back to what he started with under W. T. Grant and cases like that?

MR. JONES: If there --

QUESTION: Isn't that exactly what we have got here?

MR. JONES: The Court would have to evaluate the likelihood that the state would recur to the behavior that caused the lawsuit to be initiated in the first place.

QUESTION: Well, W. T. Grant and those cases involved violators, and the idea was that after somebody has voluntarily

ceased the activity, there is no point in enjoining him. But this Court in that case and other cases held, yes, you can enjoin them because they might sometime in the future want to continue their violations. But your claim here is that there was no violation, and we should decide that.

MR. JONES: No --

QUESTION: If we decide that there wasn't a violation, it is moot, aren't you arguing that?

MR. JONES: Well, there was a violation in the terms of the Court of Appeals award.

QUESTION: Right.

MR. JONES: That is correct.

QUESTION: Right.

MR. JONES: Now the question is whether a voluntary cessation of that alleged violation is likely to be temporary or permanent, and the --

QUESTION: Well, it isn't very voluntary if it is undertaken in the face of a court order.

MR. JONES: Oh, no, no, the order did not require us to abandon the EA program.

QUESTION: But it found a violation.

QUESTION: Because it wasn't paying to everybody.

MR. JONES: That would be correct in the W. T. Grant situation as well, I believe. Well, don't let me dissuade you from reaching that in this case.

QUESTION: On your own now, what do you want us to do now, on your own?

MR. JONES: Speaking for the Secretary of Health, Education, and Welfare?

QUESTION: Right.

MR. JONES: We would like this Court, we would very much like the Court to dispose of the merits because that would give both the states and the federal government the guidelines that we need.

QUESTION: There are at least two issues involving the merits. One is was Mandley I correctly decided --

MR. JONES: And the second is whether Mandley II was correctly decided.

QUESTION: -- and secondly was Mandley II correctly decided on the merits, and those are two quite different though perhaps related issues.

MR. JONES: Well, let me state my position this way: I think the Court must first decide whether the AFDC plan permits the states to pay emergency benefits. If it --

QUESTION: Because that is what is going on now?

MR. JONES: That's correct. Now, if that is permissible, then, as Mr. Justice Stevens suggested, the question is whether, having shifted to a valid plan, the state has rendered moot the initial controversy, and that would depend upon an assessment of the likelihood that it might go back to

its original sinful ways.

QUESTION: But unless this Court were to consider Mandley I, the state would be forbidden by the mandate of the Court of Appeals in Handley I from going back to that.

MR. JONES: Not if this court case were declared moot. But if the Court concluded that if it held the case were moot, the state might recur to its forbidden EA program, then you would have to conclude to the contrary that it is not moot and therefore you would have to reach the question of whether the EA program can be tailored in the way the state has done it.

QUESTION: Well, is W. T. Grant a mootness case? As I understand it, it holds that the discontinuance of the illegal practice is a factor that the chancellor may consider in deciding whether or not to grant an injunction, but it does not render the controversy moot, and that is exactly what we have got here.

MR. JONES: We have proceeded under the hypothesis that the state would not revert to an EA program since it can satisfy its needs under the AFDC program, but there may be reasons why the state would actually prefer an EA program because of the differences between the two programs.

QUESTION: The state is here saying I want it established whether I am free to go one route or another. Why is the case moot?

MR. JONES: The case has asked that the cases to be

dismissed as moot.

QUESTION: But the state's position is that it can do either one.

MR. JONES: That's correct.

QUESTION: And you do not want --

QUESTION: We are certainly not bound by the state's view of mootness.

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

QUESTION: And if they are assering that they can do either one, how is the case moot? I don't understand that.

MR. JONES: Well, it was preparatory to a speech.

We have argued that the state is so unlikely to revert to an EA program that there is no substantial probability that the W.T. Grant line of decisions will be implicated. But it may well be -- that is just an evaluation of the probability and the

QUESTION: Do you think the Court could reach an opinion in this case that is in any way influenced by their concern about what might happen by what the Court of Appeals in Mandley II regarded as rather flagrant misrepresentations to the District Court, if that was all wiped clean they might have a different attitude? I suppose there is some concern about contempt of court, wasn't there?

MR. JONES: Absolutely, but if the case was --

QUESTION: I think in that situation, the state would

have a very strong motivation for saying this case is awfully moot, please leave us alone. But if you are talking about running a welfare program, if a lot of states, and I assume some do, want to include in their EA program certain beneficiaries who are ineligible under the AFDC program, it seems to me that it is entirely reasonable to assume that Illinois might want to broaden its coverage sometime in the future. Isn't that a likely possibility?

MR. JONES: That is a likely possibility, or it is a possibility. And what you say also implicates the last argument we have made in our brief with regard to the propriety of the scope of relief ordered by the Court of Appeals. The case was certainly -- well, in our evaluation the case was moot in the District Court.

Once the Court of Appeals broadened the relief of Mandley I in its Mandley II judgment, then the implications of that decision certainly extended beyond the State of Illinois. And although the case might be moot as to Illinois, arguably it might not be moot as to many other states which would be concerned about the validity of their programs.

My time has expired.

MR. CHIEF JUSTICE BURGER: Mr. Lefkow.

ORAL ARGUMENT OF MICHAEL F. LEFKOW, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

Court:

I believe the arguments that you have heard from the petitioners point out the difficulties that they bring to the Court when they don't follow orderly appellate procedures, and I would like to briefly state what the procedures have been so far in my opening statement.

More than two years ago, the Court of Appeals for the Seventh Circuit in Mandley I held that Illinois could not grant federally funded emergency assistance to some needy families eligible under 406(e) of the Social Security Act while denying it to equally eligible families under the Act. This decision came approximately two years after the complaint was filed in the Northern District of Illinois, in so holding that Illinois' definition of emergency need conflicted with the federal definition of emergency assistance to needy families with children contained in Title IV-A of the Social Security Act, the Court of Appeals followed the line of unanimous decisions of this Court starting with King v. Smith, Townsend v. Swank, Carleson v. Remillard.

Now, rather than comply with the Court of Appeals ruling or abandon federal funds or petition this Court for certiorari, the Illinois welfare officials, with the cooperation and approval of the Department of Health, Education, and Welfare, implemented a fictitious abandonment of federal funds for emergency assistance which has enabled it to maintain its

illegal program for more than two years after the judgment in Mandley I.

QUESTION: Is it your position that Mandley II is an entirely separate litigation from Mandley I?

MR. LEFKOW: We believe it is a sequal, Your Honor, but is different in that --

QUESTION: Is it a different case in the District Court?

MR. LEFKOW: No, both decisions arose from the same complaint, Your Honor.

QUESTION: So then this Court is not bound, of course, by any Court of Appeals decision and I presume the parties to Mandley I are not bound under any document res adjudicata by Mandley I?

MR. LEFKOW: I believe they are bound under Mandley I. Of course, the petitioners did not --

QUESTION: You believe they are bound? In what sense?

QUESTION: The law of the case?

MR. LEFKOW: It is the law of the case, Your Honor.

QUESTION: But it is not law of the case in this Court, it is the law of the case in the Seventh Circuit.

MR. LEFKOW: I understand that, Your Honor. We do say that the petitioners did not follow the orderly procedures to present this case for review on certiorari, should this Court deem it worthy of certiorari after the judgment in Mandley I

that has resulted in the Court of Appeals having to make a second decision to enforce its first decision, and further resulted in many needy families in the State of Illinois being denied emergency assistance. This is a case where the state has taken tactics to delay, delay, delay.

What they did is they merely relabeled their emergency assistance plan as special assistance, submitted it to HEW, without giving any notice to the court or to the respondents that they had done this. HEW approved that plan for federal funding, placed its stamp of approval on it.

QUESTION: Why should they have given notice to the court?

MR. LEFKOW: They should have given notice to the court because it is a court of equity that was considering an emergency assistance program. This program was identical. There was not one change in it. It was in violation of the mandate in Mandley I. It was within the parameters of our complaint because we alleged that their program violated federal and state law.

QUESTION: They were parties to the litigation?

MR. LEFKOW: They were parties to the litigation. Thank you, Your Honor.

QUESTION: Well, you say that as soon as you are a party to a litigation then, whatever you do thereafter, you have to give notice to the court in which the litigation was

commenced?

QUESTION: If it affects the litigation?

MR. LEFKOW: Well, Your Honor, I think it is clear that it did affect in our opinion the litigation. It was clear in the Court of Appeals opinion that it affected the litigation. The Court of Appeals found that the petitioners had engaged in circumvention of the mandate of Mandley I and we believe the Court of Appeals was clearly correct in that, for all the reasons that they lay out in their opinion.

HEW, as I said, also approved this plan without giving any notice to the court or to the respondents.

QUESTION: Was HEW a party to the first litigation?

MR. LEFKOW: They were, Your Honor. They were joined on the motion of the State of Illinois. HEW -- the petitioners then advised the District Court that Illinois no longer had an emergency assistance plan, contrary to the representations made here today, they did not tell the court that they were going to fund the program as regular AFDC. They had asked the court for more time to consider what to do after the mandate in Mandley I came down, because they wanted to consult certain legislative committees, at which time they proposed the plan to avoid the mandate. That was on November 17th, and this is noted in the opinion.

I happened to have been at the committee meeting that day, and the next day they came into court and told the court

that they were going to fund this program solely with state funds. The Court of Appeals noted that also.

By doing so, they obtained a dismissal eventually that the case was moot. On appeal, again, the Court of Appeals in Mandley II promptly reversed and remanded with direction to the District Court to enter the proposed final judgment and decree with certain modifications. This is one year ago, despite this Court's denial of a stay of mandate to HEW and to the state, the District Court has declined to enforce the judgment pending this Court's review.

Now, the petitioners say that the judgment in Mandley II was wrong and unnecessary and, moreover, now claim that the Court of Appeals erred in Mandley I as well. We think that Mandley II was right and needed, although -- and we hold the same opinion obviously as to Mandley I, although we don't think the petitioners have properly sought review of that decision in this Court.

The respondents concede that federal judicial power has substance in our national life and in our constitutional governments. If it is a power not subject o defeat at the hands of resistant litigants, then the Court of Appeals judgment must be upheld.

The Court of Appeals in Mandley I considered for the first time by a Court of Appeals the 1968 congressional enactment of an emergency assistance program. This program had a

number of purposes. It provided that both people eligible for AFDC and people not eligible for AFDC would be eligible for emergency assistance. It did provide short-term help to help get a family over a crisis, a family over a crisis so that they might not have to be dependent upon the regular aid program. In addition, they provided emergency help for families already receiving regular AFDC or families eligible to receive it.

In fact, the Senate report noted that this type of family would be the typical type of family that would be eligible for emergency assistance, the family who is or eligible to receive AFDC.

The legislation authorized emergency needs to be met immediately by giving flexibility as to the form of payment. A state could provide the payment in a hurry by cash, in kind, by vendor payments, or such other method as the state might specify. The program was optional with the states and it was limited to a 30-day period and 12-month period. And to encourage the states to participate, Congress offered the states 50 percent matching funds for payments made as emergency assistance.

Now, under this legislation there are five points of eligibility. There must be a needy child under the age of 21 living now or recently with the relative, the child must be without available resources, and the payment must be necessary to avoid the destitution of a child or to provide the living

arrangements in a home for a child, and neither the child nor the relative can have refused without good cause to accept employment or training for employment.

In 1971, Illinois adopted its first emergency assistance program under section 406(e). It provided nearly complete eligibility in terms of the federal statute. It provided that the aid would be given from the local offices throughout the state by a disbursing order. That is a form given to a merchant for, say, $10 for food or $15 for clothing, or whatever.

In 1973, the state administratively constricted eligibility in the face of contrary state legislation which requires them to have a full program and limited emergency assistance to new applicants for AFDC, the recipients were homeless as a result of fire, and recipients who have been evicted for reasons other than nonpayment of rent. And I have noticed in the regulations just this summer that they have eliminated even those evictions, so now any family evicted in Illinois who is without available resources cannot receive any emergency assistance from the public aid department.

In addition, they excluded all non-AFDC eligible families. As a result of this, no relief from destitution was available to many families lacking food and clothing, all evictions now, crimes against persons or property, utility failures or turnoffs, as a result of agency error or delay, or

if a child was abandoned by a parent.

The state also centralized the distribution of emergency assistance in the state capital. After an applicant's request was approved, the caseworker mailed the form to Springfield for final approval and then if that was approved there, a check was mailed back to the recipient somewhere in the state.

As a result of these procedures, Illinois cut its expenditures for emergency assistance from $2.5 million a year to $500,000 a year. In doing so, they referred many of the people they used to aid to private charities, some of whom have joined this suit as amicus curiae, for instance the United Way of Metropolitan Chicago, one of its components, the Council for Community Services, which is an umbrella group of about 280 private charities or social service agencies as an amicus curiae in this suit.

These charities, lacking a regular budget to provide the need that the state has traditionally provided and ought to provide, have been unable to help many of these poor people and these people then are just now suffering, bearing their own suffering, as this Court said in the Maricopa County case.

Illinois testified at the trial that the reasons they constricted the program were for administrative ease and to prevent abuses and fraudulent applications. The District Court ruled that the department was processing applications

much too slow, that delays of seven to ten days in assistance were not uncommon. They held for the state and federal defendants on the eligibility provision. On appeal, the Court of Appeals in Mandley I reversed, holding that Illinois could not constrict eligibility among needy families following the line of decisions that this Court has made. And it is an important principle that they followed, because by doing so they insured that the people get the aid that Congress meant to have the aid.

Further, the court in Mandley I followed what I think is a traditional pattern and practice in litigation, at least in my knowledge of it, when they invalidated the regulation of an agency, be it federal or state, they did not order HEW to file draft regulations with the court to conform to Mandley I, they suggested that it would be helpful to the states and to the courts if HEW would exercise its rulemaking power to give a new regulation to replace the one that the court invalidated.

In following the principle this Court has said, which I believe is stated succinctly in Townsend v. Swank, that states may not vary eligibility requirements from federal standards in the absence at least of an authorization clearly evidenced upon the Act or its legislative history, the Court of Appeals applied that test to the Illinois situation and it found in section 406(e)(1) two areas of state discretion and no more. They found flexibility -- they found an area of

discretion for the form of payment, the state could, as I said, make cash, vendor payments, and it found that the states could in 406(e)(2) include migrant workers if they wished. But there was no evidence in the Act to allow it to exclude the families that Illinois had excluded.

This pointing out of areas of state discretion is, as this Court noted in Townsend, cogent evidence that Congress intended no further discretion to be given to the states to narrow eligibility. And indeed the petitioners point to no evidence on the face of the statute --

QUESTION: Mr. Lefkow, don't you leap one point, at least they say you do -- I want to be sure I have your answer to it. They say that the mandatory language in 402(a)(10) that was controlling in Townsend doesn't apply to the EA program, and therefore you don't have the same argument that you had in Townsend. Now, what is your answer to that?

MR. LEFKOW: My answer is that there is an error in their understanding, I believe, of the cases. First, we would say that the result is the same whether 402(a)(10) applies or not, because the principle of this Court's decisions is the conflict of the state's regulation with the federal statute and not 402(a)(10). In 402(a)(10), the Court focused on making sure that all eligible individuals receive assistance. For instance, in Townsend, the Court italicized the term "all eligible" twice in the opinion. Moreover, 402(a)(10) would not

normally have emergency assistance because it is an optional program with the state. This is our argument, that it applies. Once a state opts to provide emergency assistance, then 402(a)(10) would become operative. In other words, the term "aid to families with dependent children" includes whatever aid is provided under Title IV-A. And further --

QUESTION: You are for affirming completely or do you have any quarrel with the second opinion?

MR. LEFKOW: We have no quarrel, Your Honor.

QUESTION: Now that you have been interrupted, Mr. Lefkow, I am not sure I understand what you say is now before the Court. As I understand it, the petition for certiorari was granted to review Mandley II.

MR. LEFKOW: Yes.

QUESTION: Is that correct?

MR. LEFKOW: Yes.

QUESTION: And Mandley II merely presents only the issue of whether the program that Illinois is now carrying on under the AFDC is permissible under AFDC, is that correct?

MR. LEFKOW: Yes, that is essentially right.

QUESTION: That is what it comes down to? And if we hold that it is, you lose and that is the end of the case, and if we hold that it isn't you win and that is the end of the case that way, without considering Mandley I at all or without considering mootness at all, isn't that correct?

MR. LEFKOW: Well, I think it will be very difficult, Your Honor, to reverse Mandley II without considering Mandley I.

QUESTION: Well, if this is a permissible course of action which Illinois has now taken under its understanding of the authorization given it by the AFDC provisions, then that is the end of it, isn't it?

MR. LEFKOW: I don't think so, Your Honor.

QUESTION: Why not? I thought you said you agreed with me first?

MR. LEFKOW: Well, if I did let me make a small distinction.

QUESTION: Please do because it is not clear to me just what we have here before us.

MR. LEFKOW: It seems to me that they have accepted Mandley I, and that is that emergency assistance is provided pursuant to section 406(e)(1) of the Act if they accept federal funds. Does that clarify it for you?

QUESTION: I'm not sure it does, but maybe it is because of my lack of understanding.

QUESTION: I don't see how Mandley I is here at all. Assume that nothing was done, you couldn't bring Mandley I up now because it is dead.

MR. LEFKOW: Well, we would be --

QUESTION: What makes Mandley alive now, Mandley I?

MR. LEFKOW: Well, Your Honor, the reason that it is

to any extent alive is we opposed the petitions for certiorari and the court did not expressly limit the grant of jurisdiction to Mandley II, so we felt compelled, of course, to brief the merits in Mandley I and to present an argument upon it. I will make no further argument on that.

QUESTION: Well, how do we get it? Can you give me any kind of case like this?

MR. LEFKOW: Where the federal defendant has waited 548 days to petition for certiorari? I don't know of any case.

QUESTION: No, of where you have two cases and one is past the time for certiorari, and once the period of time to apply for certiorari is over, that is the judgment, isn't it?

MR. LEFKOW: I believe it is, Your Honor.

QUESTION: Is it final?

MR. LEFKOW: The Mandley II --

QUESTION: Is it final?

MR. LEFKOW: In my opinion, it is, Your Honor, and maybe --

QUESTION: And was it appealed in this case?

MR. LEFKOW: No, it was not.

QUESTION: Well, how did it get here?

MR. LEFKOW: Although HEW did receive from this Court an extension of time within which to petition for certiorari --

QUESTION: To review the Mandley II decision.

MR. LEFKOW: No, to review Mandley I.

QUESTION: Oh, but then did not petition.

MR. LEFKOW: Did not petition, and the Court of Appeals in Mandley II noted that they considered Mandley I final, and I think of course from the Court of Appeals position, they had to consider Mandley I.

QUESTION: Well, are any of the issues raised in the petition for certiorari in this case that is now before us dependent in any way on or in any way question Mandley I?

MR. LEFKOW: Yes, they do.

QUESTION: Well, then I don't see how you can say that Mandley I is not before us in the sense that petitioners are entitled to argue perhaps unsuccessfully whatever issues they raised in their petition for certiorari. You said the same complaint simply went back to the District Court on remand after Mandley I, and certainly we are not bound by the law laid down by the Seventh Circuit in the first Mandley I case.

MR. LEFKOW: Your Honor, I wouldn't suggest that this Court could not review Mandley I. What I have tried to suggest is that the petitioners have not followed the orderly appellate procedures.

QUESTION: Would you say that if the Illinois welfare people had never tried what they tried in Mandley I under AFDC and simply started the program challenged in Mandley II, that the case before us would be any different than the one it now is?

MR. LEFKOW: That's really --

QUESTION: That's it, isn't it, whether Illinois can permissibly do what it is now doing under AFDC?

MR. LEFKOW: The answer to that is I think, Your Honor, if they believe they could do it, they should have told the District Court the first time, they should have put it in the --

QUESTION: Well, is that a federal question?

MR. LEFKOW: It is a federal --

QUESTION: That may be a failure of protocol or courtesy, but I am asking what issues are before us? Isn't it just the permissibility under AFDC of what Illinois is now doing? You concede, don't you, that any state can abandon an EA program, a voluntary program, they can go into it and they can go out of it, can't they?

MR. LEFKOW: Well, it would depend on the state's own law. For instance, in Illinois, Illinois has a statute that requires the state to cooperate with the federal government and to fully participate in all available federal programs, so we don't think that the State of Illinois is --

QUESTION: But that is a matter of state law.

MR. LEFKOW: Right, but we allege that in our complaint, Your Honor.

QUESTION: That is a matter of state law.

MR. LEFKOW: They cannot refuse to provide --

QUESTION: But that is no concern of ours, the law of Illinois.

QUESTION: Mr. Lefkow, can I approach this from just a slightly different angle. Assume, contrary to the suggestions that have been made so far, that the Court should address Mandley I as the first issue, and assume further -- and I am not suggesting that this would be the conclusion -- that the Court should disagree with you and reverse Mandley I, would it not be true that in that set of circumstances you would have no interest in the outcome in Mandley II? There would be no reason to reach Mandley II if we did it that way? As if we held that the state had the or could grant less than the federal government authorized, which it tried to do in the first instance, and we rejected your argument there, wouldn't that end the litigation?

MR. LEFKOW: No, it would not, Your Honor, because as we mentioned, the state has a statute which requires them to fully participate; and, number two, we have alleged equal protection violation.

QUESTION: But say we disagreed with you entirely on the merits of your claim that they must provide more than they originally provided under EA, then you really don't have any reason to object to the program now in effect because all you would be saying now is that you can't even -- it is wrong to do as much as you are doing.

MR. LEFKOW: Well, Your Honor, my clients would have reason to object to it, but whether it would be a legally recognizable reason would be another question.

QUESTION: I think it is critical to your case that you win on Mandley I or we decide that Mandley I was correctly decided, one of the two.

MR. LEFKOW: Well, we certainly believe that it was correctly decided.

QUESTION: However we view the case on its merits or anyting, there is no reason to get to Mandley II if we don't make the assumption that you correctly prevail in Mandley I, because it seems to me otherwise that you have no interest in Mandley II.

QUESTION: Well, there is a question, quite apart from previous history, whether a state right now can under AFDC authority do what Illinois is doing or must it do more.

QUESTION: This litigant has no interest in that question unless it was right in Mandley I.

MR. LEFKOW: Well, Your Honor, there is no express authority in the Social Security Act for providing emergency assistance as a special need, and you heard the --

QUESTION: Well, that is a question in Mandley II.

MR. LEFKOW: Right. The petitioners have I believe conceded that point right here in this Court. And if the legislative language of the statute is not clear enough, the

legislative history clearly confirms that this was a new program and that if any authority, which we don't believe existed, had lied with HEW to provide special needs, provide emergency assistance as a special need, it was clearly superseded by the congressional direction, clear congressional direction in 406(e) in 1968. And you raised this question right at the start, I believe, with the petitions, and it struck me.

They cited this handbook of public assistance administration regulation which was the book of regulations that HEW had before they began promulgating them in the Federal Register and the Code of Federal Regulations. And they read that special need regulation to the Court. There is no mention in it of emergency assistance.

What they did not mention in their briefs or in their argument here is that prior to 1968, HEW had some regulatory material on emergency situations that we cited in our brief, as section 3434.2 of the handbook of public assistance administration. They had one on emergency payees, and they had a section on emergency situations prior to complete determinations of eligibility.

If HEW had any authority at all to provide emergency assistance, it would have been under these provisions. But I think it is clear from the testimony of the administration's only witness at the Senate hearings, who was Under Secretary Wilbur Cohen, that HEW hadn't viewed that they had no authority.

Under Secretary Cohen testified that there is no mechanism in existing law to meet the emergency needs of children in a crisis situation, and the remarks on the floor of both the Senate and the House reflect that it was a new law, a change in the existing law, for the first time the government will match payments for emergency assistance.

So I think it is pretty clear that whatever may have been before the congressional direction in 1968 pointed the way for states to provide emergency assistance, if they provided it at all. And under the cooperative federalism which pervades the Social Security Act, the states don't have the ability to tailor eligibility. They have been given the right to set standards in these.

Illinois, for instance, say in providing shelter for somebody who is destitute, they don't have to buy him a house, they don't have to pay him two months back rent. If they happen to find a barracks that was -- and Chicago is pretty cold right now -- that was heated and it was adequate, this is a minimal program, this is not a support program in the sense that the AFDC program is a support program. The standards of the Act itself say that the payments have to be necessary to avoid destitution, so that there is not going to be any fat in the payments that the state makes.

QUESTION: This is sort of an emergency disaster program, that is what it is?

MR. LEFKOW: Well, it is not disaster, it is --

QUESTION: Well, it is limited to 30 days in any 12-month period, and the state can set the need, the amount, can't it?

MR. LEFKOW: Yes, subject to providing aid to really relieve destitution. For instance, at a minimum the federal --

QUESTION: For evictions or casualty losses and so on?

MR. LEFKOW: Well, or food or clothing or for shelter or --

QUESTION: But resulting from emergency catastrophes, isn't it?

MR. LEFKOW: Well, it doesn't have to result from --

QUESTION: Individual catastrophes, it doesn't have to be --

MR. LEFKOW: Well, the language of the reports and the remarks on the floor is that when a family suffers an emergency, without limitation as to the cause or the type. For instance, the legislation itself expresses that there is only one case of fault where a person will be denied assistance and that is when they refuse to accept employment or training for it.

QUESTION: Right.

MR. LEFKOW: So I think Congress has clearly expressed, we want to protect children, we don't want any children to

be without the very essentials of life. Because really that is what this country is about, is trying to make a better life for everyone, I think.

QUESTION: Well, that is what that legislation is about.

MR. LEFKOW: It certainly is, and this is a sound social policy that Congress has adopted in this legislation.

We would say, one further point on Mandley II is that there is no evidence in the statute of the dual authority to provide emergency assistance that the petitioners claim. There is simply one way and that is that it has to meet the eligibility requirements of section 406(e).

Now, I do want to make reference to this idea that 45 states provide special needs, and I believe that there was an inference that many states provide emergency assistance. Well, I think one of them did say that only 5 states provided assistance, and from what we have gleaned from this document of HEW, which is not really very clear, only 5 states provide some very limited items of assistance. But in their brief, HEW concedes 27 states participate in the emergency assistance program, and 15 of them -- and I am not sure if this is in the brief -- but 15 of them have full eligibilities required by section 406(e), and the other 12 have differing degrees of eligibility.

QUESTION: But all less than the full --

MR. LEFKOW: Right.

QUESTION: So all of those 12 would be in violation under Mandley I, correct?

MR. LEFKOW: That would be correct, Your Honor. We believe that Mandley II is clearly correct on the law. The analysis of the legislation and the history of the legislation I think prohibits their conduct and prohibits their claiming funds in this manner. If they had had a reasonable basis for believing it, I think they would have advanced it long before presenting it for the first time to the Court of Appeals in Mandley II. They never told the District Court on remand that we can do it this way. They wanted to keep it a secret, an administrative secret perhaps. It was snd they kept it a judicial secret.

I don't see how a court can function unless it gets full advocacy of the truth.

I would like to turn if I may to the relief question. The facts show that this is a most unusual case. I think it is a unique case. HEW had issued a regulation, it was invalidated, a regulation on emergency assistance, Your Honor, it was invalidated.

The court in Mandley I invited HEW to issue a new one. HEW did not issue a regulation, it did not petition for certiorari. It approved Illinois' plan without any regulation at all. This is a message to the states that you can ignore

Mandley I, you can ignore judicial decisions because we are going to give you -- we are going to put the stamp on your plan and you can carry that over to the Secretary of the Treasury and collect your 50 percent reimbursement.

Now, they also did not redefine their special need regulation. They could have put in eligibility standards in that if they really believed that they could do it under AFDC. They could have put in a timeliness requirement because there is no -- under AFDC, there is no forthwith requirement as there is in emergency assistance. The only requirement now is that a person receives assistance within 45 days, and emergency assistance delayed is emergency assistance denied.

They didn't make any recommendations to Congress that they needed new legislation or hold any hearings in the states to see if there were any problems in administering an emergency assistance program, as the court in Mandley I defined it.

They engaged in a circumvention of the mandate and the Court of Appeals in Mandley II found that they had indeed circumvented the mandate. Under those circumstances, there have been three years since the complaint was filed in a case involving the needs of people in most dire straits and one year since the mandate had been returned, with no action by HEW. Well, I won't say no action, they had approved the plan legally.

The court in considering Mandley I was the final judgment granted what we believe is equitable relief. It

ordered HEW not to approve plans inconsistent with 406(e) and it directed them to issue new regulations to replace the old ones, and I think that this is important, they modified the judgment that was proposed by the plaintiffs and they removed from it the requirement on HEW to define certain terms of the 406(e) definition. HEW was not -- I think it is easiest to just cite what the Court of Appeals said. It didn't require us to define -- excuse me, HEW to define necessary to avoid destitution or lack of available resources. Those terms were not really at issue in this litigation. What the court said is this: "Well, it would be salutory to include such definitions in the new regulation, and while the Secretary might find it necessary as a matter of administrative practicality to include them, we will not order HEW specifically to include any items in its new regulation. Of course, whatever regulations the Secretary issues must be consistent with today's opinoin in Mandley I."

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

[Whereupon, at 12:00 o'clock noon, the Court was recessed until 1:00 o'clock p.m.]

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Counsel, you may continue.

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

I would like to clarify our position in regard to emergency assistance and special needs or emergency assistance as a special need.

Our position is this: If a state should be allowed by this Court to grant emergency assistance as a special need, a state must still do so in accord with the eligibility requirements of section 406(e). Congress in section 403(a)(5) of the Act, which is the funding provision, provides that for federal reimbursement, if a state makes payments as emergency assistance to needy families with children, they must -- and that statute is contained in the yellow brief at page A-4 --

QUESTION: Page what?

MR. LEFKOW: Page A-4. On A-4 is a continuation of the full statute set out. It begins at A-2.

QUESTION: Right.

MR. LEFKOW: At A-4, subparagraph (5), and the previous parts would read with it, the Secretary of the Treasury shall pay to each state which has an approved plan for aid and services to needy families with children, in the case of any state, an amount equal to 50 percentum of the total amount expended under the state plan during such quarter as emergency

assistance to needy families with children.

This language reflects that Congress contemplated the function of emergency assistance. If it had just meant emergency assistance in 406(e), it would not have said other emergency assistance to needy families with children, it would have said "as."

And I can think of no better words to sum it all up than what Judge Cummings said in writing for the court in Mandley II, "A rose is a rose is a rose. Emergency assistance is emergency assistance, no matter what the state may call it."

And the Solicitor General here today acknowledges that he doesn't know why the state participated in 406(e) if they can do the same thing as a special need. I suppose we could all say that if that view should prevail here, that we don't know why Congress enacted 406(e). But we think Congress had a very special reason to enact it, and that was to make sure that all needy families with children who face these dire circumstances and had no available resources to meet an emergency need receive some aid. And a contrary result would mean that the statute, Congress' statutes would be, as the Court of Appeals said in Mandley II, totally eviscerated.

On the other points that are raised concerning relief both as to the federal and state defendants, we believe that they are fully covered in our breifs and there hasn't been any contest on their part about that, and we believe that

the Court of Appeals was thoroughly correct in ordering the relief that it did, and that it should be sustained.

The result reached in Mandley I and Mandley II is a just result. Our elected representatives have adopted a sound social policy in the emergency assistance provisions of the Social Security Act. The federal and state welfare agencies charged with the duty to administer that policy have, the Court of Appeals has ruled, illegally refused to discharge their obligations to the great injury of people in most dire straits and to the public good as well.

The beneficiaries of Congress' providential policy whom we represent appeal to this Court to confirm the protections afforded them below by the Court of Appeals by affirming the judgment of the court.

Thank you.

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

[Whereupon, at 1:06 o'clock p.m., the case in the above-entitled matter was submitted.]

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