ORIGINAL

In the

Supreme Court of the United States

ARTHUR F. QUERN, Director,
Illinois Department of Public
Aid and successor in office
to JAMES L. TRAINOR,

Petitioner,

V.

JOHN JORDAN, Individually and
on behalf of all others similarly
situated,

Respondent.

No. 77-841

Washington, D.C.
November 8, 1978

Pages 1 thru 43

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ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR, Petitioner,	
v.	No. 77-841
JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated, Respondent.	

Washington, D. C.,

Wednesday, November 8, 1978.

The above-entitled matter came on for argument at 11:38 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
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WILLIAM A. WENZEL, ESQ., Special Assistant Attorney General of Illinois, 130 North Franklin Street, Suite 300, Chicago, Illinois 60606; on behalf of the Petitioner.

SHELDON H. ROODMAN, ESQ., Legal Assistance Foundation of Chicago, 343 South Dearborn Street, Chicago, Illinois 60604; on behalf of the Respondent.

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C O N T E N T S

[Afternoon Session - pg. 18]

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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 841, Quern against Jordan.

Mr. Wenzel, you may proceed whenever you're ready.

ORAL ARGUMENT OF WILLIAM W. WENZEL, III, ESQ.,

ON BEHALF OF THE PETITIONER

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

Petitioner Arthur F. Quern, the current Director of the Illinois Department of Public Aid, requests this Court to review and overturn the en banc ruling of the Seventh Circuit Court of Appeals, which petitioner submits has undermined this Court's ruling in this very litigation in Edelman v. Jordan, which established the State's sovereign immunity from suit under the Eleventh Amendment to the United States Constitution.

The en banc ruling of the Seventh Circuit authorizes the federal court to mandate the issuance of a class notice regarding entitlement to retroactive welfare benefits to more than 20,000 welfare recipients. Relief, which petitioner contends, is designed to secure indirectly the very same monetary award which this Court prohibited under the Eleventh Amendment in Edelman.

The facts in this case are not in dispute. In 1971 plaintiff filed a civil rights class action in the District

Court for the Northern District of Illinois, challenging the failure of Illinois welfare officials to comply with federal time standards for processing applications for assistance under former Title XVI of the Social Security Act, the Aged, Blind and Disabled Program.

Federal regulations had been issued by the Department of Health, Education, and Welfare in 1968 which established specific time standards for processing applications. From 1968 until plaintiff filed his lawsuit, the defendant welfare officials had processed applications pursuant to State regulations which were inconsistent with the federal time standard.

Accordingly, the District Court, on April 16, 1971, preliminarily enjoined the welfare officials from enforcing their own State standard and compelled them to follow the federal time standards issued by HEW.

In March of 1972, the preliminary injunction was made permanent. In addition, the District Court awarded equitable restitution for retroactive welfare benefits wrongly withheld for all those applicants for AABD who had applied between the date of the issuance of the federal regulation in 1968 and April 16, 1971, the date that the State regulation had been declared invalid.

This award of equitable restitution was ultimately reversed by this Court in Edelman v. Jordan as violating the State's sovereign immunity from suit under the Eleventh

Amendment.

This Court reasoned that an award of equitable restitution is, in all practical sense, relief against the State as the real party in interest. This Court further reasoned that under the doctrine of Ex Parte Young a federal court's remedial powers, consistent with the Eleventh Amendment, are limited to prospective injunctive relief and may not include a retroactive award or relief which compensates for pre-litigation conduct or past misconduct which is completed.

This Court accordingly reversed and remanded the Seventh Circuit decision to the contrary with instructions to have further proceedings not inconsistent with the Eleventh Amendment ruling.

However, on remand in the District Court, the plaintiff filed a motion to require the State defendant to issue a notice to each of the 20,000 individuals, or more, whose applications for assistance had been delayed during the period of 1968 through 1971, and inform them of their possible entitlement to the very same retroactive welfare benefits that this Court had denied.

And to inform them of their right to appeal through administrative proceedings the denial of those welfare benefits.

This was over, of course, the State's objection that it violated the law of this case, as handed down in Edelman,

and that it violated soverign immunity embodied in the Eleventh Amendment. The District Court disagreed. The District Court viewed notice relief as a relief which did not compensate, per se, and that Edelman was limited to relief which compensated per se; and this relief, while related to the possibility of securing retroactive monetary reward, was something different than an actual award itself.

On appeal to the Seventh Circuit, a three-judge panel of the Seventh Circuit disagreed; it found that the actual notice that the District Court had allowed contained a predetermination of State liability, and that this sort of notice relief, therefore, violated the law of the case and violated the Eleventh Amendment.

Plaintiff sought a rehearing en banc, which was granted. The Seventh Circuit, sitting en banc, four judges to three, decided that the District Court had in fact erred in the specific notice relief that it had envisioned, because it did contain a predetermination of the State's liability.

However, the Seventh Circuit, sitting en banc, did feel that a federal court could authorize notice relief, which was related to retroactive welfare benefits, as long as it did not contain a predetermination of liability.

The Seventh Circuit, in authorizing this "some form of notice relief", conceded that it would operate against the State sovereign and not merely against the Director of the

Department of Public Aid.

So the issue now before the Court is whether or not retrospective equitable relief against a nonconsenting soverign, in the form of a notice related to retroactive welfare benefits, is consistent with this Court's decision in Edelman, or is consistent with the State's sovereign immunity from suit under the Eleventh Amendment.

QUESTION: How much of a case do you think we still have here, in view of the majority of the en banc Seventh Circuit's opinion, which, on the State's appeal, reversed the judgment of the District Court, but said that if the District Court were so inclined it could enter a more modest decree?

MR. WENZEL: Your Honor, the -- there is a case of controversy. We do have a significant controversy, because we feel that any form of notice relief under this case, which will ultimately secure members of the plaintiff class the retroactive benefits which were denied by this Court, will either violate this Court's ruling in Edelman or violate the Eleventh Amendment.

QUESTION: Mr. Wenzel, as a matter of Illinois law, would the State have the power or authority to give some retroactive relief for a period prior to April 8, 1971?

MR. WENZEL: As a matter of State law, during this very period in time mentioned, 1968 to 1971 and up through 1974, as a matter of fact, Illinois did participate in a

Federal-State scheme of cooperative federalism known as the Aid to the Aged, Blind and Disabled Program. At that time, as a matter of State law, Illinois would have permitted people who had been denied assistance to appeal and, if they prevailed under administrative appeal or if they eventually prevailed in a judicial review, would have permitted the payment of retroactive relief.

This case, however, is not that simple, because of the action of the United States Congress in 1974 in repealing former Title XVI of the Social Security Act, and replacing it with the wholly federally funded and authorized Supplemental Security Income Program. Therefore, at present, and since 1974, Illinois has not been participating in a federal program. So the question becomes: If a particular recipient were to seek administrative review today, and if he were to go into State court, and if the court were to consider the question whether he was entitled to retroactive relief, I think it would first have to deal with the threshold question of whether the State was still participating in the federal program. And it is not today.

QUESTION: Well, but the district -- the Court of the Seventh Circuit has, as I read its opinion, left that completely up to the State court to determine. It doesn't say the State courts have to award retroactive relief, it just says that this class of people may be told that they may have a claim in

the State courts and remiss them to the State courts.

MR. WENZEL: Your Honor, we view notice relief as very closely related to an actual award that benefits themselves.

But our position goes further than that. We do not view the principles of sovereign immunity, not this Court's decision in Edelman, as to limit the application of the doctrine of sovereign immunity to only those cases involving an actual award of monetary relief.

We believe that the principles of sovereign immunity must include those cases which require the sovereign to act affirmatively, or which triggers the operation of governmental machinery. We draw support for that proposition from this Court's rulings under the issue of federal sovereign immunity from suit in the Larson vs. Domestic & Foreign Commerce Corporation case, and --

QUESTION: Mr. Wenzel, before you get too far into your argument, I want to be sure I've got your entire answer to the question I put before. Do I correctly summarize it by saying that if someone, whether he got this notice or not, who did not receive benefits during the period prior to April 8, 1971, were now to file some kind of a claim in the Illinois State system, whether it's administrative or judicial, we don't know really whether the State would pay him anything; is that right?

MR. WENZEL: That is correct. And I --

QUESTION: It's possible that -- either result is possible, as far as we know from the record and the law that you have been able to point out to us; right?

MR. WENZEL: Yes, and I really did not complete my exposition of the State procesures. If I could back up, to answer both Justice Stevens' and Justice Rehnquist's questions: notice relief will trigger governmental machinery and will intrude upon the sovereign State of Illinois in the following respects: the notice will go out; 20,000 or more welfare recipients will file requests for appeals with the administrative agency; the agency will hold hearings themselves. And, depending upon the conclusion or the final decision in those agency hearings, the recipients will have a right to seek judicial review in the State courts.

If the State court should arrive at the conclusion that retroactive assistance should be paid to members of the plaintiff class, as a matter of State law petitioner, the Director of the Department, does not have the power to request the State Comptroller to draw or the State Treasurer to pay an assistance warrant which relates to an appropriation which has lapsed. We are talking here with obligations that relate to appropriations for the years 1968 through 1971. Under Illinois law, those appropriation members have lapsed, the Director does not have the power nor does the --

QUESTION: Well, but isn't that just like various other claims that are asserted against the State? The claim may be asserted before the Court of Claims, or whatever it's called -- I forget -- and it may be established, and then the Legislature, the General Assembly in its wisdom decides whether or not to pay the claim. So isn't it possible that 20,000 people who did not get money they should have gotten could establish this sort of claim, and then they might have enough political influence to get the Legislature to adopt or pass a bill, saying "Let's pay the money"?

MR. WENZEL: That is correct. The next step in --

QUESTION: They really won't have a chance to do this unless they initiate the claim in the first instance.

MR. WENZEL: That is correct, so we are at the point that the Court of Claims, perhaps even ruling in favor of the members of the plaintiff class here, which, under Illinois law, is a mere recommendation to the General Assembly to pay or not to pay. But the catch, it seems to me, is that the federal court that has issued the notice relief stands ready to intervene at any particular point in these proceedings, whether they be the administrative, the judicial or the legislative, and use its powers under Title 28, Section 2283, to protect or effectuate its judgments; to use its powers under Title 28, Section 2202, to grant further relief.

QUESTION: But didn't the Court of Appeals say the

one thing they can't do is order payment?

MR. WENZEL: That is correct, but I think that what they could do is at each step of the proceeding, whether administrative, --

QUESTION: They can be sure the notices were mailed, and they were printed an legible and all that sort of thing.

MR. WENZEL: -- judicial, legislative, they can keep on intruding into legitimate State affairs and nudging this matter closer and closer to the point where payment will occur even though it couldn't be said directly that the federal court actually ordered it.

It did everything but, in fact, order. And we feel that that is so closely tied up with the actual award of monetary relief itself that it really amounts to a subterfuge.

QUESTION: Well, I can understand why you would say that about the District Court order in this case, but the Seventh Circuit majority rather substantially modified it, didn't it?

MR. WENZEL: It said that it envisioned a notice which would not contain a predetermination of the liability of the State. It did -- whatever notice it might send out, however, I think would include the right to appeal this denial of benefits in the period of 1968 to 1971. Once we triggered the fair hearing process, everything else follows -- judicial review, court of claims, the legislative matter. But then --

QUESTION: That's by virtue of State law.

MR. WENZEL: But assuming that the federal court would retain power to enforce and protect its notice relief, it would seem to me that the court is not merely -- the court stands ready to intrude into State law and State procedure, to see the desired result of an eventual monetary award realized.

QUESTION: I would think if the majority of the Seventh Circuit felt the way you think it felt, it would simply have affirmed Judge Will's order rather than reversed it. I can see why you could say that about Judge Will's order, but I have some difficulty with your interpretation of Judge Wood's opinion in the Seventh Circuit.

MR. WENZEL: Maybe another way of approaching the problem is to attempt to delineate what Edelman precludes in the way of a federal court's remedial power for relief. This notice, by any stretch of the imagination, is not prospective. It must be deemed to be compensatory. It's not prospective because it's the only prospective injunctive relief that was dealt with in 1971 and 1972 for federal time standards. There's never been a question of notice relief in this case.

That leaves us with notice relief, which is designed to compensate for pre-litigation conduct, and this Court said in Edelman that compensatory relief, dealing with past

completed misconduct is beyond the powers of a federal court when the objection of the Eleventh Amendment is raised.

QUESTION: Would there be any objection if some community organization decided that -- say you win the case, and then some community organization decided well, these people ought to -- these are blind, disabled, elderly people who were wrongfully denied some money about seven or eight years ago, or ten; and this community organization thought, well, they ought to know what their rights are and sent out precisely the same notice. Would there be any -- would that have a different consequence? And if the answer is no, are we really talking about who pays for the notice?

MR. WENZEL: The answer would be no. It would -- I suppose the members of the plaintiff class would be able to come into the office of Public Aid and request to appeal the denial of benefits, but we're talking here --

QUESTION: No, no. My question is: some do-gooder, some organization says, well, these people ought to know what their rights are; and sends out a bulletin in the same words as the notice the Court of Appeals apparently thought was appropriate. Wouldn't that produce all the consequences that you're concerned about?

MR. WENZEL: Yes, but it would not be as a result of a federal court's order over the objection of the State that it's in violation of its right to be free from suit under the

Eleventh Amendment.

QUESTION: You mean they might take it so seriously if a private association did it, as they would when the Court of Appeals en banc does so?

MR. WENZEL: Well, especially in the very litigation in which the prohibition of an award of monetary benefits has been precluded by this very Court. We feel very strongly that what is happening here is they are attempting to achieve the ultimate goal of retroactive benefits by indirection. And the Seventh Circuit Court of Appeals is aiding and abetting this indirection, we feel, in violation of this Court's decision, and certainly inconsistently with the principles of sovereign immunity. Because, because of the federal order to grant notice relief, there will be a significant intrusion upon State affairs. These hearings would, of necessity, follow, judicial review would follow, and I think it does matter significantly, Mr. Justice Stevens, that this would occur as a result of the federal court order and not merely because some do-gooder, at his own cost and expense, had --

QUESTION: Well, the do-gooder could say there's been a federal decision, that the State of Illinois wrongfully denied you money that you were entitled to. And the do-gooder could tell all that. And, in fact, in the Court of Appeals notice, he need not necessarily recite that it was ordered by the Court of Appeals.

MR. WENZEL: There is one significant difference. At this point in the proceedings, the only way that the names and identities of those people who have been denied benefits in the past would be able to be put together and disseminated would be as a result of the federal court order which viewed notice relief and identity of members of the plaintiff class as part of some prospective relief which it had the power to require the State to put together and disseminate.

So a do-gooder really just putting out a notice as to what your --

QUESTION: He might not be able to benefit the entire class, just those that don't know their rights, we'd just let them fall by the wayside, and we'd just protect those that are on the surface.

QUESTION: I see.

MR. WENZEL: I think that notice relief under the circumstances of this case, in any form, cannot be deemed to be consistent with the principles of federalism which are embodied in the Eleventh Amendment.

Those principles of federalism require that there be a respect for both the Federal sovereign and the State sovereigns, and that each sovereign should be free to act consistently within its own sphere of operation under our Constitution.

In Edelman vs. Jordan and Ex Parte Young, this Court

attempted to make sure that both the reaches and proper applications of the Fourteenth Amendment, as well as the Eleventh Amendment, are given their full play as long as one does not require the lessening or the weakening of the other.

If we are to believe the -- what plaintiffs say in this case about the notions of federalism, in effect we will have federal courts being able to grant relief which effectively renders the Eleventh Amendment a hollow shell. Our notion of federalism, as evidenced by the distinction between prospective equitable relief and a retroactive relief recognized in Edelman, we think is the proper balance.

And this Court was able to work with the Edelman distinction between retrospective and prospective in the Miliken vs. Bradley case, and was able to find a justification for wiping out on-going instances of inequality in the Detroit school system by granting prospective relief which contained remedial reading programs.

The distinction between prospective and retroactive, when applied to this particular case, however, shows that we are talking about relief which is measured in terms of the past breach of legal duty.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock, counsel.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Wenzel, you may resume, you have about eight minutes left, as I observe.

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

If there are no specific questions of petitioner's counsel at this time, I would like to reserve the balance of my time for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Roodman.

ORAL ARGUMENT OF SHELDON H. ROODMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The central question presented to the Court today is whether the Eleventh Amendment immunity of the State of Illinois may be invoked by a State official as a bar to an order requiring him to send notices to members of a duly certified class.

This question arises as one aspect of three-pronged relief granted by the federal court.

First, there has been a declaration by the federal court that the Director of the Illinois Department of Public

Aid promulgated his own administrative regulation contrary to the Social Security Act, and therefore void under the supremacy clause.

Second, in light of this declaration, the federal court enjoined the future enforcement of these administrative regulations.

These two aspects of the relief have already been held by this Court to be consistent with the Eleventh Amendment.

On remand from Jordan I, it must be emphasized that members of the plaintiff class were wholly in the dark regarding this lawsuit. Accordingly, the class representative, in fulfillment of his fiduciary obligations to the class, sought an order requiring the petitioner to send notices to the members of the class merely explaining, one, that a federal suit had been filed on their behalf; two, that they had been denied certain AABD benefits; three, that there were pre-existing State administrative procedures for challenging the denial of such benefits; and, four, the method by which they might trigger those procedures.

QUESTION: Mr. Roodman, class action procedures have come into play largely since I left private practice. Is that ordinary, as you say, members of a plaintiff class would be largely in the dark after a remand from this Court in Edelman, after a decision on the merits?

MR. ROODMAN: Yes, Your Honor. This was a (d)(2)

class under federal law.

QUESTION: Injunctive?

MR. ROODMAN: Correct. Under the Federal Rules of Civil Procedure, and therefore no notice is required under the federal rules, and no notice had been sent to these members of the class. So, after the decision of this Court in Jordan I, they had been -- were ordered no notice, they had never received any notice,during the pendency of the case, of the proceeding.

So the notice that the respondents did seek on their behalf merely advised them that there had been this lawsuit pending; it advised them of the declaration of the Court; and then advised them of pre-existing administrative procedures by which they might challenge the denial of those benefits.

The Seventh Circuit approved the sending of such notices, but only to the extent that those notices in no way predetermined the liability of the State of Illinois. The notices which were sent were appropriate, both under Rule 23(d)(2) of the Federal Rules of Civil Procedure and also appropriate as an exercise of the general equitable discretion of the court.

Further, under the Declaratory Judgment Act, the federal courts have the authority, after entering a declaratory judgment, to give further necessary and proper relief. Notices fall within that section as well.

QUESTION: Well, you're talking now about an affirmative basis for the District Court's authority to act. Your opponents contend that whatever that affirmative authority might support in other cases, the Eleventh Amendment bars it here.

MR. ROODMAN: That is correct, Your Honor. That is the sole basis of their argument before the Court today.

There could be, in other cases, other equitable considerations that might compel the federal court to decline to send notices to a class, even after finding a violation of the Social Security Act. Those are questions of equity not in the Eleventh Amendment jurisprudence.

The only question raised before the Court today is the Eleventh Amendment immunity of the State of Illinois.

We believe a close examination of the principles of sovereign immunity and federalism, embodied in the Eleventh Amendment, will show that the petitioner is seeking to use the Eleventh Amendment in a way in which it was never intended, and contrary to the purposes of the Eleventh Amendment.

I will first discuss the Eleventh Amendment issues and then turn to the 1983 issues presented in this case.

In Jordan I, this Court reaffirmed the principle that the Eleventh Amendment bars a federal court from entering awards for money damages directly against the State. This interpretation of the Eleventh Amendment fell within the

historical purposes of the Eleventh Amendment: to protect State treasuries from federal court orders. Both to avoid a potential clash between Federal and State sovereigns and also to prevent a direct and substantial intrusion upon the sovereignty of the State by the federal courts. A question of federalism.

Neither of these historical purposes of the Eleventh Amendment, however, are in any way jeopardized by the sending of the notices approved by the Seventh Circuit en banc.

The order challenged here by the petitioner does not result in any clash between the Federal and State sovereigns. On the contrary, the order respects the institutions of State Government and leaves to the institutions of State Government the ultimate determination of the fiscal liability of the State.

QUESTION: What if the order had provided, in addition to what the Seventh Circuit said it could provide, that although Illinois law did not provide for any hearing in this situation, as a matter of federal constitutional law under the Goldberg vs. Kelly line of cases, a hearing was mandated by the Constitution, and therefore, regardless of Illinois law, the Illinois State system would have to give hearings?

MR. ROODMAN: Your Honor, we believe that that order as well would be permissible under the Eleventh Amendment. That order would not displace the State from determining its

own question of fiscal liability in accordance with State law. To the extent that the order does not intrude upon central decisions of the State Government, that are central to its sovereignty, so that --

QUESTION: Well, it certainly would be imposing a rather substantial aspect of retrospective relief, would it not?

MR. ROODMAN: Your Honor, it would not necessarily be imposing such a burden. That question would be left to the State.

QUESTION: Except that the State would be required to hold a hearing.

MR. ROODMAN: Yes, Your Honor. There is the fact that the petitioner has violated the federal rights of the members of the plaintiff class, which is central. There is a weighing of the federal interest in this case with the State interest. We have, a central finding in this case, a violation of the supremacy clause, a knowing violation of the supremacy clause.

Thus, there are federal interests at stake in this case.

What the federal court here has done has accommodated and harmonized the federal interest with the State interest. It is done so in a way that is not intrusive upon the State Government. It leaves to the State Government the final

determination of fiscal matters that are central to State Government.

The direct --

QUESTION: I just wondered what was the jurisdictional basis for this suit in the federal court?

MR. ROODMAN: The original jurisdictional basis for the lawsuit is Section 1343.

QUESTION: And your claim was based on the federal law?

MR. ROODMAN: Your Honor, the original claim was based both on the equal protection clause and the supremacy clause. The federal court never reached the equal protection clause, --

QUESTION: I see.

MR. ROODMAN: -- they relied solely upon the Social Security Act and the supremacy clause.

Your Honor, we would submit that in fact petitioner, a State officer, is not here seeking to protect the sovereignty of the State of Illinois. What he seeks to do is block access by the respondents to the State-created remedies. "The sovereign State of Illinois (a) agree to provide administrative remedies for all public aid recipients who wish to challenge the denial of benefits". That requirement was part of the Social Security Act. But the State of Illinois went even one step further, they provide for judicial review

of the administrative decisions of the Director of the Illinois Department of Public Aid.

So the very procedures and remedies that the sovereign State has adopted for members of the plaintiff class, the Director here seeks to prevent them from utilizing.

We submit that there is no basis for assuming that the interests of the sovereign State of Illinois are aligned with the interests of the Director of the Illinois Department of Public Aid. The Director of the Illinois Department of Public Aid originally violated the Social Security Act.

QUESTION: Who speaks for the State of Illinois in this Court?

MR. ROODMAN: Your Honor, the Attorney General does represent the Director of the Illinois Department of Public Aid before this Court.

QUESTION: Well, who else would we look to to hear the views of the State of Illinois?

MR. ROODMAN: Well, Your Honor, that is the sole person before the Court today. I think --

QUESTION: Well then, I'm not sure I understand your prior statement.

MR. ROODMAN: Your Honor, we think that --

QUESTION: I understood you to say there's nothing to indicate that the Director is speaking for the sovereign State of Illinois.

MR. ROODMAN: We were maintaining, Your Honor, that his interests and the interests of the sovereign State of Illinois are not necessarily aligned. The sovereign State, through its Legislature, has adopted explicit remedies for the respondents in this case to challenge denial of benefits. The Director, on the other hand, is a State officer. It is not true that in all cases a State officer has the identical interests of the sovereign, particularly when the State officer is responsible for the initial violation of law.

We think in cases of this kind the State officer is seeking to block the respondents from utilizing procedures the State, through its Legislature, has expressly adopted.

QUESTION: How do we resolve this potential conflict that you imply?

MR. ROODMAN: Your Honor, I think --

QUESTION: That is, do we decide what the State of Illinois thinks about this?

MR. ROODMAN: No. The question is whether the State officer should be permitted to invoke the immunity of the State of Illinois.

QUESTION: Can the Attorney General invoke the immunity?

MR. ROODMAN: No, Your Honor -- the Attorney General, in representing the State officer here, we think should not be permitted to invoke the immunity of the State of Illinois,

except in those cases in which there is a direct and substantial intrusion upon the State Government.

This Court held in Jordan I that money damages against the State are a direct intrusion upon the State and therefore it is appropriate for the State officer to be able to invoke the immunity of the State of Illinois.

In the tax cases of the 1940s, which were claims for money judgments against the State, once again the State officer could claim the immunity of the State.

However, in those cases in which -- there are no cases, other than money damages cases, in which a State officer has been permitted to claim the immunity of the State of Illinois, or any other State in this nation.

The notice relief here, we submit, does not create a clash between the sovereign State of Illinois and the national government through its federal courts. Instead, the notice remedy is a carefully tailored remedy which is designed to avoid such a clash. The remedy, by sending the members of the class back to the State institutions, avoids any clash between the sovereigns.

Ultimately the question of whether they shall recover for the benefits that have been denied them is a question for the State Government to decide through its administrative agencies and through its judicial branch.

QUESTION: Well, the original District Court decree

in this case didn't speak in terms of damage, did it, it spoke in terms of equitable restitution, suggesting that, you know, it wasn't quite as airtight as an award of damages.

So that are you correct in saying that it's just strictly and only damages that's forbidden by the Eleventh Amendment?

MR. ROODMAN: Money judgments, Your Honor. Judgments that have a direct monetary impact upon the State for past conduct.

This Court did say that the equitable restitution was indistinguishable from money damages that had been barred previously, or money judgments for the recovery on bonds, or the tax cases in which persons sought to recover taxes that they claim had been illegally exacted from them.

In the absence of a money judgment, and with the particular notices that have been ordered here, there can be no problem of enforcement that this Court was concerned about in cases involving money judgments. The enforcement is solely against the State officer. If, in fact, the plaintiffs do not recover in this case, the State officer is not in contempt of the federal court. The only requirement on the State officer is to send the notices. After that, the questions of liability are reserved to the State Government.

QUESTION: What if the State Executive Branch, pursuant to your suggestion, decides not to pay, then what --

then they go in the State courts?

MR. ROODMAN: Yes, Your Honor, we would --

QUESTION: And what if the State court decides that they should pay? Then what happens?

MR. ROODMAN: Well, I would assume if the State court decides that they should pay, that the State officer would respect the judgment of the State court.

QUESTION: What if the Attorney General says that, for purposes of illustration, that violates the Eleventh Amendment and our holdings?

MR. ROODMAN: The Eleventh Amendment would not apply in the State courts, Your Honor.

QUESTION: That's why I posed it -- what if he asserted that?

MR. ROODMAN: Our only remedy, Your Honor, would be within the State court system. We might pursue remedies of contempt within the State court system. He would not be in violation of the federal court order, and we would have no remedy of contempt in federal court, no potential clash between the State sovereign and the Federal sovereign.

QUESTION: Then, conversely, if the State courts, in that hypothetical, decide no entitlement, that's the end of it, is it?

MR. ROODMAN: Yes, Your Honor, that is correct.

QUESTION: Mr. Roodman, what do you do with cases

like In Re Ayers and Hagood v. Southern that were cited in Edelman v. Jordan, where the Court refused to permit suit in federal court for specific performance of a contract? Which, I take it, could well not have involved monetary damages.

MR. ROODMAN: Your Honor, those cases did involve collection on bonds, those cases were intended specifically to recover the payment of principal and interest on bonds, they did involve money judgments. Those cases fell within the historical purposes of the Eleventh Amendment in the original case of Chisholm vs. Georgia, in which there was a suit for the collection of money.

QUESTION: Would you think the Eleventh Amendment allowed a district court, in a case such as this, to order a State official to specifically perform a contract in which the State had engaged, so long as it did not involve actual payment of money? Suppose it had involved furnishing of supplies to a group of people?

MR. ROODMAN: The question, Your Honor, we think would turn on principles of federalism. It would be the extent to which the federal court order was so intrusive upon the State sovereign that it should not stand within our federal system.

That, we think, is the basis, the balancing test that the federal court would have to apply in that situation.

The question is -- throughout the almost 200 years

of the Eleventh Amendment, it has always been whether the particular relief is consistent with this nation's federalism. And federalism requires a sensitivity to both the State interests and the national interests.

In this case, in the absence of such relief, as approved by the Seventh Circuit en banc, the federal court will be ignoring and condoning the violation of the federal rights of the plaintiff class.

In our federal system, the violation of federal rights cannot go unredressed. What the lower courts have done here is to tailor a remedy that is sensitive to those federal rights and to the supremacy clause of the Constitution, while, at the same time, recognizing the interests, the legitimate interests of the State Government and not intruding upon the institutions of State Government.

By leaving to the State Government the ultimate determination of liability, the federal court here has harmonized the interests of the Federal Government, the federal funds that are at stake in the AABD program, the federal rights that are involved in the Social Security Act, and, of course, the federal interest involved in seeing that the supremacy clause is adhered to.

The federal interests in this case are quite different from those in the tax cases of the 1940s and the bond cases in the latter part of the Nineteenth Century. In those cases

it was not -- there was no program that was based upon cooperative federalism. There were no federal interests involved directly in those cases.

QUESTION: Well, Mr. Roodman, in the tax cases, wasn't the claim of Ford Motor Company, for example, that the tax violated the Federal Constitution?

MR. ROODMAN: Yes, but --

QUESTION: Would you say that was not a federal interest?

MR. ROODMAN: Your Honor, there certainly is a federal interest in the Fourteenth Amendment. That question then could be raised and presented through the State court system and ultimately considered by this Court.

And what we seek here is no more than in that case. We seek to have the issues of liability referred back to the State court system and then determined within the context of State law in the State court system.

QUESTION: Well, I was puzzled by your statement that there were no federal interests of the same magnitude involved in the tax cases in the Forties as there were in this case. I would think the federal courts sit to vindicate the Fourteenth Amendment quite as much as they do the supremacy clause.

MR. ROODMAN: I certainly would agree, Your Honor. The point was that in this case there has been a finding of a

violation of federal law that this Court has upheld. So that because of the three-pronged nature of the relief, there is a finding of a violation of federal law. Whereas, in the tax cases, the entire matter is referred ab initio to the State court system for consideration.

The petitioner here does not explain how the notice relief in any way undermines federalism. Further, the petitioner cites no cases in support of his position. Petitioner seems to suggest that the State is the real party in interest, and that the notices will be a burden upon his office.

However, it is important to distinguish between equitable consideration and Eleventh Amendment considerations. If the class here involved only 500 persons, that is a question of comparison to the equities of the case. It is a question that this Court would weigh in the balance in deciding whether to send notices.

But the Eleventh Amendment immunity of the State does not turn on the question of the number of persons in the class.

What is important here is for the federal courts to provide a remedy that is co-extensive with the violation. Unless the federal remedy here, of notices to the members of the plaintiff class, is approved, then those persons who are actually harmed by the violation of law would receive no redress whatsoever.

The petitioner further argues that the respondents are seeking to accomplish by indirection what Jordan I barred directly. It is not true that this Court held in Jordan I that the members of the plaintiff class were to be barred from recovering. What this Court held only was that the federal court could not order such recovery, and therefore the decision by the federal court en banc is consistent with the original decision in Jordan I.

Finally, it is important to take into account also the principles of federalism embodied in Section 1 of the Civil Rights Act of 1871, now codified as 1983.

In enacting that provision, Congress clearly intended to provide an effective federal remedy for infringement of federal rights by State officers, just as occurred in this case. In doing so, Congress recognized that the federal courts would be (1) overriding certain State laws, (2) providing a federal remedy where State law was inadequate, and (3) providing a federal remedy where the State remedy, though adequate in theory, was not available in practice.

And that is precisely the situation we have today. A State remedy that is available in theory but not in practice; a State remedy that is only triggered by the sending of a notice and unless the members of the plaintiff class have such notice, they would be unable to utilize those procedures.

Thus, it is consistent with the intent of Congress

in 1983 to provide for the sending of notices to these individuals. For the State officer here to frustrate the intent of Congress, there is a heavy burden. The State officer must be able to show that the remedy appropriate under 1983 is a direct intrusion upon the sovereignty of the State.

In the absence of such a showing, the argument that the 1983 remedy should be frustrated must fail.

In conclusion, then, we urge the Court to affirm the judgment of the Seventh Circuit en banc, to hold that the Eleventh Amendment bars an order merely requiring a State official to send notices would be inconsistent with the historical purposes of the Eleventh Amendment, it would be inconsistent with our federalism, and would be inconsistent with the congressional mandate embodied in 1983.

Thank you.

QUESTION: May I pursue my previous question with you for a moment?

MR. ROODMAN: Yes, sir.

QUESTION: Suppose that in this complaint there had been only the so-called statutory issue, a claim of conflict, no equal protection issue, would there have been a jurisdiction under 1343?

MR. ROODMAN: Your Honor, we believe there would be. This question is now --

QUESTION: Because?

MR. ROODMAN: Because there is a -- the supremacy clause is an integral part of the Constitution. The violation of the Social Security Act is in fact a violation of the supremacy clause; and therefore it would come --

QUESTION: And if you're wrong on that?

MR. ROODMAN: If we are wrong on that question, that would not disturb in any way the Court's affirmance of the order of the Seventh Circuit.

QUESTION: Well, just take my example: only the statutory claim, is in the complaint.

MR. ROODMAN: Excuse me, you mean jurisdictionally?

QUESTION: Yes. Was there any -- I'll ask you two questions. Do you think you state a cause of action, if there was only that claim in the complaint? And, secondly, if you did, would there be jurisdiction in the federal courts?

MR. ROODMAN: Yes, Your Honor, to both questions.

This Court, in fact, in Jordan I, expressly held that 1983 was an appropriate cause of action for enforcing the Social Security Act. We would find jurisdiction --

QUESTION: Under the "and laws" part of 1983; is that it?

MR. ROODMAN: Yes, Your Honor, there is the dual -- both under the constitutional language of 1983 as well as the "and laws" --

QUESTION: Well, let's assume that 1983 did not

reach "and laws".

MR. ROODMAN: Yes.

QUESTION: Would there be a jurisdictional problem in my example?

MR. ROODMAN: Your Honor, we would have jurisdiction under 1331, this is a question arising under the Constitution, we would claim that in this case there is in excess of $10,000.

QUESTION: Yes, but there your cause of action would be arising under the Social Security Act.

MR. ROODMAN: If we were then to claim that the cause of action for the violation of the Social Security Act was not a question also under 1331?

QUESTION: Yes. Well, if 1983 does not reach all federal statutes and the Social Security Act isn't covered by 1983, and you went in under 1331, attempting to state a cause of action, you would have to successfully claim that the Social Security Act gives a private cause of action.

MR. ROODMAN: Well, we would have -- Your Honor, in addition there is the Declaratory Judgment Act, which provides a cause of action. And we would seek equitable relief under the -- first, a declaratory judgment that the acts of the State officer were contrary to federal law and the supremacy clause. Then, pursuant to that declaration, we would seek equitable relief to enjoin the future violation of the Social Security Act.

So we would have no remedy adequate at law, the plaintiffs would be suffering irreparable injury, and therefore we would meet the test under equitable jurisdiction, under normal equitable principles, to secure an injunction against the acts the State officer is in violation of.

QUESTION: In any event, there's been no jurisdictional issue raised in this case here, is that it?

MR. ROODMAN: That's correct, Your Honor. That is correct.

QUESTION: But I suppose we're permitted to raise it on our own.

MR. ROODMAN: Well, no, the jurisdiction of the federal court here is clear, it's already been upheld in Jordan I. We are clearly properly in federal court. It is conceivable that in other cases now pending before the Court, Houston Welfare Rights --

QUESTION: Well, you may be properly in the federal court on the constitutional issue that you've asserted, under 1343. The question is, how about the pendent claim?

MR. ROODMAN: Well, Your Honor, after seven years of this litigation, I think it is appropriate for the Court to exercise that pendent jurisdiction.

QUESTION: Well, did you say you thought Edelman had sustained the cause of action under 1983?

MR. ROODMAN: Yes, I did.

QUESTION: Merely because the allegation was a violation of a law of the -- a federal law; namely, the Social Security Act?

MR. ROODMAN: That is correct, Your Honor.

QUESTION: I see.

QUESTION: Well, you also allege a constitutional violation in your complaint, don't you? So that you would presumably have an argument for pendent jurisdiction under Hagans v. Lavine.

MR. ROODMAN: Precisely, that --

QUESTION: Yes, but there still has to be a cause of action. I mean, for a cause of action to be pendent, there has to be a cause of action.

MR. ROODMAN: Yes.

QUESTION: And if 1983 doesn't reach the Social Security Act, there's no cause of action.

MR. ROODMAN: Well, the Declaratory Judgment Act --

QUESTION: And there's nothing to be pendent.

MR. ROODMAN: Well, if 1983 would be the proper cause of action for the constitutional claim, we would have a pendent claim under the Declaratory Judgment Act and under general equitable principles for what you're denominating as solely the statutory claim.

QUESTION: Yes, but would you under 1983 have a pendent claim? That's the question.

For violation of the Social Security Act.

MR. ROODMAN: Yes, it is our --

QUESTION: And you say -- I think what you said was that Jordan I said indeed you did.

MR. ROODMAN: Precisely.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Wenzel?

REBUTTAL ARGUMENT OF WILLIAM A. WENZEL,III, ESQ.,
ON BEHALF OF THE PETITIONER

MR. WENZEL: In response to counsel's comments, I would like to return to what I think are two crucial facts that are particular to this case, which are decisive of the issue of whether any form of notice relief is appropriate under this Court's decision in Edelman and the Eleventh Amendment.

Those two facts are: one, when plaintiff brought his complaint in federal court in 1971, he alleged that he had no available administrative remedies; paragraphs 27 and 39 of the complaint, Appendix A-12 and A-14.

He purposefully chose to ignore his right to seek a hearing in State court. And now, some six or seven years later, he's back in court saying that now he's entitled to notice.

The second crucial fact --

QUESTION: I thought he was now saying the class is entitled to notice.

MR. WENZEL: That is correct. In fact, the plaintiff, Mr. Justice Marshall, Mr. Jordan has received his retroactive benefits, so he would not even be --

QUESTION: That was declared.

MR. WENZEL: The second crucial fact, I believe, is that in 1974 Congress repealed former Title XVI of the Social Security Act. Any right to notice or a hearing, which members of the plaintiff class may have had in 1971, I believe are extinguished by the fact that there are no longer any rights or obligations with respect to notice, which are binding on --

QUESTION: Well, both of these propositions are propositions that may be -- that will presumably be considered, and may be accepted by the State administrative agencies or courts, i.e., that there's no administrative remedy or (b) if there may have once been, now Congress has repealed the law so there now no longer is. But that's a matter for the State courts to determine.

That doesn't really directly bear on the Eleventh Amendment question in this case, does it?

MR. WENZEL: Well, we back up to whether or not the notice -- whether or not it will ultimately --

QUESTION: It may be the notice is a vain thing, it's a futility maybe, but that again doesn't directly bear on

the Eleventh Amendment.

MR. WENZEL: In so far as notice will trigger the requests for hearings, the hearings themselves, judicial review, possible action by the legislative, it's triggering governmental machinery which, as far as we're concerned, substantially intrudes upon the sovereign and violates the sovereign's freedom from suit.

Counsel for the plaintiff stated that the State officer is not seeking to protect the State, but to block access to State remedies; and I think we've sufficiently dealt with that. The fact that we are no longer operating under former Title XVI.

Federalism, plaintiffs assert, requires a balancing of the competing interests of the State and the Federal Government. I think what plaintiff is trying to do in this case is confuse the notion of federalism as used in cases, in Younger v. Harris, which is, as I understand it, a prudential notion of federalism. But federalism is inherent in every Eleventh Amendment controversy.

Federalism here must take into account that the Eleventh Amendment renders an absolute bar to jurisdiction of the federal courts. This Court has said so in Monaco v. Mississippi, and the Eleventh Amendment must be given effect as far as it reaches. So it's not really a question of balancing interests, and for every violation of federal law

there must be a remedy.

The point is that if the suit is essentially against the State, the State is free to assert its Eleventh Amendment immunity from suit.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:36 p.m., the case in the above-entitled matter was submitted.]

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