ORIGINAL

In the

Supreme Court of the United States

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, Appellant, v. CINDY WESTCOTT, ET AL., Appellees, and JOHN D. PRATT, ETC., Appellant, v. CINDY WESTCOTT, ET AL., Appellees.	)	No. 78-437 No. 78-689 (consolidated)

Washington, D. C.
April 16, 1979

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Washington, D. C.
Monday, April 16, 1979

The above-entitled matter came on for argument at 10:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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 H. AISUP, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, on behalf of Appellant in No. 78-437

APPEARANCES (Continued)

PAUL W. JOHNSON, ESQ., Assistant Attorney General, Commonwealth of Massachusetts, One Ashburton Place, Boston, Massachusetts 02108, on behalf of Appellant in No. 78-689.

HENRY A. FREEDMAN, ESQ., Center on Social Welfare Policy and Law, 95 Madison Avenue, New York, New York 10016, on behalf of Appellees in both cases.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 78-437, Califano against Westcott and the consolidated case.

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

ORAL ARGUMENT OF WILLIAM H. ALSUP, ESQ.,

ON BEHALF OF APPELLANT IN NO. 78-437

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

This is a direct appeal from the United States District Court for the District of Massachusetts. The District Court held unconstitutional Section 407 of the Social Security Act. That's a provision which extends aid to families with dependent children to two-parent families whose father is unemployed.

The District Court held the provision unconstitutional because it does not likewise extend such aid to similarly situated families whose mothers are unemployed.

The Secretary of HEW appeals the holding that that section is unconstitutional. John Pratt, Commissioner of Public Welfare, in a consolidated appeal, appeals only from the remedies selected by the District Court.

The Aid to Families with Dependent Children provides financial assistance to families of needy children. It is a program under which if a state elects to participate and submits a plan which complies with Section 402 of the Social Security

Act, the Federal Government will participate in funding of the program.

Originally, the program was limited to needy children who were deprived of parental -- the support of a parent by virtue of the absence from the home of the parent, or a parent, or the death of a parent, or the incapacity of a parent. Principally, this was limited to single-parent families.

Later, an adjunct program, that is the program we are concerned with today, was added. That program extended AFDC benefits to two-parent families where there was an unemployed father.

Now, that program appears in Section 407 of the Social Security Act. It is 42 U.S.C. 706 -- Sorry -- 607. In order for a two-parent family to qualify under that provision, the family must show that the father has a minimum but recent connection with the employment market and that he is unemployed.

The Act does not require that the mother be in the labor market, nor does it require that she be unemployed, or that she be employed. In fact, she may be employed and the only effect of her earnings is to reduce the amount of benefits that are paid to the family.

In this case, the Appellees are two families which did not qualify because the fathers lacked the requisite employment history. The Act, as mentioned, requires that there be some recent, but minimal, connection with the labor market.

QUESTION: In both cases, the mothers in the Appellee families would have qualified under the statute had they been fathers instead of mothers; is that right?

MR. ALSUP: That's correct.

The fathers did not qualify because the Act requires that within one year prior to the date of application the father have been employed, that is earned at least $50 in six out of the preceding thirteen quarters. Or it counts in addition to earning the $50 per quarter if the father had been enrolled in a training program, that would have counted toward the six out of thirteen quarters.

As mentioned, neither Mr. Westcott nor Mr. Westwood satisfied this prerequisite. And, as Justice Stewart points out, in both cases the mothers did satisfy that requirement and they were unemployed. Accordingly, they were denied benefits under the program.

These two families then brought this action in the District Court. On summary judgment, the court held that the program was unconstitutional, either under the rational basis test or under the substantial connection test.

QUESTION: Under what provision of the Constitution?

MR. ALSUP: Under the Due Process Clause of the Fifth Amendment and the equal protection component of the Due Process --

QUESTION: Because it discriminated on the basis of gender?

MR. ALSUP: Right.

The District Court, in fact, sustained that claim. The District Court reasoned that there were only two purposes that could be imagined for such a program. One was to assist needy children of families which were impacted adversely by unemployment.

Secondly, the Court said the unemployed fathers program had been designed to remedy a structural flaw in the basic AFDC program which had encouraged unemployed fathers to desert in order that their remaining family could qualify for benefits.

QUESTION: Mr. Alsup, is "impact" a verb?

MR. ALSUP: It has been recently. I'll remodify that families adversely affected by unemployment.

Well, the District Court reasoned that with respect to the first of those two objectives, that is to assist families adversely affected by unemployment. It didn't make any difference whether it was the woman or the man who had been discharged or lost employment, that both families were just as needy.

I should say, by the way, that the Government does not disagree with that part of the analysis of the District Court. Our disagreement concerns the second goal of the statute. That, again, is to remedy a structural flaw in the basic AFDC program that had created an incentive for an unemployed father to leave home so that the mother and child, or other children, could qualify.

Some reports of the Secretary or a congressional committee indicated that that was rather pervasive, did it not?

MR. ALSUP: Yes, Your Honor. In fact, I would like, because that has become such an important issue in this case, I would like to spend a fair part of my argument time going over some of that legislative history. But I think you are absolutely correct that was a predominant goal in both 1961, 1962 and 1967 when this program took final shape.

With respect to that goal, though, the District Court said that the program might go to a -- part of the way towards eliminating the incentive to desert, but there was still an incentive to desert in exactly the case before the Court, because the mother had lost her job and therefore the family needed income and the father, though he had not been connected with the labor market within the meaning of the Act, nonetheless might leave home in order to qualify the family.

Therefore, the court said the statute did not go as far as necessary to remedy the desertion problem, and in fact thwarted the desertion remedy intended by Congress. Therefore, it did not satisfy the substantial connection test nor the rational basis test.

Now, our appeal here is a narrow one. As I mentioned, we do not -- In fact, we agree that if the sole purpose of the unemployed fathers program had been to provide relief to needy families hurt by unemployment, that it would be unconstitutional

to limit the benefits based upon a stereotypical assumption that working mothers' incomes are less important than working fathers' incomes.

We disagree, however, with the District Court's refusal to sustain the program as substantially related to the purpose to remove or mitigate that incentive for fathers to desert that was existent and identified under the prior program.

Let's consider that latter point for a moment. The AFDC program began in 1935. As President Roosevelt said at the time he proposed it, the core of the program was to provide aid to children.

There were two basic principles involved. First, the President and Congress reasoned that needy children with two ablebodied parents would be assisted by general work relief program and unemployment compensation. Therefore, there was no special need in that program for them.

However, second, children with only a single parent would not be assisted by such general work relief because, as was all too common in that day, such a parent would be unable to accept employment without placing the child in an institution.

Now, it was in order to avoid breaking up the home where there was a single parent, that Congress originally enacted the AFDC program, so as to give that parent a choice to be able to stay home and take care of the child in the event there was only a single parent. And that applied whether there was a

father or a mother.

Now, over the years, it became generally accepted and Congress so found in 1961, '62 and '67, that rather than, quote, "maintaining and strengthening family life," as Section 401 proclaims its goal to be, the AFDC program, in fact, had a very perverse effect of breaking up homes.

President Kennedy said in his first State of the Union address, "To many fathers, unable to support their families, have resorted to real or pretended desertion in order to qualify their children for help."

So the President asked Congress to pass what was then called an Unemployed Parents Program. That program provided aid both to unemployed fathers and unemployed mothers. But one of the predominant reasons behind that --

QUESTION: Let me have that again. Aid to them?

MR. AISUP: Aid to the family --

QUESTION: Not to the unemployed mother or father, but for the benefit of the family unit?

MR. AISUP: You are absolutely correct, Your Honor. I misspoke. It is important to emphasize that this is aid to families and not to any particular individuals within that family. The whole program is designed for families with children.

Now, two reasons were given by the Administration and throughout the legislative history for enacting the program in 1961. First, the country was in a recession. An extension of

AFDC to families that were hurt by unemployment was a form of temporary unemployment relief.

Second, however, Congress did want to reduce or mitigate the incentive for fathers to desert, which had been caused, since 1935, by the basic AFDC program itself.

Now, even though we are concerned principally with the 1967 change, this legislative history in 1961 and 1962 is very pertinent because it reflects and illuminates congressional intent in dealing with this problem over the years.

Secretary Ribicoff appeared as the leadoff witness -- or the second witness behind Secretary Goldberg. He said, "This bill would eliminate one of the major concerns expressed through the years about Aid to Dependent Children, namely that unemployed fathers are forced to desert their families in order that their families may receive aid."

He presented convincing evidence of this. He showed that there was an overwhelming percentage of cases in which there was no father in the home. In fact, the 1958 statistics show this. In only 1% of the AFDC cases, 1%, was there just a father in the home with the children. In 70% of the cases, there was a mother in the home with the children, but no father.

QUESTION: How about the other 29%?

MR. AISUP: In 19½%, both were present. In 10%, both had deserted, or neither was present.

QUESTION: I thought the program, up until then, was

applicable only to families in which there was one parent, only one parent.

MR. ALSUP: That's principally correct, except for the incapacity point. If a parent is incapacitated, if they are not ablebodied and, therefore, they were able to qualify. As a practical matter, most of the families were single-parent families. But an exception was made when --

QUESTION: Some 29% of the total were not one-parent families.

MR. ALSUP: No, 19.5% were --

QUESTION: 70% were no father, 1% were no mother. That leaves 29%.

MR. ALSUP: And 10% of those were neither. That means that the children were living with relatives and not with the parents.

QUESTION: With ersatz family, with kinfolk.

MR. ALSUP: Correct.

QUESTION: Or in foster homes?

QUESTION: It wouldn't apply in foster homes, woult it?

MR. ALSUP: Not to a foster home. Usually the grandparents or uncles or aunts. Foster homes came in later, in a later amendment.

MR. ALSUP: So, again, it was 1% father only, 70% mother only, 19½% both and 10% neither.

Now, 18% of all those cases was a case in which the

father had deserted. And by desert, I don't mean that they had died or divorced. There was another category for those. This 18% were people who literally deserted their families.

Now, there was no evidence that there was a problem with maternal desertion. The statistics that were presented now showed that the number of cases in which a mother had deserted from a two-parent family, at most, could be 1.8%. That 1.8% also included departures due to death or incapacity or divorce. So, although we can't give you the exact breakdown within that 1.8%, we know that the number of maternal desertions was quite small.

So, here we have a problem of masses of fathers deserting in order, at least in some cases, to qualify for benefits, virtually no mothers doing the same.

QUESTION: Mr. Alsup, could I ask one question about the facts of this case?

If the fathers, in this case, of both families should desert, would the families then become eligible?

MR. ALSUP: That is correct.

Now, Representative McCormack --

QUESTION: Under the original concept, the families would then become eligible, wouldn't they?

MR. ALSUP: That's correct. Under the original program.

I don't believe that's happened in this case, but you

are correct.

QUESTION: To the extent you are emphasizing the desire to prevent a paternal desertion from qualifying a family, the statute really doesn't accomplish anything in this particular case, does it? Because the incentive is still there.

MR. ALSUP: That's correct. Congress did not remedy this precise situation in the 1967 amendment.

Now, for example, on the House floor in 1961, Representative McCormack said about this very provision, "It is my considered opinion, which is shared by many social welfare leaders, that these restrictions" -- referring to the previous program -- "have contributed to advance instability and synthetic desertions when such desertions represented the father's only means of getting adequate financial protection for his minor children."

That has been cited in the briefs, but because it is in a footnote, let me draw the Court's attention to that. That's 107, Congressional Record 3768.

We've cited other passages similar to that in our brief. The program was passed. It was optional only with the states, just the Unemployed Parent Program, and twelve states quickly adopted it, but the program ran out a year later.

Secretary Ribicoff came back to Congress and successfully obtained another extension of the same program. He submitted a report during the Senate hearings on the bill, which

showed that in fact it had accomplished the purpose, in part, of preventing family breakups. He said that one of the most significant services which the ADCUP program offered to recipient families was, quote, "the prevention of family breakups."

Assistant Secretary Wilbur Cohen also testified. One of the reasons why the recommendation was made was to provide assistance where there was unemployment, so as not to encourage men to leave their homes in order to make their families eligible. That appears at page 154 of the Senate hearings.

Then Representative Kehoe said, concerning the extension, "It seems to us last year, before the provision was first added, that Congress was saying this to the unemployed father: 'If you stay with your family and try to hold it together during this critical period, we can offer you no federal assistance. But if you happen to desert them, your family will be fully eligible for aid to dependent children."

He continued, "This seemed then and it seems to us now an anomalous and indefensible situation. Moreover, there is evidence which indicates that this new program has already had the effect of returning fathers to their families." "A study," he said, "conducted by HEW for the first seven months of the program's operations shows that of the 66,100 applications allowed at that time, 2,900 families which had been receiving aid to dependent children for reasons other than unemployment became eligible under the new program, usually because an absent

father had returned to the home."

Now, in 1967, Congress restricted the program to unemployed fathers only. The recession had passed at that time and the principal objective in 1967 in restricting it only to unemployed fathers, was that Congress had intended to remedy the structural incentive built into the original program for fathers to desert.

I'll only burden you with one quotation from the Senate report in 1967. They said, "The Committee is concerned about the effect that the absence of a state program has on family stability. Where there is no such program"-- Let me pause here.

There were only twenty-two states, at that time, which had adopted the program. Congress was concerned that the other 28 had not yet adopted it.

--"Where there is no such program, there is no incentive for an unemployed father to desert his family in order to make him eligible for assistance. This will be a matter of continuing study by the Committee.

"This program was originally conceived by Congress as one to provide aid to the children of unemployed fathers. However, some states make families in which the father is working but the mother unemployed eligible for assistance. The bill would not allow such situations."

Thank you.

QUESTION: Mr. Alsup, could I ask you a question?

The District Court did certify this case as a class action, did it not?

MR. ALSUP: Correct.

QUESTION: And it defined the class as all Massachusetts families who would be eligible for the AFDCUP, and therefore medicaid benefits, except for their requirement in 407 that the unemployed parent be a father?

MR. ALSUP I believe that's correct.

QUESTION: So the relief it granted and its decision really went far beyond the facts of this particular case, did it not?

MR. ALSUP: That's correct, in this sense. The facts of this case are that the fathers did not even meet the connection with the employment market test of the six out of the thirteen quarters.

The relief afforded by the District Court would also provide relief in the case where the father actually is employed, but the mother becomes unemployed. And, therefore, because they are below the standard of need, they are eligible for assistance.

So you are correct the relief, I believe, does extend beyond the facts of this individual case.

QUESTION: Mr. Alsup, your opponent's brief says that the Task Force on Sex Discrimination of the Civil Rights Division last October made, in its report to the President, a flat statement

that the statute overtly and substantively discriminated against women.

Do you have any comment about that?

MR. ALSUP: Yes, the -- I've looked at that provision of the Task Force report. It's about a page and a half in the context of a much longer report concerning discrmination against women in Federal legislation. That report does not purport to have any exhaustive analysis of the legislative history. In fact, there is no analysis of the legislative history. And, on its face, this does appear to be some sort of curious sex discrimination. But once you get into the legislative history and you see that there was a very permissible purpose that Congress had in mind, and that this is substantially related to curing that problem, then you see that it is not a suspect or unconstitutional classification.

The Task Force did not address itself to that legislative history, so we disagree with the analysis of that report and believe that had they considered the legislative history that we have now looked at they might agree with us.

QUESTION: Does the Department of Justice assume any responsibility for what the Task Force said?

MR. ALSUP: Of course, the Solicitor General speaks for the United States and the Department of Justice before this Court with respect to what our legal positions are. So, to that extent, the Solicitor General has disapproved the report of the

Task Force.

MR. CHIEF JUSTICE BURGER: Mr. Johnson.

ORAL ARGUMENT OF PAUL W. JOHNSON, ESQ.,

ON BEHALF OF APPELLANT IN NO. 78-689

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

My name is Paul Johnson. I am an Assistant Attorney General, representing the Commissioner of the Massachusetts Department of Public Welfare.

The Commissioner has only appealed from the District Court's remedy the defect which it found in Section 407. This appeal raises a fundamental question concerning the balance to be struck between equity powers of federal courts and the separation of powers principle.

The District Court elected to extend Section 407 under inclusive class in order to salvage AFDC-UP program. While this decision to extend the class was correct, the District Court extended the class too far. The District Court rewrote Section 407 such that the unemployment of either parent would qualify the family for benefits, even though the family's principle wage earner was still employed. Under this remedy, a parent who had been only a casual member of the labor force could trigger benefits by his or her unemployment.

QUESTION: Do you agree, then, that the challenged provision is unconstitutional? Do you agree with the United

States in that respect?

MR. JOHNSON: We incorporated the United States' arguments before the District Court. We have not appealed from the District Court's ruling.

QUESTION: That isn't quite what I asked you.

MR. JOHNSON: We have no objection to the District Court's ruling on the constitutionality of the provision as written in the Congress.

QUESTION: Just the remedy?

MR. JOHNSON: Just the remedy, Your Honor.

QUESTION: Well, you will get reimbursed regardless of how it comes out on that point.

MR. JOHNSON: We get reimbursed at a 50% rate, Your Honor, so the gross spendout by the state does go up, of course, and dramatically in the case of the remedy ordered by the District Court.

QUESTION: Would a reversal on the federal appellant's appeal moot your claim?

MR. JOHNSON: Yes, Your Honor, it would.

QUESTION: And save you some money?

MR. JOHNSON: It would be a less expensive program, Your Honor.

Contrary to the District Court's ruling, Section 407's legislative history demonstrates that Congress meant to assist only those families whose principal wage earner had become

unemployed. This legislative goal is the critical fact in this case. The judicial power to extend an underinclusive class depends upon an implied grant of power from Congress to recast its programs in a constitutional form.

QUESTION: Well, Mr. Johnson, didn't the District Court's remedy do no more than provide that the existing statutory framework shall be applicable when -- to situations where the mother is unemployed as it has been in the past to situations where the father is unemployed?

MR. JOHNSON: That was the District Court's remedy, Your Honor. It simply attempted to --

QUESTION: In other words, even today, under the existing statute, quite apart -- I mean, assuming it is all valid -- when a father is unemployed, even though the mother is the primary wage earner in a family, when a father is unemployed benefits are payable if the family income is below the standard of need. Isn't that correct?

MR. JOHNSON: Yes, Your Honor.

QUESTION: So, the District Court did no more than I suggested; is that correct?

MR. JOHNSON: You are quite correct, Your Honor.

QUESTION: And it found it invalid insofar as it discriminated against women. It said the same statutory tests and framework should be applicable now when the mother is unemployed as it has been up to now when the father is unemployed. Isn't

that what it did?

MR. JOHNSON: Yes, Your Honor, but that rather straightforward attempt to expand the statutory classification ignores the fact that in 1967 Congress, at its level, made the decision that families would not get benefits simply because the mother --

QUESTION: And the Government says, of course, that that is perfectly valid legislation. And that, as my brother White suggests, would be the end of your case if we agree with the Government of the United States that this is not unconstitutional, then that's the end of it.

MR. JOHNSON: But Congress has always meant the AFDC-UP program.

QUESTION: Congress also in 1967 enacted a law that said these AFDC payments shall be made only when the father is unemployed, but that was held unconstitutional.

MR. JOHNSON: Yes, Your Honor. But in order to fashion a remedy that stays true to congressional intent --

QUESTION: If we stayed true to congressional intent, we would reverse the District Court's judgment, holding that the intent of Congress was unconstitutional, wouldn't we?

MR. JOHNSON: But the remedy of extension finds its fountain of justification in what Congress would have done if it had known that the program, as written, was incorrect. What Congress meant to do, at bottom, was to establish a program for families whose principle wage earner had been knocked out of the

labor market.

Congress traditionally assumed that that principle wage earner was the father.

QUESTION: But, in fact, under the -- assuming the validity of the present program, if the principle wage earner was, in fact, the mother, nonetheless AFDC payments are payable if the father is unemployed. Isn't that right?

MR. JOHNSON: That practice has been tolerated by Congress --

QUESTION: Isn't that true, under the statute? Not the practice being tolerated, isn't that what the statute provides?

MR. JOHNSON: The statute simply says the father's unemployment.

QUESTION: Right.

MR. JOHNSON: But the legislative reports in 1967, when that term came in, specifically said the reason for this was because states had abused the term "parent," by providing benefits to families where the mothers were unemployed, even though that principle wage earner -- presumed principle wage earnier -- the father, was still working.

Congress specifically reacted to that syndrome of allowing a secondary wage earner to trigger benefits by unemployment. That, I think, when you strip away the sex characteristics that Congress used to define these economic terms, is the

underlying intent of Congress.

If you consider a program that provides benefits when a secondary, or even casual wage earnier is knocked out of the labor market, that is a great step forward from the limited goal which Congress sought in 1961, '62 and '67, to achieve, which was simply to help families whose principle wage earner, their economic mainstay, had been knocked out of that employment market.

QUESTION: Some of your arguments make me wonder why you did not appeal on the constitutional questions, instead of just on the remedy.

MR. JOHNSON: Your Honor, I think that may highlight the fact that the Commissioner differs tremendously with the Secretary and the Solicitor General on his reading of legislative history. The Solicitor General has retreated to the concept that the only purpose of AFDC-UP was to keep fathers from leaving the home, a prophylactic against a defect in the AFDC program.

QUESTION: The simulated desertions, the synthetic, as they were called.

MR. JOHNSON: Yes, Your Honor. But we say the fundamental reason the Congress enacted this program -- and my brief bears this out in terms of legislative history -- was to get benefits out to families whose principal wage earnier had been laid off.

When President Kennedy came into office in 1961, he found a tremendous recession and instituted two major programs

right off the bat, to extend unemployment compensation and to provide benefits to wage earnier who couldn't find jobs. The concept was one of equality of treatment. Why should a child whose father sits at home because his employer is shut down be any less needy, any less worthy of benefit than a child whose father has simply walked out the door? The idea was to take care of children whose wage earners had been let down by the economy. This was what AFDCU was generated to do.

In short, the District Court's remedy has two flaws. As a constitutional matter, it oversteps the limits which Congress set for the AFDCU program. As a matter of equity, its remedy exceeds the scope of the constitutional wrong which it would remedy.

A principal wage earner remedy, that advocated by the Commission, would assist every family whose principal wage earner, whether male or female, is unemployed. That is a complete remedy and it more accurately preserves the congressional conception of the AFDCU program, which I have discussed with Mr. Justice Stewart and Mr. Chief Justice Burger.

The Secretary in his brief now attempts to buttress the District Court's remedy from another direction. He asserts that his power to define unemployment bars this Court from adopting the principal wage earner remedy, even if that remedy more accurately reflects the intent of Congress. The Secretary's argument misreads Section 407 and must be rejected.

Turning first to legislative history -- and quite briefly, because I have discussed it -- the key, in the Commissioner's eye, to this case, is what Congress meant when it selected the father as the parent who must be unemployed. Congress identified the principal wage earners, whose unemployment would impoverish their families, as fathers. Purged of this sex bias, only the legislative focus upon the family's principal wage earner remains. Substitution of the term "principal wage earner" with the term "father" would preserve the legislative purpose to assist those families whose true breadwinners were unemployed, no more and no less.

Turning to the Secretary's argument, the plain language of Section 407 rebuts the Secretary's assertion that only he has the power to adopt the principal wage earner remedy. The Secretary now points to his exclusive discretion under Section 407 to define unemployment. Section 407 defines an eligible family in terms of, and I quote, "The unemployment, as determined in accordance with standards prescribed by the Secretary, of its father."

Section 407 only authorizes the Secretary to define unemployment. It does not authorize him to redefine the term "father." These two terms express very different concepts. Unemployment is a relative notion subject to empirical definition, a definition appropriately left to administrative discretion on an ongoing basis.

Congress' choice of the term "father," on the other hand, represents a policy judgment as to which families should be entitled to benefits. The Commissioner argues those families whose principal wage earner has been knocked out of the labor force.

In order to reaffirm the limits on the judicial ability to rewrite legislation, this Court should reverse the remedy ordered by the District Court and put the principal wage earner remedy in its stead.

Thank you, very much.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Johnson.

Mr. Freedman.

ORAL ARGUMENT OF HENRY A. FREEDMAN, ESQ.,

ON BEHALF OF APPELLEES IN BOTH CASES

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

Under Section 407 of the Social Security Act, Appellees are denied desperately needed cash and medical benefits for one reason and one reason only. The parent of the family whose unemployment caused the destitution is female. These families are just as needy as those who receive benefits. The female parent has just as extensive a work history and is as willing to comply with work requirements as the male parent whose unemployment qualifies the family for benefits.

The problem with Appellee families, apparently, is that

the mother, for reasons of circumstance or of choice, does not conform to traditional stereotypes and is or has been a family breadwinner. But only traditional, that is male, breadwinners can qualify a family for AFDC benefits. The gender discrimination that we have in this case is more onerous than that which this Court has encountered in any prior gender discrimination case. It is because of a combination at work here.

First, subsistence benefits, benefits needed for survival are being denied. And secondly, the Act imposes an absolute bar to receipt of those benefits, rather than simply applying a further test under which a showing must be made, such as a test of dependency.

Since there is gender discrimination in this case, the test to be applied, as this Court most recently reiterated in Orr v. Orr last month, is that the gender classification must serve important governmental objectives and be substantially related to the achievement of those objectives.

QUESTION: Orr v. Orr was not a case involving governmental largess.

MR. FREEDMAN: That is correct, Your Honor. That was a case involving a claim between parties.

QUESTION: In any event, it was limited -- what that did was limit the discretion of a divorce court judge. No matter what the situation was he was simply not -- prohibited from ever awarding alimony in favor of a husband against a wife, but that

involved private property. This involves government largess, and our opinions in that area have a somewhat different cast, don't they?

MR. FREEDMAN: While there might be somewhat more division, it is still clear that the Orr decision was applying the test that had previously been applied by this Court in Califano v. Webster, Califano v. Goldfarb, cases involving the Social Security Act. So Government benefits have been tested under the same standard by this Court.

In seeking to avoid the effect of this test, however, the Solicitor General, particularly in his brief, has argued that there was one objective, really, and one objective only for the AFDCU program, and that was to encourage fathers, not parents, not the father or the mother, but just the father, to remain in the home.

But, as the state has also argued, the overriding objective of the AFDCU program, throughout its history, has been to meet needs of children caused by unemployment of the parent. And that objective is, of course, totally unserved by the gender classification at issue.

QUESTION: Does your argument boil down at all to at what point you slice this thing, so to speak? Do you determine intent as of 1935 or as of 1967?

MR. FREEDMAN: For purposes of this case, we would argue it doesn't matter as of what year you determine it. There were

really two years here where decisions were made with regard to the AFDCU program. The first was in 1961 when the program was created and then it was clearly sex neutral. If no change had been made in 1967, the Westcott family and the Westwood family would have qualified for benefits.

So what we have here is a cutback made in 1967.

QUESTION: But I thought you were arguing it's the overall purpose of the AFDC program, which I understand was adopted in 1935?

MR. FREEDMAN: That is correct. The AFDCU program is a subprogram, clearly a subprogram of AFDC. AFDC was designed to meet the needs of dependent children. AFDCU was added in 1961 to expand the class of dependent children whose needs were going to be met by the program, namely to include the children of the unemployed. And that definition of a dependent child has been maintained in the AFDCU program until the state -- The dependent child, a child qualifying for benefits of the program, is a child deprived of parental support or care by reason of the unemployment. And the word that was changed in 1967 was "unemployment of a father" instead of "unemployment of a parent."

But clearly, the purpose reflected by that statutory language, and by the legislative history throughout, was to meet a need caused by unemployment. Indeed, in 1967, former HEW Secretary Ribicoff, now Senator Ribicoff, has stated that a child can be just as hungry if a parent is unemployed, as if a parent

is dead, absent or incapacitated.

Indeed, nowhere in the legislative history is there any statement or any reflection that the fundamental purpose of the AFDC program to meet needs was being rejected or abandoned or even diminished by Congress.

QUESTION: But in fact it was.

MR. FREEDMAN: Indeed it was.

Nowhere did Congress say, "We are cutting back on the program because we believe there are needy children whose needs we don't want to meet."

QUESTION: But Congress did cut back on the program, evidently, or you wouldn't be here.

MR. FREEDMAN: That's correct. And what we are trying to discern is why did Congress cut back on the program.

QUESTION: As a representative of the people of the United States, it did.

MR. FREEDMAN: It had power to act. The question is why did it act?

Under the test that we are applying today, the Court has set out for itself the task of determining what was the actual purpose of the gender classification.

QUESTION: Are you telling us that there is something that this Court knows that Congress didn't know about what its purpose was in 1967?

MR. FREEDMAN: Not at all. What this Court has to do

is to read the Act, which tells it that the purpose is to aid dependent children. And then look at the legislative history and attempt to discern why was it that Congress made the change that it did in 1967, and then does the gender classification substantially serve that purpose?

And when we look at the legislative history in 1967, as I was saying, we find no indication that there was desire to move away from the needs-meeting purpose and move, as the Solicitor General argues, to an anti-paternal desertion purpose.

What we do find is that the debate was pervaded by sex stereotyping. The words "father" and "parent" were used interchangeably, without any indication or sense that something different was being said.

QUESTION: Well, what do you say the purpose of Congress in 1967 was, when it enacted this, as reflected in the legislative history?

MR. FREEDMAN: We would say that the purpose of the introduction of the gender classification was consistent with the general concern that Congress had in 1967 with regard to the AFDCU program, that some states were qualifying families for benefits on the basis of the so-called unemployment of a family member they assumed to be the homemaker, the housewife, when that person really had no prior attachment to the work force and was not the type of person whom Congress saw as unemployed who was losing income and therefore someone who created a need that Congress

wished to meet.

Congress addressed this in several ways. It addressed it by adding a primary attachment to the work force test. But it would seem that in terms of the stereotypical thinking, that the real wage earner in a family is the father and that the mother is basically the person who stays at home. The way of nailing down that decision was to deny aid where there was an unemployed mother.

Now, we don't really know, because the problem we have here is that the legislative history is generally so uninformative. But what we do know is that no one claimed that the purpose was being changed, no one attached real significance to this change. Rather, they spoke in terms of the types of stereotypes which this Court has consistently rejected, such as --

QUESTION: Are you saying that where the legislative history is not clear you are not free to look at the language of the statute itself?

MR. FREEDMAN: Not in the least. Our argument is that the language of the statute demonstrates concern about need caused by deprivation. I mean the Solicitor General is arguing that the purpose here was to deter desertion. And we look at the language of the statute and nowhere do we see any discussion of that. That is why we suggest that it is valid to look at the legislative history.

QUESTION: Do you have difficulty finding that concept

in the legislative history?

MR. FREEDMAN: The deterrence of desertion?

QUESTION: Yes.

MR. FREEDMAN: Not at all. We find it quite easy to find it in the legislative history, with regard to other sections of the AFDC program, which were enacted to address the question of desertion. In fact, in taking the action that Congress took in the Social Security Amendments of 1967, the bill that we are addressing here today, both committee reports had a heading, one heading that said, "AFDCU program," and another heading that said, "Desertion." And under the heading Desertion, two provisions were discussed. One, to strengthen the child-support program, under which states would identify and pursue absent parents for child support. And the other to impose a so-called AFDC freeze, under which federal reimbursement to the states -- there would be a cap on federal reimbursements to the states for absent parent cases, so that if the state's absent parent caseload increased, there would be no further federal funding.

Congress made it clear that the reason for this was to stir the states into action to do something about desertion, to improve their family services, to strengthen their child support program. But in both of those instances in which Congress explicitly addressed the question of desertion, it did so clearly in a sex-neutral manner, in terms of the legislation. There is no indication that it was less concerned about a mother deserting

a family than about a father deserting a family. And, clearly, if Congress had such an anti-desertion objective related to the AFDCU program, it too would have been sex-neutral. And, of course, the gender discrimination would not bear a fair and substantial relationship to such an objective.

The Solicitor General, it should be noted, has made no attempt to defend the gender discrimination in this case on the basis of a general congressional desire to maintain family stability or to deter desertion.

Moreover, we would want to point out that the Solicitor General, this morning, relied almost entirely upon the 1961 and the 1962 history of the Act, when the Act was clearly sex-neutral.

QUESTION: Suppose in 1961 -- Was this first adopted in '62?

MR. FREEDMAN: 1961.

QUESTION: Suppose it had been adopted in 1961 in the '67 form and it were perfectly clear from the legislative history, which you dispute, that the reason they wanted to adopt it was to obviate the desertion of the fathers.

Would you still argue that there was unconstitutional gender discrimination?

MR. FREEDMAN: We certainly would, Your Honor, for at least two reasons. One would be that if its concern was to deter desertion of fathers, as Justice Stevens noted before, it simply doesn't work that way. Cases in which -- cases such as

Plaintiffs' cases in which it was the mother who became unemployed, are still cases in which there -- the father or the mother -- as is the case when the father becomes unemployed -- the father or the mother will be in a position where the family can only qualify for benefits if one of the parents leaves home.

We should note, in response to the question before, that, indeed, in this case, Billy Westcott, although his landlord suggested that he leave home in order to qualify the family for AFDC benefits and then enable it to pay the landlord rent, that he did not leave home. Rather, the family went without benefits until --

QUESTION: Well, it is true that up until 1961 if two parents were in the home, even though the father became unemployed, they were totally ineligible for AFDC payments.

MR. FREEDMAN: That is correct.

QUESTION: Up until 1961, unemployment didn't have anything to do with it, if both parents were there. And, therefore, if an employed father became unemployed, prior to 1961, there would be an incentive for him to leave home, so it would be a single-parent family and they would be eligible.

MR. FREEDMAN: There was an equivalent incentive for the mother to leave home. And the point is that there was no gender discrimination in the AFDC program. From 1935 until the present time, it has not drawn a distinction on the basis of sex.

QUESTION: Up until 1961, a family was eligible only if there was a single parent. It was not eligible if both parents were in the home, even though unemployed.

MR. FREEDMAN: Unless one was incapacitated, of course, as you pointed out before.

QUESTION: And that was the problem to which Congress was addressing itself, because prior to 1961 the regime provided an incentive to a father who became unemployed to leave home so his family would be eligible.

Am I quite wrong about that?

MR. FREEDMAN: You are right that the eligibility was based upon there being a parent absent.

QUESTION: Away, physically gone.

MR. FREEDMAN: That is correct. We would not agree that that was the problem that Congress was addressing in 1961. We believe the legislative history shows that the overwhelming problem that Congress was addressing in 1961 was that there were needy two-parent families out there in this point of recession who were not eligible for benefits and who desperately needed benefits. And the purpose of the program, as the legislative history shows throughout, was to meet the needs of children. It was also noted that this would have the desirable effect of eliminating an incentive that was perceived in the existing AFDC program. There were those who argued in Congress that there was no such incentive to desert, that, indeed, states had general

assistance programs which often provided for these families. There were certainly the skeptics who said this was not the purpose. Everyone did agree that the purpose of the legislation, and the overwhelming purpose at least, was to meet needs, was to provide for families who were otherwise not receiving benefits or who were receiving inadequate benefits under state plans or who had exhausted unemployment compensation.

QUESTION: Are you telling us that this counterfit or synthetic desertion pattern was not part of the motivation of Congress?

MR. FREEDMAN: We do not believe that the record shows that the motivation of the committees who adopted this legislation that the Congress had adopted -- that the motivation was affected in any significant way by a concern about desertion, real or synthetic. But it clearly was discussed and certainly our case doesn't turn upon rejecting that as a purpose. Whereas, the Solicitor General's case, at least the way the brief has been presented, turns upon his establishing that there was no purpose related to meeting needs.

It is our argument, however, that in 1967, when this change was made, there is no reflection that Congress adopted the gender discrimination because it was abandoning a fundamental needs-meeting purpose of the program. And, moreover, there is no indication that when it adopted this change it was related to the issue of desertion.

Once again, all of the discussion about desertion comes essentially from two sources. One is the other provisions of the Act, that I referred to that concern desertion, child support program, the AFDC freeze, and so forth. There, the sponsors of the legislation, the committee chairmen, and so forth, spoke in terms of desertion. The other time desertion was discussed was with regard to the AFDCU program, and it was by those upon whom the Solicitor General relies, who were those who supported expansion of the program and who ultimately voted against this bill that was adopted. Those individuals said, "We deed a mandatory AFDC program in every state to fight desertion." And that was voted down by the Congress.

What the Congress supported was a bill presented by Senator Long, by Congressman Mills, to which they attached no significance. They never even noted, on the House or Senate floor, in presenting the bill, that a gender discrimination has been introduced here. It went entirely without notice.

Senator Long, in discussing the bill with other Senators referred interchangeably to the unemployed fathers and the unemployed parent bill. He didn't see it as significant, apparently, and no one else called him on it, or said, "Why are we changing this from unemployed parent to unemployed father?" The reason, we submit, is that they were thinking consistently in terms of the types of stereotypes which this Court has rejected, in Stanton, the assumption that men are going

to go out into the world of work, women will stay at home, the archaic and over-broad generalizations in Wiesenfeld, that it is only the male parent earnings that provide a significant source of support to the family.

QUESTION: Mr. Freedman, isn't that somewhat inconsistent with your use of the word "archaic," if in your view the Congress had used correct perceptions of male and female roles in 1935 and 1961 and '62? Isn't it a little ironic that all of a sudden in '67, years after those dates, it all of a sudden reverted to what you describe as "archaic" notion?

MR. FREEDMAN: It certainly is, and we really have no explanation for it. It did happen. It was not the law before. The AFDC and AFDCU benefits were provided on a sex-neutral basis and we have searched through the legislative history, as have our opponents, and the best explanations have been offered, and we believe the best explanation is they didn't even think about it. They slipped into some format, we believe, because they were, indeed, looking to a prior attachment to the work force and assumed, looking into the question of employment, that women did not contribute significantly to their families in the past.

QUESTION: I think you said you understood the Solicitor General's argument to be entirely based upon this legislative purpose with which you disagree. It is true that he spent a great deal of time in oral argument this morning on that subject. But, as I read the brief, the basic argument is that this is

simply not the kind of gender discrimination with which this Court has previously dealt, because this deals with benefits to families and the families might be all female, they might be all girl children, and that the benefits that are payable or not payable are not in any way discriminatory upon the basis of gender, unlike our other cases to which you have just been citing us.

MR. FREEDMAN: Mr. Justice Stewart, we were struck by --

QUESTION: Isn't that their argument?

MR. FREEDMAN: -- we were struck by the fact that what appears to be a major argument in their brief, that there is no gender discrimination in this case at all, was not pressed before the Court this morning.

QUESTION: No gender discrimination with respect to the benefits that are or are not payable.

MR. FREEDMAN: That's right, and we simply --

QUESTION: Because the beneficiaries, at least half of them, are female and maybe in any particular case 100% of them are.

MR. FREEDMAN: Well, indeed, in every family -- their argument is that in every family where an unemployed mother is denied benefits, there is a father also, because by definition we are talking about two-parent families.

QUESTION: And there are children and they may be boys

or girls.

MR. FREEDMAN: May be boys or girls.

The issue in this case, however, is the benefits that are being provided.

QUESTION: Didn't you understand that to be a large part of their argument in the brief?

MR. FREEDMAN: That's right, Your Honor, and I did not address it this morning because they seem to have pretty much abandoned it this morning.

QUESTION: I think they filed their brief here and I don't think they have withdrawn any part of it.

MR. FREEDMAN: Fine. And our response to that is that the benefits that are at issue in this case are benefits based upon past employment. When the government distributes benefits on the basis of past employment and then denies them when the person who was employed in the past is a woman, it is clearly denigrating the efforts of women who work --

QUESTION: But this isn't unemployment compensation. It is not based upon past employment.

MR. FREEDMAN: It is based upon past employment and need, Your Honor. The Federal Government has, by statute, determined that certain people are eligible for benefits, and the criteria for eligibility are essentially need and past employment.

QUESTION: Is need, unlike Social Security payments

and unlike Unemployment Compensation.

MR. FREEDMAN: It is need and past employment. There is a specific past employment test, six out of thirteen quarters.

QUESTION: There is a test as to when a person is unemployed.

MR. FREEDMAN: That is correct, so it is based upon past employment. It is not based upon past contributions to a fund. It is based upon past employment. And it is determined that past employment of men qualifies a family for benefits and that past employment of women does not.

QUESTION: It is present unemployment, isn't it?

MR. FREEDMAN: But that is defined in terms of past employment.

QUESTION: It is present unemployment, that's the test.

MR. FREEDMAN: Yes.

And we would submit that that is no different from the kinds of discrimination that this Court has found in many previous cases. In Goldfarb and Wiesenfeld, for example, the Court found that there was discrimination against one particular category of family, that in which the female spouse was the wage earner. And in Frontiero and in Jablon, the Court found --

QUESTION: But those were matters of compensation, were they not?

MR. FREEDMAN: Well, these are different cases. In

Frontiero, it was a question of husband, wife, families, some of whom received larger benefits.

QUESTION: Military compensation.

MR. FREEDMAN: But they were benefits that went to the family. Not every person -- Not every serviceman or servicewoman received those benefits. It was only if there was a dependent. It was to a husband, wife, family that those benefits were being provided, and they were provided to all families in which the husband was the employee. But they were not provided to all families in which the woman was employee. And they were family benefits that were at issue in those cases.

We submit that there is clearly gender discrimination involved in this case, and therefore it is unconstitutional.

In sum, then, with regard to the case on the merits, it is our argument that the overriding purpose of the AFDCU program is to meet the need of children caused by the unemployment of the parent and the denial on the basis of the sex of that unemployed parent neither serves nor is related to important governmental objectives. The purpose for the gender classification was not to deter desertion, but rather that purpose was served in sex-neutral terms.

And finally, the classification was based upon sex stereotypes, upon archaic and over-broad generalizations about the roles of men and women as breadwinners. And I should also note, although we have not discussed them, the roles of men and

women as family deserters, with the assumption that it is the father who always deserts a family, despite the statistical showing that there are more fathers than mothers who desert, but still clearly desertion is something that might confront either parent.

And this Court has never accepted sex stereotyping simply on the basis that more of one sex than another sex might engage in certain behavior, and therefore deny benefits to all members of a sex because of the possible behavior of certain members of a sex.

Accordingly, the decision on the merits should be affirmed, and I will turn to the question of remedy raised in this case solely by the State of Massachusetts.

I will first discuss for a moment the traditional choice of remedy, the choice that has always confronted this Court in the past, between invalidation of the program itself or extension to the class that has been excluded. In this case the class of families with an unemployed mother, where the family is denied benefits solely because the unemployed parent was female and not male.

We raise this for a minute because the state's attack, on extension, has included the argument that extension violates the principle of separation of powers.

We will then turn to the restructuring primary wage earnier remedy urged by the state.

Extension of benefits to the excluded class follows the consistent line of this Court's equal protection benefit cases, including gender discrimination cases, and is clearly correct. Invalidation would cause the abrupt termination of benefits to more than half a million needy children and their parents, would disrupt the state and local treasuries involved. Whereas, extension would continue benefits to those needy families and also provide benefits to needy families in which a mother --

QUESTION: Do you have another case where a Federal Court ordered a state to remedy an equal protection violation one way or another?

MR. FREEDMAN: Where a Federal Court ordered -- In all of the Social Security Act cases before this Court, extension has been the remedy, and of course in the residency cases, Shapiro v. Thompson, and so forth, involved state AFDC and other public assistance programs. And the remedy there was to extend to those who had less than a year's residence in a state.

Again, in all of these programs, as we would point out, there is an option to the state to participate in the program or not. Indeed, with regard to the AFDCU program, there is an option to the state to participate in the AFDCU program and still retain its participation in the basic AFDC program. So, the order of extension here simply makes it

possible for the State of Massachusetts, and every other state, to decide whether or not it wishes to participate in the extended program. Whereas, invalidation would make it impossible for any state, even if it wants to, to participate in the extended program. And this Court had earlier received an amicus brief from the State of Pennsylvania which indicated firmly that it wanted an extended AFDC program. It would be denied that opportunity if invalidation --

QUESTION: Denied that opportunity by whom, the Pennsylvania Legislature?

MR. FREEDMAN: No, no. If the Court's order were to invalidate the AFDCU program, the state then could only provide benefits to families of the unemployed by using its own money entirely. It would be denied the opportunity to request federal reimbursement, in effect. I mean that's what's at issue here, in terms of invalidation or extension.

And that is clearly why invalidation is simply not adopted in benefit cases, because of the problems it would present.

QUESTION: Why doesn't the state, then, invariably want the broadest possible option in terms of invalidation, if it is just a question of how much extra federal money that the state can pick up?

MR. FREEDMAN: Well, the argument here is that the State of Massachusetts, apparently, would like to get some

federal matching -- for certain families, but not for others. So it is taking the occasion of this case to do, in effect, what I believe Mr. Justice Stewart was suggesting before, to try to redefine the terms in the Act, not really as a matter of extension or invalidation, extension to the excluded class. Clearly extension to the excluded class here means picking up the families who would be eligible, but for the sex of the unemployed parent. And there is really not much complication here.

Rather, what the State of Masschusetts has said is that while we are at it why don't we redesign this program the way we in 1979 would really like to see it. And that's by having a primary wage earner test.

And what the State, in effect, is doing is arguing that as a matter of statutory construction is, indeed, perhaps a way of avoiding the constitutional issue.

The Court could say that looking at the legislative history Congress in 1967 said "father," but really meant primary wage earner.

The problem is that would clearly fail as a matter of statutory construction. Congress said "father," Congress meant father, Congress never said "primary wage earner," never even used the term.

So, instead, what we have here is a state seeking --

QUESTION: But you said the judge may add father and

mother. Congress clearly meant father, but you say the judge can order those words -- that word to mean "father and mother."

MR. FREEDMAN: That is extending the benefits to the class that has been excluded.

QUESTION: All the state suggests is we -- instead of saying "father and mother," we say "father or mother, whichever is the primary wage earner."

MR. FREEDMAN: That is what the state is saying, but in many ways it runs afoul of the test for remedy, starting with the separability clause which is in the Social Security Act, itself, which provides that the invalidation of any provision of the Act -- and we are discussing remedy, of course, only if a provision of the Act has been held invalid -- as it applies to certain persons -- shall not affect its application to others.

And yet what the state is arguing for is the termination of benefits to many families who currently receive them, because for some reason the father, while unemployed and while his unemployment has made the family needy, the father does not satisfy the primary wage earner test for some reason.

So, clearly, the separability clause of the Act would be violated. Moreover, the administration of the AFDC program would be seriously disrupted throughout the country, as the states attempted to grapple with the term "primary wage earner."

As I suggested before, the legislative history does

not give any guidance as to what "primary wage earner" means. What Congress did do in 1961 and 1967 is make irrelevant the employment of a spouse. And we believe the Court should adhere to that.

QUESTION: What is the procedural posture of this case? It was a class action for what, declaratory judgment?

MR. FREEDMAN: And injunctive relief.

QUESTION: A declaratory judgment that this statutory scheme was constitutionally invalid?

MR. FREEDMAN: Right.

QUESTION: And the Court so found, and shouldnot that, as a matter of appropriate exercise of judicial power, be the end of it?

MR. FREEDMAN: It really was the end of it, Your Honor. The court entered its injunction on April 20 and, at least, I think the United States and Plaintiffs thought the case was over. The state then came back and in the process of implementing the court's order sought to impose the primary wage earner test. So the parties had to go back and litigate the state's change in --

QUESTION: But why didn't the court just say, "I enjoin the enforcement of this statute I've just found unconstitutional"?

QUESTION: Because it is unconstitutional.

QUESTION: Why didn't they just say that? It went

much farther than that. It said, "I am not going to invalidate the statute, I am going to rewrite it."

MR. FREEDMAN: No, the court did not rewrite it. The court decided that, as between the choice, it could either invalidate or --

QUESTION: But the statute is still in force.

QUESTION: After it has been held invalid.

MR. FREEDMAN: But the AFDC program has continued in effect, but has been held in doubt --

QUESTION: But the '67 Amendment has been invalidated.

MR. FREEDMAN: To the extent it changed the word "parent" to "father," yes, but not the rest of the Act.

QUESTION: So that reinstated the earlier, '61-'62 --

MR. FREEDMAN: That's correct.

QUESTION: Although that had been repealed, hadn't it?

MR. FREEDMAN: It had been repealed -- or it had been amended by the change to father. I don't believe it had been repealed. The word had been changed.

QUESTION: That still doesn't explain why they needed an injunction to require the inclusion of women.

MR. FREEDMAN: Well, the injunction was needed, as against the state so long as it had an AFDC program to provide benefits --

QUESTION: Why? That does more than reinstate the 1961 law.

MR. FREEDMAN: No, the state could opt out of the program at any time. The injunction, as in all welfare cases, was so long as you are in the federal program you must comply with the federal law that has not been rendered constitutional.

QUESTION: Now been rendered -- Now been held unconstitutional. Just say, "I enjoin the enforcement of this unconstitutional statute."

MR. FREEDMAN: I think the result would have been the same.

QUESTION: Why would it? The state would then have had to decide what to do about it.

MR. FREEDMAN: Well, it decides to opt in or out, which is still the decision that it has. The one thing it cannot do is continue to discriminate on the basis of sex.

QUESTION: If the court had held this statute, this 1967 statute, was unconstitutional and I enjoin its enforcement for that reason, period. Then there would have been no unemployment -- There would have been no AFDCU.

MR. FREEDMAN: That would have been invalidation of the program.

QUESTION: Correct. It was held to be unconstitutional. Then it would have been up to Congress whether to have anything at all, any AFDCU or to put in a sex-neutral one or none at all. But until Congress acted, this 1967 statute would have been held unconstitutional and the District Court would have

enjoined its enforcement for that reason.

MR. FREEDMAN: That is not the course that has been followed in any of the prior cases. In Weinberg v. Wiesenfeld, for example, the Court had the option of denying benefits to all young widows who were caring for children in the home.

QUESTION: That's an option of Congress.

MR. FREEDMAN: Well, this Court did not give Congress that option, of course, it extended benefits.

In Goldfarb, this Court did not give Congress the option, it extended benefit. And in every case, it did the right thing, we would submit, the only thing that could be done under the circumstances, because the test, as all the parties agree, Justice Harlan announced most succinctly in his concurring opinion in the Welsh --

QUESTION: Was that a Court opinion?

MR. FREEDMAN: No, it was not. It was a concurring opinion.

QUESTION: Only vote that way.

MR. FREEDMAN: He was the only vote that way in the case, but various courts have described that as --

QUESTION: This Court?

MR. FREEDMAN: I will withdraw that.

We would submit --

QUESTION: The one distinctive thing about that

opinion is that none of the other eight agreed with it.

MR. FREEDMAN: That is correct. But the principle announced with regard -- and the principle followed --

QUESTION: No one since has, as far as I know.

MR. FREEDMAN: The principle followed has been the question confronting a court in determining an aspect of a statute unconstitutional is whether the entire program is to be abolished, whether it is more consistent with Congress' purposes, in terms of the entire program, to abolish the entire program or to extend benefits to the class that has been excluded from the program.

We submit that the legislative history here shows consistently that Congress' overwhelming concern was with the needy children of unemployed parents, that benefits have quadrupled in the program since 1967 when this provision was last adopted, and that, therefore, the congressional purpose is served by extending benefits to the class, and leaving to Congress, over time, the choice of how it may wish to change the program in any way.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:17 o'clock, a.m., the case was submitted.)