In the

Supreme Court of the United States

RICHARD SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., Petitioners	)	
v.	)	No. 80-756
GRAY PANTHERS	)	

Washington, D.C.
April 29, 1981

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Petitioners

v. No. 80-756

GRAY PANTHERS

Washington, D.C.,

Wednesday, April 29, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 o'clock a.m.

APPEARANCES:

GEORGE W. JONES, Esq., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the Petitioners

GILL DEFORD, Esq., National Senior Citizens Law Center, 1636 West 8th St., #201, Los Angeles, California 90017; on behalf of the Respondents

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 Schweiker, Secretary of Health and Human Services v. Gray Panthers.

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

ORAL ARGUMENT OF GEORGE W. JONES, ESQ.,

ON BEHALF OF THE PETITIONERS

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

The issue in this case is whether Congress' use of the term "available income" in the Medicaid statute was intended to preclude the consideration of the income of an institutionalized applicant's spouse for the purpose of making Medicaid determinations.

Respondent filed suit in the United States District Court for the District of Columbia, challenging the regulations of the Secretary of Health and Human Services on statutory and constitutional grounds. The regulations required all participating states to consider the income of an applicant's spouse in limited circumstances, but also permitted some states to consider the income of an applicant's spouse more broadly. The District Court held the regulations invalid on statutory grounds, and therefore did not consider the constitutional arguments.

On appeal, the D.C. Circuit affirmed on the ground

that the Secretary had failed to consider certain factors and policy concerns that the Court thought relevant. One judge dissented.

Pursuant to the order of the District Court on remand, the Secretary has now published new regulations based on the analysis of the Court of Appeals. While it is difficult to determine precisely what the Court of Appeals held, it is nevertheless clear that the Court erred in invalidating the Secretary's regulations. Congress expressly authorized the Secretary to define the term "available income" for purposes of the Medicaid statute.

QUESTION: Could I ask, that new regulations have been issued finally?

MR. JONES: Yes.

QUESTION: And if you win this case what happens to them?

MR. JONES: The regulations may be modified. In the preamble to the regulations the Secretary pointed out that the regulations were based solely on the analysis of the District, the D.C. Circuit, and -- which had, in effect, rejected the Secretary's legal analysis --

QUESTION: Well did he need to issue the regulations Under the -- was he ordered to issue them?

MR. JONES: Yes. In fact, the District Court --

QUESTION: Did he ever ask for a stay?

MR. JONES: Several times. And denied.

QUESTION: Including here, I suppose?

MR. JONES: No stay was asked for in this Court.

QUESTION: Will these new regulations be rescinded if you prevail in this litigation?

MR. JONES: The Secretary has indicated that depending on the nature of this Court's disposition of this case, the regulations would probably -- may have to be revised and of course, rescinded first and then revised.

QUESTION: You mean, if there's a reversal there will have to be a revision?

MR. JONES: Yes.

QUESTION: There wouldn't have to be, would there?

MR. JONES: There wouldn't have to be, but since the Secretary was in effect ordered to disregard his own analysis of the statutory provisions, and instead, published regulations based upon the analysis of the Court of Appeals, if that -- if the analysis in the Court of Appeals is held to be wrong, the Secretary would of course have to reconsider the regulations.

QUESTION: Well, all he says, and this is in that footnote on page 2, it may be necessary to revise them.

MR. JONES: Depending on the nature of this Court's disposition.

QUESTION: Well, if there's a reversal, I suppose --

MR. JONES: That's right.

QUESTION: He still wouldn't require -- having a reversal wouldn't require him to do anything.

MR. JONES: That's right. But the Secretary was in effect ordered --

QUESTION: Well he says if I win this case I may revise these regulations.

MR. JONES: Well, no. He says if --

QUESTION: He says it may be necessary, whatever that is supposed --

MR. JONES: -- the Supreme Court grants --

QUESTION: Well when would it ever be necessary to -- I suppose if the Secretary loses the case, but on a ground that's different from the Court of Appeals, maybe he would have to issue some different regulations, is that what he means?

MR. JONES: That's right.

QUESTION: Well what if the Court of Appeals is just reversed, outright, and say the Secretary is told that you were right the first time? What happens then? Do you know? Does the Secretary say what he would do then, or not?

MR. JONES: No, the Secretary doesn't. And the Secretary didn't know whether the Court was going to grant --

QUESTION: Well, did he make these new regulations

under the coercive impact of the Court of Appeals' decision?

MR. JONES: Yes.

QUESTION: So the odds are that he will re-examine them at the very least, and see whether he wants to stay with them if you prevail here?

MR. JONES: That's right.

QUESTION: And whether or not he does, he's asserting the right to do so, that's what you're here for, why you're here?

MR. JONES: Sure. And that's the purpose of the statement in the preamble to the regulations.

QUESTION: And we can't rewrite them?

MR. JONES: Excuse me?

QUESTION: And we can't rewrite them?

MR. JONES: That's for sure. Congress has expressly authorized the Secretary to define the term "available income" for purposes of the Medicaid statute. And this Court's decision in Batterton v. Francis makes it plain that an agency's exercise of such express statutory authority may only be set aside if it is inconsistent with the statute on which it is based, arbitrary, capricious, or otherwise unlawful.

Disagreement with the judgment necessarily implicit in such an exercise of authority is insufficient. The Court of Appeals first agreed with the Secretary that the Congress'

use of the term "available income" was not intended to preclude consideration of the income of the applicant's spouse. Although there is nothing in the statute or the legislative history that distinguishes between spouses who are living together and those who are separated by institutionalization, the Court of Appeals inferred from the legislative history, a congressional intention to create such a distinction.

The basis for this inference was a statement in the legislative history indicating that the states would be precluded from assuming the availability of the income of an absent father, or on the basis of a court support order. In the view of the Court of Appeals, this statement suggested a general intention to treat spouses living together different from those who are separated by institutionalization. The statement provides only the most tenuous support for the Court's inference, and it is plainly insufficient to support invalidation of the Secretary's regulations. As the Court of Appeals acknowledged, Congress has stated that it is the primary responsibility of the Secretary and not the courts, to determine whether and to what extent the income of the Medicaid applicant's spouse will be considered for the purposes of determining Medicaid eligibility and the amount of assistance.

Without substantially more support than that relied on by the Court of Appeals in this case, the Secretary's

exercise of that responsibility should be upheld. The Secretary has consistently interpreted the term "available income" to include the income of the applicant's spouse whether they live together or not. Both the language and the legislative history of the statute support the Secretary's interpretation of the statute.

In the provision of the Medicaid Act dealing exclusively with state eligibility criteria, Congress provided that only available income should be considered. In this same provision, Congress also stated that the states could consider the financial responsibility of the applicant's spouse for the purpose of making Medicaid determinations and for the purpose of determining the amount of assistance an applicant might be entitled to.

In the legislative history, Congress expressly stated its view that spouses should be expected to support each other. Congress did not distinguish between spouses living together and those who are separated by institutionalization, or for some other reason, nor was the Secretary required to do so.

Respondent contends that the states may only consider the income of the applicant's spouse by filing an independent lawsuit under generally applicable civil or criminal support statutes. This Court should reject that interpretation of the statute for at least three reasons.

First, it is inconsistent with the language of the statute which provides that the states may consider the income of an applicant's spouse for the purpose of determining Medicaid eligibility and for the purpose of determining the amount of assistance an applicant may be entitled to. This is an initial step. Respondent has never attempted -- or, never explained how filing an independent lawsuit under a generally applicable civil or criminal statute can be said to be considering the income of the applicant's spouse for the purpose of making Medicaid determinations.

Second, this interpretation of the statute would require the filing of thousands of tiny lawsuits, sometimes perhaps several against the same individual, since the payments are made by the state monthly or quarterly and the spouse -- and, at the same time the state would be continuing to pay benefits to an individual who may or may not be eligible for benefits.

And finally, if Congress intended to create such a distinction or such an administrative scheme which would have required the states to spend a great deal of money filing all of these lawsuits, trying to recover money that they shouldn't have had to pay out in the first place, one would expect that something in the legislative history would have been said about this. There is absolutely no support in the legislative history suggesting that Congress intended

for the states to consider the income of the applicant's spouse for the purpose of determining Medicaid eligibility by filing an independent lawsuit.

QUESTION: Mr. Jones, while you are on the legislative history -- although I understand you are directing yourself now to this question of spouses, what about the House Report that is quoted on page 42 of your opponent's brief, which says that another provision that is included that requires states to take into account "only such income and resources as are actually available to the applicant." And then they also quote a comment by Senator Ribicoff that says the bill will require only income and resources actually available to the applicant to be considered in the -- does that, what is your comment on those --

MR. JONES: Well, the omission from the quotation here is that the states were to take into account income that was -- as determined in accordance with standards prescribed by the Secretary, actually available to the applicant.

QUESTION: But can the Secretary pass standards that include the deemed income to be available when it is not actually available? Isn't that the issue?

MR. JONES: Well, to put the question that way is almost to assume the answer, because the available, for purposes of the Medicaid statute, is determined by the Secretary and income that the applicant's spouse actually

receives is actually available. The Secretary and Congress, have always interpreted the term "available income" for purposes of the Medicaid statute to include the income of the applicant's spouse.

QUESTION: Would you -- is it your view that if the statute included the words "actually available" we'd still have the same case?

MR. JONES: If the statute also said "actually available" as determined in accordance with --

QUESTION: We've just inserted the word "actually" in the statute, which is not there, but the word "actually" is in the legislative history. Would that make any difference to your argument?

MR. JONES: I think not. Respondent also contends that the word "available" --

QUESTION: Mr. Jones, do you think that this case is controlled by Batterton v. Francis?

MR. JONES: Yes. The language of the two provisions, in Batterton v. Francis -- the Secretary was authorized to prescribe standards for determining unemployment, for defining the term "unemployment". In this case, in almost identical language, the Secretary is authorized to prescribe the standards for determining what is "available income".

QUESTION: Of course, the Court in that case was closely divided.

MR. JONES: But the majority opinion is controlling here. The Respondent contends that the term "available income" includes the income of the applicant's spouse only if it is actually contributed in some sense.

Congress however, used the term "available income" and not contributed. Furthermore, Congress expressly authorized the states to consider the income of the applicant's spouse. In further answer to your question, Mr. Justice Stevens, it might be said that Congress clearly did not intend the term "available" to be interpreted to exclude the income of the applicant's spouse since there would have been no need for the further provision that the states could consider the income of the applicant's spouse that was prohibited in the preceding section.

In addition to authorizing the states to consider the income of the applicant's spouse, Congress delegated responsibility to the Secretary for giving further content to that term. The Secretary has never construed the term to exclude the income of the applicant's spouse simply because the spouse refused to turn it over to the applicant; nothing in the statute or the legislative history even suggests that interpretation of the language and there's certainly nothing that requires the Secretary to adopt that construction.

Absent compelling evidence that the Secretary has grossly misconceived Congress' intent, this Court should

decline Respondent's invitation to disregard the interpretation of the agency Congress has expressly authorized to define the statutory term.

The last part of our brief is devoted to explaining the analysis that led to the particular regulations in this case. And we recognized, as Respondents point out, the complexity of that analysis. And I would like to try briefly to explain what the analysis was that led to the regulations.

Following the enactment of the Supplemental Security Income program for the aged, blind and disabled in 1972, the Secretary published regulations reflecting the impact of this new legislation. All participating states were required to consider the income of a Medicaid applicant's spouse to the extent that it would be considered in determining SSI eligibility. The states that exercised the 209(b) option were permitted to consider the income of the applicant's spouse to the extent that they did so in 1972 even if it would not be considered in determining SSI eligibility.

And thus, the Secretary's regulations established a kind of maximum and minimum extent to which states may consider the income of an applicant's spouse for purposes of determining Medicaid. The Secretary's regulations are based on the very careful analysis of two exceedingly complex social welfare statutes. They are not based on the notion that Congress' reasons for adopting the particular SSI

provisions are directly applicable in the Medicaid context, nor did the Secretary assume that Congress intended in some sense to prescribe rules for determining what income is available for purposes of the Medicaid program. Rather, as I said, the regulations are derived from an analysis of the interlocking provisions of the Medicaid and SSI statutes. These regulations cannot reasonably be characterized as arbitrary or capricious.

Section 1902(a)(10) of the Medicaid statute establishes the basic scope of the Medicaid program. More important for present purposes, that provision establishes or provides the key to understanding the analysis that led to the regulations challenged here. Because of the relationship between the two statutes the Secretary requires the states to consider the income to the extent that it would be considered in determining SSI eligibility. Because of the purpose of the 209(b) option, the Secretary permits the states to consider the income of an applicant's spouse to the extent they did so in 1972.

Under the first provision of Section 1902(a)(10), all states, all participating states, are required to provide Medicaid benefits to every aged, blind, disabled individual receiving benefits under the SSI program. Now putting to one side for the moment the 209(b) option, it is clear that the Secretary could not permit any state to consider the

income of an applicant's spouse if it would not be considered in determining SSI eligibility. Otherwise, individuals who were receiving SSI benefits could be found ineligible for Medicaid contrary to the very clear command of Section 1902(a)(10)(A) that all SSI recipients be covered.

Now, on the other hand, aged, blind or disabled individuals who are ineligible for SSI benefits are also ineligible for Medicaid, unless the state -- unless they meet the requirements of one of the very carefully circumscribed optional group provisions and the state has decided to provide Medicaid benefits to that particular group. Now again putting aside for the moment the 209(b) option, it follows that the Secretary cannot -- it follows that the states must consider the income of all applicants and their spouses to the extent that it would be considered under the SSI statute. Otherwise, even if an individual is ineligible for SSI benefits he could be found eligible for Medicaid, even if the state doesn't provide benefits to any of the optional coverage groups; a result that is manifestly contrary to the terms of the statute. The Secretary obviously cannot redetermine the eligibility of every person covered under every state plan.

There are certain optional coverage provisions and it is unnecessary to describe them in detail here -- it should be emphasized however, that each of them is subject to its

own set of very carefully drawn limitations. Because of the inequity of permitting the states to use one method for determining the, for calculating the income of the optional coverage groups, and another method for calculating the income of the mandatory coverage groups, the Secretary has required the states to use the same method for calculating the income of both.

Neither the Court of Appeals nor Respondent challenges that aspect of the Secretary's regulations. Thus, unless the 209(b) option requires a different kind of analysis, the relationship between the Medicaid and SSI statutes not only supports the reasonableness of the Secretary's regulations but virtually compels those regulations.

The language, the legislative history and the purpose of the 209(b) option all support the Secretary's conclusion that the provision does not require a different analysis. By its terms, the provision simply gives the states an option to deny Medicaid coverage to those individuals the states would otherwise be required to cover. As I pointed out however, the only individuals the state is required to cover are SSI recipients, under Section 1902(a)(10)(A).

The primary effect of the 209(b) option then is simply to give the states a partial exemption from the otherwise applicable requirements of that provision. The legislative history makes virtually indisputable what seems apparent

from the terms of the provision. In explaining the purpose and intent of the provision, both the Senate Committee and the House Committee pointed out that the provision was simply intended to allow the states to exclude from mandatory Medicaid coverage those individuals it would not have been required to cover before the SSI program was adopted.

The states were to be permitted to exclude from coverage those individuals who were newly eligible, that is, those who became eligible for mandatory Medicaid coverage because the scope of coverage under the SSI statute was broader than that of the old Categorical Assistance Programs that it replaced. With one arguable exception, 209(b) states like SSI states are only entitled to federal financial assistance for providing Medicaid benefits to an individual who is ineligible for SSI if the state provides benefits pursuant to one of the optional provisions.

Thus, all states must consider the income of an applicant's spouse at least to the extent that it would be considered in determining SSI eligibility. Otherwise, the Secretary would be obliged to redetermine the eligibility of every person covered under every state plan in order -- or before he could determine whether the state was entitled to federal financial assistance, an impossible administrative burden and surely not one Congress intended to impose.

QUESTION: Mr. Jones, could I ask you another

question? Am I correct in believing that the basic issue here would have been the same if -- I guess the regulations has been the same ever since 1965, is that right?

MR. JONES: No. They've gone through a series of --

QUESTION: But on this particular issue, on the deeming issue?

MR. JONES: The regulations have always permitted the states to include or consider the income of an applicant's spouse, whether they live together or not.

QUESTION: And some states have done that since the beginning evidently?

MR. JONES: That's right.

QUESTION: How do you explain the fact that this issue wasn't litigated somewhere between 1965 and 1972?

MR. JONES: Well --

QUESTION: Because it could have been, couldn't it?

MR. JONES: It could have been. There were several, a number of District Court decisions which aren't very carefully analyzed, but the -- the problem apparently, was that when the Secretary published these new regulations the provision was explicitly put in that the states would be obliged to use the SSI standards, and that brought home to everybody, I presume --

QUESTION: But as I understand it, some of the

states had, although hadn't been using SSI standards because there was no SSI, they had been using the same approach to the joint income.

MR. JONES: Right. And in fact, the Secretary, in the preamble to the regulations, indicates that in large part, or most of the states, the SSI states, would be limited in the extent that they would be considering the income of the applicant's spouse. So it was a benefit for Medicaid applicants in all of those SSI states. Congress' purpose in --

QUESTION: It's a good thing in the 209(b) states, I don't understand why it wouldn't have been litigated there?

MR. JONES: Right. Because the 209(b) option wasn't adopted until 1972.

QUESTION: Well no, I know, but wasn't the effect of that to say there are a group of states that can follow the same rules they used to follow from '65 to '72?

MR. JONES: That's right.

QUESTION: It's those states we're now concerned with, and I don't understand why this issue didn't arise somewhere along the line a lot earlier?

MR. JONES: Well --

QUESTION: I mean, it's not -- I'm not, no reason to blame you for it, I'm not -- don't mean that, but I just don't understand it, why it takes so long for such a -- what

seems to me to be a fairly obvious problem, about which --

MR. JONES: Well I think --

QUESTION: -- reasonable men could differ.

MR. JONES: As Justice -- as the dissenting judge in the Court of Appeals pointed out, the real problem here and the thing that has caused the commotion, I guess, is that Congress has allowed the 209(b) states to use the 1972 levels, and over the course of the years, since 1972, inflation has increased substantially. And although all of the states, all the 209(b) states I think have raised the level somewhat since 1972, they are still lower in many cases than the SSI standards. And I think it's the inflation factor that has generated the controversy surrounding the regulations now.

As I pointed out, the purpose of the 209(b) option was to permit the states to consider the income -- or to exclude from Medicaid coverage, all of those individuals who wouldn't have been eligible in 1972, and if the states were validly considering the income of the applicant's spouses in 1972, the Secretary has no power to require them to ignore that income today and provide Medicaid coverage even if the individual is receiving SSI benefits.

QUESTION: Well unless it was a violation of law in 1972?

MR. JONES: That's right, if they were validly

considering --

QUESTION: Right.

MR. JONES: -- the income. I would like to reserve the balance of my time, if there are no further questions, for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Deford.

ORAL ARGUMENT OF GILL DEFORD, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

Before I begin, I would like to clarify two points which were raised in the questioning of Mr. Jones. First, I'd like to note that the preamble to the regulations which were finally promulgated in December, 1980, pursuant to the Court of Appeals decision, has been misinterpreted. They did not require that the Secretary only consider the policy factors outlined by the Court of Appeals in its decision. I'd like to read briefly from the end of the Court of Appeals' majority decision, to make that point.

This appears on page 12(a) of the government's petition for a writ of certiorari: "In issuing regulations implementing the 209(b) option, the Secretary is required to consider those policy concerns outlined in part above, which Congress intended would guide for discretion in determining under what circumstances and to what extent deeming would be

permitted." What the Court of Appeals did, was to outline two factors, at least, which the Secretary should take into account in promulgating new regulations. But the Secretary's regulations, as the preamble indicates, took into account several other factors. And so it is not fair to say that the Court of Appeals decision told the Secretary what she had to do. All the Court of Appeals did was to say, go back, look at this issue again, take into account policy factors which you've never considered before and then promulgate new regulations in light of those policy considerations.

QUESTION: But the Court of Appeals did set aside the existing regulations of the Secretary, did it not?

MR. DEFORD: The Court of Appeals did affirm the District Court's invalidation of those regulations, that's true.

QUESTION: And that was under the Administrative Procedure Act?

MR. DEFORD: Yes, that's correct.

QUESTION: Well where you have to show they are either arbitrary or capricious or contrary to law?

MR. DEFORD: Well, Your Honor, I assume you refer to the Batterton standard which is quoted -- which quotes the APA --

QUESTION: Well I'm referring to the Administrative Procedure Act.

MR. DEFORD: I would say that the Court of Appeals

must have been acting under that aspect of the Act.

QUESTION: We often don't know, of course, with this Court of Appeals.

MR. DEFORD: Well, assuming since they referred throughout the decision, both to Batterton and to Overton Park, Citizens for Overton Park, I assume that the Court of Appeals was using the APA standard in making its determination.

QUESTION: Well may I ask what --

QUESTION: Mr. Deford, do you -- excuse me -- do you read the Court of Appeals' opinion as rejecting your basic theory; because they in effect held, as I understand it, that deeming is permitted under certain circumstances.

MR. DEFORD: What the Court of Appeals held was, in certain circumstances deeming was not permitted and in certain circumstances it was permitted, specifically where the spouses were still living together, but in certain circumstances especially where they were separated, and especially where they were separated under certain conditions, deeming was not permitted. The Court of Appeals did not tell the Secretary what regulations, at that time, she had to come up with. It only outlined those factors and said deeming is a different ballgame when the spouses are separated, and it should not be permitted at that time.

QUESTION: May I ask, what is the significance of what you just said to the issue we have to decide?

MR. DEFORD: Well the issue was raised before as to whether the Court of Appeals had told the Secretary what exactly --

QUESTION: I know, but what's it's relevance?

MR. DEFORD: Your Honor, I simply wanted to clarify what I consider a point which was made --

QUESTION: You don't suggest the case isn't a live case?

MR. DEFORD: No, I certainly don't, Your Honor. One other point which was raised at the end of the other discussion was the reason why this issue was not raised until 1974, I believe, was the first case. We speculate that the major reason was not just inflation, but the inflationary cost of nursing home care. And since that has gone up dramatically in the last six or seven years, it has cost the nursing homes much more to take care of people and therefore, there's a much greater need for the government at least -- there's been much more expenses for the government, both state and federal; and therefore, there's been a greater need to attempt to deem income from a non-institutionalized spouse.

QUESTION: Is it not generally true that under state law, take a hypothetical case, a man and wife are separated but not divorced, and the wife is affluent, has millions, and the husband falls on evil times and can't take care of himself, under state law in most states cannot the one spouse

be required to --

MR. DEFORD: Absolutely, Your Honor. That's exactly what I consider --

QUESTION: No question about it, is there?

MR. DEFORD: No question that this -- I think virtually every state has spousal responsibility laws, which allow the state to force the contribution, an appropriate contribution from the wealthy spouse, if that's what it is, and to go into state courts and demand that contribution be provided; the same way a state can obtain a contribution from an absent father.

QUESTION: My hypothetical was wealthy, even if not wealthy, whatever the other spouse has must be employed to --

MR. DEFORD: Not whatever, the other spouse has to have sufficient income --

QUESTION: I see. So that they can maintain their own support.

MR. DEFORD: Exactly. So that they may maintain their own support.

QUESTION: But if there's enough for both it must be shared, is it?

MR. DEFORD: That's correct. We do not contest the fact that non-institutionalized spouses have an obligation under state law to support the individual in the institution. The only issue --

QUESTION: Non-institutional, I guess, why do you make the difference between institutionalized and non-institutionalized?

MR. DEFORD: For purposes of support. Because when spouses are living together as a general practice, one spouse is going to almost automatically have to take care of the other spouse. The payment for a mortgage or for rent, the payment for food, the payment for utility costs, will automatically be available to the other spouse.

QUESTION: What if they are separated first and then after the separation one of them becomes institutionalized and the other one has resources, those resources may be reached?

MR. DEFORD: Through the state's judicial processes, that's correct.

QUESTION: Well, isn't it true also that under the statute, 49 U.S.C. 1396a, Appendix H, in the petition for certiorari, these numbers and letters are kind of difficult to cope with, but Section 17(B) in the middle of the page of 35(a) says "a state plan for said medical assistance must provide for taking into account only such income and resources as are -- as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient in determining his eligibility for such aid, assistance or recipience." Now, you have to show, don't you, that

that portion of the Secretary's regulations promulgated pursuant to that congressional directive was either arbitrary, capricious, or contrary to law?

MR. DEFORD: That's correct, Your Honor. That that -- that the regulations are inconsistent with that statute, as is fleshed out by the legislative history.

I'd like to reiterate what the issue is of this case, because I believe it was misstated by the government. The issue here is whether Congress intended that an arbitrary portion of a non-institutionalized spouse's income can be conclusively presumed available to the institutionalized spouse who is applying for Medicaid without regard to whether in fact that income is available.

Without the requirement that the income be actually available, be in the hands of the institutionalized spouse, before it is considered by the state, the spouses are placed in an impossible dilemma. Their choice is between the denial of necessary health care to the individual in the institution and a sub-poverty standard of living for the other.

QUESTION: But what Congress said was that the Secretary shall issue regulations that shall define this --

MR. DEFORD: Shall define what is available.

QUESTION: --distribution-- and you, to say that spouses are placed in an impossible situation, may

lead one court or this Court to conclude that the regulation is arbitrary or capricious or contrary to law. But Congress did authorize the Secretary to define what shall be available.

MR. DEFORD: That's correct, Your Honor; that is right in the statute, there's no dispute about that. But I would also like to emphasize that Congress did not leave us with the word "available" in the statute. It provided a rather extensive background for that in the legislative history which goes into considerably greater detail.

QUESTION: Are you referring to the use of the term "actually available"?

MR. DEFORD: That's one instance, Your Honor.

QUESTION: But isn't that a term that could have so readily been put into the statute that if Congress intended that they would have said it?

MR. DEFORD: I think Congress' thinking was that available meant "actually available".

QUESTION: Well, how do we know that?

MR. DEFORD: Well, because of other instances in the legislative history. For instance, Congress also says that the income must be in fact available, that also appeared in the legislative history.

QUESTION: Where did they say that?

MR. DEFORD: In the same portion of the legislative history.

QUESTION: Legislative history, not in the statute?

QUESTION: Not in the legislation.

MR. DEFORD: Not in the legislation itself, that's correct.

QUESTION: But Mr. Deford, I think you have still another hurdle, because as I understood your opponent, he conceded for purposes of argument that even if the word "actually" could be considered to be a part of the statute, and it wouldn't change his basic argument. That even if it read "actually available", still, what is actually available must be defined by the Secretary's regulations.

MR. DEFORD: I think the Department of Health and Human Services itself, has in some senses recognized what I believe most people would believe actually available and income in fact mean, which is income actually in the hands of, in the control of, the institutionalized spouse. In the guidelines and regulations which preceded the regulations which were challenged in this case, the Secretary himself used the expression actually available from 1966 through 1977, in the medical--in supplement (B) to the handbook of medical assistance, the Secretary said that only income in hand or under the control of the institutionalized spouse could be taken into consideration.

I think HHS in some sense, the Department of Health

and Human Services, understood what Congress had in mind. Moreover, I think when Congress expects that there will be deeming, that it can differentiate that. For instance in the SSI statute, there's an indication that it understands that deeming is the contrary to available income. I believe it's 42 U.S.C. Section 1382c(f)(1), which we cited in our brief, points out that although the income -- that income between spouses in certain situations should be deemed even if it is not available to the other spouse. So I think Congress sees available to mean what I assume most people would assume it to mean, which is that spouse who is going to have Medicaid eligibility determined, must have that income in hand or available to her. And if the income is still in the hands of the other spouse, and for whatever reason, either because that spouse does not want to contribute or feels that he or she simply cannot contribute, that income will not be in the hands of the individual in the institution. She will not have access to it, in order to afford to pay for the costs of care.

QUESTION: Do you think there's a difference between in hand and available? Isn't there a wide difference? I'll give you one that comes to mind, you are left 10 million dollars in a will and that's available, isn't it, but it's not in hand?

MR. DEFORD: That's correct, Your Honor. And --

QUESTION: You have to go through a little something to get it?

MR. DEFORD: Until that will -- is probated, the income is not available or is certainly not in hand of the individual who might have access to it at some point later in the future.

QUESTION: So there is a difference between the two?

MR. DEFORD: There's a difference, but I think the Secretary --

QUESTION: Is it significant, that's what I want to know?

MR. DEFORD: Well I think the Secretary has understood that in this context, given the legislative history, Congress intended that available meant in hand, because it was the Secretary who repeatedly interpreted the word "available" to mean in hand or under the control of the applicant spouse.

QUESTION: May I ask you one other question while you are stopped, what is your view of the sort of standards he should write under Clause (b)? If he can't write standards that say when income shall be deemed attributable to one spouse or the other, what kind of standards -- are those -- is that just a procedural concept in your view?

MR. DEFORD: As to what the regulation should look

like?

QUESTION: Yes, what should -- what kind of standards should he be writing to determine what income is available if he isn't adopting some rather arbitrary rules, saying well, if the husband makes $X, why certain percentages --

MR. DEFORD: I think the Secretary has, in fact, promulgated those regulations. That was done back in November of 1979, after the District Court decision, before the Court of Appeals decision. Those regulations were never finally -- were never published in final form. They were promulgated.

Those regulations said that only income which is actually being contributed to the institutionalized spouse can be taken into consideration.

QUESTION: But if the statute means what you say, you didn't even need those regulations, it would have been obvious on the face of the statute.

MR. DEFORD: Well I must say that the words "actually available" in the statute and the regulations, when I first read them, suggested to me that the Secretary was not, himself, following his own regulations. If "actually available" and "income in hand" and "income under the control of", does not mean income which the institutionalized spouse, him or herself actually has. I really do not know what it meant.

In fact, it's our position that HEW and HSS have

been inconsistent in dealing with this statute. For 11 years, the regulations --

QUESTION: My question though, is directed at what do you think Congress meant? I mean, it seems to me you wouldn't even need a regulation to implement (b) if it means, and I certainly understand your very persuasive argument, it means that it's got to be actually available. But I don't know why the statute wouldn't take care of it and why do you need a regulation that says yes, we mean it's got to be actually available.

MR. DEFORD: I can't think of an example off the top of my head, Your Honor, but I suppose there would be instances in which income might ultimately be considered available to someone and should be considered available, which that individual does not have. Maybe the example is as -- that Justice Marshall suggested, of money that ultimately will be probated -- maybe in some circumstances that might be considered available. I don't think it should, but I think there could be instances in which available might be stretched somewhat. I don't think this is one of those instances and I think Congress made that clear in the legislative history.

I think we've been discussing this morning a rather dry situation, but I think it's important to bring it into some human terms. In the record below we did introduce affidavits indicating how deeming actually operates with

flesh and blood people. I'd like to briefly illustrate, by going through the fact situation of one of the individuals described in the amicus brief, how deeming does in fact operate. In that particular case, which I said is discussed in greater detail, as are other cases, in the amicus brief, the husband was extremely sick, had organic brain syndrome, and the wife was attempting to care for him at home and did so for about 8 or 9 months. Finally because of his illness --

QUESTION: You're talking about the amicus brief --

MR. DEFORD: I'm talking about --

QUESTION: There's more than one?

MR. DEFORD: Yes, Your Honor.

QUESTION: You're talking about the one filed by John H. Ford, Lana Carter and others?

MR. DEFORD: That's correct. That's the one. The wife was finally, after 8 or 9 months, unable to care for her husband at home and was forced to put him into a nursing home. And it was at that point that the deeming regulations took hold. The wife's total income was only $241 per month in Social Security disability benefits. As the record in that case reflected, this was just barely enough for her to get by, at a subsistent standard of living. The State of North Carolina determined that she should be allowed to keep only $162 per month and about 1/3 of her total income was then to be deemed available to the individual in the institution.

It then became impossible for her to get by, and she was faced with what we think is the common and regular dilemma faced by individuals in which deeming -- against whom deeming is applied. The wife had the choice of paying the deemed amount and then herself living without sufficient food, shelter, utility, or of not paying the deemed amount and having her husband evicted from the nursing home, which is the ultimate effect of that non-payment of the deemed amount.

QUESTION: Well, are you claiming as the result of examples like that, that deeming is totally improper under the statute, or that a hearing has to be held in every case?

MR. DEFORD: Claiming, Your Honor, that in order for the state to demand a payment from the spouse outside of an institution, if that spouse refuses to cooperate voluntarily, that the state would have to use its relative responsibility laws which the Medicaid statute specifically allows it to do in Clause (d) of subsection 17, and go into Court, and at that point a determination would be made as to what a reasonable contribution should be.

QUESTION: Well, then what do you make of the subsection (b) of 17, where it says "available" in accordance with the regulations that the Secretary shall prescribe. Don't you think the Secretary can prescribe general regulations that may -- hit an occasional person very hard, but in the interest of administrative convenience follow the Congressional

line?

MR. DEFORD: I think as a general rule, the Secretary obviously has a right to promulgate fairly general regulations. But this is not an isolated instance. This is happening regularly throughout the country to a large number of people.

QUESTION: Well, why don't they ask Congress to change the law?

MR. DEFORD: I don't know, Your Honor. I think the law as it is now set up takes into account this situation. Congress itself --

QUESTION: What it does, Mr. Deford, on the very example you give -- let me just be sure what your view is -- your view is that under the statute the husband is entitled to be institutionalized, but the state could nevertheless bring a lawsuit against the spouse and --

MR. DEFORD: Absolutely, Your Honor.

QUESTION: -- get an order requiring her to turn over $80 a month.

MR. DEFORD: I don't think --

QUESTION: It may end up in the -- economically in the same harsh position, is what you're saying?

MR. DEFORD: I don't think the state would be able to go into a state court of law and get a judge to order a woman whose income is only $240 a month to pay a third of

that income to the institution, if that's going to force her to live in a sub-poverty standard of living. I think that's the key point, that deeming is an arbitrary system --

QUESTION: But is the deeming -- is it arbitrary then because it imposes a greater financial burden on the spouse than state law would impose, is that your argument?

MR. DEFORD: It's arbitrary in the sense that it is administratively convenient to the state, as Mr. Justice Rehnquist has pointed out, but that administrative convenience is far outweighed by the terrible burden it places on both spouses. And that was the burden that Congress sought to avoid.

QUESTION: Well, I was under a misapprehension, because I was under the impression that you were assuming that the Secretary could not deny the medical benefit to one spouse but would nevertheless have a remedy in state court to collect the $80 a month. But you're not, you're saying there is --

MR. DEFORD: I'm saying that in many instances, the non-institutionalized spouse would have sufficient income --

QUESTION: Well, let's take the hard cases, let's take this very case. Is it your view that the Secretary not only must accept the incapacitated spouse, but may not recover the $80 from the other spouse in a subsequent proceeding?

MR. DEFORD: I'm saying that the state could go into court and might be able to get some money out of her. But I doubt that a state court would order someone to pay one-third of their income, in that instance. Whereas deeming automatically allows the state to do that, without going to any of the necessary expenses of the non-institutionalized spouse might have. I think in a state court the judge would evaluate what the necessary expenses of that person were, have them prove what they needed to get by, some sort of basic standard of existence. But I don't -- I think the more common example would be someone who perhaps had $400 a month income. Now the state -- under deeming, that person would be forced to give up, in this state, $240 a month, down to $160. I think the state court might order that person to pay $50 or $60 or $80 or $100. But I don't think they would force them into poverty as the price for obtaining necessary health care for the other individual.

QUESTION: Well do you think the federal statute places some limit on what a state court might do under your theory as to allowing recovery by the state from one spouse or another?

MR. DEFORD: No, the federal statute simply gives the state the right to use its responsibility laws for spouses. It takes that right away for virtually every other relative except parents, in Clause (d). But the federal government

does not impose on the state how much it might ultimately recover from that individual through the regular judicial process.

Our argument here is that deeming is an entirely arbitrary process, which precludes the individual from showing, the non-institutionalized spouse from showing what his or her necessary basic expenses are. The normal judicial process would allow that individual to make a proof as to what income that individual needs to get by.

QUESTION: But in cases like Weinberger v. Salfi, we've said that the -- you don't have to have an individualized determination in every case. The Secretary may propound a general regulation that is adequate for most cases. There may be some hard cases, but when you are administering a complex system of social insurance, you are not required to have an individualized hearing.

MR. DEFORD: Well first, Your Honor, if I am not mistaken, Salfi was a statutory case; I think there was a statute which was challenged, not a regulation. We say that the statute here requires that available income only be taken into consideration. I believe in Salfi it was a statute which was challenged on constitutional grounds, and this Court--

QUESTION: But here, the statute says available as prescribed by the Secretary's regulations.

QUESTION: In effect, you are challenging the

statute to -- for not having included the adjective "actually".

MR. DEFORD: Your Honor, I think that is not only implicit, but explicit in everything Congress has said in the legislative history of this case, both by individuals --

QUESTION: You are challenging -- you are in effect challenging the statute here?

MR. DEFORD: No, Your Honor. We're simply saying that the word "available" in the statute must be interpreted in at least this context, to mean only income which is actually there. When the spouses are separated, when the spouses are no longer living together, the logical basis for deeming which is couples, spouses contributing to each other, no longer exists -- they are living at different places and one of them is living in an institution. It's simply illogical and irrational to pretend that the income of one spouse is necessarily and automatically available to the other individual. There is no longer any logical basis for deeming in that context.

QUESTION: Then you don't distinguish between whether it is $500 a month or $5000 a month, that the spouse has, apparently?

MR. DEFORD: I don't distinguish, but I think in the great majority of cases, and I'd like to emphasize this, spouses do want to contribute to each other, they do not want to leave the other hanging in the nursing home and say, good

luck. A person with $5000 is likely to make the best contribution that he or she can make. I'd also say that a person who has $5000 a month income, the spouse probably would not be eligible for Medicaid, if that's the person making the contribution.

If the spouse with $5000 -- if that person simply refuses to make the contribution, then the state has the right to go into state court and obtain a necessary contribution, and a reasonable contribution.

I'd like to point out also, that this Court in similar cases involving the AFDC program has apparently shown some disenchantment with exactly the procedure used here, and in Van Lare v. Hurley and Lewis v. Martin, this Court emphasized that states cannot include income available to an applicant for AFDC which is not in fact available. One of those cases, the Court stated that the bread can only be counted when it is actually set on the table. There's another important aspect of those two cases.

In Van Lare, the Court noted that deeming in that context, directed against a lodger living in the house, who might not be contributing to the support of the applicant child, that the state could not move against the lodger by essentially holding that child blackmail. And that is exactly what deeming in this context amounts to. The state is using the guilt or whatever of the non-institutionalized spouse

-- about the institutionalized spouse, in order to force a support payment. And that support payment, we submit, can only be obtained through the regular state judicial process. The state cannot say to the non-institutionalized spouse, well, you can either contribute the $150 a month, or ultimately your spouse is going to be evicted from the nursing home. The purpose of the Medicaid program was to guarantee that individuals who needed necessary health care and did not have sufficient income regardless of the reason why they didn't have sufficient income, would obtain needed health care. In this instance, that health care is ultimately going to be denied because the state is trying to force the other spouse to cooperate. It's trying to put -- is putting and is holding the institutionalized spouse, essentially a hostage, in this game in an effort to obtain support from the non-institutionalized spouse.

QUESTION: Mr. Deford, would you comment just very briefly on the government's second argument which, as I understand it, is that deeming is permitted under SSI and it's not realistic to assume Congress intended the 209(b) option to prohibit deeming if it is permitted in the more liberal option.

MR. DEFORD: Your Honor, I don't agree with the government's interpretation of 209(b) option. The 209(b) option is not necessarily a more restrictive or a less liberal

program than the SSI procedure. 209(b) option is essentially an effort to give the states the flexibility --

QUESTION: Can I interrupt you just for one preliminary? Do you agree that deeming is permitted in the SSI situation?

MR. DEFORD: No. I don't, I don't agree with that. I think there's a stronger argument in that instance, because of the relationship between the Medicaid statute and the SSI statute. But I think there's also a strong argument that subsection 17 of the Medicaid statute precludes deeming in either kind of state.

But I'd like to say that the 209(b) options essentially gives the states the right to choose whatever Medicaid rules they want, with only one proviso -- that they cannot be any more restrictive than those in effect in 1972. It was an effort to give the states some flexibility; they could choose to go with SSI, as about two-thirds of the states have done. That gives the states much more administrative convenience because the Social Security Administration will then determine Medicaid eligibility for them and they don't have to go through that process.

If the states want to use more restrictive rules, they can by choosing a 209(b) option. They then have the administrative burdens which comes with that. At the same time, however, they are required to use the spend-down

mechanism, which is probably the most liberal element that Congress has included in the Medicaid statute. And that allows individuals whose incomes might be slightly over the cash assistance levels to spend-down and obtain eligibility.

The 209(b) option was a choice that Congress gave the states. It set no maximum eligibility levels for those states which chose the 209(b) option. Therefore, we don't believe that the SSI statute is in any way related to this particular case involving 209(b) --

QUESTION: Well, you differ with government counsel as to --

MR. DEFORD: Absolutely, Your Honor.

QUESTION: -- what the statute says, don't you?

MR. DEFORD: The statute does not say anything about maximum eligibility levels. It begins by saying that notwithstanding --

QUESTION: Well it also says that an option state can go back to the regime that it administered from 1965 to 1972, if the dates are right.

MR. DEFORD: As long as it was in effect in 1972.

QUESTION: Yes, in '72, so long as it was lawful. But that, it need not give Medicaid to anybody who is not eligible under SSI, that is, I think that's the government's position.

MR. DEFORD: That is the government's position, but

the statute does not say that.

QUESTION: And you disagree? And you disagree as to what the statute provides.

MR. DEFORD: The statute has no language about using the SSI rules as the most liberal which a state can use. Any other questions? Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Jones, you have about three minutes left.

ORAL REBUTTAL ARGUMENT OF GEORGE W. JONES, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. JONES: The first point that I want to make in my three minutes is that Respondent's emphasis, one, the levels with the hypotheticals of Mrs. Ford or Mr. Ford, I guess, is inappropriate in this case because the level of benefits or the levels -- or the amount of the contribution the state requires the spouse to make is not at issue in this case. The Court of Appeals held that the Secretary's regulations were invalid for failure to distinguish between spouses living together and those who were separated by institutionalization. The level, the amount of the contribution is not at issue here. The Secretary's regulations did not prescribe the amount of the contribution, and the Court of Appeals didn't invalidate the regulations because of the amount of the contribution asked. Now, in response, my own hypothetical might be useful. Respondent's position is

that it doesn't matter how much money the spouse has, as long as he refuses to contribute it. Now, if a spouse has $100,000 of income, Mr. Deford says most of these people don't have $100,000 of income. But as he pointed out, in response to the Chief Justice's question, it wouldn't make any difference if he did, as long as he refuses to contribute it, the applicant is eligible for Medicaid and the state is obliged to pay out benefits while, or in the interim, while it tries to collect this money from the spouse who may or may not have money available for the state to attach, assuming of course, that the state has such a statute under which it could pursue the spouse.

We are informed that there are some states who don't. Now, it's conceivable that the states could adopt a statute that would allow them to do this, but it's not clear that all states do have those programs, those statutes.

The final point I'd like to make is that Respondent has suggested that the 209(b) option doesn't do what we say it does. I'd like to just read briefly from the Senate Report describing that option. "The 209(b) option gives states the option of covering under Medicaid, aged, blind and disabled persons made newly eligible for cash assistance as a result of the increases in payment levels to these persons provided under the bill, the SSI statute. No state would be required to furnish medical assistance to any individual

receiving aid as a needy aged, blind or disabled adult, unless the state would be required or would have been required under its 1972 plan." There's no other way to read that language. My time is up.

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

(Whereupon at 11:06 o'clock a.m. the case in the above matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 80-756

RICHARD SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

v.

GRAY PANTHERS

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: William J. Wilson

William J. Wilson