ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1371

TITLE MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner v. LEON S. DAY, ET AL.

PLACE Washington, D. C.

DATE December 5, 1983

PAGES 1 thru 52

ALDERSON REPORTING

(202) 628-9300

440 FIRST STREET, N.W.

IN THE SUPREME COURT OF THE UNITED STATES

- x

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner

v. : No. 82-1371

LEON S. DAY, ET AL.,

Respondent

- x

Washington, D.C.

December 5, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

J. PAUL MC GRATH, ESQ., Assistant Attorney General, Civil Division, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

RICHARD H. MUNZING, ESQ., Springfield, Vermont; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Heckler against Day.

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

ORAL ARGUMENT OF J. PAUL MC GRATH, ESQ.

ON BEHALF OF THE PETITIONER

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

The District Court here imposed mandatory time limits on the processing of Social Security disability claims, Title II claims, in the State of Vermont. That order was based on a finding that the Secretary had violated the Social Security Act because, in the District Court's view, disability claims were not being decided quickly enough.

The statute in question, which is Section 205(b) of the Social Security Act, requires that claimants be given, and I quote, "reasonable notice and opportunity for a hearing." The statute does not contain any mandation of time limits nor does it refer to timeliness as a requirement.

The issue here then is what did Congress require by this broad statutory mandate? And, in turn, since the Secretary, under Section 205(a), has full power to issue

rules, regulations, and procedures to carry out the Social Security Act.

The further issue is whether the Secretary acted arbitrarily and capriciously in not promlugating mandatory time limits.

We urge that the critical point here is this: Both congress and the Secretary looked long and hard at whether mandatory time limits should be imposed. Both concluded that mandatory time limits would tend to undermine the effective operation of the Social Security disability system.

QUESTION: I take it, Mr. McGrath, you acknowledge that the Secretary has the power to issues regulations imposing such effort.

MR. MC GRATH: Yes, we do, Justice Blackmun.

In that context, we urge that it was totally inappropriate for the District Court to overrule the policy choice made by Congress and the Secretary.

The Social Security disability system is a very complex management problem and there are three reasons for this. One is that the number of claims has been rapidly expanding. There were more than two million disability claims last year.

The second thing is that many of these claims present very difficult physical and mental and economic

issues, especially since many of the claimants themselves are unable to present their claims effectively because of their very situation.

And, third, and perhaps most troublesome as a management matter, the statute gives the Secretary three quite conflicting mandates. One is to pay claimants who are eligible as quickly as possible.

But, secondly, given the dollars involved in the program, it is equally important that claimants not entitled to benefits not be paid.

And, finally, the Secretary is under an obligation to conduct the program as fairly and accurately and uniformly as possible.

Over the last ten years, Congress and the Secretary have wrestled with how best to manage the program given these conflicting concerns. Each of them has considered on a number of occasions the imposition of mandatory time limits and each has decided against such imposition, even though they recognized that that would undoubtely result in faster decisions in many cases, they also recognized that it almost certainly would result in many more wrong ones.

First, I would like to focus on what Congress did. For one thing, Congress, on a number of occasions, has amended the Social Security Act in a manner that is

inconsistent with any intent to impose mandatory time limits, and I want to mention just two instances.

One is that when it established the Supplemental Security Income program, the SSI program, which is part of the Social Security system, it had put into the statute the same reasonable notice and opportunity for a hearing requirement.

In addition, however, in that case, it put in a 90-day requirement for ALJ hearings, but most interestingly, it exempted from that requirement disability cases.

It is our position that the inclusion of a 90-day requirement as to the SSI program, but the exemption from that of disability claims is clear indication that when Congress intended to impose time limits, it knew how to do so and did do so --

QUESTION: Mr. McGrath, in that connection did Congress do something about interim payments?

MR. MC GRATH: It has done something about interim payments in connection with the Title II program. Several years ago it imposed interim payments where a claimant's disability payments are being discontinued. It imposed such interim payments at the reconsideration stage and it is our position that Congress' imposition of interim benefits for that narrow class of disability

claims, Title II claims, is a further indication that Congress did not intend the broad kind of interim relief imposed by the District Court.

QUESTION: What is the present status legislatively of that interim program?

MR. MC GRATH: That interim program actually expires, I believe, at the end of this month, but starting next year some new rules apply at the reconsideration stage including hearings, de novo type hearings that were not required prior to this time.

QUESTION: Mr. McGrath, if the Court of Appeals in this case had granted relief only to the individual Plaintiff, Mr. Day, would you be here?

MR. MC GRATH: We would probably not be here in this sense, Justice O'Connor, that this case may not have been cert worthy and we may not have petitioned for cert. But --

QUESTION: Would the Court have had the power and authority in your view to order relief for an individual plaintiff in the nature of saying you have to complete your work within "X" number of days and, furthermore, you can have interim relief?

MR. MC GRATH: We believe not on the facts of this case. It is possible that you could have an extreme case where a claimant could prove that the Social Security

Administrator had simply put that case on the back burner, refused to act on it, and mandamus might be appropriate.

QUESTION: Well, do you agree that Section 405(b) gives a claimant a right to a hearing within a reasonable time?

MR. MC GRATH: No, Justice O'Connor, not in so many terms. We believe that the Secretary has a broad obligation to run the program as expeditiously as possible, but that that obligation also -- That overlaying that operation --

QUESTION: Well, does it impose an obligation of any kind on the Secretary to grant an administrative law judge hearing within a reasonable time?

MR. MC GRATH: It does on an overall basis. The Secretary is required, we believe and we concede, on an overall basis to try to conduct hearings as rapidly as possible. The problem is, as Congress --

QUESTION: Well, how rapid is that in Vermont?

MR. MC GRATH: In Vermont, it really --

QUESTION: In the face of the District Court findings of fact.

MR. MC GRATH: Well, if you look at the District Court findings of fact on -- Let's take administrative law judge claims, hearings, all the Court found was that in approximately 47 percent cases were not decided within 90

days.

QUESTION: I thought it also found that in Vermont there were enough administrative law judges to go around and the case load was pretty small and, therefore, it was easily handled within a 90-day interval, particularly because the errors that it found were simply errors of judgment, if you will.

MR. MC GRATH: At the ALJ stage, the Court did not rely on any errors. It just relied on the percentage of cases that took more than 90 days.

And, the problem is, as Congress has noted over and over again, many cases simply take a longer period of time to develop the facts. In many cases, perhaps the claimant has not really been able to make out a claim, but as Justice Brennan noted last year in the Campbell decision, the agency still has an obligation to try to develop the facts itself to see whether there is a valid claim. Many times that involves additional medical or vocational or other information.

In Day's case itself, he had not made out a claim. It was only after a quality review proceeding with the Social Security Administration that additional neurological tests were ordered which eventually resulted in his being able to establish a claim. That is the point.

As Congress most recently noted in 1982 in the hearing -- in the congressional report that accompanied one of the bills that eventually was enacted in '82, in many cases, take a longer period of time. And the problem with mandatory time limits is that they, by their very nature, are arbitrary and do not permit the additional work in cases where that work needs to be done.

QUESTION: Well, I guess the Court tried to fashion various exceptions to its order to cover most of those situations.

MR. MC GRATH: But, the problem with the Court's order is this: It does not recognize the dynamics of the situation. For example, the Court ordered that ALJ hearings be held within 90 days. This did not take into account that many times the administrative law judge would want additional medical or vocational information. He can't conduct the exams himself. He needs the help of others and frequently that takes time.

It did not take into account that many times the facts are difficult to come by and they are not acquired within 90 days. It did not take into account the fact that the facts change. We are talking about disability, on-going disability situations where the important thing is what are the facts at the time. And, many times at the administrative law judge stage those facts have changed

and that may not be apparent until before the hearing.

What the Court did is that Court said, well, yes, if it has been the fault of the claimant, then the 90-day period does not bar the Secretary. The problem with that is there are a whole host of other factors that could cause a delay and the Court did not take those into account.

QUESTION: Mr. McGrath, is the hearing de novo at the administrative law judge stage?

MR. MC GRATH: Yes, it is.

QUESTION: And, that is the second de novo hearing the claimant has had?

MR. MC GRATH: Well, the hearing at the -- What happens at the state level stage is not as full -- Is not as full an evidentiary hearing as it is at the ALJ stage.

QUESTION: It is characterized as a de novo hearing.

MR. MC GRATH: It is characterized as a de novo hearing because of the fact that it is a de novo review of the state's original finding, yes.

QUESTION: Has Congress ever considered whether it is really necessary to have, first of all, that many hearings and, secondly, two de novo hearings?

MR. MC GRATH: Well, Congress has considered that on a number of occasions and, indeed, as I indicated

in response to an earlier question, has actually required a new, so-called face-to-face hearing at the reconsideration stage, particularly in the case of claimants whose disability benefits are being withdrawn. And, I believe the theory was that as to those cases there is a particular concern that the case be made out as best as it can at an early stage so that a claimant can be kept on the disability system where he or she has come to rely on the Social Security.

QUESTION: What is the average case load of the administrative law judges?

MR. MC GRATH: The average case load of the administrative law judges is over 200 cases per administrative law judge. That average case load has been increasing over the last ten years. In fact, the number of requested hearings has gone from about 70,000 in 1974 to about 350,000 this year.

But, during that period of time, the Secretary has about doubled the number of administrative law judges from about 400 to about 800.

I think it is interesting that there are less than 500 sitting federal district court judges in this country today. There are almost twice as many administrative law judges coping with this load of cases.

QUESTION: Is there an overload in Vermont?

MR. MC GRATH: The situation in --

QUESTION: I mean, does the average law judge in Vermont have 200 cases?

MR. MC GRATH: The average caseloads are roughly comparable from state to state and from region to region. We have lodged with the Court the workload statistics of the Secretary.

QUESTION: Well, let's put it another way. You characterize the 90-day rule as being arbitrary, right?

MR. MC GRATH: Yes.

QUESTION: How do you characterize the present rule which, as I understand it, allows the law judge to take the rest of his life on a case.

MR. MC GRATH: Well, the --

QUESTION: How would you characterize that as to whether it is arbitrary or not?

MR. MC GRATH: Justice Marshall, I would not characterize the present situation as arbitrary for this reason. What the Secretary has done over the last ten years in the face of the tremendous increase in claims is to do a number of things which has resulted in a much more efficient system. Despite a five-fold increase in claims, today claims are heard as quickly as they were ten years ago, and, indeed, over the last five or six years, the average processing time has gone down substantially and

this hasn't happened by accident. It has happened through the addition of new judges. It has happened through management improvements, through computer techniques, systems, goals, and putting pressure on the ALJs to hear cases more quickly. And, the fact is ten years ago the average ALJ was issuing only 14 opinions per month. By last year, the average number of opinions per month was in the high 30s. That is an enormous number of judicial decisions per decider of cases I would submit.

QUESTION: Could it go high enough that it would take 20 years?

MR. MC GRATH: Well, the --

QUESTION: And, if so, would that be considered arbitrary?

MR. MC GRATH: I think if it were 20 years it would be considered arbitrary. But, if you --

QUESTION: I am not going to ask you what you would consider.

MR. MC GRATH: I think the significant thing --

QUESTION: May I ask you a question about the government's theory, because I must confess I think -- I tend to confuse two issues as I read -- The first issue is whether the statute was violated. Secondly, assuming there was a violation, was the remedy appropriate? It doesn't seem to me we reach the second question, we even

reach mandatory time limits unless we decide the statue was violated. What is your position on whether the statue was violated?

MR. MC GRATH: Our position is that the statute was not violated.

QUESTION: Then we don't have to talk about mandatory time limits, do we?

MR. MC GRATH: But, the problem is that in looking at whether the statute was violated, you can't really separate that from what the Secretary was doing. And, in our view, what the Secretary was doing was appropriate because the Secretary has broad discretion under this statute to decide how to manage it and obviously whether to impose mandatory time limits --

QUESTION: And, what you are saying -- I guess your position then is even if it takes 200 or 250 days to dispose of a case, that is not a statutory violation. Judges are busy. We take a long time some times.

MR. MC GRATH: No. What we would say is this. It may be that in an individual case, an individual claimant, because of the way he or she was treated by the agency, might be able to make out a claim that his or her rights were violated under the statute.

QUESTION: But, none of these plaintiffs did.

MR. MC GRATH: What happened here was the

findings of the Court was on a broad class basis.

QUESTION: Right.

MR. MC GRATH: By the time the District Court issued the order here, the claims of the individual plaintiffs had been taken care of. The whole point of this case is that it was a class-wide order in which the judge made a decision based on the whole operation of the statute in Vermont. And, what the Court was addressing was not whether individual Claimant "A" has not gotten relief from the agency. Two hundred and fifty days has gone by and you can see under the facts of that case that that was unreasonable because no additional medical evidence was needed, no additional vocational evidence was needed, and there was no excuse.

That wasn't what the District Court did. What the District Court did was to look at the length of time that ALJ hearings were taking, found that in roughly 40 some percent of the cases they were taking more than 90 days and from that fact alone issued relief. At the reconsideration stage, the Court looked at some docket entries type information about 70 some odd cases, concluded that the docket entries did not explain why there were periods of time between different events and also noted that roughly 40 percent of cases took more than 90 days and concluded from those facts alone that the

statute was violated and that mandatory time limits were necessary.

QUESTION: And, your view is that even as to those 40 percent there is no statutory violation.

MR. MC GRATH: There is no statutory --

QUESTION: If that is true, we don't really have to address all this other stuff.

MR. MC GRATH: Well, that is our view; that as to the 40 -- the statute is not violated and that that is the clear --

QUESTION: What if we concluded that there was sufficient evidence to support the conclusion that there was a violation? Then what would the appropriate remedy be?

MR. MC GRATH: The appropriate remedy would depend on --

QUESTION: Could there be class-wide relief?

MR. MC GRATH: The appropriate thing here would be whether it was appropriate for the District Court to issue the kind of management order that it did --

QUESTION: Well, I understand. You object to this remedy. I am asking you, if we concluded there was a violation, what would the appropriate relief be in your view?

MR. MC GRATH: The appropriate relief in our

view would be to consider cases on a case-by-case basis.

QUESTION: In other words, there should be no class-wide relief.

MR. MC GRATH: There should be no class-wide relief.

QUESTION: Even if there is a class-wide violation?

MR. MC GRATH: Even if there were a class-wide violation which obviously we don't concede.

QUESTION: Is the Administrative Procedure Act relevant here at all?

MR. MC GRATH: The Administrative Procedure Act was raised in the complaint here. It was not a basis of either the District Court or the Court of Appeals decision.

QUESTION: Well, it may not be, but that has some reasonable requirements, doesn't it?

MR. MC GRATH: It does. And, our position on that is basically this, that the reasonableness requirement in the Administrative Procedure Act is essentially, for purposes of this case, no different from the reasonableness requirement in the Social Security Act; that the Administrative Procedure Act talks about reasonable times given the status of the parties and that really you have to look at the same --

QUESTION: What kind of remedies have been issued in individual cases under the Administrative Procedure Act or do you know of any?

MR. MC GRATH: Typcially, under the Administrative Procedure Act, the individual remedy is either an order to the agency to proceed more quickly or, if the individual actually has been found to be eligible, an order requiring whatever the benefits are.

QUESTION: Are there -- Did you say the plaintiffs have been paid or are their cases over?

MR. MC GRATH: Their cases have long since been dealt with. The only live issue here is as to the class, that is correct.

QUESTION: Well, as to the class, but is there any problem of mootness?

MR. MC GRATH: Although the government has argued in a number of these cases in the lower courts that the case was moot or raised mootness issues, the courts have held the case is not moot for this reason. At the time the class was certified, the claims of the class plaintiffs were still live and it was held, since basically what is being decided here is not the merits of individual claims, but rather the ancillary question of how those claims should be dealt with as a procedural matter, that it was appropriate under various decisions of

this Court for the Court to consider the case.

QUESTION: That is quite contrary to that Jacobs versus Indianapolis case that we decided in '74 or '75.

MR. MC GRATH: And, that is the reason why the government below did argue that the case was moot. We do not raise that here because of the findings of --

QUESTION: Well, it is a jurisdictional case.

QUESTION: No party has to raise it. It is here if there is any substantial claim of it at all.

MR. MC GRATH: Well, the on-going part of this case is that -- is solely as to class members who in the future will be able to say I did not have my claim processed within 90 days. The issue is whether they receive interim benefits or not.

QUESTION: And, they have not presently been denied anything.

MR. MC GRATH: Well, of course, this order now has been in effect for several years and what has been happening is that on a few occasions where the processing went beyond 90 days interim benefits were permitted. So that it is now kind of an on-going thing. There is probably nobody whose claim is now being considered in Vermont where it was the same claim that was pending back when the District Court was considering this claim. There may be some of the same individuals because claims can be

denied, disabilities can disappear. But, as an on-going matter, none of the people who are now affected by the order, at least none of the claims now affected by the order were live at that time.

QUESTION: Going back to the situation of what remedy the Court could impose in a class action situation, if it determined on the basis of the facts that the delays were unreasonable, in the Sixth Circuit, I think it was, the Court there, as a matter of relief, said, well, we won't impose arbitrary timeliness, we will just order that the Secretary develop some reasonable time limits to take care of these cases and the government opposed that as well, is that right?

MR. MC GRATH: The government did oppose that.

QUESTION: Now why?

MR. MC GRATH: That was the Blankenship case. At the same time as the Court there ordered that the government impose mandatory time limits in regulations, virtually the same month, Congress, by statute, required the Secretary to submit a report as to what time limits might be appropriate and ordered the Secretary to take into account such considerations as timeliness on the one hand and the need to consider claims thoroughly on the other hand. The Secretary, at the same time as he was considering what to submit to Congress, was considering

what to do in the Blankenship case, the Sixth Circuit case.

The Secretary concluded in both instances to urge that time limits were not appropriate, because after the extensive rule-making process that had concluded, the Secretary concluded that the imposition of mandatory time limits would be inconsistent with the effective operation of the statute, submitted that report to Congress.

Congress, in 1982, did not adopted mandatory time limits. Instead, it is clear from the committee reports that accompanied other legislation which Congress did adopt that Congress concluded that mandatory time limits would be inappropriate because -- And the main thing they emphasized is that individual cases may vary greatly and that in many cases you do need additional information and mandatory time limits are arbitrary in the sense that the tend to ignore that consideration.

The congressional reports also indicated, and this, I think, is perhaps even more important, that mandatory time limits can result in more incorrect determinations. And, the problem with incorrect determinations is not just that people will be paid that shouldn't be paid. The perhaps greater problem is that people won't be paid who should be paid and that creates a severe problem, because in these cases many of the

claimants really are not capable of effectively presenting their claims. Most of them, the vast bulk of them, are not represented by counsel and the burden, however, is on them to establish their claim. And, if they can't do it, the claim is denied.

If an arbitrary time limit is imposed and at that point the Secretary has to act, the claim will get denied and then the problem is they have to go to court and even though they may get a reversal in court, the statistics show that the federal courts today are taking two to three times as long as the Secretary is at the ALJ stage to hear these cases.

So that imposing mandatory time limits -- I think the biggest problem with the District Court's order is that it may, in fact, result in many claims being denied that should have been granted and then many of those claimants going to court and even if they win in court, it will have taken a much longer time for them to receive benefits.

QUESTION: So, you would just leave this whole question to mandamus?

MR. MC GRATH: I would say leave it to mandamus in individual cases because here both Congress and the Secretary have looked at this question so carefully. So many administrative improvements have been made under the

statute. There are serious problems with the kind of order issued by the District Court and since, under those circumstances, I do not believe it could be held that the Secretary's decision not to impose mandatory time limits was arbitrary.

Since the Secretary has such broad statutory responsibilities under the statute, we urge that the order of the District Court should be reversed and the case dismissed.

QUESTION: Can you think of other examples where we may have held that class action relief simply isn't possible and that we have to order individual claimants to resort to mandamus?

MR. MC GRATH: I cannot --

QUESTION: Because the Court has no inherent power or it would be an abuse of discretion to grant any class action.

MR. MC GRATH: I do not offhand know of another situation.

We are not saying here that there would be no conceivable factual situation here in which a class-wide order would have been appropriate. What we are saying here is that given the history, the close congressional consideration, the careful scrutiny by the Secretary, and the fact that the Secretary over the years has done a wide

variety of things to make this whole process more efficient, that in this context class-wide relief is inappropriate because the Court was wrong in deciding that the Act was violated.

CHIEF JUSTICE BURGER: Mr. Munzing?

ORAL ARGUMENT OF RICHARD H. MUNZING

ON BEHALF OF THE RESPONDENT

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

As the record and results of this case show, entrenched, unnecessary delays do not need to be apart of the disability insurance appeal system.

The District Court, as affirmed by the Court of Appeals in this case, engaged in the most basic of judicial functions.

As counsel for the Secretary admitted, the Court viewed the facts of the case and determined that disability insurance claimants in Vermont were routinely being deprived of the right to reasonably expeditious administrative appellate action that the Secretary is mandated to provide, together with other statutory goals, by 205(b) of the Social Security Act.

As a consequence, the District Court, pursuant to its traditional, flexible, remedial, equitable powers fashioned a balanced, meaningful remedy that compelled

expeditious processing that was within the Secretary's capacity, that did not cause extra cost to the Secretary, and that did not harm other statutory goals such as quality and accuracy in decision making.

QUESTION: How significant do you think it is, Mr. Munzing, that Congress addressed this problem on a number of occasions and decided that arbitrary time limits were not feasible?

MR. MUNZING: Your Honor, I think that in virtually every instance where Congress has amended the Social Security Act in recent years in the disability programs, in SSI and in disability insurance, vitually the primary factor prompting Congress' interest has been the problem of lengthy, unnecessary delay. Virtually every action Congress has taken has been, at least in part, in the hopes of getting the Secretary to be able to deal with and eliminate this problem.

Indeed, on many occasions, the Secretary has represented to Congress that the disability delay problem is well in hand and would shortly be resolved.

So, I hardly think we can say that either Congress has not been interested in curing the delay problem or that Congress has been made fully aware that the Secretary does not have the capacity alone to deal with the problem.

QUESTION: But, the one remedy that Congress didn't impose in the disability field was a flat time limit.

MR. MUNZING: We don't dispute that, Justice Rehnquist, but what the Court did here, in the absence of fixed time limits, but with the mandate to provide hearings within a reasonable time, was to engage in a fact-specific analysis of the circumstances it found in Vermont.

As this Court noted in Fusari v. Steinberg, the Connecticut unemployment delay case from 1975, any statutory requirement embodying notions of timeliness, accuracy, and administrative feasibility will inevitably generate fact specific applications.

QUESTION: Well, supposing, in fact, the system of processing disabilities is running pretty much the same all through the country; that the delays in Vermont are no different than anywhere else, then I suppose the people who go to court in Vermont and perhaps people who go to court in Oregon are going to get this kind of relief, but people who don't go to court in other states are going to be left off the band wagon.

MR. MUNZING: Well, that is where the fact-specific analysis, the analysis of the factual record developed before it by the District Court lead the Court

to find that there were differences in Vermont from elsewhere. And, indeed, there was nothing put into the record by the Secretary to show that the causes of delays elsewhere or the circumstances of delays elsewhere -- What the Court found in Vermont, first of all, was that the Secretary, since January of 1978, had a goal of processing all cases within 90 days. That was almost a year before this case was even filed.

The record also showed the District Court that since 1977 the Secretary was processing SSI cases and Title II cases, or it was supposed to be processing them within this 90-day goal.

In other words, the Secretary herself provided the District Court in Vermont with an objective criterion against which the plaintiffs' allegations of unreasonable delay could be measured.

QUESTION: But, the fact that the Secretary set the goals that are not, in fact, conformed to by the ALJs doesn't make that kind of objective factor, at least so far as I can see, automatically translate into mandatory time limits.

MR. MUNZING: But, it wasn't just the fact that the Secretary, through these goals, supplied the Court with this objective criterion against which to measure unreasonableness. The Court also found in the factual

record that even though she had the goals she was not complying with them in nearly one out of every two cases.

The Court found that of all the claimants who perservered to reach the fair hearing level, fully 56 percent of them turned out to have been disabled all along.

QUESTION: Well, the Court found the Secretary wasn't complying with a goal. Really the Court found the Secretary wasn't meeting the goals. I mean, there wasn't an arbitrary or kind of willful failure to comply, was it?

MR. MUNZING: No, I don't believe so. But, the interesting thing is that with the impetus of the Court's remedial order the Secretary discovered a capacity to achieve the goals that previously she had articulated but had not been able to achieve without having to move additional resources into Vermont from elsewhere, without harm to claimants elsewhere, without harm to other statutory goals by fashioning a flexible, balanced, effective, injunctive remedy.

QUESTION: Mr. Munzing, my problem is that the 90-day limit applies equally to the sparsely populated district of Alaska and a rather heavy populated southern district of New York. They are a little different.

MR. MUNZING: I thnk -- They are a little different and that is why we say that to address these

problems with a state-wide class a District Court judge is bound to analyze the specific facts within that district to ascertain whether the general reasonableness requirement is violated. We maintain that --

QUESTION: They can do that now if we uphold the order in this case? Can the district judge in Alaska say I will give you 91 days?

MR. MUNZING: I think in --

QUESTION: Yes or no?

MR. MUNZING: Yes. I think inherent in the notion that the facts determine unreasonableness --

QUESTION: So, this order does not have nationwide repercussions?

MR. MUNZING: I don't believe so, Your Honor.

QUESTION: You don't? Okay.

QUESTION: Let me ask you a hypothetical question that might shed some light or might not. You are familiar with the Speedy Trial Act that was passed by Congress in relation to criminal prosecution in recent years? You are generally familiar that Congress did that? Suppose a district judge, becoming impatient with cases not being brought to trial and disposed of rapidly entered an order, all criminal cases must be brought to trial within 90 days. In other words, entered an order that essentially what the Speedy Trial act is now and said any

indictment not persued with trial in that 90-day period would be dismissed. Does the district judge have the power to do that?

MR. MUNZING: Your Honor, I guess I am not familiar enough with the Speedy Trial Act to -- I suspect the answer is not, but I think that situation could be distinguished from what happened in Vermont.

For one thing, the 90-day time frames that are in place in Vermont now have been for about three years and have resulted in virtually uniform compliance. There has been one violation in the entire three --

QUESTION: That doesn't go to the question of the power and authority of the court. It may be a very good thing.

My question is addressed to the question of whether or not a court had the power to establish time limits which Congress expressly rejected.

MR. MUNZING: I think if Congress expressly rejected time limits and the court imposed them, it would be acting inconsistent with Congress. But, we do not -- We maintain that there is nothing inconsistent with the failure of fixed time limits to exist within the Social Security Act with the actions of the court below.

For one thing, the time limits are not written in stone. They were, in the words of the Second Circuit,

crafted with an eye to the Secretary's concerns. There are exceptions.

Again, from the factual record, the District Court learned that the Secretary's major concern at the reconsideration level was that her disability determination people would have sufficient time to be able to develop enough medical evidence to do accurate decisions.

At the hearing level, the Secretary's major concern, as articulated to the District Court, was that ALJs would have sufficient time to be able to deliberate to ensure accurate decisions and, if necessary, to schedule new consultative examinations if the ALJ perceived that new evidence needed to be generated.

The District Court order excepted both of those circumstances from the time frames, thus responding directly to the Secretary's concern that time limits might have some adverse impact on the quality of decision making.

QUESTION: Mr. Munzing, Mr. McGrath has told us that these arbitrary time limits are going to cause claims to be denied that are meritorious. There is not enough time to process them properly. Has that been demonstrated?

MR. MUNZING: I respectfully disagree, Justice

Stevens. The exceptions ensure, in fact, that that exactly does not occur.

QUESTION: Well, he just made it up out of the blue in other words?

MR. MUNZING: Well --

QUESTION: At least there is no record support for it, I guess.

MR. MUNZING: I don't find any. That is exactly what -- That concern is exactly what the exceptions are designed to address and, in fact, that is exactly what they do address in practice.

QUESTION: And, we have had how much experience, about three years' experience?

MR. MUNZING: The Court's preliminary injunction as to the hearing phase delays issued in December of 1980 through the end of the first quarter in 1983, as the appendix to our brief indicates, there had been but one violation in that two and a quarter year period.

QUESTION: But, I mean, what is the evidence on his suggestion that when they are hard pressed the ALJs will simply deny meritorious claims?

MR. MUNZING: The order merely requires that ALJs schedule hearings within 90 days which the Secretary told the District Court she had the capacity to do without moving resources into Vermont to the detriment of

claimants elsewhere. The ALJ is left unlimited time post hearing to develop a case, to deliberate upon a case to ensure an accurate decision. All it is is a docketing order, not a decision order.

QUESTION: As I look at the record, the case of the case of Leon Day, the particular case, would appear to be the sixth time the matter was considered when the District Court acted finally. Now, can that be correct?

MR. MUNZING: Yes, Your Honor. Mr. Day went through the process, exhausted the entire administrative appeals process, went to District Court in an individual claim, had it remanded back down for a second hearing which ultimately was approved by the Appeals Council. The case took three years, which, I submit, hardly says anything about accurate and quality decision making by the Secretary.

QUESTION: But, very many of the people in Mr. Day's situation take six hearings. That probably has some bearing on the fact that these hearings take more than 90 days.

MR. MUNZING: Well --

QUESTION: If everybody in Vermont who has got a claim gets six shots at this target, I can understand why they have a lot of delay up there.

MR. MUNZING: The interesting thing about that

though is that the first five bites of the apple he had the Secretary erred, because it ultimately turned out that he was disabled all along.

The facts of his case illustrate the point that delay in Vermont, as the District Court found it, was unnecessarily lengthy and thereby unreasonable and in violation of the statute.

As the Court probably knows, there is a reconsideration level that a claimant must exhaust before he can even go to hearing which is solely a regulatory creature that the Secretary, in her administrative wisdom, has imposed. We don't dispute the right of her to do that.

It took Mr. Day six months just to get a reconsideration deterination through no fault of his own, through agency error, and then after he finally got an adverse reconsideration determination in error as it turned out, and he requested his hearing, another six months went by before he got his hearing, again, through no fault of his own, through agency error only.

It is our position that these kinds of facts, and they are typical of the facts endured by the class, justified the District Court, in a fact-specific analysis situation, interpreting a statute, to find that that statute was violated.

QUESTION: Mr. Munzing, could the District Court have certified a national class? Would it have had authority to do so?

MR. MUNZING: The government's argument almost makes it seem like the government would have preferred that in some ways. But, I think if this had been the first case to come along, as the Court's decision in Califano v. Yamasaki shows, a nationwide class would have been within the discretion of the District Court.

In point of fact, it would not have been a practical consideration in this case, because there already existed --

QUESTION: My question was as a matter of power, would the District Court have had the authority to certify a national class?

MR. MUNZING: But -- I guess by excluding those districts where orders were already in effect, it would have had the power to do so. And, of course, ultimately the factual record would have been far more massive than the factual record that needed to be addressed relating to the Vermont class in this case.

QUESTION: How long was this case before the District Court? When did you file this suit?

MR. MUNZING: The action began in 1978 and the District Court's final judgment order was in 1981.

QUESTION: Two years?

MR. MUNZING: Two to three years, yes, Your Honor.

QUESTION: Did the district judge think that was unduly long?

MR. MUNZING: The reason it took unduly long, if that is what it was, was because the Court wanted to make sure that it took sufficient time to understand the process, not rushing to judgment before it issued a remedial order in favor of the wrong claimants.

QUESTION: Do you think a new administrative law judge would have a similar problem?

MR. MUNZING: I believe the Secretary actually have procedures to ease new administrative law judges into the process at less a rate of productivity than experienced administrative law judges.

QUESTION: Could the Court of Appeals have, in its judgment, ordered all District Courts in the jurisdiction of the Court of Appeals, to decide these cases in 90 days?

MR. MUNZING: I think that would have been an abuse of its power reviewing the District --

QUESTION: Why would that have been abuse of power?

MR. MUNZING: I think the Court of Appeals would

have been limited to reviewing the record of the case that came up before it.

In point of fact, the Second Circuit has reviewed a number of other cases from New York and Connecticut.

QUESTION: Impose arbitrary limitations on District Courts with respect to deciding cases?

MR. MUNZING: The Second Circuit has affirmed other District Courts that have found the Secretary to be in violation of the Act elsewhere.

QUESTION: That is quite different from the question I asked though, isn't it?

MR. MUNZING: I am sorry, could you repeat it?

QUESTION: My question was whether, in view of the problems of delay that properly concern you, and I don't denigrate the importance of the issue at all, but in order to accelerate the process, as a matter of power, could the Court of Appeals have said that this is such a wholesome order, according to the Vermont issue, that we are going to make it circuit wide applying it to New York, Vermont --

MR. MUNZING: I don't think it could have in light of the fact that it was reviewing a Vermont record and it didn't, in that review, have knowledge that the delays were unnecessary and thereby unreasonable

elsewhere. If it did have that knowledge, perhaps it could.

QUESTION: So, this has to be done on a state-by-state basis.?

MR. MUNZING: It dosn't have to be, but in this case it was and the test for whether a District Court's injunctive discretion, equitable discretion, should be limited is whether there exists a valid legislative command. We submit that there is no valid legislative command that precludes courts from protecting claimants in implementing the timeliness provision inherent in Section 205(b) of the Act.

Absent such a command, the test for this Court on Review should be whether the District Court abused its discretion. Clearly, I submit, it did not because it balanced all of the Secretary's concerns against the needs of the claimants that this remedial statute is designed to protect and it achieved compliance with the Act in a timely fashion without injury to other statutory goals and without harm to claimants elsewhere.

I also want to emphasize from the factual record that the District Court -- The Secretary specifically told the District Court that she had the capacity to comply with its order in Vermont without the need to adversely impact on other statutory goals or on the rights of

claimants elsewhere.

QUESTION: Is the order -- is the report that the Court ordered to be filed as to how the remedy was to be implemented, is that in the record?

MR. MUNZING: Yes, it is, Your Honor.

QUESTION: And, has that report ever been modified at all?

MR. MUNZING: Well, what is in the record --

QUESTION: The implementation of the plan.

MR. MUNZING: No, it has not been changed at all.

We submit that if the Secretary finds that changed circumstances -- and they would have to be changed, because she had the capacity to comply at the time the District Court order issued -- if change --

QUESTION: Where do we find that statement that she had the capacity?

MR. MUNZING: In the initial interrogatories in the Joint Appendix you will find that the plaintiffs asked the Secretary how many ALJs she had working in Vermont? The answer was three. How many ALJs are needed in Vermont to comply with your own 90-day goal? The answer was three. And other materials in the Joint Appendix will show that, will support that.

As to the --

QUESTION: Well, is there in the record any explanation as to why those goals, those 90-days goals were not being met even though there were three administrative law judges that the Secretary apparently thought were adequate?

MR. MUNZING: I submit to you, Your Honor, that --

QUESTION: Did the Court identify any reason, the District Court?

MR. MUNZING: Also in the record you will find a report from the Secretary's own quality assurance review people and they found that in almost every case lengthy cases to process were caused by lack of basic adherence to sound development practices and lack of timely follow-ups to request for medical information.

It it unfortunate, but what happened in Vermont was that it took the impetus of a judicial order to enable to the Secretary to discover the capacity to process cases within a reasonably prompt time frame that she had articulated that she had the capacity all the time and, in fact, she did have the capacity all the time.

QUESTION: Mr. Munzing, am I correct that all the order requires is that a hearing be held?

MR. MUNZING: That is correct.

QUESTION: It doesn't say it has to be decided

within 90 days.

MR. MUNZING: That is correct. Let me differentiate though, the reconsideration phase --

QUESTION: You are going to differentiate plain English? That is what it says.

MR. MUNZING: Hearings are required to be scheduled only within 90 days, correct.

QUESTION: Right.

MR. MUNZING: Reconsideration --

QUESTION: And, what is the limit on how long he can hold it sub judice?

MR. MUNZING: There is no limit. The Secretary can take as much time as she needs to render an accurate --

QUESTION: Twenty years?

MR. MUNZING: I think a claimant who had to wait 20 years would probably have a good presumption working that the processing was not proceeding in the normal and proper fashion.

I think good faith is at issue in that kind of circumstance. What the District Court did was simply left to the Secretary, in her administrative capacity, the right to make cases to ensure thoroughness and accuracy of decision making.

QUESTION: Well, who decides -- When there is a

request for reconsideration, who decides that request?

MR. MUNZING: The Secretary contracts in the individual states or most of them anyway --

QUESTION: Those are not ALJs.

MR. MUNZING: No.

QUESTION: So, there are two parts to this case, I take it. One is the reconsideration stage and the other is the hearing stage, is that right?

MR. MUNZING: That is correct.

QUESTION: Now, did the Secretary admit or represent that she had the capacity to comply with the Court's 90-day order on reconsideration?

MR. MUNZING: No. But, what the Secretary -- That is why the District Court, although it issued its preliminary injunction as to hearing delays in 1980, it waited another year before issuing its final judgment order and also finding that reconsideration delays were unreasonable, because it conducted additional factual development. It denied summary judgment a couple of times and required additional factual development to find out the reasons why the reconsideration delays were occurring. And, it found that they were not being done within a reasonably prompt time because of such factors as I have already enumerated, lack of adherence to sound development practices, lack of --

QUESTION: Then I understand that the order here is not the order that is here.

MR. MUNZING: No. There is just two aspects of it.

QUESTION: Then why isn't it in the record?

MR. MUNZING: No, it is in the record. There are two aspects of the order. One enjoining delays at the reconsideration phase, one enjoinging unreasonable delays at the hearing phase of the process.

QUESTION: We have got to go to the record to look for them?

MR. MUNZING: They are in the judgment order itself which is listed --

QUESTION: The judgment order only applies to the hearing.

MR. MUNZING: The judgment order applies to both hearings and reconsiderations.

QUESTION: On what page?

(Pause)

MR. MUNZING: I am sorry, I can't direct you to this immediately.

QUESTION: That is all right, I will find it.

QUESTION: It is on page 32A, 32A of the petition.

MR. MUNZING: That would be the appendix to the

petition.

QUESTION: That is right.

QUESTION: 32A is it?

QUESTION: I notice that the district judge took three years, something over three years to decide this case himself. I suppose we can assume that he had other cases to decide in the meantime too.

MR. MUNZING: Yes, I think that is a good assumption, Justice Brennan.

QUESTION: Does the record show anything about other cases, what the number of cases that were decided in a way that you would regard as prompt or does the record concentrate just on the cases that took an undue length of time in your view?

MR. MUNZING: Well, I would submit that average delay certainly -- average delay that might seem somewhat expeditious. It certainly is no solace to those persons on the high end of the mean who suffer unreasonable lengthy delay.

Mr. Day, from the time he initiated his reconsideration, waited 340 days just to get his hearing scheduled.

In a remedial scheme like the Social Security Act Disability Insurance Benefit Program, I think Congress intends that all claimants should get expeditious action,

not just half of them.

As the undisputed record and the results of this case show, successful results were achievable in this case. Unnecessary delay was eliminated and did not need to be an entrenched aspect of the system. And, the statutory purpose could be furthered without additional cost to the agency, without impact on the needs of claimants elsewhere and without harm to other statutory goals.

In Vermont at least the Secretary's administrative appeal system now runs smoothly, the way it should, and justice is no longer denied through unnecessary delay.

QUESTION: What was the remedy, if any, that was issued in those prior cases in the Court of Appeals like the White case?

MR. MUNZING: The White case required hearing decisions within 120 days of request.

QUESTION: And, how about the other one? What was that, Barnett?

MR. MUNZING: Barnett, 90 days to hearing, similar to this one.

QUESTION: And, that was -- Those cases purported to be implementing the reasonable time requirement in the statute?

MR. MUNZING: Correct, Your Honor.

QUESTION: Now, had those cases been decided when Congress was amending the Social Security Act?

MR. MUNZING: Well, those cases were decided before --

QUESTION: I see the Court of Appeals says that Congress must have been aware of these cases, and when they turned down specific time limits, they were aware of these cases. And, hence, Congress is going to leave it to the Courts.

MR. MUNZING: That is our position, Your Honor. Congress was, in fact, aware of the time limitations that certian courts had imposed and took no action to repudiate them. There was no clear and valid legislative command saying that courts could not do that.

MR. MUNZING: And, your position is Congress must have thought that these cases represented and acceptable implementation of the reasonableness requirement?

MR. MUNZING: Drawing inferences from congressional silence is always treacherous, but, yes, I think that is a reasonable inference.

QUESTION: You are as entitled to be as treacherous as the government.

(Laughter)

MR. MUNZING: Certainly there is nothing at the level of a clear, valid legislative command precluding that kind of traditional, flexible, equitable relief.

The interim payment device as well shows the same kind of accommodation toward the Secretary's concerns. In the first place, the interim payments, which we submit are not benefits but merely another aspect of the court's flexible equitable powers, ensure compliance. They are a yardstick to measure compliance. They give the Secretary an undeniable financial incentive to comply and, in fact, they have worked in Vermont, because there has only been on violation in the --

QUESTION: I gather intermim payments apply only in terminated cases?

MR. MUNZING: No, Your Honor, that --

QUESTION: Also in initial --

MR. MUNZING: Yes.

QUESTION: When one initiates a claim may there be immediate interim payment?

MR. MUNZING: Well, only after unnecessary -- unreasonable delay where none of the exceptions apply. That could conceivably happen. In practice, it does not, because the Secretary does comply because of that incentive device.

CHIEF JUSTICE BURGER: Your time has expired,

Mr. Munzing.

MR. MUNZING: Thank you.

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

MR. MC GRATH: Yes, I do, Mr. Chief Justice.

ORAL ARGUMENT OF J. PAUL MC GRATH, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. MC GRATH: I believe -- I wanted to make one principal point. As I said at the outset, the question here is what did Congress intend? And, I think if you look at the legislative history of the last few years, you cannot come away with the conclusion that Congress intended mandatory time limits. To the contrary, I think you --

QUESTION: Well, the certainly didn't intend themselves impose it, but it is another question of whether they were willing to put up with what the courts were then doing to implement the reasonableness requirement.

MR. MC GRATH: It is another question except that I think the congressional record answers that question also, Justice White, because Congress over and over again said in their reports, things like the report we quoted at pages 29 to 30 of our brief which was that they were very concerned that mandatory time limits would

ignore the fact that Social Security disability cases tend to vary greatly from case to case.

QUESTION: In answer to my first question at the start of your argument you conceded that the Secretary had the ability to impose mandatory time limits.

MR. MC GRATH: Yes, Justice Blackmun.

QUESTION: How does that tie in with your statement just now that Congress was otherwise inclined?

MR. MC GRATH: The Congress was very concerned about mandatory time limits and I think that indicates what Congress meant by the reasonableness requirement under the statute and whether a court could read into the statute more of a requirement of expedition than Congress intended to put there. That is not to say, however, that the Secretary, in her discretion, could not conclude that time limits of some sort were appropriate, perhaps different time limits for different parts of the country. The Secretary, however, independently, operating under the authority in Section 205(a) of the statute, concluded that such time limits were not appropriate.

And, what we have here, however, is the worst of all possible worlds. We have different courts issuing different kinds of orders, different time limits, different requirements. As we have shown in our reply brief, this has required in some states the allocation of

resources from other states.

QUESTION: Mr. McGrath, may I interrupt you for just one question? Has your oponent fairly characterized the experience in Vermont under the particular order we are reviewing?

MR. MC GRATH: Absolutely. The Secretary has been able to comply with the time limits, probably would be able to comply with any time limits, because all the Secretary has to do at the reconsideration stage is make a decision. Decisions would be made. There will just be many more wrong decisions and that really is a part of our point.

QUESTION: Do you submit that your experience during the last three years supports your suggestion that there have been a lot of wrong decisions in Vermont?

MR. MC GRATH: We cannot, on the basis of the experience in Vermont, state a factual conclusion one way or another as to that.

QUESTION: Why should we assume they would make wrong decisions? I don't quite understand that.

MR. MC GRATH: Well, we assume it for this reason.

QUESTION: If you have got the time -- If you only need 90 days and you can do it in 90 days, why won't they decide these things -- Most of them are not all that

difficult.

MR. MC GRATH: Many of them are not. In fact, of the two million claims a year, the vast bulk of them are decided even before they get to the reconsideration stage. It is only a declining fraction of cases that take more than the mean 68 days that, indeed, was the experience in Vermont. And, the reason we conclude as to those case there is a problem is that based both on the lengthy hearings and reports in Congress and on the findings of the Secretary based on all of past Secretaries' experiences, they concluded that there was a problem with mandatory time limits, which problem is essentially that it would undercut the overall goal of thoroughness and accuracy. And that really is the record basis that we rely on.

Thank you very much.

CHIEF JUSTICE BURGER: Thank you, Gentlemen, the case is submitted.

We will hear arguments next in Heckler against Mathews.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-1371 - MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner v. LEON S. DAY, ET AL.

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

BY _____

(REPORTER)