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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1097

TITLE MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner v. SANDRA TURNER, ET AL.

PLACE Washington, D. C.

DATE October 9, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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MARGARET M. HECKLER, SECRETARY :
OF HEALTH AND HUMAN SERVICES, :
Petitioner, :
v. : No. 83-1097
SANDRA TURNER, ET AL. :

- -x

Washington, D.C.

Tuesday, October 9, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:16 o'clock p.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the petitioner.

MARK N. AARONSON, ESQ., San Francisco, California; on behalf of the respondents.

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 next in Heckler against Turner.

Mr. Phillips, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court, this case concerns the proper interpretation of Section 402(a)(7) and (8) of the Social Security Act, which is a provision in the Aid to Families with Dependent Children statute. Specifically at issue is the proper way to treat mandatory payroll withholdings from salary, primarily income taxes, in determining a working AFDC recipient's eligibility for or level of benefits.

Although the AFDC scheme is no stranger to this Court, in order to understand the narrow legal issue involved here, a brief statutory history may be helpful.

As this Court has recognized, the statute basically embodies the notion of cooperative federalism. The state determines the level of need, and determines the level of benefits. But in providing those kinds of benefits to AFDC recipients, the state is

obliged to comply with a variety of requirements embodied in Section 402 of the statute.

QUESTION: Mr. Phillips, are you going to tell us the government's view of the new statute? What do we decide in this case?

MR. PHILLIPS: Well, it seems to me that the new statute has ratified the Secretary's interpretation of the 1981 --

QUESTION: Well, makes gross income certainly for the future, doesn't it?

MR. PHILLIPS: Yes, Your Honor, and I think it --

QUESTION: And is there any dispute as to the past?

MR. PHILLIPS: I think -- well, there is no dispute in my mind that the Congress recognized that the Secretary's interpretation of the structure of the statute has always been correct from 1981 through 1984.

QUESTION: Back to my initial question. Why should we be talking about this case?

MR. PHILLIPS: Well, there is still a substantial amount of controversy with regard to the period --

QUESTION: About what?

MR. PHILLIPS: Subsequent to the enactment in

1981, and before the injunction was issued in this case, there is a claim for retroactive benefits by state AFDC recipients in California.

QUESTION: Why shouldn't we just apply the statutory law the way it is now? The case isn't final yet. Isn't the usual rule we just apply the law as it presently stands until the case is over?

MR. PHILLIPS: I don't know that that -- well, that would be perfectly satisfactory to us, Your Honor.

QUESTION: Well, I know, but why aren't you making that argument?

MR. PHILLIPS: Well, it seemed to us somewhat unfair to deprive individuals of their rights. In fact, Congress had changed the statute, and had intended to do so prospectively. In our view, Congress meant to do it retrospectively, and therefore it is not an issue.

QUESTION: They didn't say it was prospective, did they?

MR. PHILLIPS: No, Your Honor, they did not.

QUESTION: Usually there is a presumption that the Court applies the law in effect when the case is still open, the final version of the law that is in effect.

MR. PHILLIPS: Yes, Justice Rehnquist, that is correct. And we would be perfectly content to stand on

that, but we do think that there is still an issue with regard --

QUESTION: Would it make more sense, Mr. Phillips, for us to send this back? Where is it from? The Ninth Circuit? And tell them to wrestle with it first? Why should we?

MR. PHILLIPS: Well, I don't believe that there is nearly so much to wrestle with any longer. Congress has made quite plain --

QUESTION: Well, even if there isn't, why should we? Why shouldn't we let them do it?

MR. PHILLIPS: Well, the reason the agency has asked to have you do that is because we have a substantial number of these cases pending in various circuits. This case is presently before the Court ready for final disposition --

QUESTION: Well, if you apply --

MR. PHILLIPS: -- and will remove -- it will presumably save the Court a tremendous burden, and the lower courts.

QUESTION: If you apply the statute as it is amended, it is not much of a struggle, is it?

MR. PHILLIPS: It is not a struggle at all in my mind. I think Justice Rehnquist's order lifting the injunction made clear that effective July 18th, Congress

has unambiguously ordered the Secretary to --

QUESTION: Well, they didn't just apply it to cases that are still to come.

MR. PHILLIPS: Nothing in the statute -- well, I mean, the statute became effective July 18th.

QUESTION: Well, I don't know. That's the current law, and the --

MR. PHILLIPS: As I say, we have no quarrel with the Court's adopting that approach in this case, because it seems quite clear what the result is.

QUESTION: Isn't that a standard rule?

MR. PHILLIPS: Yes, Justice Rehnquist.

QUESTION: You mean applying it to this case? You have no objection to applying it to this --

MR. PHILLIPS: Well, we don't have any objection to the standard rule or to applying it in this specific case.

To return to the statutory background, the Congress has since the 1940's required that in determining the level of benefits that should be afforded to recipients, that those recipients who work should have their income counted against those benefits, and since 1962, Congress has also recognized that working AFDC recipients incur unique expenses which also should be taken into consideration.

In Section 402(a)(7) of the -- as adopted in 1962 provides that the states must deduct expenses reasonably attributable to the earning of income. In 1981, Congress removed that portion of Section 402(a)(7) and substituted in its place in 402(a)(8) a standardized deduction, which as the Senate report explained, was in lieu of work expenses.

QUESTION: Mr. Phillips, can I return for a minute to the new federal statute, because I want to be sure I understand your position. Is it your view that if the Ninth Circuit was correct when it decided the case, and then Congress enacted a new statute earlier this year and said, we want a different rule in the future, we should nevertheless apply the new statute?

MR. PHILLIPS: Well, we did not make that argument in our reply brief.

QUESTION: Do you think it is a valid argument?

MR. PHILLIPS: I will frankly concede that it seems somewhat unfair to individuals within the AFDC recipients' position to have the statute done that way, and given the absence of any indication that Congress intended to apply it retrospectively. I recognize the presumption is the other way, but in a case where Congress says the statute goes into effect

prospectively, it is a little difficult.

In this instance, since it makes no difference, it is quite clear that Congress intended by the '84 Act to ratify the Secretary's interpretation, and it seems to me there is no theoretical importance --

QUESTION: The reason I ask you, it seems to me it is entirely consistent with everything we know about this field of the law, but if we just sent it back to the Ninth Circuit to reexamine the issue in the light of the new statute, they might say, yes, but the statute is prospective only. That could happen, couldn't it?

MR. PHILLIPS: Yes.

QUESTION: So you think we really have to decide the case.

MR. PHILLIPS: Well, I think that's correct. I mean, there is no question that there is at least some doubt as to how the Ninth Circuit would handle this particular issue, and so it seems it certainly would be more efficient in use of judicial resources for the Court to decide the case, since it is presently here and ready for disposition.

QUESTION: What is the controversy here?

MR. PHILLIPS: Well, in the specific case here, we would have a right to recoup any of the moneys given out when the injunction -- that were overpaid

because of the injunction of the District Court. We would, both the state of California and HHS would have the right to go against those recipients and reacquire the benefits that we had overpaid.

QUESTION: Just with the new statute?

MR. PHILLIPS: Yes, Your Honor, that is with the new statute. Under the old statute, we still have the right. We also have it in our discretion not to go after those claims, but we certainly --

QUESTION: Well, is there some plan --

MR. PHILLIPS: But a disposition of this case would resolve it.

QUESTION: Is there some plan to do that, Mr. Phillips, on either the part of California or HHS? Are you going after the back --

MR. PHILLIPS: We are not so presumptuous, I suppose, to have assumed that we would necessarily win so that we would have implemented a plan to go after those resources at this stage. I have been informed by the state agency that it is seriously considering at least doing it to a certain extent on the theory that if recipients realize that they can have overpayments recouped against them, they might well think a second time before chasing out after statutory schemes. There is at least some possibility that they may do that, but

there is obviously no -- it is not compelled. The agency need not do that.

QUESTION: Is the government prepared to indicate what is involved, what is the aggregate amount that might be involved?

MR. PHILLIPS: Under the injunction between -- it is in tens of millions of dollars. That much I know. Precisely how much it is, I don't know, Mr. Chief Justice.

QUESTION: Are you going to get that out of a turnip?

MR. PHILLIPS: Well, everyone recognizes that it will be difficult, which may well be why it won't be requested, but on the other hand, there may be some individual recipients who are in a better position to reimburse us.

QUESTION: I guess I have the feeling that we are dealing with a hypothetical case.

MR. PHILLIPS: But it is not a hypothetical case, Justice Marshall. There is a dispute involved here. We have rights at stake. Whether we choose to ultimately implement those rights do not undermine the existence of the rights in the first instance.

QUESTION: I don't think every dispute is soluble by a court action. So I still have the feeling

we are passing upon a statute which has not been litigated.

MR. PHILLIPS: Well, there is no question that the 1984 -- we don't require the 1984 statute for these purposes. We are perfectly content to rely on the 1981 statute as the basis for overturning the Ninth Circuit.

QUESTION: Which has been replaced by the 1984.

MR. PHILLIPS: Well, there is no question that prospectively, or at least I gather from the way the questions are going that there is no question that prospectively this case is at an end, but that still doesn't in any way diminish the fact that retrospectively there is still at least some issue, although, as we argue at some length, in our view the 1984 Act does no more than ratify what the preexisting law was.

Respondents are a class of working AFDC recipients.

QUESTION: What do you mean by that, ratify?

MR. PHILLIPS: Well, as I -- the way that the Secretary interpreted --

QUESTION: I think your position ends up being that you apply the current law.

MR. PHILLIPS: Retrospectively. Well --

QUESTION: Well, I think it is.

MR. PHILLIPS: When we get there --

QUESTION: You say the Secretary has just ratified. Well, assume that we would interpret the law differently before the so-called ratification. Then what the Congress has done is amend it.

MR. PHILLIPS: If you were to take that position, but that is not -- I mean, as we understood the legislative history of the 1984 amendments, what they said was that they were verifying the law to endorse the Secretary's preexisting interpretation, and that they had acted in 1981 in cutting the way they had with the projections in mind as the Secretary had created them.

QUESTION: It sounds to me like you are just suggesting we unnecessarily decide what the law meant before this new statute.

MR. PHILLIPS: Well, unless -- if you are going to take the view that the 1984 statute is the one in effect and that should resolve the claims that exist --

QUESTION: Well, you think it should do. You say it ratified.

MR. PHILLIPS: Well, I think there is no reason to decide what Congress really specifically

intended with respect to prospective or retrospective effect of the new provision. What we say is that the technical clarification ratified the preexisting law in any event. So it is just simply -- we come to the same conclusion, just simply through two different routes, Justice White.

QUESTION: You say because there is a possibility of unfairness to individual claimants that you have some reservation about applying the traditional rule that you decide a case that is still alive by the most recent Congressional enactment, but then as I understand it what you say is that putting entirely aside the 1984 ratification that has been referred to, properly analyzing the legal materials available before 1984, the Court of Appeals should be reversed because they were wrong on the preexisting law.

MR. PHILLIPS: That is correct, Your Honor.

To return for a moment to the 1981 statute and why it is we believe -- and why the Secretary concluded that the mandatory withholdings must be included within the $75 cap, Congress did two things.

First, it removed the reasonably attributable work expenses provision in 402(a)(7). Prior to 1981, this Court had decided in Shea versus Vialpando that that provision referred to all expenses, subject only to

a reasonableness limitation that could be attributable to income.

Every state recognized that those expenses would also include mandatory payroll withholdings. When Congress took that provision and added it to 402(a)(8), the inference seems to me inescapable that Congress intended to include the mandatory withholdings within that provision.

But any doubt on that question seems to me to have been resolved because Congress added the work disregard to earned income, and earned income also had been well established prior to the 1981 enactment as meaning gross wages, and therefore Congress called for the disregard to come from gross wages.

Accordingly, the two, the combination of the treatment of 402(a)(7) and 402(a)(8) seems to me clearly to require the conclusion that mandatory withholdings must be within the -- were always intended in 1981 as within the mandatory -- or within the $75 disregard.

That also comports well with the policy of the 1981 amendments. First Congress intended to standardize this process to avoid any kind of arithmetical errors or potential abuse, and clearly a $75 standard disregard eliminates any kind of problems that might otherwise arise in case of handling specific individualized tax

items.

Congress eliminated that by including only $75 as the cap. In addition, Congress meant to save some money by including a $75 cap that was below the national average. In order to assure that work expenses are below the national average of $75, one has to include mandatory payroll withholding. That is the force of the McMann affidavit.

If you exclude those mandatory withholdings, then the national average drops below $75, which would mean that this provision was in effect a bonus for the recipients instead of a cut, as Congress clearly intended.

Thus in our view there is no way to read the action of the Congress in 1981 in terms of its statutory history and in terms of its policy of the Act in any way but to endorse the Secretary's interepretation. For reasons that I think are even clearer, and that I have already discussed, the 1984 amendments essentially ratified the Secretary's interpretation. There is a live controversy as to that, and that issue then can be disposed of readily, and we ask the Court to do so.

QUESTION: Mr. Phillips, can I just ask you another practical question? Assume we were to dismiss the case as improvidently granted or something of that

kind, which I am not suggesting we should, but what exactly would happen? Is there a stay in effect?

MR. PHILLIPS: Justice Rehnquist issued a stay.

QUESTION: In other words, they would then have a claim for unpaid moneys under the Ninth Circuit.

MR. PHILLIPS: That's correct, that's correct, both from the time of the issuance of the stay and for the time prior to the issuance of the original permanent injunction.

QUESTION: I see. I see.

MR. PHILLIPS: And its enactment. So that is still in effect. Moreover, if you were to dismiss the writ as improvidently granted, we have the additional problem of the petitioners from the other states where the Courts of Appeals had rejected the Ninth Circuit's interpretation who are also before this Court, and those cases would have to be resolved independently, too.

If there are no questions, then I would reserve the balance of my time.

CHIEF JUSTICE BURGER: Mr. Aaronson.

ORAL ARGUMENT OF MARK N. AARONSON, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. AARONSON: Mr. Chief Justice, and may it please the Court, the dispute before the Court today

concerns the effects of what Congress did in 1981 on the AFDC program. It is, as the Court acknowledges, new legislation was enacted in 1984, and it is our reading of that new legislation that it evidences for the first time a Congressional intent supportive of the HHS Secretary's position.

I think the record regarding the 1984 enactment is in sharp contrast to the record regarding 1981, and we think the prospective applicability of the 1984 enactment is one which courts will have to consider, and will have to consider below. It is not the dispute before this Court.

What this Court has to weigh is any information that can be gleaned from the 1984 record about the intent of Congress in 1981, but it will not override the intent of Congress in 1981 as this Court can determine from the legislative record at that time and the language at that time.

In this regard, I think what is very striking is to look at the reasons Congress was given for enacting the work expense disregard in 1981. Secretary Schweikert, the predecessor to the current Secretary, who is the petitioner in this case, at the hearings held before the Public Assistance Subcommittee of the House Ways and Means Committee indicated that a principal

reason for the work expense disregard was to provide an incentive for AFDC recipients to find the most economical way to meet their work expenses.

As we have shown in our briefs, the average work expenses for a working recipient in California prior to the '81 enactment was $83. A recipient working full-time at the minimum wage in the typical AFDC household would have had withheld for payroll taxes, the basic core payroll taxes, at least $75.

If that is the case, the idea of having a $75 work expense disregard that would allow recipients to take some measures to economize on their expenses is a meaningless provision. That disregard would be eaten up entirely by the mandatory withholdings over which recipients have absolutely no control.

Secondly, in terms of the statement of reasons for this particular provision, not for some of the other provisions that were enacted during the 1981 legislative session, was given by the Senate Budget Committee.

The Senate Budget Committee listed three reasons, and we have cited these in our brief: one, that there was great variation among the states in dealing with work expenses. The record in this case is clear that there was no variation with respect to mandatory payroll taxes. Every state gave recipients a

credit for those expenses, and it did not count against them in determining their eligibility or benefit levels.

Second, there was a problem of administrative complexity and opportunities for error. There is almost no problem of administrative complexity and opportunity for error with respect to payroll tax withholdings. Recipients must submit each month their payroll stubs, and eligibility workers and state welfare departments take from those payroll stubs the exact amount of withholdings that an employer has subtracted from the gross income of recipients.

And third, there was a concern for abuse by recipients in claiming work expenses. Again, as the courts below in this case have indicated, this notion of withholding taxes is a paradigmatic example of the kinds of items that are not subject to abuse and fraud.

QUESTION: Well, certainly we have examples of excessive dependency assertions, which affects the amount of withholding.

MR. AARONSON: Yes, but there is a provision and have been provisions in almost every state law. In California, for example, recipients were required to declare the number of dependents that they actually have. They had no option. It was written as part of the administrative regulation governing the calculation

of grants, so that --

QUESTION: But it is still subject to abuse, if somebody asserts ten, and he has only three.

MR. AARONSON: It is subject to very easy verification. You get on AFDC because you have children eligible for the grant. Your dependents are going to typically be your children and yourself. If it happens to be a two-parent household, there will be four parents.

It is really very easy to verify. There was an absolute requirement that recipients not have any opportunity to vary, take advantage of the tax laws, if you will, and declare either fewer or more dependents.

QUESTION: Then the Tax Court cases that struggle over the issue of whether a dependent is assertable are of no significance?

MR. AARONSON: Not in this case. This provision -- the AFDC households would be governed in terms of declaring dependents for AFDC purposes by the number of dependents they actually have.

Now, I think the purpose behind the work expense disregard is illustrated by one of our class representatives in this case, Ms. Kathryn Bass. She had each month $84 of withholding taxes taken from her paycheck. She also declared, not counting her child

care expenses, $180 in out of pocket work expenses.

Under the new provision, she is forced to economize on those $180 in work expenses, and will have to get them down to $75. That is what the new law required of her.

In terms of directly addressing, if one looks in the legislative record, and looks at statements of officials or Congressional representatives, there is absolutely no reference to taxes at all in the 1981 legislation. There appeared to be no concern, no focus by Congress on this particular issue.

This comes up as an issue precisely after litigation is brought challenging the federal government's interpretation of this provision, and the 1984 enactment is enacted in response to HHS bringing that litigation to the attention of Congress, and it is, I think, striking to compare Congress's attention to this issue in 1984 with its total lack of attention to the issue in 1981.

Now, the real heart of the problem in this case is an historical interpretation that has been endorsed by this Court, that has been ratified by Congress on several occasions, of the meaning of what is termed the income and resources clause of Section 402(a)(7)(A).

That is at the very first part of that section of the Social Security Act, and it has not been amended since its original enactment in any significant way in 1939. It was reenacted in 1962, when Congress first enacted a mandatory work expense provision to take into account the problems of out of pocket work expenses.

It was reenacted in 1967-68, when Congress again amended these provisions, and it was reenacted even a third time in 1981, again, without modification, and it is that provision which the lower courts have relied on and the long-standing administrative interpretation, legislatively and judicially endorsed interpretation that that provision requires recipients only to take into account what is called actually available income.

And we have submitted in the record, and you will find in the joint appendix the 1940's Social Security Board statements which require the states in administering the AFDC program at that time consistent with the intent of Congress as expressed in 1939 to take into account only income that is in hand, that is readily available.

That particular -- these particular statements are the predecessors of the current AFDC provision in the regulations that requires that only income actually

available be taken into account.

In 1962, when Congress enacted the reasonable expense provision, the Secretary contends that that was also intended to cover mandatory tax withholdings. It is again, as in 1981, striking that there is absolutely no reference whatsoever in the 1962 legislative record, in the administrative guidelines that were proposed before, in the implementing administrative regulations that were enacted after that in any way referenced tax withholding.

HEW and Congress in 1962 was dealing with the problem that states were not consistently. They were urged. It was optional for them. They were not consistently taking into account the out of pocket expenses individuals have for transportation, for lunches, for meals.

They in no way were talking about taxes. It just hasn't come up as an issue. It is also evidence, as we have submitted in the record and you will find in your joint appendix, that prior to that enactment, HEW commissioned a report, and that report very clearly says that the states were considering as the income available to the household if there were earners in the household their takehome pay as the starting point, and from their takehome pay they then urged the states on an optional

basis to subtract the kind of discretionary expenses.

Congress knows how, Congress knows how to make exceptions to the actually available income principle. They did it in 1981. They did it on behalf of income from stepfathers that were residing in AFDC homes, thereby superceding in terms of the precise issue a case of this Court, Lewis v. Martin.

They also deemed available moneys from the earned income tax credit, an action they undid in 1984, and they also deemed available very explicitly actions from sponsors of aliens who might have come here as being moneys available.

Prior to the 1981 legislation, Congress had a number of bills concerning this precise issue, work expenses, and also the problem which is not part of this case, of the computation of the work incentive disregard.

A very important bill was H.R. 4904. In that bill, they did something very specific that was not done in 1981. They amended the definition of income in the income and resources clause. They in fact repealed the notion of actually available income and very specifically in the statute qualified the definition of income by reference to another provision that very carefully listed what income was to be included and what

income was to be excluded.

They then established, as part of Section 402(a), a set of disregards that were more liberal than those finally enacted, and that were intended to roughly keep recipients in the same place as they had been before in terms of the subtraction of various deductions and out of pocket expenses and also continue to provide for the kind of work incentive disregard that existed before.

Congress knows how. It showed again, not as directly, I must say, but I think there certainly is evidence in the Congressional reports in 1984 that it can create an exception, but our contention has been, and I think one fully supported and very well reasoned by the Courts below that they did not do that in 1981. They were not concerned with this particular issue.

Now, we have raised in our briefing the question of whether given the 1984 legislation this should be a case before this Court, not because the 1984 provision applies retrospectively. I do not think that is the case at all. But that it now does provide prospectively, and our assumption has been that the Court accepted the cert petition in this case because there was a conflict among the circuits, and there was likely to continue to be a conflict among the

circuits.

QUESTION: But if we accept your submission that perhaps the writ should be dismissed or the case simply remanded to the Ninth Circuit, then what about the cases from the various other Courts of Appeals that have come out the other way? Would it be your submission that given the fact it is no longer a live issue, that is a tolerable conflict?

MR. AARONSON: That would be our position, that that is just -- you know, in balancing all the various considerations, that if in fact Congress had enacted the 1984 legislation before this Court had accepted the cert petition, I think it would have been an important question for the Court to consider.

And it may well not have reached the same conclusion that it did reach when it was presented with a case where it was a continuing vital issue.

QUESTION: It wouldn't trouble you, then, that AFDC recipients in one part of the country had been found to be entitled to certain amounts and the same recipients similarly situated in other parts of the country had been found not entitled to them?

MR. AARONSON: It would trouble me, just as it troubles me that in many parts of the country there never were any challenges presented to this provision at

all, and in fact there has been over a period of time a differential implementation, and even if this Court were to rule in this case, in order for that judgment to be enforced throughout the country, there would have to be individual actions brought.

And in this particular case, given this Court's holding in Edelman v. Jordan, in state courts, in all likelihood, in the 50 states one would have to bring this particular action in order to enforce retroactively the decision if this Court were to rule in favor of recipients.

So, in terms of there being a difference, a difference exists as a matter of practice. I am not happy with it. I think the Ninth Circuit was right, and that the other circuits are wrong, that the reasoning --

QUESTION: But just from the point of view of judicial administration, supposing you were totally neutral as to how this particular issue should be resolved. Wouldn't it trouble you some to think that, you know, identically situated people in North Carolina and Alabama were treated differently than identically situated people in California and Nevada?

MR. AARONSON: It would trouble me, and I would then have to weigh whether I thought it was better to reach the case on the merits, and I think if that

were the case, I think the Ninth Circuit decision should be upheld in this case. There still will be problems as a practical matter in implementing that everywhere.

If you were to affirm the Ninth Circuit, it doesn't end the matter in terms of the differentiation in treatment. That is the point.

QUESTION: Do you think we should just ignore the '84 law?

MR. AARONSON: I think in terms of resolving this particular issue, unless you think that the very summary statements made in '84 override what we find to be the intent of Congress in '81 and the intent of prior Congresses --

QUESTION: Can we take Congress over you?

MR. AARONSON: Excuse me?

QUESTION: Can we take Congress over you, and send it back to the Ninth Circuit to decide what effect, if any, the '84 Act has on this case?

MR. AARONSON: I certainly think that is an alternative for the Court. The Court could simply remand to the Ninth Circuit. I think it would be --

QUESTION: There is no difference between send back and remand, is there?

MR. AARONSON: No, there is not.

QUESTION: I thought not.

MR. AARONSON: No, I think that is an alternative. I think the better alternative is to affirm, or if you think it is not an issue the Court really should get involved in at this point, to dismiss the writ and just end the matter.

QUESTION: What makes you think Congress didn't intend the statute to affect a case like this?

MR. AARONSON: There is no statement in the Act at all that that --

QUESTION: The presumption is the other way.

MR. AARONSON: Your Honor, I am not familiar with the law that would say the presumption is the othr way. In briefing the issue, I assume the question would --

QUESTION: Do you think that the -- You don't agree with the United States, then, that Congress intended to ratify the Secretary's interpretation of the Act?

MR. AARONSON: No. I don't think the Secretary was --

QUESTION: Because if we read the legislative history and the statute, whatever other evidence there is, and thought that the Congress really did intend to ratify, in those words, using that word, the prior interpretation by the Secretary, then you certainly

would be led to believe they thought the Act ought to -- that that view ought to govern cases like this.

MR. AARONSON: I don't think the record -- now, we again haven't gotten fully into it. The 1984 legislation is a case of first impression here. But I think the Secretary was not free to interpret the statute in an impermissible way. Our argument is, that is the case between 1981 and 1984, and I don't think the record on 1984 indicates that Congress was ratifying the Secretary's interpretation retroactively.

I think it was indicating for the first time that it was intending to create an exception for earned income from the principle of actually available income, an exception that never took place before. The Secretary has never been able to point to when in time this kind of miraculous exception was created for Section 402(a)(8).

QUESTION: Well, you say then that the '84 Act is not a ratification of the -- in the sense of agency law, that in order to ratify it must have been within the authority of the agent prior to the ratification?

MR. AARONSON: If Congress was doing that, it was in direct conflict with what prior Congresses had done in 1939 and 1968.

QUESTION: But even if it was an amendment,

your sole reliance for nonretroactivity is unless Congress indicated it should be applied retroactively, it shouldn't be applied retroactively. Is that your view?

MR. AARONSON: Well, I am more familiar with California state law, where in fact certain statutes might be applied retroactively, more in the land use area. You have me on a certain point that I am not directly familiar with. And that only occurs when there is a vesting of rights.

And if I were to draw an analogy to this kind of case, I think there has been a vesting of rights in these recipients, and it would be an injustice, and I suspect I could find cases to show incorrect legally to apply this statute on its face without any more comment from Congress than what one finds in a very brief section of a 1,000-page piece of legislation concerning the budget reconciliation process.

This was not careful deliberation by Congress in '84, and it was not extensive deliberation, given all the other matters that were before Congress in 1981. And I think it is incumbent to look very clearly about what was done to try when you have a statute like this that has to be viewed in terms of a series amendments taking place over time, where Congress at various times

had different objectives.

And I think the duty of this Court, as it was the duty of the Courts below, is to reconcile what in a program as complicated as the AFDC program often one finds competing kinds of considerations and potentially conflicting policies.

QUESTION: Mr. Aaronson, I guess you don't think that when Congress got around to the '84 Act, perhaps not explicitly, but at least implicitly Congress suggested it did not agree with the Ninth Circuit's interpretation.

MR. AARONSON: I think it certainly made a different -- you could argue certainly implicitly they made a different policy choice. There is clear and manifest intent that Congress was addressing the issue and was making a policy choice. There is not a clear and manifest intent expressed in the 1981 legislation.

QUESTION: But doesn't the legislative history show that they were well aware of the Ninth Circuit position?

MR. AARONSON: I think in '84. That is what I say. The difficulty is, they didn't directly amend Section 402(a)(7), but they added a new section to Section 402(a)(8), read in conjunction with the legislative report, I think, can be shown to have for

the first time evidenced their intent to create an exception.

Now, I think what was really going on in 1981, and what was of primary concern to Congress was ending certain financial incentives that existed for working recipients, and those have to do with this work incentive disregard that is not at issue in this case, and reversing how it is computed, fixing certain limits on its availability to four months.

They were also concerned about certain high earners being on welfare, so they established a flat amount, a flat limit on eligibility, what is called the 150 percent rule. They were concerned about the higher earners being on welfare.

What they were not concerned, what they didn't express other than in a general concern for simplifying administration and dealing with a certain problem of abuse, was to put recipients in a worse position because they are working.

And the interpretation of the 1981 provision does precisely that. In 1984, Congress enacted some provisions that modified the harshness of that impact at the same time they enacted the definition of earned income, so that the provision operating prospectively will not be as harsh on working recipients as it is in

the past.

In essence, what the Congress was doing in 1981 with respect to this issue was superseding this Court's decision in Shea versus Vialpando. Shea did not address the mandatory payroll deduction issue at all. What was at issue was Colorado's provision for applying a flat $30 work expense disregard for transportation and other out of pocket expenses.

It didn't cover child care. It didn't cover tax withholdings. This Court did not address the statutory basis on which states may have been taking into account individually tax withholdings.

In 1981, Congress enacts the $75 work expense disregard. They enact a separate provision for child care, and they don't address taxes at all. What Congress was doing is saying what this Court said it could not do under the 1962 legislation. They are saying you can't establish an absolute limit, have an absolute standard on work expenses.

Basically, what has happened in this case, after Congress enacted, without the HHS Secretary in any way informing Congress ahead of time, at least from what is evident in the record that one can find, the HHS Secretary decided to bootstrap the notion of including mandatory payroll taxes within the $75 work expense

disregard.

And what one sees afterwards and one sees in the briefs is a post facto rationalization of that administrative decision by HHS, an administrative decision that is impermissible, that involves an impermissible construction at the time of Section 402(a)(7)(A) because it would result in a conflict with the over 40-year history of using only actually available income.

Unless the Court has questions for me, I am prepared to sit down.

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

ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. PHILLIPS: Yes, Mr. Chief Justice, just a couple of points.

Basically, we would like to make two points. One, in response to respondent's contention concerning the actually available income principle, and then second, I would like to make a few comments concerning the 1984 legislation.

Respondents contend that this Court should basically disregard everything that Congress had before it in 1981 when it amended Sections 402(a)(7) and (8),

and instead think back into the 1940's and 1950's to practices that were never part of any of the statute or the regulations that would expressly incorporate the kind of actually available income doctrine that respondents argue for.

Respondents basically say that actually available income must refer to takehome pay. Congress has never defined income to refer to takehome pay. No legislative history of Congress has ever defined income to refer to takehome pay. No regulations or instructions of either HEW or HHS has ever referred to income as takehome pay.

Indeed, the Ninth Circuit in this case did not even adopt the theory that income is takehome pay. It recognized that some withholdings could properly be included within the standard disregard.

There is simply no authoritative source for the notion that actually available income is takehome pay. What is much more reasonable to conclude is that this is in fact actually available income. It is moneys paid directly from the employer to the employee, and are immediately used for certain expenses that the employee must incur by virtue of having worked, and that is exactly what work expense disregards would presumably embrace.

Accordingly, in our view, the actually available income concept is simply too weak to sustain the burden of respondent's submission in this case, especially in light of the notion that Congress had a different administrative practice to which it was responding.

With regard to the effect of the 1984 legislation, it seems to me respondents suggested a couple of alternatives. The worst of those is that the Court should dismiss the writ as improvidently granted. In that event, the state will immediately become liable for $20 million in retroactive benefits prior to the time of the permanent injunction.

Moreover, presumably the injunction of the District Court will now be reinstated in that event, and therefore prospectively the statute will now be interpreted in a way consistent with respondent's theory. It makes no sense to force HHS and the state to incur those kinds of liabilities in a situation where the Ninth Circuit's decision is manifestly inconsistent with Congress's intent, certainly in 1984, and under our theory in 1981.

The alternative, of course, is to simply vacate and remand, and while we suggested that that is a possible alternative in our reply brief, it seems to us

to make much more sense that since there are a lot of cases out there with differing results and in differing stages.

And this issue is properly presented. The legislative history is unambiguous that the Court should simply decide that issue, and should decide it not on the basis that the 1984 legislation should be presumed to apply retroactively, but rather to recognize that the 1984 legislation ratified the Secretary's understanding of the proper approach to the 1981 statute, and by so doing, the Court would, of course, reverse the judgment below.

Thank you.

QUESTION: Have you got a case for me?

MR. PHILLIPS: For which?

QUESTION: Have you got a case for me?

MR. PHILLIPS: Which principles?

QUESTION: A case that we can cite for what you just said.

MR. PHILLIPS: For having the issue decided? No, Justice Marshall, I don't have any cases.

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

(Whereupon, at 3:00 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

#83-1097 - MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner v. SANDRA TURNER, ET AL.

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

BY Paul A. Richardson

(REPORTER)