ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1948

TITLE RICHARD E. LYNG, SECRETARY OF AGRICULTURE, ET AL., Petitioners V. RONALD E. PAYNE, ETC.

PLACE Washington, D. C.

DATE March 24, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD E. LYNG, SECRETARY OF AGRICULTURE, ET AL.,

Petitioners

v. : No. 84-1948

RONALD E. PAYNE, ETC.

- x

Washington, D.C.

Monday, March 24, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

BRUCE N. KUHLIK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

THEODORE L. TRIPP, JR., ESQ., Fort Myers, Florida; on behalf of the Respondents.

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C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments next in Secretary of Agriculture against Payne.

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

ORAL ARGUMENT OF BRUCE N. KUHLIK, ESQ.

ON BEHALF OF THE PETITIONERS

MR. KUHLIK: Thank you, Mr. Chief Justice, and may it please the Court:

This case is here on certiorari to the Court of Appeals for the Eleventh Circuit. The decision of the Court of Appeals requires the Farmers Home Administration to reopen and accept applications now for an emergency loan program intended to tide farmers over the immediate difficulties posed by heavy rains in north Florida in 1973.

Such a result is wholly inconsistent with the purpose of the emergency loan program which was to enable farmers to make good their losses on crops that were damaged at that time and then to resume their operations with regular credit from other sources.

The loan program provided substantial government benefits, including an outright grant of $5,000 to each farmer at an interest rate of one percent.

These funds, however, could not be used to produce new crops in 1974 or subsequent years, but only to reimburse farmers for their 1973 losses so that they could remain in

business at that time.

At this late date, the relief ordered by the Court of Appeals would amount to a government give-away to persons who could not reasonably have unmet needs from so long ago.

The Court of Appeals decision is insupportable. It bars the agency from enforcing a valid regulation that established April 2, 1974 as the deadline for applying for these loans. That result conflicts with this Court's many cases that forbid application of estoppel against the government, at least absent extraordinary circumstances that are not present here.

Moreover, the basis of the Court of Appeals decision that the agency violated a self-imposed obligation to publicize the loan program is plainly wrong.

Finally, neither this purported violation nor the violations found by the district court could support an application of estoppel in this case, especially on the classified basis ordered by the courts below.

Heavy rains struck north Florida in early April of 1973. The area was declared a disaster area a short time later which allowed farmers to apply for emergency loans from a number of government agencies, including the FMHA, the Small Business Administration.

At the time FMHA loans carried an interest rate of five percent. It could only be made to farmers who were

unable to obtain credit elsewhere and they carried no forgiveness principal, no grant aspect to the loans.

Loans from the SBA, on the other hand, carried an interest rate of one percent, included a substantial forgiveness of principal, and could be made without a showing of unavailability of credit elsewhere.

During the time that the initial application period was open for these loans, a number of farmers obtained SBA emergency loans, they obtained regular, operating loans from the FMHA.

In January 1974, however, Congress passed Public Law 93-237, which included a grandfather clause extending the favorable terms that were previously available from the SBA, and also had been available from the FMHA for earlier disasters, to disasters up through April 20, 1973, a time period that included the north Florida flooding that is at issue in this case.

At the time, in the statute, the Congress directed the Secretary of Agriculture to extend for 90 days the application period for applying for loans under this new, more favorable emergency loan program. Accordingly, the Secretary promulgated a regulation establishing April 2, 1974 as the deadline for applying for emergency loans under this program. The deadline was published in the Federal Register.

At the same time, the Secretary also promulgated

a regulation providing that publicity of the provisions of Public Law 93-237 would be provided to the local news media and when he issued the staff instruction that first embodied this requirement, the Secretary issued to the state FMHA officials a sample press release to be distributed to the local media. In fact, in this case, that sample press release was distributed to the state FMHA officials and by them to the local county FMHA officials. It was forwarded by the local officials to the local media. It was, in fact, carried in at least two local newspapers.

Respondent filed this lawsuit in August of 1976, well over two years after the expiration of the application deadline.

With the exception of the name class representative and a few other farmers, no class member had applied for a loan, either before or after expiration of the loan application deadline. All of the persons who had, in fact, applied for loans had done so before the deadline and had received emergency loans under the program.

Following a bench trial in 1981, the district court order the Secretary to reopen the loan program and to accept applications at that time without regard to their untimeliness under the April 2, 1974 deadline.

Reaching this conclusion, the district court relied primarily on publicity that was given -- or lack of publicity

that was given to the earlier, less favorable loan program, and in particular the district court relied on Section 1832.3 of the regulations which provided that the Secretary would make such public announcements as appear to be appropriate.

The Court of Appeals affirmed, though it did not rely on that regulation but a later one, the one that provided the FMHA would inform the news media of Public Law 93-237.

Reaching the conclusion that the FMHA violated this regulation, the Court of Appeals did not consider the fact that the sample press release that had accompanied the regulation was, in fact, distributed to the local news media.

The Court of Appeals distinguished this Court's decision in Schweiker versus Hansen which the Court had refused to allow an estoppel against the government on the ground primarily that this case does not involve an adverse impact on the public fist.

In reaching this conclusion, the Court of Appeals failed to consider the $5,000 grant aspect of the loan program and the below-market interest rate of one percent that accompanied the loans.

We submit that the Court of Appeals decision is wrong for a number of independent reasons. We would point out that the fundamental error of the Court of Appeals was that it failed to recognize the limitations that sovereign immunity places on judicial remedies for alleged governmental

wrongdoing.

It is quite clear the courts, once they find a violation of some regulation or other provision by government personnel, are not free to roam at will and impose whatever remedies they feel are equitable against the government.

QUESTION: Mr. Kuhlik, can I ask you right there, one of the things that is troubling about the case is its age. It is such an old case and I guess it took about five years just to get to trial even which is kind of puzzling to me, but, anyway, supposing the case had been brought promptly, within 30 days after the deadline, they just discovered it and so forth. Would your position be basically the same?

MR. KUHLIK: If the lawsuit were brought after the expiration of the loan application --

QUESTION: Missed by a couple of days and said they didn't know what --

MR. KUHLIK: Our position would be that the courts did not have authority to set aside the deadline.

QUESTION: There is really no remedy. It is not a question of what the appropriate remedy, there just simply isn't any remedy for this particular violation.

MR. KUHLIK: For this particular violation, given the failure of the respondent class to bring the lawsuit before the expiration of the deadline --

QUESTION: You wouldn't have to bring the lawsuit

if they were ahead of the deadline. They could have just filed for the loans, I suppose.

MR. KUHLIK: Of course. But, if they intended to enforce the publicity regulation -- the problem is -- the violation that the Court of Appeals fastened on, failure to give adequate publicity, is simply not a pre-requisite in any sense to the application of the loan application deadline.

If the Secretary's regulation had provided that the application period would expire 30 days after the presentation of sufficient publicity in the local news media, it would be a completely different case.

QUESTION: Well, for the purpose of this argument, are you conceding there was a violation or are you arguing in the alternative, there was no violation anyway?

MR. KUHLIK: We are most certainly not conceding that there has been a violation. In fact, that was the point I just intended to make.

QUESTION: Well, assume with me just for the moment, because apparently the lower courts disagreed with you on that. Assume for a moment there had been a violation, just to get into this whole estoppel problem, would you then take the position that there was still no remedy?

MR. KUHLIK: That there was still no remedy of this estoppel like nature, that is correct.

QUESTION: Well, of any kind. Would there be --

MR. KUHLIK: Of any kind, that is correct at this point in time.

The fact of the matter is though there is --

QUESTION: Before you go ahead, may I follow up on the questions that Justice Stevens had asked? At the bottom of page 7-A in the petition for certiorari, the Court of Appeals, and it is a good Court of Appeals, states as a fact that apart from other problems with the notice to the farmers, that the release totally omitted any reference to the nine-month period that expired February 26, 1974. The release was routinely forwarded to the local media. However, county officials made no follow up to determine whether the press release was ever published. But, if if didn't give the date as to when the right to apply for loans existed, how did the farmers get notice of their right to apply for loans.

MR. KUHLIK: Justice Powell, the press release that the Court of Appeals is referring to here on page 7-A is not the press release that it found insufficiently informative later. This was a press release that had to deal with the initial less favorable loan period and --

QUESTION: Is it clear from the record that the farmers had adequate notice?

MR. KUHLIK: We think it completely clear from

the record. As a matter of law, the FMHA did comply --

QUESTION: As a matter of fact, did they have notice. If you had been a farmer down there, would you have known about this?

MR. KUHLIK: There were no findings made by the district court with respect to whether any individual class member did or did not have notice. The only farmers that we know about, in fact, are the named representative and the other farmers who did have a notice.

QUESTION: Is it not a fact that very few applications were made?

MR. KUHLIK: It is true that very few applications wre made, however, we don't believe the reasons for that are relevant. I think that it is clear from the record that during the initial loan application period the loan terms were simply were not sufficiently favorable to attract enough farmers. They went to the SBA to obtain the loans that were available from that agency for physical losses and they determined to use regular operating loans which were not in any real relevant respect less favorable than the emergency loans at that time.

QUESTION: So, even though the government concluded that in view of the situation additional loans could be made, for whatever reason, very few people applied for them?

MR. KUHLIK: That is right.

QUESTION: May I ask this question? If the notice had been wholly inadequate, would the government be estopped?

MR. KUHLIK: We do not believe that it could be.

QUESTION: In other words, your position is that if notice whatever was given, there could be no estoppel.

MR. KUHLIK: That is right. I would like to point out that the statute, Public Law 93-237, that established these favorable loan terms made no mention of publicity whatsoever. And, the FMHA -- The Secretary determined to provide a certain quantum of publicity and that publicity is stated in the sample press release which is at pages 50 to 51-A of the Appendix to the Petition. And, that sample press release did specify the loan application deadline. It was forwarded to the news media. And, I submit that this sample press release constitutes a contemporaneous construction of the regulations by the agency that promulgated them and that there were was no warrant for the Court of Appeals to suppose that there had been a violation of this regulation.

We would also note that without reaching the main estoppel question in the case that there can be no estoppel here because there has not been an adequate showing of reasonable reliance, certainly not on behalf of the class as a whole nor on behalf of any individual class member.

The fact is that regardless of whether or not this particular press release could have said more it did make

clear the key fact that there was a new emergency loan program. It was up to farmers to make further inquiries if they needed emergency credit under the terms of that program.

And, moreover and perhaps more fundamentally, the complete terms of the emergency program were published in full in the Federal Register. And, as this Court's cases such as Community Health Services and Federal Crop Insurance Corporation against Merrill make clear one cannot support an estoppel against the government in a case where the true facts are there for the reading in the Federal Register of the statutes at large.

Most fundamentally, the Court of Appeals decision clearly conflicts with this Court's many cases establishing that the government cannot be estopped from enforcing a valid statutory or regulatory condition of the receipt of public benefits. It is exactly what the Court of Appeals did here whether it was willing to admit it or not. It has barred the government from enforcing a valid regulatory deadline that was promulgated pursuant to the Secretary's substantive rulemaking authority and has not been suggested by Respondents or any court that that regulation was defectively promulgated.

The Court of Appeals has barred us from enforcing that deadline on the basis of alleged misconduct by governmental agents and that is an estoppel and that is what this Court's cases plainly make clear simply cannot be done.

The Court of Appeals gave a number of reason for disregarding this Court's estoppel cases, but in our view, none of them are substantial.

For example, the Court of Appeals on remand from this Court purported to draw a distinction between acts and failures to act which we believe is irrelevant, and, similarly, the fault between one employee and several also are irrelevant under this Court's cases.

The Court of Appeals purported to rely quite heavily on the Accardi doctrine, that agencies must follow their own regulations. We would submit, however, the doctrine is irrelevant for the following reasons: The issue in this case is not whether an agency must follow its procedures. Of course, it should. The question is what remedies are available when an agency has not followed its procedures.

And, in all of the Accardi line of cases, the Court invalidated agency action whose validity depended on following the precise procedure that was found to have been violated. It was for simply a matter of logic quite a short step to say that the ultimate agency action was invalid.

But, here, as I was mentioning earlier, the substantive validity of the loan application deadline was not made to depend in any way on the quantum of publicity that was given by the agency or in compliance with the regulation that established -- compliance with the regulation

that provided for publicity in the local news media.

I think it is quite clear under the Court's estoppel cases that it would be inconsistent with well-established notions of sovereign immunity to deny a valid legal defense to the government based only on the Court's own notions of what would be equitable in a particular case.

The Court of Appeals also --

QUESTION: May I ask whether you would take the same position if the regulation had not been published in the Federal Register, had just been put in somebody's desk drawer and nobody had access to it?

MR. KUHLIK: The application deadline regulation?

QUESTION: Yes.

MR. KUHLIK: I am not sure whether we would. If it had been a regulation that was established by the Secretary in a way that substantively provided --

QUESTION: What I want to know is the only defect would be a total failure to make it possible for anyone to know about the regulation.

MR. KUHLIK: In those circumstances, the application deadline would not be valid under the APA, I don't believe.

QUESTION: Why not?

MR. KUHLIK: Well, if the APA provided that the application deadline would have to be published in the Federal Register of it not being enforceable against persons without

actual knowledge of the regulation, then it would not be enforceable except as to those people who had knowledge of it.

If it were contained in an internal staff instruction that were then publicized, I think that those --

QUESTION: I am assuming no publicity at all.

MR. KUHLIK: If there were no publicity at all --

QUESTION: That you have the same practical consequences that your opponents contend happened -- I know you disagree -- but that they also really had no possible means of getting access to the information.

MR. KUHLIK: I believe under the circumstances that you are stating, Justice Stevens, that there would not be an estoppel problem because that regulation or that internal instruction would not be enforceable.

The point is the regulation here was published. It was published in the exact place it was supposed to be published which was the Federal Register. It was promulgated as a binding regulation pursuant to the Secretary's rulemaking authority.

QUESTION: I just want to be sure I do understand. You have responded to one of my questions by saying that if there had been no notice of any kind, there would still be no estoppel against the government. That was the same answer you have just given Justice Stevens.

MR. KUHLIK: My answer is that if the application deadline is published in the Federal Register, then there is no requirement that the government give additional --

QUESTION: Then you are saying it had to be published in the Federal Register?

MR. KUHLIK: That is right.

QUESTION: If not, the government would not be estopped.

MR. KUHLIK: If there were no -- If the regulation --

QUESTION: If not published, the government would be estopped.

MR. KUHLIK: If the loan application deadline were not published in the manner necessary for it to be a binding regulation, then there wouldn't be an estoppel question. It would be a binding rule.

QUESTION: You are saying the notice itself is irrelevant. Do you think many farmers read the Federal Register?

MR. KUHLIK: I doubt very much that any of them do.

There is two different kinds of notice here though that it is important to separate. There is notice of the application deadline which we contend, as long as that was provided in the Federal Register, and, therefore, as long as the loan application deadline was properly promulgated

under the APA, as long as that notice was given, then that deadline is a valid legal requirement that cannot be set aside by the courts.

The separate question is the notice of the loan program as a whole and we would simply submit, as I have been saying, that the amount of publicity given to that governmental program is simply irrelevant to whether the government can enforce the application deadline.

The Court of Appeals --

QUESTION: Let me be sure I understand. You say as long as the deadline is published. Do the terms of the loan program also have to be published to satisfy your position?

MR. KUHLIK: I don't believe they do. In fact, they were published though in this case.

QUESTION: But, if so, there is just a statement in the Federal Register that loan program number XYZ expires on such and such a date without telling anybody what loan program XYZ is, that would be sufficient to protect the government from liability.

MR. KUHLIK: I believe it would. Of course, here we are talking about an emergency loan program. The fact is if the farmers had emergency credit needs, one would have expected them to go to the FMHA and make adequate inquiries without waiting to determining whether the terms amounted to --

QUESTION: Why do you suppose they didn't?

MR. KUHLIK: Well, I think the record shows a couple of things. First, that the emergency did not turn out to be as serious as people expected originally. It also shows again that the original FMHA loan terms were simply not all that favorable and that people went to other sources to obtain loans and by the time that this program was reopened in early 1974 with more favorable terms, very few people had emergency credit needs at that point. But, again, that question, we believe, is irrelevant to the determination of this case.

Finally, the Court of Appeals attempted to seek support for its decision under the APA. They suggested, I believe, that the regulation could be waived and that it would be reasonable to do so here.

The point isn't whether -- If this regulation were waivable, the point would not be whether the Court's own notion of equity supported a waiver in this case, but whether a failure to waive would be arbitrary and capricious. And, we would submit that given the emergency nature of the loan program, that there wouldn't have been any basis for reaching such a conclusion here.

But, moreover, this is not a waivable regulation. There is nothing in the regulation to suggest that it is.

QUESTION: Mr. Kuhlik, am I right in thinking that the deadline was an administratively imposed one, not one

imposed by statute?

MR. KUHLIK: That is the conclusion the Court of Appeals reached and we are not challenging that here.

QUESTION: And, am I also right in thinking that any requirement for publicity was also an administrative requirement, not one in the statute?

MR. KUHLIK: There was no mention of publicity in the statute.

The fact is this is not a waivable regulation. The Secretary has long taken the position that this sort of regulation cannot be waived administratively under any circumstances. We would submit that that provides a further reason why the Court of Appeals could not rely on the APA to require a waiver in this case.

If there are no further questions at this time, I will reserve the balance of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Tripp?

ORAL ARGUMENT OF THEODORE L. TRIPP, JR., ESQ.

ON BEHALF OF THE RESPONDENTS

MR. TRIPP: Thank you, Mr. Chief Justice, and may it please the Court:

Justice Stevens, I think, has hit upon the issue in this case and that is that the agency asks this Court to rule that a federal court is powerless to provide a remedy for the gross failure of an entire agency to provide notice

required by binding regulation.

We believe that the Administrative Procedure Act mandates the use of equitable remedies, to compel agency action, in this case notice, which was not provided, and to set aside agency action, in this case, the application of the administrative deadline, until the agency observes the procedures required by law.

First of all, this is not a challenge to the contents of a press release. The district court made findings which I believe are crucial to understand the context of the issue before this Court. This was a natural event which gave rise to losses and under 7 USC 1961 provided that natural citizens who were full-time farmers, who were engaged in farming activities and suffered losses, were entitled to apply for government benefits. That program had been statutorily proceeding for many years until 1972.

In 1972, the Secretary of Agriculture decided for executive budgetary reasons that he would decrease the availability of those programs that he felt was least essential. That is the backdrop for the enactment of Public Law 93-24 which amended Section 1961 and instead of saying the Secretary may make loans available in these circumstances, the language was changed by Congress to provide that the Secretary shall make those loans available.

We believe that at the time Congress made that

change Congress was aware that the Farmers Home Administration had binding regulations, Justice Rehnquist, that required certain types of notice be afforded so that the agency would carry out this statutory mandate to make loan benefits available to farmers who suffer loss.

QUESTION: Is there something in the legislative history or the statute itself that leads you to the conclusion that the Congress knew about the existence of this regulation?

MR. TRIPP: Not directly to the existence of the regulation. The legislative history indicates that the Congress intended to change it from a discretionary function, may make loans available, to a mandatory function, precisely so that the loan benefits would be made available.

We would suggest that to allow an application of an administrative deadline cannot be considered, therefore, in the abstract.

QUESTION: Didn't Congress extend whatever deadline ther was by 90 days or something like that?

MR. TRIPP: Justice White, in the enactment of 93-237, which came later, after 93-24, they did, when confusion arose among the farmers as to what --

QUESTION: Isn't it clear that Congress intend for there to be a deadline?

MR. TRIPP: It is clear that Congress intended there to be a deadline.

QUESTION: So, it is a statutory deadline?

MR. TRIPP: No.

QUESTION: Well, if it is 90 days from whatever it was, that sounds to me like a statutory deadline.

MR. TRIPP: The Court of Appeals feels and we feel the legislative history shows that that was more in the nature of action by Congress to insure that people were not --

QUESTION: Well, suppose the agency had previously administratively set March 1, 1985 as a deadline and the Congress comes along and says please extend that deadline for 90 days. That is not hard to understand.

MR. TRIPP: No, sir, Justice White.

QUESTION: It is still an administrative deadline?

MR. TRIPP: Well, the 90-day deadline existed before 93-237.

QUESTION: Yes.

MR. TRIPP: It has been an on-going deadline that applies not just to this disaster but to each and every disaster. They have said 90 days for property damage and nine months for production losses. It is not a regulation that only applies to us.

But, in 1973, when Congress believed that eligible farmers were not making application because of confusion over the benefits, they, in 93-237, required an extension for 90 days. We believe that was a minimum extension and

did not mean by Congress you may not extend it any further.

QUESTION: At least Congress sanctioned the closing of the loans after the 90-day extension.

MR. TRIPP: In our view, Justice Rehnquist, Congress required a minimum extension of the application period --

QUESTION: And was satisfied with the 90-day extension.

MR. TRIPP: At that time, that is correct, Justice Rehnquist.

QUESTION: And, was there later word from Congress that it was unhappy? You say "at that time."

MR. TRIPP: No, sir, I do not believe that Congress has spoken again to that subject.

The notice, however, that was required to be provided by the Farmers Home Administration was not simply that they advise the news media of the provisions of 93-237. The district court found that there were other specific types of notice required to be provided to state and county USDA defense board chairmen, to other agricultural lenders, to the county governing bodies for the purpose of insuring that during this administratively set application period those who were eligible would have an opportunity to come in an apply.

In each and every instance, the district court found, and we do not understand the Solicitor General to dispute, that the Farmers Home Administration breached a

mandatory, self-imposed duty to provide notice to eligible farmers.

It is in that context that the district court considered the validity of the 90-day deadline.

We believe that the district court found that these farmers were clearly prejudiced by the failure of the Farmers Home Administration to provide this notice. The district court found that more farmers would have applied had the Farmers Home Administration provided the notice, and, in fact, the only loans that were afforded were afforded as a result of the fortuity that Mr. Payne received a letter from Senator Gurney which outlined the program. He took it to his Farmers Home Administration county supervisor, who at that time -- this was now some two or three weeks before the 90-day deadline that Congress required. At that time the county Farmers Home Administration supervisors were not even aware that Congress had enacted this extension.

To suggest, as the Solicitor does, that the publication of these regulations somehow gives notice to Carbie Ellie, as I suggest, contradicted by the evidence in this case which says that the farmers went to the Farmers Home Administration county officials and were affirmatively told there are no emergency loan benefits for which to apply.

It is rebutted by the district court's findings that the efforts of the Farmers Home Administration to make

such public announcements as appear appropriate consisted entirely of one press release which stated that the deadline was some 70 days hence, when, in fact, there was a nine-month application period for crop loss.

And, participation in the Live Oak meeting at which farmers who went for the express purpose of inquiring about the availability of emergency loans were told if you are a farmer there is nothing for you to apply for because there are no benefits available to farmers.

In fact, the Farmers Home Administration had actual knowledge of existing FMHA borrowers who suffered losses as a result of this disaster and who needed these emergency loans. They visited those farms and they did not inform the farmers of the availability of the FMHA loan benefits.

We believe under these circumstances, the Administrative Procedure Act has empowered the federal court to remedy this failure to act.

QUESTION: Well, now, Mr. Tripp, in Maryland against Federal Crop Insurance Corporation, there a government agent, kind of comparably situated to the ones you have been talking about, made an affirmative representation to a farmer that his wheat crop was covered by federal crop insurance. It turned out that representation was contrary to the regulations. This Court said when you deal with the government you turn square corners.

Here, you are relying on something that is a failure to act which is usually in court law thought of as much weaker than an affirmative misrepresentation. Why is your case any better than the Federal Crop Insurance case?

MR. TRIPP: For at least two reasons, Justice Rehnquist. First of all, the agent to whom Mr. Merrill applied was not required by regulation to provide information concerning this loan program to this particular farmer.

QUESTION: No, but he affirmatively supplied misinformation.

MR. TRIPP: That is correct, Your Honor, but as I recall the facts of that case, there was no alternative available to that farmer. He could not go out and get spring wheat crop insurance from some other source. So, it is difficult to see how he was prejudiced.

QUESTION: But, that wasn't the reasoning of this Court. They didn't say there was no damage from the misrepresentation. They said you can hold the government for a misrepresentation in a way you can hold a private individual.

MR. TRIPP: That is correct, but I do not believe that that has been extended by this Court to suggest that you may not remedy the failure of an agency to comply with its own regulations.

In this case, we are complaining not about the misstatement in the abstract in isolation, but by a failure

to provide notice required by regulations, coupled with affirmative misrepresentations which were reasonably relied upon by these farmers in failing to apply for benefits which they were told were not --

QUESTION: Again, there is no question but the reliance was reasonable in the Merrill case. It strikes me your distinctions are really quite unsubstantial.

MR. TRIPP: The third distinction that I would suggest, Justice Rehnquist, between the Merrill case and this case is that the Merrill case did not present a situation where an agency has, through misrepresentation or inaction, frustrated a congressional intent.

I believe that the clear -- the circuit court and the district court all found that the clear intent behind the statutory scheme which established the right of emergency loan benefits and these farmers was frustrated and, in fact, was completely nullified by the agency's refusal to provide this notice.

So, while the Merrill court was presented with a situation where, if the relief had been granted, then government monies would be expended for a purpose contrary to statute or regulations.

Here, you have a situation where applicants are eligible for benefits, where the benefits are going to be spent for purposes intended by Congress and where the only

thing that is thwarting the intent of Congress in this case is the agency's failure to provide the notice required by the regulations.

QUESTION: You know, counsel, it isn't all that clear to me that the courts were below were correct in saying that the agency violated its own publicity regulations. The requirement the agency imposed on itself was something to the effect that it give appropriate notice and I would think the agency's own implementation of its own regulations is some indication that the agency thought what it did was appropriate. And, I have a little trouble just conceding that the court below was correct in finding a violation of the publicity regulations.

MR. TRIPP: Justice O'Connor, there are four aspects to the publicity regulations. First, the notice to the state and county USDS defense board individuals and we had direct testimony from a member of the board who testified that the Farmers Home Administration did not apprise him of the existence of this emergency loan program.

With regard to the duty to inform other agricultural lenders, we had the testimony of the Chairman of the Board of the Federal Land Bank, Mr. Welch, who testified that he was a farmer, he needed emergency loans, and he was not aware of it. And, nobody ever told the primary commerical agricultural lender in this area.

With regard to the requirement that they notify the county governing bodies, I believe that the record shows a stipulation that that notice was not afforded.

So, I would suggest to the Court that there is certainly confident and substantial evidence and it is not clearly erroneous to suppose that both the initial application period and the extended application period required by Congress, those four specific types of notice were not, in fact, afforded.

And, the testimony showed from the farmers that when they attempted to determine what benefits might be available, they went first to the FMHA and were told that nothing was there for which to apply and then consulted with other agricultural lenders, USDA officials, and county governing bodies.

So, the failure to provide all of those notices, we believe, is supported in the record and shows that as a result these eligible benificiaries were deprived not only of the notice but of the opportunity to apply for these benefits.

I would like to point out that we are not dealing here with an order which requires the expenditure of funds.

The district court awarded only the ability to apply.

Consistent with this Court's holdings that it keenly observe the requirements, the valid requirement for charging the public fist, the Farmers Home Administration is directed

to apply the eligibility requirements and the restrictions on the utilization of those funds when and if any eligible farmers can demonstrate their ability, their entitlement to receive the funds.

So, we are not overriding in this case any statutory regulation with regard to the expenditure of these benefits. We are not, unlike Heckler or the other cases in which this Court has been asked to require expenditures of funds which have lapsed or no longer available. This is a revolving fund. The monies were available in 1973 and they continue to be available today.

Finally, we believe that --

QUESTION: Would your view be that under present application it would be enough to have met the hardship requirements as of 1973 or would you have to show hardship now?

MR. TRIPP: Well, as the Solicitor General himself concedes, Mr. Justice Rehnquist, it is not need which defines participation, it is loss.

The regulations as amended do not require that you show that you were unable to acquire credit from other sources. The only thing that you need show is that you suffered a demonstrable loss, that it was a significant loss under the regulations, and that you are a farmer who is a citizen of the United States and capable of repaying the

loan.

QUESTION: So, there isn't any hardship requirement or any requirement you can't get credit elsewhere?

MR. TRIPP: Not under 93-237. There was in the initial loan application period and if you could obtain credit elsewhere you were not entitled to participate in that program. But, as amended, that program removed the requirement that you show the non-availability of credit elsewhere.

So, we believe it is the event of loss to which Congress directed itself and not whether or not you have a current financial hardship.

In fact, if you look at the regulations of the Farmers Home Administration, you will see that you are authorized under the regulations to spend those monies for seed, for fertilizer, for rent, for family expenses, for a variety of things that are not necessarily tied directly to the waters and the damage caused by the waters.

QUESTION: What is the interest rate available on this particular category of loans?

MR. TRIPP: The interest rate initially under the first application period was five percent which would have been the same as operating loans. We submit -- The district court found by the way that the prejudice in the switching -- and there was testimony that when a farmer came to inquire about emergency loans, he was switched to an operating loan,

which also drew interest at five percent.

However, the more beneficial terms of 93-237, which reduced the interest rate to one percent and which provided for the $5,000 forgiveness, was that if someone had applied for an emergency loan during the original application period and had been turned down, they would have received and would have been required to receive under the Farmers Home Administration regulations individual letter notice, saying we now have a more beneficial program available, you may come down and reapply and the availability of other credit no longer precludes your participation in this program.

Because the Farmers Home Administration in some circumstances switched farmers from emergency loans to operating loans, the district court found that they were deprived of the individual letter notice, because while the letters were provided and while the Farmers Home Administration continued to send routine mailings to its farmer clients during the scope of this application period, they never provided the letter notice to anyone because no one had applied for the emergency loans which they were told were not available.

QUESTION: Counsel, agreeing with you if I should, it is going to be quite difficult to show what happened 15 years ago, isn't it?

MR. TRIPP: Mr. Justice --

QUESTION: On both sides. I mean, you have got to show loss, how are you going to show it? How are you going to show your loss?

MR. TRIPP: The regulations which were in effect in 1973, at the time of this loss, and which continue in effect today, provide that with regard to production losses the applicant's statement of loss shall be accepted without further investigation if it seems --

QUESTION: My question is how can he present it? Does he have a paper to show what the loss was?

MR. TRIPP: Justice Marshall, I believe that most -- a lot of farmers, for example -- Mr. Ellie, who was a named Plaintiff, has an arrangement whereby he borrows money from the Farmers Home Administration, he pledges his crops. When the crops are harvested they handle the marketing of the crops, so, there would be records in that instance of the Farmers Home Administration itself that would show the diminution of the crop return.

With regard to other farmers, it is true that the agency's continued refusal to provide notice and continued resistance to judicial requirements that it provide that notice, as imposed by its own regulations, had forced these farmers to wait for ten years.

QUESTION: How about the farmer who sold out and left?

MR. TRIPP: I believe the farmer who sold out and left has simply been -- irrevocably deprived of his right to participate in this program, but those who have hung in, we assert, are the benificiaries of a congressional intent that those who suffer losses be given an opportunity to apply following reasonable notice.

QUESTION: I take it you would be making the same argument if the statute unambigously said that all applications will be made before a certain date, April 30, 1979. Suppose the statute just said that. Then the regulation said, well, we really ought to publicize all this stuff to the farmers and they never did and they just failed to live up to their own regulations. Do you think the Court has authority to set aside that --

MR. TRIPP: Absolutely not, Justice White. I think that -- When you are dealing with a statutory termination you get into a different area. Here you have an administratively set regulation. It is not set for this particular disaster. They are seeking to apply this deadline, the courts below found, to frustrate the intent of the congressional scheme.

Obviously, if Congress itself says that we are going to give $5,000 to each and every farmer who applies before July 1, Congress is free to make that distinction.

We suggest that the difference is an executive agency has never been thought to be empowered to frustrate

the intent of Congress by failing to provide notice that it is required to afford under the application and then applying the deadline which we submit is contingent upon and its validity rests upon their compliance with the procedure required by law, that is the notice.

If there are no other questions, thank you very much.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Kuhlik?

MR. KUHLIK: Yes, Mr. Chief Justice.

ORAL ARGUMENT OF BRUCE N. KUHLIK, ESQ.

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. KUHLIK: I would submit that Respondents' answer to Justice White's question decides this case. Respondents admit that if this were a statutory deadline there would be no authority for a court to override it.

The fact of the matter is this was a properly promulgated regulatory deadline that was recognized by the Court of Appeals as a legitimate time restriction.

This Court's many cases under the Administrative Procedure Act and its estoppel cases as well make very clear the regulations that are promulgated in accordance with the APA have the force and effect of law just as if they were statutory eligibility requirements. That is language directly from the Court's opinion in Merrill. There is simply no

basis for overriding the regulatory application deadline --

QUESTION: I take it you are not urging that this was the statutory deadline.

MR. KUHLIK: No, we are not, but the fact is that they are the same thing. There is no ground for treating them any differently.

I would like to return to some questions that were asked earlier by Justice Powell and Justice Stevens concerning the publicity of the program.

There is no requirement under the APA or in any statute that as a matter of law publicity must be given of governmental benefit programs just in general. There is certainly no requirement that that publicity be given as a pre-condition to the validity of an application deadline.

There was a regulation here that provided that the agency would give publicity, but it did not specify nor did the application deadline specify that the loan application deadline would depend on the amount of publicity that was given.

I think it is very clear that if the publicity regulation had said the agency will inform the news media of this loan program, but its failure to do so shall not in any way affect the validity of the loan application deadline. I can't believe that we would be here. It would be clear that the loan application deadline would be affected.

But, that is exactly the same as this case. There is nothing in the regulations, nothing in the statute at all which even speaks publicity that would in any way suggest that the validity of the loan application deadline somehow depended on whether this regulation concerning publicity was followed.

We would suggest that that is enough to decide the case.

If there is nothing further, thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:50 p.m., the case in the above-entitled matter was submitted.)

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84-1948 - RICHARD E. LYNG, SECRETARY OF AGRICULTURE, ET AL., Petitioners

V. RONALD E. PAYNE, ETC.

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BY Paul A. Richardson

(REPORTER)