

# TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of: )

EUGENE TRAYNOR, )

Petitioner, )

v. )

THOMAS K. TURNAGE, ADMINISTRATOR, )  
VETERANS' ADMINISTRATION AND )  
THE VETERANS' ADMINISTRATION; )

and )

JAMES P. MCKELVEY, )

Petitioner, )

v. )

THOMAS K. TURNAGE, ADMINISTRATOR )  
OF VETERANS' AFFAIRS, et al. )

**LIBRARY**  
SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

No. 86-622

No. 86-737

Pages: 1 through 46

Place: Washington, D.C.

Date: December 7, 1987

**Heritage Reporting Corporation**

*Official Reporters*  
1220 L Street, N.W.  
Washington, D.C. 20005  
(202) 628-4888

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x

3 EUGENE TRAYNOR, :

4 Petitioner, :

5 V. : No. 86-622

6 THOMAS K. TURNAGE, ADMINISTRATOR, :

7 VETERANS' ADMINISTRATION AND :

8 THE VETERANS' ADMINISTRATION; :

9 and :

10 JAMES P. MCKELVEY, :

11 Petitioner, :

12 V. : No. 86-737

13 THOMAS K. TURNAGE, ADMINISTRATOR OF :

14 VETERANS' AFFAIRS, ET AL. :

15 -----x

16 Washington, D.C.

17 Monday, December 7, 1987

18 The above-entitled matter came on for oral argument  
19 before the Supreme Court of the United States at 1:53 p.m.

20 APPEARANCES:

21 KEITH A. TEEL, ESQ., Washington, D.C.;

22 on behalf of the Petitioners.

23 JERROLD J. GANZFRIED, ESQ., Assistant to the Solicitor General,

24 Department of Justice, Washington, D.C.;

25 on behalf of the Respondents.

C O N T E N T S

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ORAL ARGUMENT OF

PAGE

KEITH A. TEEL, ESQ.

on behalf of Petitioners

3

JERROLD J. GANZFRIED, ESQ.

on behalf of Respondents

22

KEITH A. TEEL, ESQ.

on behalf of Petitioners - Rebuttal

43

1 P R O C E E D I N G S

2 (1:53 p.m.)

3 CHIEF JUSTICE REHNQUIST: Mr. Teel, you may proceed  
4 whenever you're ready.

5 ORAL ARGUMENT OF KEITH A. TEEL, ESQ.

6 ON BEHALF OF PETITIONERS

7 MR. TEEL: Thank you, Mr. Chief Justice, and may it  
8 please the Court.

9 These cases today raise two issues for your  
10 consideration. The primary issue is not, as the Government  
11 suggests in its brief, the medical question of whether  
12 alcoholism is a disease. That issue has been decided by the  
13 Congress, which has determined that alcoholism is a handicap  
14 and that it is an illness, a finding that is conclusively  
15 supported by the American Medical Association, the American  
16 Psychiatric Association, and the National Council on  
17 Alcoholism, all of whom have filed briefs in support of  
18 petitioners in this case.

19 Instead, the question here is whether the Veterans'  
20 Administration can ignore Congress' determination and enforce a  
21 regulation that defines alcoholism to be willful misconduct,  
22 which regulation is applied to bar alcoholic veterans from  
23 obtaining extensions of the time in which to use their VA  
24 educational benefits. We contend that the VA cannot use such a  
25 regulation because it is impermissibly discriminatory under  
Section 504 of the Rehabilitation Act of 1973.



1           Before reaching that issue, however, there is a  
2 threshold question of the jurisdiction of the Federal courts  
3 even to consider the legality of the willful misconduct  
4 regulation. Section 211(a) of the Veterans Benefits Statutes  
5 precludes review of certain VA decisions. The Government  
6 argues for a sweeping interpretation of section 211(a), one  
7 that would bar review of all VA action except constitutional  
8 challenges to VA statutes, and challenges by persons not  
9 themselves in a position to receive Veterans' Administration  
10 benefits by who are affected by VA action.

11           Petitioners argue that Section 211(a) should be read  
12 slightly more narrowly and that at a minimum review of VA  
13 regulations to determine whether they comply with non-VA  
14 statutes is permitted.

15           QUESTION: Is that because of the text, Mr. Teel,  
16 that you say that review of Regs to see if they comply with  
17 non-VA statutes?

18           MR. TEEL: It is because of the text and because of  
19 the legislative history and the statutory scheme for review  
20 that we believe Congress created here, which I will explain in  
21 just a moment.

22           The petitioners here are both honorably discharged  
23 veterans. They each have a family history of alcoholism, and  
24 each of them began drinking while they were children; Mr.  
25 Traynor at age 8, Mr. McKelvey at age 13. After they left the  
Service, they were both disabled by alcoholism for a period of

1 six to eight years.

2 Before 1977, veterans were required to use their  
3 educational benefits within a period of ten years following  
4 their separation from the Service. In 1977, the Educational  
5 Benefits statute was amended by the Congress to allow  
6 extensions of the limiting date, the ten-year period, to  
7 veterans who had been unable to use those benefits within the  
8 ten year period because of a disability that was not the result  
9 of their own willful misconduct.

10 Both petitioners here applied for an extension of the  
11 time in which to use their benefits. Both were denied that  
12 extension in decisions of the Board of Veterans Appeals, in  
13 which the Board of Veterans Appeals stated explicitly the  
14 extension were being denied on the basis of the Willful  
15 Misconduct Regulation at issue here.

16 Thereafter, both petitioners brought suit; both  
17 prevailed on summary judgment in the district courts. In the  
18 Courts of Appeals, Mr. Traynor lost on the jurisdictional issue  
19 in the Second Circuit; Mr. McKelvey lost on the merits question  
20 in the District of Columbia Circuit. We believe that both  
21 Courts were in error on the issues in which they ruled against  
22 petitioners.

23 I'd like to begin with the jurisdictional issue. It  
24 is difficult to imagine a less attractive circumstance for a  
25 Federal Agency to argue that review is precluded. In this  
case, the Veterans Administration refused to decide the issue

1 here; whether this regulation violated the Rehabilitation Act.  
2 Even though it would not decide the question, it contends that  
3 the Courts cannot decide the question either. Finally, at the  
4 same time it is making these arguments to the Courts, it has  
5 repeatedly during this decade told the Congress in response to  
6 questions, and in testimony, that review of VA regulations is  
7 in fact permitted under Section 211(a).

8 As with any case involving the question of bars to  
9 judicial review, we begin here with a strong presumption that  
10 there is judicial review which can be overcome by a clear and  
11 convincing showing that Congress did not intend such review.  
12 In Block v. Community Nutrition Institute, in 1984, this Court  
13 enunciated a number of factors that should be considered in  
14 deciding whether review is precluded.

15 The first of these is the language of the Statute;  
16 others are the structure of the statutory scheme and the  
17 legislative history. Let me address those three elements.

18 First, with respect to the language of Section  
19 211(a), is not as sweeping as the Government suggests. The  
20 specific language at issue here is whether decisions of the  
21 Administrator on any question of law or fact, under any law  
22 administered by the VA providing benefits to veterans is barred  
23 from review.

24 Now, certainly the Congress could have drafted a  
25 statute far more clearly had they intended to entirely preclude  
review of everything affecting the VA. They simply could have

1 said, nothing the VA does can be challenged in Court. That's  
2 not what we have here. We have a statute here with a number of  
3 specific clauses that must be interpreted. First, there's a  
4 requirement in the Statute that a decision be on a question of  
5 law or fact arising under any statute administered by the  
6 Veterans' Administration.

7 Judge Kearse noted in her dissent in Traynor in the  
8 Second Circuit that not only was the Rehabilitation Act not  
9 administered by the VA, there's a distinction there between  
10 administering and complying with a statute. Presumably all  
11 Federal agencies comply with Federal statutes of broad scope  
12 that affect it.

13 Administering a statute, we believe, indicates some  
14 expertise. Here, the President, by Executive Order, has  
15 delegated the administration of Section 504 to the Justice  
16 Department. This Court recognized in its decision in 1986 in  
17 Bowen v. American Hospital Association that a number of  
18 agencies have issued regulations under Section 504 and that  
19 those agencies do not have any particular expertise so there is  
20 no reason to give deference to those agencies' views with  
21 respect to Section 504.

22 The reason we believe that is relevant is that is  
23 some indication that those agencies do not administer the  
24 statute; they merely comply with a statute.

25 Secondly, there is a requirement that the Statute  
provide benefits to veterans. Again, the Rehabilitation Act



1 does not do that. What we have with the Rehabilitation Act is  
2 a limitation on the power of Federal agencies to discriminate  
3 against handicapped persons on the basis of their handicap.

4 Now, the structure and the legislative history are  
5 essential to understanding the scope of Section 211(a). It is  
6 our position that the Congress crafted a rational scheme for  
7 review of VA actions. Certain actions are subject to review in  
8 the Board of Veterans' Appeals. Section 4004(a) of the  
9 Veterans Statutes establishes the jurisdiction of the Board of  
10 Veterans' Appeals. It makes clear in Section 4004(c) that the  
11 Board of Veterans Appeals does not have authority to review  
12 regulations of the Veterans' Administration. It is bound by  
13 those regulations.

14 That, as petitioners discovered here in their  
15 administrative hearings in this case, is a restriction taken  
16 quite seriously by the Board of Veterans' Appeals. The Board  
17 of Veterans' Appeals in both cases here stated that it was  
18 powerless to review regulations of the Veterans'  
19 Administration. It was bound by those regulations.

20 With this view, this Court basically is left with two  
21 alternatives; one is to make a decision that nevertheless  
22 despite the view of the Board of Veterans' Appeals, there is no  
23 review available here. The effect of that is that the  
24 Veterans' Administration could pick and choose among those  
25 Federal Statutes that it wanted to pay attention to. It could  
decide not to bother with the Rehabilitation Act. It could

1 decide not to bother with the Civil Rights Act. And presumably  
2 under the Government's interpretation of Section 211(a), the  
3 Veterans' Administration could do so with impunity.

4 We believe that that is not supported by the language  
5 of the Statute, and that the more rational interpretation of  
6 Section 211(a) is that while decisions of the Veterans'  
7 Administration within the specific facts of a veteran's case  
8 under Veterans' laws as to whether a particular veteran is  
9 entitled to benefits is consigned to the Board of Veterans'  
10 Appeals, but that challenges to regulations under non-Veterans'  
11 Administration statutes may be reviewed in the Federal Courts.

12 QUESTION: How about challenges to regulations under  
13 VA Statutes?

14 MR. TEEL: Our position is that regulations generally  
15 are reviewable because of the distinction between decisions and  
16 regulations that we believe is in Section 4004. I would note  
17 that we believe this is not that case.

18 QUESTION: The Government says there are just  
19 thousands and thousands of regulations if you say any decision  
20 based on a regulation is reviewable that there are just going  
21 to be all sorts of cases coming into the courts.

22 MR. TEEL: Well, I know they say that, and I think  
23 the experience --

24 QUESTION: Do you have reason to doubt it if we were  
25 to say that VA statute regulations as well as non-VA statute  
regulations were reviewable?

1           MR. TEEL: I think there is quite a lot of reason to  
2 doubt it. Within the last decade, four Federal Courts have  
3 allowed review of regulations, challenges to regulations that  
4 they were in excess of statutory authority, that kind of  
5 challenge. There simply has not been that flood of litigation  
6 which you would expect if the Government's position were  
7 correct here.

8           QUESTION: And these were allowing review of  
9 regulations based on VA statutes?

10          MR. TEEL: Yes.

11          The other point to note here is that we believe our  
12 interpretation here is supported by the Veterans'  
13 Administration. It's only in this case they seem to be arguing  
14 something differently. They have repeatedly expressed the view  
15 to the Congress that review in these circumstances is  
16 permitted.

17          In 1952, they explained to the Congress that they  
18 believed that Section 211(a) barred review of determinations  
19 arising in the facts of particular veterans' cases under  
20 particular Veterans' law, and they gave as an example, rating  
21 decisions, degrees of disability, that kind of thing. No  
22 mention of regulations. More recently, the Veterans'  
23 Administration has been questioned repeatedly since 1980 on  
24 this issue by the Congress and has stated that in their view,  
25 regulations of the Veterans' Administration are subject to  
review. Indeed, what is particularly striking is they most

1 recently said that in response to a letter from Senator  
2 Cranston in 1986, which was after the decisions of these courts  
3 in the Courts of Appeals.

4 QUESTION: But Mr. Teel, here we have the Veterans'  
5 Administration appearing formally before us by the Solicitor  
6 General, and he's saying this is what the Veterans'  
7 Administration, this is their position. Now, we ordinarily  
8 accept that. You may argue that it has not been consistently  
9 applied in the past, but we ordinarily take the Solicitor  
10 General's word for what the VA's position is.

11 MR. TEEL: I'm disputing that, Your Honor.

12 QUESTION: But you say the Veterans' Administration  
13 itself believes the way you do. If it did, obviously, there  
14 wouldn't be any lawsuit.

15 MR. TEEL: Well, I would think so myself, but that  
16 doesn't seem to be what we have here. The statutes, the  
17 legislative support we have cited in our brief, quite clearly,  
18 they have taken a different view for Congress. Now, they are  
19 no doubt here arguing a different position, but that shouldn't  
20 control.

21 QUESTION: Well, you say legislative support, and  
22 you've cited states made, or you think were made -- and  
23 probably were -- by VA people to the Congress, but that isn't  
24 legislative support. That may be an inconsistent position by  
25 the Agency.

MR. TEEL: I agree with you it is not legislative



1 history in the sense that this Court often refers to it.

2 QUESTION: In any orthodox sense.

3 MR. TEEL: Pardon me?

4 QUESTION: Or in any orthodox sense.

5 MR. TEEL: That's correct. But this Court has noted  
6 repeatedly, and we cite cases to support this view that the  
7 view of an agency with respect to statutes that govern it is  
8 entitled to some deference. That's the reason we think that  
9 the statements made by the Veterans' Administration to the  
10 Congress are significant.

11 QUESTION: Yes, but this statutory provision really  
12 doesn't have much to do with what the Agency does; it describes  
13 what courts may do.

14 MR. TEEL: Nevertheless, I think that the Agency  
15 lives day to day with this statute. They presumably know what  
16 they do is not subject to review, and they better get it right.

17 Here their view seems to be -- other than in this  
18 case -- that they think 211(a) does not reach regulations. We  
19 think that view is entitled to some deference, certainly  
20 consideration by this Court in resolving these issues. We  
21 think that it's an indication that the Veterans' Administration  
22 recognizes that the statutory scheme for review that I  
23 suggested was created by 211(a) is in fact the proper one.

24 I'd like to now turn, if I could, to the  
25 Rehabilitation Act issue before the Court. Our argument is a  
simple one. We contend that because alcoholism has been

1 defined as a handicap under the Rehabilitation Act, and because  
2 Section 504 of the Rehabilitation Act applies to the VA  
3 Educational Benefits Program, the regulation here at issue is  
4 impermissibly discriminatory and cannot stand.

5 QUESTION: I guess under your view, disability  
6 payments would have to be made as well, wouldn't they?

7 MR. TEEL: Well, it is a troubling aspect of this  
8 case, as the Government points out, that the VA uses the same  
9 term, willful misconduct, in its disability statutes as it does  
10 in these educational benefits statutes. The fact is, however,  
11 we believe that the choice for the Court is to write these  
12 petitioners out of the Rehabilitation Act by saying that you  
13 don't get your benefits, or to worry about the question of  
14 disability benefits which, if that resulted in a problem, the  
15 Congress could correct that problem. There's ample room  
16 for --

17 QUESTION: Well, it would be pretty hard to  
18 distinguish legally, wouldn't it, if you're right?

19 MR. TEEL: Well, under the current statutes, it is.  
20 But I note, for instance, under the Rehabilitation Act under  
21 the definitions of what's a handicapped person with respect to  
22 employment benefits, the Congress has made just that kind of  
23 distinction that persons who are currently alcoholics or  
24 currently are drug abusers are not covered with respect to  
25 employment opportunities if their problems would prevent them  
from being able to do their job.

1           There is that kind of precedent that the Congress has  
2 made those small corrections when necessary. Presumably it  
3 could do the same thing here.

4           Last term in Arline, this Court noted that  
5 discrimination against the handicapped often results from  
6 insensitivity. We believe this is not such a case. The  
7 Regulation here is discriminatory by intent. The VA knows  
8 about the problems of alcoholism. Its hospitals may be the  
9 Federal Government's largest provider of treatment and services  
10 to alcoholics. And it significantly does not make any  
11 distinction on the basis of wilful misconduct in treating those  
12 patients.

13           Despite that, it continues to enforce a regulation  
14 that we believe is based on nothing more than the history of  
15 the Regulation. The regulation comes from the era of  
16 prohibition. It has never been reconsidered in light of  
17 current medical knowledge, despite the united opposition of the  
18 leading medical groups in this country including the AMA and  
19 the American Psychiatric Association. It truly is reflective,  
20 to use the phrase used in Arline of archaic attitudes and laws.  
21 And we believe cannot be allowed to stand.

22           Previous judicial decisions under Section 504 have  
23 created a four-part analysis for determining whether the  
24 Section 504 has been violated. The first question is, are the  
25 petitioners handicapped. The answer here obviously is, yes.  
This Court recognized in Arline that alcoholics are covered by

1 the language of the Rehabilitation Act.

2 Are they otherwise qualified. Again, the facts in  
3 this case indicate that the answer must be, yes. Both  
4 petitioners here received education after they recovered from  
5 their alcoholism. The Government has not disputed that point.

6 Third point, are these programs covered by Section  
7 504. Again, the answer is, yes. The Government concedes that.

8 The fourth point, have these petitioners been  
9 excluded solely on the basis of handicap. Here, the Board of  
10 Veterans' Appeals said, we've got this regulation here that  
11 says if you are an alcoholic, we can't give you an extension.  
12 Therefore, that's the end of the case.

13 QUESTION: You feel that's an irrebuttable  
14 presumption.

15 MR. TEEL: Yes.

16 Now, I want to address a point that the Court of  
17 Appeals in McKelvey made because they had some problem with the  
18 notion that this was exclusion on the basis of handicap. The  
19 majority there said this was not discrimination on the basis of  
20 handicap but rather on the basis of conduct. We believe that  
21 that is a distinction that does not make sense.

22 The key feature of alcoholism is the compulsion to  
23 drink. There may be other points about it but what  
24 characterizes the illness in its active phase is drinking  
25 behavior. We believe the two must be taken part and parcel, at  
least with respect to this kind of regulation. Here the



1 Regulation was not regulating behavior, it was simply saying,  
2 if you are an alcoholic, you don't get your benefits. That is  
3 a decision made not on the basis of any conduct but on the  
4 basis of the petitioners' status as alcoholics.

5 In Arline, this Court noted that the contagious  
6 effects of tuberculosis cannot meaningfully be distinguished  
7 from the disease itself. We believe here you have essentially  
8 the same kind of problem. You can't separate the drinking  
9 behavior from alcoholism. To do so would write alcoholics  
10 entirely out of the protection of the Rehabilitation Act. We  
11 believe that any Federal Agency could say well, we understand  
12 you're an alcoholic and we're not saying anything about that.  
13 We're just regulating on the basis of your conduct.

14 QUESTION: Mr. Teel, I would like to go back because  
15 your argument I think raises the point to the question Justice  
16 O'Connor asked you earlier. Does your argument also require  
17 the same treatment of claims for disability benefits by a  
18 veteran? And I particularly am concerned about the legislative  
19 history in 1977 in which the Senate suggested that in  
20 determining whether the disability was a result of willful  
21 misconduct, they wanted to apply the same standard that was  
22 being applied by the VA under this Regulation.

23 MR. TEEL: I think the answer to the question is,  
24 yes. The VA applies the same willful misconduct standard in  
25 the context of disability benefits as well as these educational  
benefits.

1 QUESTION: Your arguments against doing so in the  
2 tolling context seem to me to apply equally to the disability  
3 benefit claim context.

4 MR. TEEL: I'm sorry, I don't understand the  
5 question.

6 QUESTION: You're explaining why they should not do  
7 it in the context of tolling the ten-year prohibition, but  
8 doesn't your argument also apply equally to a claim by a  
9 veteran for disability benefits based on his alcoholism?

10 MR. TEEL: I think it well might, yes, sir.

11 QUESTION: So you don't really buy Judge Ginsburg's  
12 distinction of the two. You say then whatever we decide today  
13 will decide the issue on disability benefits?

14 MR. TEEL: Well, I think, as Justice O'Connor notes,  
15 it's a tough distinction to make. There are suggestions that  
16 the VA might be able, for instance, to determine that if  
17 somebody knows they have the problem of alcoholism and they're  
18 not receiving treatment, that perhaps that alone is a  
19 sufficient basis to call willful misconduct in the disability  
20 benefit context.

21 That is a bit far afield from this case. We don't  
22 have that problem because here we've got petitioners who are  
23 recovered from the problem of alcoholism. It's conceivable the  
24 VA might try to make those distinctions. But nevertheless, we  
25 recognize that there is the same language in the Statutes and  
that if the Congress perceives that to be a problem as a result

1 of the decision for petitioners in this case, they may have to  
2 modify it.

3 QUESTION: Not only the same language in the Statute  
4 and the Regulation, but also legislative history suggesting at  
5 least in 1977 Congress intended the two rules to be the same.

6 MR. TEEL: Well, that's right. And in fact, I'd like  
7 to mention that legislative history. In our view, the  
8 Government makes much of the point that that reference in '77  
9 to these regulations. We think that the most that can be made  
10 out of that is that Congress felt the same standards should be  
11 applied across the board. That's a rational thing for an  
12 agency to do. If you've got the same language, apply the same  
13 meaning to it.

14 QUESTION: Isn't this tough enough for us to take it  
15 one step at a time?

16 MR. TEEL: Well, in fact, I think it is, it's very  
17 difficult. And I think this Court's decision for instance in  
18 Choate where you decided some things -- we reached some  
19 disparate impact under Section 504; we may not reach it all --  
20 has shown a willingness to take things one at a time. You  
21 could have a narrow decision such as that in this case.

22 QUESTION: If there had been no Rehabilitation Act,  
23 the Veterans' Administration would withstand challenge of its  
24 interpretation and application to alcoholics of this tolling  
25 provision, without the Rehabilitation Act Section 504, you  
would not have a case, I take it?

1 MR. TEEL: Well, I think we would have a much more  
2 difficult case.

3 QUESTION: But that's your principal reliance?

4 MR. TEEL: Yes, we are principally relying on Section  
5 504.

6 QUESTION: So here's an Act that was being  
7 administered as it was supposed to be administered, and then  
8 came the Rehabilitation Act and you say there's a fundamental  
9 inconsistency between the two statutes?

10 MR. TEEL: No, actually that's what the Government  
11 argues. The Government argues there is a fundamental  
12 inconsistency. We don't argue that for a minute.

13 QUESTION: What are you arguing?

14 MR. TEEL: Well, our point is that the inconsistency  
15 here --

16 QUESTION: Yes, but you say that the Rehabilitation  
17 Act requires the Veterans' Administration to change its views.

18 MR. TEEL: It's views as expressed in a regulation.  
19 We do not contend that they could not then take petitioners'  
20 cases and direct them back for the sort of --

21 QUESTION: I know, but I thought that you answered  
22 that the Veterans' Administration position in its regulation  
23 would be perfectly acceptable absent the Rehabilitation Act.

24 MR. TEEL: No. What I said was, I think it would be  
25 a tougher case. You said, did we principally rely on Section  
504 and we do.



1 QUESTION: Assume for the moment that the Regulation  
2 was quite valid, absent the Rehabilitation Act, and hence the  
3 Regulation is a valid regulation under the applicable statutes.  
4 And that expresses the meaning of the statute or a permissible  
5 meaning of the statute.

6 MR. TEEL: I concede it would be more difficult to  
7 challenge that.

8 QUESTION: Well, let's assume that it was a  
9 permissible interpretation of the statute. Now, you in effect  
10 say that the Rehabilitation Act made it an impermissible  
11 construction of the statute.

12 MR. TEEL: That's right, but that does not have the  
13 affect, as the Government suggests, of repealing the '77  
14 Statute. What it does is mean they can't enforce this  
15 particular regulation. There's no inconsistency.

16 QUESTION: Well, the reason they can't is because it  
17 is no longer a permissible interpretation of the Veterans'  
18 Statute.

19 MR. TEEL: Well, it is no longer permissible with  
20 these statutes with the Rehabilitation Act to define a  
21 condition, a handicapping condition under the Rehab Act. But  
22 to define that as --

23 QUESTION: Yes, but you're arguing that the  
24 Rehabilitation Act means that the Veterans' laws governing the  
25 Veterans' Administration can no longer be construed the way the  
Veterans' Administration has been construing them.

1 MR. TEEL: If you assume, as is correct, the  
2 regulations implement that statute, I will concede that point,  
3 but there is no inherent contradiction between the two  
4 statutes, we believe. You can still have a determination on  
5 these petitioners of whether there was something in particular  
6 in their behavior --

7 QUESTION: But you say that the Rehabilitation Act  
8 means that there is no longer any room to construe the laws of  
9 the Veterans' Administration is administering in the way that  
10 they have been construed.

11 MR. TEEL: Make a blanket determination that  
12 alcoholics have engaged in misconduct we believe that's  
13 inconsistent with the Rehabilitation Act.

14 QUESTION: Even though absent it, it was quite  
15 consistent with the Veterans' Administration laws?

16 MR. TEEL: Well, actually, I'm not so sure it is  
17 inconsistent with the Veterans' Administration laws. The  
18 Veterans' Administration laws, as this Court has noted in  
19 previous opinions, the Radiation case back in '85, are  
20 typically slanted in favor of the veteran. This is something  
21 that while maybe as a legal matter absent the Rehabilitation  
22 Act, would be consistent with Veterans' laws, I'm not sure that  
23 somebody couldn't challenge it on that basis.

24 QUESTION: In light of the Senate history in 1977?

25 MR. TEEL: Well, again, the Government, I believe,  
places too much reliance on that history. I think the most that

1 history stands for is that the same concept should be applied  
2 in the same circumstances, pardon me, applied in the same way.  
3 Willful misconduct means the same thing in all contexts. There  
4 was no discussion in that legislative history of what the  
5 regulation meant, and there was certainly no consideration of  
6 it in light of the Rehabilitation Act, which did not apply in  
7 '78 to this program.

8 I'd like to reserve my remaining time.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Teel.

10 We'll hear now from you, Mr. Ganzfried.

11 ORAL ARGUMENT OF JERROLD J. GANZFRIED, ESQ.

12 ON BEHALF OF RESPONDENTS

13 MR. GANZFRIED: Thank you, Mr. Chief Justice, and may  
14 it please the Court.

15 Congress has spoken plainly and directly on the two  
16 questions that are at issue in these cases. One  
17 jurisdictional, the other substantive.

18 First, did Congress intend to preclude judicial  
19 review in these cases. The answer is, yes. And second, did  
20 Congress intend for the GI bill to be administered just as the  
21 VA has administered it here. And the answer, again, is yes.  
22 The common theme in both issues is ultimately the principle  
23 that Congressional intent must govern.

24 The Statute barring judicial review, Section 211(a)  
25 precludes review of decisions of the Administrator on any  
question of fact or law under any law administered by the VA

1 providing benefits. The intent of this language couldn't be  
2 clearer.

3 QUESTION: You're going to explain how the Rehab Act  
4 is administered by the Veterans' Administration?

5 MR. GANZFRIED: I'm going to explain how what's being  
6 challenged in this case is a decision by the Administrator  
7 under a law administered by the VA, namely the decision was to  
8 deny the particular extension on the educational benefits  
9 program to the petitioners. I would also point out that to the  
10 extent that the petitioners are suggesting that the  
11 Rehabilitation Act has required some modification of the  
12 Veterans' Benefits law, they're arguing that the Rehabilitation  
13 Act has been integrated into that Statute, and of course, it's  
14 the head of the Agency who has been given the responsibility by  
15 Congress of implementing the Rehabilitation Act within his  
16 Agency's programs.

17 There's a reference to the Department of Justice.  
18 The Department of Justice has coordinating responsibilities,  
19 but to the extent that the Administrator has to make a decision  
20 in a benefits case, that subsumes questions raised under other  
21 statutes, he's still deciding a question under the VA Benefits  
22 Laws.

23 QUESTION: Mr. Ganzfried, I want to be sure -- as  
24 long as the ten years has not expired, the veteran is entitled  
25 to this assistance, isn't he?

MR. GANZFRIED: That's correct.



1 QUESTION: Even though he's an alcoholic?

2 MR. GANZFRIED: That's correct.

3 QUESTION: And all you're doing is denying him the  
4 necessary time to get the full benefit?

5 MR. GANZFRIED: He is not in a position from anyone  
6 else who is not handicapped. He had reasonable access to the  
7 package of benefits, the educational benefits program. He had  
8 the ten years. All that has been denied is the extension that  
9 Congress provided in 1977 for certain handicapped people, and  
10 they defined handicapped people to whom that extension would be  
11 available and defined it in a way that did not include the  
12 petitioners within that category.

13 I should make clear that the VA Regulation does not  
14 disqualify alcoholics from benefits. And as I think your  
15 question implied, had they applied during the ten-year period,  
16 and in fact both of them did, and did receive educational  
17 benefits during their applicable ten year delimiting periods,  
18 and they got them. There was no disqualification on account of  
19 alcoholism. It just becomes a relevant consideration in  
20 connection with this limited extension of the ten-year period  
21 that Congress has provided for certain handicapped people.

22 QUESTION: Well, I take it you imply that their delay  
23 in completing their education was due to the continuing  
24 disability due to alcoholism?

25 MR. GANZFRIED: What I mean to say is that as the  
Board of Veterans' Appeals determined in this case, they did

1 not meet any of the statutory or VA regulatory criteria for  
2 qualifying for the extension.

3 QUESTION: Isn't it somewhat unrealistic. You say  
4 they could have had the benefits, but aren't we assuming that  
5 during the period of alcoholism, they really were not fit to be  
6 students in higher education institute.

7 MR. GANZFRIED: Well, we're not assuming that because  
8 had they suffered consequential physical disabilities,  
9 consequential physical effects of the alcoholism that  
10 themselves would have qualified as a disability, they would  
11 have gotten the benefits.

12 QUESTION: Yes, but still, doesn't the alcoholism  
13 itself, assuming it's serious enough, would not that prevent a  
14 person from passing college grade courses?

15 MR. GANZFRIED: It could but it would be the  
16 derivative physical effects of the alcoholism and the  
17 determination in these cases by the Board was that the physical  
18 effects on which the petitioners relied did not satisfy to meet  
19 other regulatory requirements as to how severe a disability you  
20 have to show to get your benefits.

21 QUESTION: I really don't understand your argument.

22 MR. GANZFRIED: Okay. The regulation --

23 QUESTION: I mean, the physical effect is just that  
24 the person is consuming so much alcohol that he or she is  
25 unable to live a normal life. Are you saying --

MR. GANZFRIED: I take issue with one statement

1 there. The physical effect is consuming too much alcohol, our  
2 position that consuming too much alcohol is conduct, not a  
3 physical effect. If the veteran has derivative physical  
4 effects that are so disabling --

5 QUESTION: Yes, but that conduct itself is sufficient  
6 to prevent the person from acquiring an education, isn't it?

7 MR. GANZFRIED: Only if he has the consequential  
8 physical disabilities.

9 QUESTION: Maybe in the Government's interpretation  
10 of the regulation, it doesn't count, but just as a practical  
11 matter whether it was otherwise qualified or not, if he is  
12 consuming large quantities of alcohol 24 hours a day, six days  
13 a week, and there's nothing else -- he doesn't break his leg in  
14 an accident or anything like the no other conduct -- but isn't  
15 that itself something that as a practical matter makes it  
16 rather unrealistic to suggest he should be taking advantage of  
17 this education benefit.

18 MR. GANZFRIED: Well, what I have to understand in  
19 the question is are there any physical consequences of his  
20 consuming --

21 QUESTION: He's drunk all the time.

22 MR. GANZFRIED: Well, in that case, if he's consuming  
23 alcohol 24 hours a day, if he's not eating, then he's going to  
24 have nutritional deficiencies, he's going to have vitamin  
25 deficiencies which is specified in the VA regulation as -- he  
may have all kinds of other physical maladies and consequences

1 of it, and if he has those and if he proves them, he gets the  
2 benefits. And the fact that alcoholism may have been the cause  
3 is not a disqualification.

4 QUESTION: But is being dead drunk so to speak a  
5 physical consequence that would entitle him to some sort of  
6 benefits?

7 MR. GANZFRIED: Being unconscious?

8 QUESTION: Yes.

9 MR. GANZFRIED: The question is whether it's a  
10 disability that would have prevented someone from pursuing an  
11 education. Being dead drunk on occasions does not disable  
12 someone from pursuing an educational program. The problem that  
13 the petitioners ran into before the Board here was that -- and  
14 there are various periods of hospitalization in Mr. Traynor's  
15 case. He was hospitalized five times over the course of four  
16 years, but none of his periods of hospitalization were  
17 sufficiently long to satisfy a separate regulatory requirement  
18 that only hospitalization periods of 30 days would permit  
19 someone to get an extension of benefits.

20 QUESTION: If he had been hospitalized for 30 days  
21 because of alcoholism, then he would have gotten credit for  
22 that 30 days in the tolling?

23 MR. GANZFRIED: He may have, depending on how the  
24 Board looked at what evidence he presented. But ordinarily,  
25 the hospital records are not going to say often simply,  
hospitalized 30 days alcoholism. They're going to indicate



1 alcoholism and because, as the brief suggests as a very  
2 important part of alcoholism, and that is denial, the fact that  
3 this person is not likely to be in the hospital in the first  
4 place unless there is some physical manifestation.

5 QUESTION: But this rule doesn't say anything about  
6 physical manifestations or anything else about being drunk or  
7 anything. It says, if you're an alcoholic; that's all.

8 MR. GANZFRIED: No, it does not say that.

9 QUESTION: What does it say?

10 MR. GANZFRIED: The VA rule is that alcoholism is  
11 divided into two categories: primary alcoholism and secondary.

12 QUESTION: Right.

13 MR. GANZFRIED: Secondary alcoholism, which is the  
14 result of any underlying psychiatric disorder, is not a  
15 disqualification. You get the extension of benefits.

16 QUESTION: That has nothing to do with how much  
17 liquor he drinks or anything else.

18 MR. GANZFRIED: Well, whether someone's an alcoholic  
19 doesn't always depend on how much liquor he drinks.

20 QUESTION: That's what I'm talking about; that's  
21 exactly what I'm complaining about.

22 MR. GANZFRIED: There are people who may drink as  
23 much as someone who is an alcoholic, and yet those people are  
24 not alcoholics. There are alcoholics who may be functioning  
25 alcoholics. There are alcoholics who may have binges or  
weekend drinking and yet are able to function at school and at

1 work five days a week.

2 QUESTION: I guess he couldn't teach either, could  
3 he, if he's an alcoholic? He couldn't teach, could he?

4 MR. GANZFRIED: An active alcoholic, 24 hours a day,  
5 seven days a week?

6 QUESTION: Yes.

7 MR. GANZFRIED: And showing the physical  
8 manifestations of that?

9 QUESTION: Yes.

10 MR. GANZFRIED: I suppose not.

11 QUESTION: That's right, but you pick on this one  
12 group.

13 MR. GANZFRIED: No, it's only a group of people who  
14 can prove neither --

15 QUESTION: Who are sick. Have you admitted that this  
16 is an illness?

17 MR. GANZFRIED: That alcoholism is an illness?

18 QUESTION: That alcoholism is an illness?

19 MR. GANZFRIED: We submit that it's basically an  
20 irrelevant question in this context for reasons very similar to  
21 --

22 QUESTION: Well, do you mind answering an irrelevant  
23 question? Do you agree that it is an illness?

24 MR. GANZFRIED: It can be. It can be.

25 QUESTION: Do you agree that the "average alcoholism"  
in quotes, is an illness?

1 MR. GANZFRIED: Well, we don't know what the average  
2 alcoholism is.

3 QUESTION: Well, the one that you're talking about in  
4 your statute?

5 MR. GANZFRIED: Primary alcoholism?

6 QUESTION: Yes, sir.

7 MR. GANZFRIED: Okay, what is defined in the  
8 regulations --

9 QUESTION: Is that an illness?

10 MR. GANZFRIED: It can be.

11 QUESTION: Is it? Is it?

12 MR. GANZFRIED: It is not always.

13 QUESTION: It's in your Statute, you put it in there.

14 MR. GANZFRIED: Well, it's in the Regulation and the  
15 term primary alcoholism is essentially what the VA has  
16 determined to be willful alcoholism.

17 QUESTION: Is it an illness?

18 MR. GANZFRIED: It can be. Is it in every case? I  
19 don't know.

20 QUESTION: Mr. Ganzfried, if it's not an illness,  
21 what is it?

22 MR. GANZFRIED: It can be conduct, it can be a  
23 compulsion short of an illness, it can be an inclination short  
24 of a compulsion, it can be a predisposition.

25 QUESTION: Is that what they're talking about?

MR. GANZFRIED: Well, we don't know.

1 QUESTION: Oh, you mean the statute's indefinite?

2 MR. GANZFRIED: The statute simply says disability  
3 not the result of willful misconduct.

4 QUESTION: And the regulations are indefinite.  
5 They're not too indefinite to take away a man's livelihood.

6 MR. GANZFRIED: It's not talking about any questions  
7 of taking away anyone's livelihood.

8 QUESTION: Well, I'm asking you, is it an illness, or  
9 not?

10 MR. GANZFRIED: You raise it in terms of someone's  
11 livelihood. The Congress has said in the Rehabilitation Act  
12 that an alcoholic who is not able to perform employment duties  
13 is not a handicapped person. That's in the Statute in the  
14 Rehabilitation Act.

15 QUESTION: I'm talking about this Statute which says,  
16 alcoholism.

17 MR. GANZFRIED: Well, this statute doesn't say,  
18 alcoholism.

19 QUESTION: It says primary?

20 MR. GANZFRIED: No, it's a regulation and the VA  
21 policy, it says primary regulation.

22 QUESTION: Well, is that regulation an illness when  
23 it says alcoholism in the regulation?

24 MR. GANZFRIED: It doesn't address the question  
25 whether it's an illness.

QUESTION: Well, does it say alcoholism? Primary



1 alcoholism?

2 MR. GANZFRIED: Primary alcoholism.

3 QUESTION: Well, is that or not -- I'm going to try  
4 this one more time, and then I'm through: Is it or is it not  
5 an illness.

6 MR. GANZFRIED: The regulation doesn't say.

7 QUESTION: Well, is it or is it not. Is it  
8 administered as, or is it not?

9 MR. GANZFRIED: In terms of providing rehabilitation  
10 and treatment, the answer to that, in terms of the Veterans'  
11 Administration is, yes. And it provides \$100 million in in-  
12 patient rehabilitation alcoholism services each year, and for  
13 rehabilitation, it regards it as an illness. It will help  
14 people overcome the condition.

15 QUESTION: You agree, it is an illness.

16 MR. GANZFRIED: In some contexts.

17 QUESTION: It took quite awhile, but I made it.

18 QUESTION: Mr. Ganzfried, let me try to bring this  
19 down to earth. I take it that the issue much proclaimed by the  
20 media as to whether alcoholism is or is not a disease is not  
21 really very relevant in this case, is it?

22 MR. GANZFRIED: No. Because illness is not  
23 necessarily a disability.

24 I guess I've gotten a bit afield from the section  
25 211(a), but I think the colloquy points out that we are dealing  
here with very complex questions that touch on a very intricate

1. ganglion of nerves in society that cuts across questions of  
2. medicine and law and philosophy and religion.

3.           The case doesn't have to be decided on that level,  
4. but the issues do implicate all of those concerns. The basis  
5. for deciding the case is really determining Congress' intent in  
6. two statutes. 211(a) in which it said, no review because it  
7. didn't want the Courts to get involved in day to day  
8. determinations of VA policy and VA benefits. And it's clear  
9. that that's exactly what is really involved in these cases.  
10. It's clear from the prayers for relief in the District Courts.

11.           QUESTION: Yes, but Mr. Ganzfried, that's because  
12. these cases arise in that particular way. But supposing they  
13. brought declaratory judgment actions asking for a ruling on the  
14. consistency of this regulation with the Rehabilitation Act.  
15. Then your language of the Statute argument really wouldn't fit.  
16. It's just that it happens to arise in that particular way.

17.           MR. GANZFRIED: Without ever first doing something  
18. like petitioning the administrator of the VA to reconsider? I  
19. mean, what's the agency action that's being challenged here?  
20. It's either the benefits determination in their cases --

21.           QUESTION: It's the regulation, I suppose.

22.           MR. GANZFRIED: -- or it's a regulation that was  
23. promulgated in 1972 before the Rehabilitation Act was passed,  
24. six years before it became applicable to Federal programs, and  
25. it's simply not an appropriate basis for Federal jurisdiction  
to come into Court --

1 QUESTION: Well, maybe it's a challenge of the  
2 failure of the VA to --

3 MR. GANZFRIED: -- without having gone to the head of  
4 the Agency petitioning him to reconsider his regulation as --

5 QUESTION: No, but all I'm suggesting is that if you  
6 brought that kind of a lawsuit, the language of 211(a) would  
7 not read upon it.

8 MR. GANZFRIED: It might. It might, because what  
9 might happen is that the Administrator could say that this was  
10 a question of whether I should interpret --

11 QUESTION: The Administrator could say, as he did  
12 here --

13 MR. GANZFRIED: -- the benefits law to have the  
14 following consequences on the benefits law as a result of the  
15 Rehabilitation Act.

16 QUESTION: Or the VA could say, as it did here, we're  
17 just not interested in deciding that question. They did not  
18 decide it here, as I understand.

19 MR. GANZFRIED: The Board of Veterans' Appeals didn't  
20 decide it here. The Board of Veterans' Appeals was deciding  
21 the particular eligibility --

22 QUESTION: And your position is that nobody should  
23 decide it, nobody should decide it, because the agency refused  
24 to and the Court says we can't.

25 MR. GANZFRIED: No, we've got to forums here, neither  
one of which was addressed by the petitioners. The first is a

1 petition to the Administrator. The Administrator has by  
2 issuing this as a regulation and not maintaining it as a  
3 decision which it had been in earlier years in 1931 and 1964,  
4 they were decisions by the Administrator, individual  
5 determinations, not subject to judicial review.

6 In 1972, the Administrator put that into a  
7 regulation. And the Administrator --

8 QUESTION: Yes, but the question is whether that  
9 regulation, so interpreted by the Administrator, continues to  
10 comport with the law that was passed in 1978.

11 MR. GANZFRIED: Yes, and the answer is you go back to  
12 the Administrator, the person who promulgated the regulation,  
13 553(e) of the Administrative Procedure Act, which has been  
14 incorporated here by the VA, says you go back and you petition  
15 to the head of the Agency, or you go to Congress.

16 QUESTION: No. But do you concede that there would  
17 be review under the Administrative Procedure Act in such a  
18 proceeding, notwithstanding the language of the --

19 MR. GANZFRIED: Well, it's altogether different from  
20 this case and it's not a concession that --

21 QUESTION: Yes, but are you contending that the  
22 Statute would bar such a proceeding? If you are, why are you  
23 suggesting that's the way they should have done it?

24 MR. GANZFRIED: Because they could have gotten  
25 relief. There might not have been a need for a proceeding. Or  
having gotten that decision from the Administrator to go in, to



1 present the medical evidence, to present whatever you'd like to  
2 present from the recent medical literature and say, look, times  
3 have changed, the statute has changed. We think that a  
4 rethinking is in order here.

5 The Administrator has, independent of the fact that  
6 there had been no such petition for that, has looked at this  
7 question.

8 QUESTION: Yes, but I don't understand that as a  
9 jurisdictional argument unless you're saying that there would  
10 have been review under the Administrative Procedure Act. If  
11 you're not saying that, they could have written him a letter,  
12 too, and said, please reexamine this. They could have done a  
13 lot of things.

14 MR. GANZFRIED: That's right, but they did none of  
15 them.

16 QUESTION: The question is whether the Statute  
17 requires them to do those. And I still don't know what your  
18 answer is on whether there would have been review in an  
19 appropriately framed proceeding under the Administrative  
20 Procedure Act.

21 MR. GANZFRIED: If ultimately what it was was a  
22 decision by the Administrator under a law administered by the  
23 VA, the answer to that has got to be that there would not be  
24 judicial review.

25 Let me address the question briefly as to whether  
review extends only to regulations or turn that around, whether

1 the preclusion of review extends only to adjudications in  
2 individual cases, or it applies to regulations as well.

3 The petitioners have argued that there has been very  
4 little litigation on this subject, very few cases brought, even  
5 though a number of circuits have permitted judicial review of  
6 VA decisions in particular instances. The question really  
7 isn't whether we can predict whether flood gates will open and  
8 the waters will rush in. It's more important to look at what  
9 Congress was saying when it was writing the statute and whether  
10 it was concerned about flood gates, and the answer to that is,  
11 yes.

12 In 1970, when 211 was amended to its present form as  
13 this Court discussed in its decision in Johnson v. Robison, it  
14 was done as a reaction to decisions by the D.C. Circuit that  
15 had permitted review in certain circumstances. And the  
16 legislative history which is discussed in Johnson v. Robison,  
17 and is also discussed in then Judge Scalia's opinion in the  
18 case of Gott v. Walters, indicates that there was concern that  
19 there were 353 cases pending in the D.C. Circuit alone, and  
20 that there was concern that future cases would be brought based  
21 on individual benefits determinations and regulations.

22 And that was part of Congress' concern and that is  
23 part of the basis upon which Congress amended the Statute to  
24 read the way it does today.

25 QUESTION: How did it read before the amendment?

MR. GANZFRIED: It used the term, claims, and what

1 the D.C. Circuit had said, well, that would preclude judicial  
2 review if you're coming in and applying for benefits, but in  
3 instances where benefits were discontinued or benefits were  
4 forfeited for some reason, the Court had held that you can come  
5 into court because that's not a claim for benefits, that's  
6 something that happens after you're already getting benefits.

7 And Congress came in and said, no, we want no review;  
8 we don't want to involve the courts in the day to day workings  
9 of the VA. Now, would a decision that you could challenge  
10 regulations, even the validity of regulations under other  
11 statutes interfere with the day to day workings of the VA? And  
12 the answer to that is, yes.

13 Just one example is that the VA has a regulation on  
14 the ratings for disability of malaria. It's got four  
15 categories that rate the disability from 100 percent to 50  
16 percent to 30 percent to 10 percent. The gradations depend on  
17 such things as whether there have been three relapses in a six  
18 month period or two relapses in a six month period. I suppose  
19 that someone could claim that current medical evidence makes  
20 that distinction inappropriate, that two serious relapses is  
21 more important than three not so serious relapses, and that he  
22 shouldn't be discriminated against because he happened to have  
23 two rather than three relapses of malaria. Well, under  
24 petitioners' theory, he would get into Court. That's just one  
25 example.

Asthma is another condition with four categories.

1 High blood pressure has four categories. Ulcers have five.  
2 Epilepsy has six. And blindness has more than 100 different  
3 ratings categories in the regulations that depend upon the  
4 degree of impairment division.

5 A suggestion that reviewing regulations would not  
6 inject the courts into the day to day workings of the VA has no  
7 basis in fact.

8 Now, if the Court concludes despite the arguments  
9 I've made and those in our brief, that there is jurisdiction  
10 for these cases to proceed --

11 QUESTION: May I ask one question on that point, Mr.  
12 Ganzfried?

13 MR. GANZFRIED: Sure.

14 QUESTION: Do you agree with the view taken by then-  
15 Judge Scalia in the McKelvey case that the Administrator  
16 necessarily decided in the benefit claims case that the  
17 regulation was consistent with the Rehab Act?

18 MR. GANZFRIED: I didn't hear the middle part --

19 QUESTION: Judge Scalia's view in the McKelvey case,  
20 do you agree with it?

21 MR. GANZFRIED: I think that view as amplified in his  
22 opinion in the Gott case, Gott v. Walters, an earlier case that  
23 was the opinion was vacated upon granting of rehearing en banc  
24 and then the case was settled but the opinion is cited in some  
25 of the briefs mentioned briefly in a quotation in our brief.  
That explanation is an appropriate one.



1           There's also a procedural wrangle in this case as to  
2 whether the Administrator or the VA had decided the issue or  
3 hadn't decided the issue.

4           QUESTION: Would that view have implications for us  
5 in terms of our jurisdiction in other cases do you think?

6           MR. GANZFRIED: The question of whether a decision --

7           QUESTION: Whether necessarily encompasses others?

8           MR. GANZFRIED: It would have enormous implications.

9           Let me say something about a case, considering the  
10 subject matter of this case it is quite astonishing that the  
11 case has not been mentioned before. This is not the first time  
12 that this Court has been asked to consider the legal  
13 ramifications of alcoholism. In Powell v. Texas, the Court  
14 refused to accept the blanket rule that alcoholics may not be  
15 asked to bear some degree of responsibility for their conduct,  
16 criminal responsibility in that case. And the Court recognized  
17 that alcoholism is not merely status, it involves conduct,  
18 drinking, for which there may be an element of volition, at  
19 least at some point in the progression leading toward chronic  
20 alcoholism.

21           Now, the Powell case is discussed in our brief in  
22 several places, but it's not mentioned in Petitioners brief or  
23 reply brief, or in any of the amicus submissions and hasn't  
24 been mentioned today.

25           I've tried to explain that the VA policy is not a  
blanket disqualification of alcoholics from benefits. They get

1 rehabilitation and treatment and medical services. They also  
2 get educational benefits if they apply within the ten years.  
3 So there's some reasonable access to the package of benefits  
4 that we're talking about in this case.

5           With respect to the language of willful misconduct,  
6 that is language that petitioners try to paint as deriving from  
7 prohibition. What's more important about that language is that  
8 it derives from the statutes that deal with veterans benefits  
9 for disability compensation and pensions. And no one can  
10 seriously claim that a disability compensation which amounts to  
11 \$1355 a month for a total disability and that's not an income-  
12 sensitive amount, that that should be paid to someone whose  
13 sole disability is alcohol abuse or drug abuse. And I should  
14 mention that the VA has a regulation that treats drug abuse,  
15 for the purposes of these programs, in a similar way to the way  
16 it treats alcoholism.

17           Because to take that position would be tantamount to  
18 paying that person for life to continue drinking or taking  
19 drugs, and would discourage treatment or rehabilitation. And  
20 it is certainly an appropriate response for Congress to take to  
21 say that funds would be better spent on rehabilitation and  
22 treatment than on simply providing pensions and disability  
23 compensations.

24           And I should add also that a claim along those lines  
25 has already been made, a claim for alcoholism disability has  
been made in the pension area and is pending in the Third

1 Circuit and is mentioned in our briefs.

2 Now, in 1977, Congress incorporated the willful  
3 misconduct language into the educational benefit program to  
4 assess who was entitled to this extension. And it took a term  
5 of art. It didn't make up some language. It took a term of  
6 art that had a particular meaning that had evolved in VA  
7 pension determinations over the course of years, a position  
8 that was first addressed in 1931, was reviewed again in 1964,  
9 and was reviewed again in 1972 when the present regulation was  
10 promulgated and sent out for notice and comment, and there was  
11 only one comment on this regulation when it was proposed in  
12 1972. So the VA's position is not as it's been suggested  
13 woodenly fixed in the early days of the century. It has  
14 evolved in response to changing conditions as to the facts as  
15 they were presented.

16 QUESTION: Mr. Ganzfried, may I ask you this  
17 question. Supposing in 1978, the VA had said, we want to take  
18 another look at this regulation and allow an extension in this  
19 kind of situation. Do you think the 1977 history would have  
20 prevented them from doing it?

21 MR. GANZFRIED: It would have made it awfully  
22 difficult and the VA came to that conclusion, because there's  
23 legislative history in 1979 and 1981 when members of the Senate  
24 Committee that oversees the VA said we really don't want you to  
25 apply this alcoholism standard in the educational benefits  
extension context. And the VA went up there and said, well,

1 you may say that now, but in your Committee Report in 1977 you  
2 said that by using the term, willful misconduct, we intend for  
3 the VA to apply that term as it's applied it in the other  
4 contexts, and specifically referenced this regulation --

5 QUESTION: I understand that. Do you think --

6 MR. GANZFRIED: -- and the provision from the manual.  
7 And the VA went back to Congress and said, you may have  
8 something different in mind, but we've concluded that we're  
9 bound by what you told us in '77. You told us, you must do  
10 this.

11 QUESTION: Do you think they would have been bound by  
12 that 1977 history even if they read the 1978 legislation the  
13 way your opponent does?

14 MR. GANZFRIED: I think the answer to that is still  
15 yes, but it's a question for the Administrator to take up in  
16 the first instance because the 1978 legislation is more general  
17 and it doesn't repeal something that's more specific. If it  
18 requires a different result, then you do have to address  
19 whether it effected an appeal by implication.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ganzfried.  
21 Mr. Teel, you have three minutes remaining.

22 ORAL ARGUMENT OF KEITH A. TEEL, ESQ.

23 ON BEHALF OF PETITIONERS - REBUTTAL

24 MR. TEEL: Thank you, Your Honor.

25 I would just like to address a couple points. First,  
with respect to Mr. Ganzfried's astonishment at our failure to



1 discuss Powell v. Texas, I also note this Court has the  
2 precedent in 1962 of Robinson v. California, which explicitly  
3 held that it was improper to punish people for the status of  
4 being, in that case, drug abusers.

5 QUESTION: Didn't Powell say it wouldn't apply the  
6 Robinson principle in the case of alcoholics?

7 MR. TEEL: No. What it said was, the Court there I  
8 think was concerned about extending the principle of you can't  
9 do something to somebody just because of their status to  
10 regulating conduct that went along with it. The express  
11 concern in that case I think was along the lines of criminal  
12 statutes in the states, for instance, regulating drunk driving.  
13 The Court wanted to make clear it did not reach those kinds of  
14 things.

15 But with respect to regulation based solely on  
16 somebody's status as an alcoholic, which is what we think this  
17 regulation does, we think Robinson is still controlling here.  
18 Well, that was in a criminal context, constitutional context,  
19 to the extent that it has any relevance at all or that Powell  
20 does, we contend we're Robinson and we're not Powell.

21 The Rehabilitation Act, as this Court noted in  
22 Arline, requires an individualized determination of each  
23 handicapped person's situation. That is at essence the problem  
24 with a regulation like this. This Regulation is  
25 discriminatory. We believe it cannot stand.

However, we contend that a decision our way here, the

1 probable result of that decision would be to send these cases  
2 back to the Veteran's Administration with a directive that  
3 you've got the law wrong. The law is, alcoholism is a  
4 handicap. You can't discriminate solely on that basis.

5 Now, you have a Statute in 1977 that says the VA does  
6 have a right to decide whether a particular petitioner,  
7 particular veteran engaged in willful misconduct. The  
8 effective of a decision for petitioners here is to send these  
9 cases back to the Veterans' Administration for that willful  
10 misconduct determination. The delimiting date extension  
11 statute would still have force. The VA just would be unable on  
12 the basis of these petitioners' condition as alcoholics to say  
13 that alone means you don't get your benefits. That is in  
14 essence what our case is here. The VA is ignoring the  
15 requirements of the Rehabilitation Act. They will continue to  
16 do so as long as this regulation stands, and therefore, we  
17 believe this regulation should be invalidated by the Court.

18 If there are no further questions.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Teel.

20 The case is submitted.

21 (Whereupon, at 2:50 p.m., the case in the above-  
22 entitled matter was submitted.)

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

REPORTERS' CERTIFICATE

DOCKET NUMBER: 86-622 and 86-737  
CASE TITLE: Eugene Traynor v. Thomas K. Turnage and  
James P. McKelvey v. Thomas K. Turnage  
HEARING DATE: December 7, 1987  
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence  
are contained fully and accurately on the tapes and notes  
reported by me at the hearing in the above case before the  
United States Supreme Court  
and that this is a true and accurate transcript of the case.

Date: December 11, 1987

*Margaret Day*  
\_\_\_\_\_  
Official Reporter

HERITAGE REPORTING CORPORATION  
1220 L Street, N.W.  
Washington, D. C. 20005

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'87 DEC 14 P2:56