10-1978

Califano v. Westcott

Lewis F. Powell Jr.

Discuss with 78-449 Califano v. Stevens - possibly note, & hold on

Note (Act of Congress invalidated)

DC (Mass) invalidated § 407 of the Social Security Act.

PRELIMINARY MEMORANDUM

December 8, 1978 Conference
List 1, Sheet 1

No. 78-437-ADX

Appeal from D. Mass. (Freedman)

CALIFANO (Sec. HEW)

v.

WESTCOTT (AFDC claimant) Federal/Civil Timely (w/ 2 extns.)

No. 78-689-ADX

SHARP (Comm. Mass. Dept. Pub. Welfare) same

v.

WESTCOTT same Timely

SUMMARY: These are direct appeals pursuant to 28 U.S.C. § 1252 from a decision of the United States District Court for the District of Massachusetts declaring § 407 of the Social Security Act, 42 U.S.C. § 607, unconstitutional as violative of the equal protection guarantee of the 5th Amendment. Section 407 provides AFDC benefits to two-parent families in which a dependent child has been deprived of parental support because of the unemployment of the father, but does not provide benefits when the mother becomes unemployed. Sec. Califano in No. 78-437 challenges

I would note. Paul

the equal protection decision on the merits, but does not question the relief ordered by the DC. Commissioner Sharp in No. 78-689 acquiesces in the decision on the merits, but challenges the relief.

BACKGROUND: The Aid to Families with Dependent Children (AFDC) program, 42 U.S.C. § 601 et. seq., provides financial assistance to families with needy dependent children. If a state elects to participate in the program, it must comply with the requirements of the Act and the applicable federal regulations, and its plan must be approved by the Secretary of HEW. A state with a qualifying plan is reimbursed by the federal government for a percentage of its expenditures. If a state that participates in the AFDC program also participates in the Medicaid program, individuals who receive AFDC benefits are entitled to receive Medicaid benefits.

As originally enacted in 1935, the AFDC program provided benefits only to families whose children were needy because of the death, absence, or incapacity of a parent. 42 U.S.C. § 606. This provision, which survives today, was gender-neutral: benefits are available to any family so long as one parent of either sex was dead, absent, or incapacitated, and the family meets the financial requirements for eligibility. In 1961 Congress expanded the AFDC program to provide assistance to certain families where both parents are present and not disabled, but the children are in need because of a parent's unemployment. Again, this extension was gender-neutral. In 1967, however, Congress made this extension permanent, and in so doing added a gender classification to the statute. The definition of "dependent child" in § 407 now includes a "needy

child...who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father...." This portion of the program is known as Aid to Families with Dependent Children, Unemployed Father (AFDC-UF). Although all 50 states participate in the AFDC program, only 26 states (and the District of Columbia) take part in the AFDC-UF program. One of these states is Massachusetts.

To be eligible for benefits under the AFDC-UF program, a family must meet both categorical and financial requirements. The major categorical requirements are that the father must have had 6 or more quarters of work in any 13 quarter period ending within one year prior to the application for aid, and must be currently employed for less than 100 hours per month. The financial requirement is that the family's income may not exceed the AFDC standard of need.

FACTS AND DECISION BELOW: Appellees are two couples who do not qualify for AFDC-UF benefits, even though both meet the financial requirement of the Act and in both one parent is out of work. Cindy and William Westcott are married and have an infant son. Cindy was the family breadwinner until her most recent employment as a chambermaid ended in November 1976. William has a minimal work history which does not give him enough quarters of work to qualify as an unemployed father under the Act. Cindy, however, was qualified at the time the suit was brought. The parties have stipulated that the Westcotts satisfy all conditions of eligibility for AFDC-UF benefits except the condition that the unemployed parent be male.

Susan and John Westwood are married and have two small

children. Susan was the family breadwinner from 1972 to 1977, working 10-15 hours a week as a bookkeeper. John is cronically unemployed and does not have enough quarters of work to qualify as an unemployed father. In 1977 the Westwoods applied for Medicaid because they wanted coverage for medical care in connection with the birth of the second child. They were determined to be ineligible. Again, the parties have stipulated that the Westwoods would be eligible for Medicaid but for the requirement that the unemployed parent be male.

The DC certified the case as a class action under Fed. R. Civ. P. 23(b). Addressing the equal protection claim, the court found that there was no question but that § 407 established a gender-based classification. Reviewing this Court's most relevant decisions, the court observed that "the standard of review of gender based classifications has not been altogether clear." Jur. State. 20A. Nonetheless, it concluded that Craig v. Boren, 429 U.S. 190, 197 (1976) and Califano v. Webster, 430 U.S. 313 (1977), establish that gender-based distinctions are unconstitutional unless they "'serve important governmental objectives and [are] substantially related to the achievement of those objectives.'" Jur. State. 21A-22A.

After examining the legislative history, the court concluded that § 407 was designed to serve two "important governmental objectives." First, the Act was intended to secure the protection and care of needy children in families without a breadwinner's support. Second, it was designed to counteract one of the perceived defects of the original AFDC program, which by making assistance available in the event of the absence of a parent from home had induced the real or pretended desertion of fathers.

The court then scrutinized the "fit" between these governmental objectives and the gender-based classification erected by the statute. It concluded that the classification did not further the objective of assisting families with needy children who are without the support of a breadwinner, but would cause many families with needy children to go unaided. Specifically, families where the unemployed wage earner is female were left without AFDC-UF benefits and Medicaid. Furthermore, the classification would thwart the objective of preserving family stability. In families where the unemployed wage earner is female, and benefits are not provided, the father would have the same incentive to desert in order to make the family eligible as he had prior to the passage of § 407.

Finally, the court acknowledged that the notion that fathers are more likely to be the primary supporters of their spouses and children "is not entirely without empirical support," quoting Wiesenfeld v. Weinberger, 420 U.S. 636, 645 (1975). Nevertheless, it found that "an assumption that all mothers are not breadwinners is clearly archaic and overbroad," and that this Court has not hesitated to invalidate gender classifications based on "archaic and overbroad generalizations." Jur. State. 31A.

The court's discussion with respect to the appropriate remedy is summarized in the memo in No. 78-689, attached.

CONTENTIONS: The SG concedes that § 407 establishes a gender-based classification, but contends that this classification is constitutional when analyzed under the intermediate standard of review set forth in Craig v. Boren, supra, or any other standard shor of strict scrutiny. Appellees, in opposition, assert

that three district courts have considered the constitutionality of § 407, the court below and the courts in Califano v. Stevens, No. 78-449, and in Califano v. Browne, No. 78-603; that all of these courts had little difficulty concluding that the statute was infirm; and that the decision below should be affirmed.

The SG advances four reasons why the Court should afford this case plenary review. First he argues that § 407 differs from other gender-based statutes considered by the Court in that although the Act imports a distinction based on gender, it does not have gender-biased consequences. The Act does not award benefits to a father where it denies benefits to a mother. The award or denial of benefits in each case affects an entire family, which will impact to an equal degree one man, one woman, and children of either or both sexes.

Second, the SG submits that the limitation of aid to families where the father is unemployed was not "the accidental byproduct of a traditional way of thinking about females." Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring). Rather, it was the result of an "actual, considered legislative choice." Ibid. The 1967 Committee Reports give the following explanation for the inclusion of the limitation:

> This program was originally conceived as one to provide aid for the children of unemployed fathers. However, some States make families in which the father is working but the mother is unemployed eligible. The bill would not allow such situations. Under the bill, the program could apply to the children of unemployed fathers. H.R. Rep. No. 554, 90th Cong., 1st Sess. 108 (1967).

Thus, the statute does not reflect "archaic and overbroad" stereotypes about women. It was, instead, part of a conscious decision on Congress' part to eliminate a specific flaw in

the original AFDC program.

Third, the SG contends that the gender classification is substantially related to the objective of reducing the incentive of unemployed fathers to desert their families. In enacting § 407, Congress heard testimony that 65% of all families receiving AFDC payments were those where both parents were alive but the father was absent from home. In contrast, the families in which the father was present but the mother was dead, incapacitated, or absent for any reason made up only 1.8% of all AFDC families. Congress therefore acted on solid statistical evidence when it concluded that males are more likely to desert their families than females. Although, as the DC suggested, it is possible that there would also be an incentive for the father to desert where the mother, who had been the breadwinner, became unemployed, "this was not the pressing problem that confronted Congress." Jur. State. 14.

Fourth, the SG argues that this case is distinguishable from other decisions by this Court involving gender classifications in the Social Security area. Unlike Social Security retirement or disability payments, which are based on contributions or taxes paid by a worker, AFDC payments are based on a general, non-participatory welfare program. Thus, § 407 does not "denigrate...the efforts of women who do work and whose earnings contribute significantly to their families' support." Weinberger v. Wiesenfeld, supra, 420 U.S., at 645.

In a footnote, the SG informs the Court that the Secretary has estimated that the total cost in fiscal year 1980 of extending AFDC-UF benefits to families in which the mother but not the father is unemployed will be $510.7 million. Jur. State 7 n. 6.

The appellees respond that the argument that this case is somehow different because there is no "loser" on the basis of sex is simply frivolous. Section 407 discriminates against mothers in two-parent homes, such as the appellees in the present case, by denying them and their families needed welfare benefits that they would concededly have been provided if they were male. Appellees also contend that the casual substitution of the word "father" for "parent" in 1967, with only a passing reference in the Committee Reports, indicates that even in 1967 Congress was simply acting on the archaic and overbroad assumption that women are dependent on their husbands and that they are child-rearers and homemakers rather than family breadwinners.

Appellees acknowledge that a central purpose of the AFDC-UF program was to mitigate the problem of deserting fathers. But they agree with the DC that the gender discrimination of § 407 is irrational in light of that purpose. Families such as the Westcotts and the Westwoods, no less than families where the father has been the breadwinner and is unemployed, face the dilemma of remaining together and foregoing benefits or separating so that the remaining parent and children can qualify. In fact, the record shows that after the Westcotts were denied AFDC-UF benefits, their landlord, impatient for overdue rent, suggested that William Westcott leave the home so that Cindy and her unborn child would be eligible for AFDC. Jur. State. 27A n. 16.

DISCUSSION: The SG suggests only one governmental objective served by § 407's gender classification: the promotion of family stability. For a two-parent family that meets the financial requirements for AFDC eligibility, there are nine situations

where the family might have an incentive to separate in order to obtain AFDC benefits under the traditional absent-from-home criterion. (1) Where the father is unemployed and the mother is not in the labor force (i.e., is unemployed but does not meet the categorical requirements of the Act). (2) Where the father is unemployed and the mother is unemployed. (3) Where the father is unemployed and the mother is employed in a modest paying job. (4) Where the father is not in the labor force and the mother is not in the labor force. (5) Where the father is not in the labor force and the mother is unemployed. (6) Where the father is not in the labor force and the mother is employed in a modest paying job. (7) Where the father is employed in a modest paying job and the mother is not in the labor force. (8) Where the father is employed in a modest paying job and the mother is unemployed. And (9)Where the father is employed in a modest paying job and the mother is employed in a modest paying job. Appellees argue that the statute is irrational because it covers only situations (1), (2), and (3) and does not cover other situations where there are two parent families with needy children. However, even if the decision below were affirmed, the statute would then reach only situations (1), (2), (3), (5), and (8). This suggests that there are "irrationalities" in the statute that go beyond the imposition of a gender qualification. In particular, the most needy families of all--those where both the father and the mother have been out of work so long that neither qualifies as "unemployed"--would not qualify for AFDC-UF even with the reference to gender removed. On the other hand, a family where

the father is employed in a modest paying job and the mother is unemployed would qualify.

Although the statute appears to be irrational both because of the gender classification and otherwise, at least when viewed in terms of abstract situations, the thrust of the SG's argument is that Congress legislated on the basis of what it believed to be the most common situations existing in the real world--where the father is unemployed and the mother is not earning enough to bring the family above the AFDC financial requirements. There appears to be some support for this interpretation in the legislative history. Moreover, the SG has a plausible point that the gender classification of § 407 presents issues that are somewhat different from those considered in cases like Weinberger v. Weisenfeld that involve contributory retirement and disability programs. Finally, the separate appeal by Commissioner Sharp in No. 78-689 raises serious questions about the appropriate relief in this case, and if those issues are to be addressed, the merits of the equal protection claim should be considered too.

I would note. There is a motion to affirm.

11/29/78 Merrill DC op. in Jur. State.

Other Note to set with Califano v Westcott, [redacted]. 78-437, or Hold for that case.

[redacted]

Another Social Security Act case.

(SG suggests we Hold)

PRELIMINARY MEMORANDUM

December 8, 1978 Conference
List 1, Sheet 1

No. 78-689-ADX

Appeal from D. Mass. (Freedman)

SHARP (Comm. Mass. Dept. Public Welfare)
v.
WESTCOTT (AFDC claimant)

Federal/Civil

Timely

SUMMARY: Pursuant to 28 U.S.C. § 1252, which permits any party who has received notice of appeal to take a subsequent or cross appeal, the Commissioner of the Massachusetts Department of Public Health challenges the relief entered by the DC in this case. Appellant contends that it should be allowed to limit AFDC-UF payments to families whose children are needy because the "principal wage-earner" is unemployed. The facts and general statutory background are set forth in the memo in No. 78-437.

I would [redacted] note.

Paul

DECISION BELOW: Section 407 of the Social Security Act defines the term "dependent child"to include "a needy child who meets the [financial requirements of § 406] who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father...." Thus, the Act gives the Secretary of HEW the authority to set standards for the "unemployment" necessary to make a family eligible for AFDC benefits. The regulations adopted by the Secretary require each state to adopt a definition of an unemployed father that "must include any father" who meets certain stated requirements. 45 C.F.R. § 233.100(a)(1). Accordingly, Massachusetts adopted regulations that limited eligibility for AFDC-UF payments to needy families with unemployed fathers.

The DC concluded that § 407 violates the equal protection guarantee of the 5th Amendment, and also concluded that the Massachusetts regulations violate the Equal Protection Clause of the 14th Amendment. The DC considered that it had two remedial choices: elimination of the AFDC-UF program altogether or extension of the AFDC-UF program to include all children of needy families where either the father or the mother was unemployed within the meaning of the Act and implementing regulations. Applying the test articulated by Mr. Justice Harlan in Welsh v. United States, 398 U.S. 333, 365 (1970), focussing on "the intensity of commitment to the residual policy" and "the degree of disruption of the statutory scheme that would occur by extension as opposed to abrogation," the DC opted for extension. Accordingly, it enjoined the Massachusetts Commissioner from refusing to grant AFDC-UF benefits to families

with children deprived of parental support by reason of the unemployment of the mother. It also enjoined the enforcement of § 407 insofar as it acted to prevent the Secretary of HEW from paying federal matching funds to Massachusetts for the payment of AFDC benefits to families who would be eligible but for the fact that the mother rather than the father was unemployed.

Appellant then moved for clarification or modification of the DC's opinion and order to permit the adoption of Massachusetts regulations that would provide benefits only to families with dependent children who were deprived of parental support by reason of the unemployment of the parent who had been the principal wage-earner. On August 9, 1978, the DC declined to amend its order, concluding that any further reformulation of the statutory scheme beyond deletion of the gender distinction was a matter for Congress, not the courts, and that the State was "'not free to narrow the federal standards that define the categories of people eligible for aid' under the AFDC program," quoting Quern v. Mandley, 46 U.S.L.W. 4594, 4598 (U.S. June 6, 1978).

CONTENTIONS: Appellant analyzes the AFDC-UF program in terms of two models: a single parent model, whereby benefits would be paid to a needy family when a key individual--the breadwinner--became unemployed, and a two parent model, whereby benefits would be paid to a needy family when either of two parents became unemployed, regardless of who was the breadwinner. Appellant contends that the critical inquiry is what form of sex-neutral AFDC-UF program, if any, Congress would have established if it had known of § 407's constitutional

defect at the time of its enactment. Appellant maintains that the legislative history of § 407, the structure of the Act, and considerations of comparative costs, all indicate that Congress would have selected the single parent gender-neutral model, rather than the two parent model. The DC's order, however, by simply extending eligibility to needy families with unemployed mothers, as well as needy families with unemployed fathers, has mandated the adoption of the two parent model.

The legislative history of the original 1961 version of the AFDC-UF program indicates that the AFDC program was expanded "to include families in which the breadwinner is unemployed." S. Rep. No. 165, 87th Cong., 1st Sees. 1 (1961). "Breadwinner," according to appellants, denotes a status which only one member of a family can hold at a given time. The 1968 revision also supports the view that Congress intended to adopt the single parent model. The reason given for restricting elegibility to families with unemployed fathers was that "some States make families in which the father is working but the mother is unemployed eligible"--in other words, some states were affording benefits to families where the breadwinner had steady employment.

The single parent model is also supported by consideration of the structure of the Act. The Act imposes both categorical and financial requirements for eligibility. The principal categorical requirement is that the father must be employed for less than 100 hours per month. The single parent model would retain this requirement by conditioning eligibility upon the principal wage-earner being employed less than 100 hours per

month. The two parent model would remove this requirement, by permitting one parent, and then the other, to satisfy the unemployment cirterion by working less than 100 hours, while the other parent could work more than 100 hours. As a result, the Act would be limited only by the financial requirement.

Finally, appellant submits that the DC failed to consider the cost differential between the single parent and the two parent model of the AFDC-UF program as an index of Congressional intent. Appellant estimates that the dual parent model would cost Massachusetts $2,580,000 more than the single parent model in the first year alone.

Appellees respond that there is no support for the "principal wage-earner" test in the plain language of § 407, and that the frequent references to "breadwinner" in the legislative history and the apparent disapproval of the payment of benefits to families who were not acutally deprived of a breadwinner's support does not justify re-writing the statute. Furthermore, the argument that the DC's order would eliminate the requirement of unemployment is simply wrong. The Act makes clear that there must be a parent who can satisfy all the requirements for being unemployed, including the prior work history test.

More generally, appellees submit that appellant is really arguing about the proper policy to follow in affording welfare benefits to families with needy dependent children, and that these policy considerations should be left for Congress. For example, they point out that adoption of the principal wage-earner test would mean that families currently

receiving benefits based on the father's unemployment would be terminated unless the father could show that he was also the principal wage-earner.

The SG has also filed a memorandum opposed plenary review of appellant's claim. The SG notes that under § 407, it is the Secretary, not the states, who has the authority to set standards for the unemployment necessary to make a family eligible for AFDC benefits. Because the DC's order did not purport to restrict the Secretary's authority to define "unemployment" in any gender-neutral way, or to prevent any state dissatisfied with the federal standards to withdraw form the AFDC-UF program. the DC's order is correct. The SG asks that the Court defer consideration of this appeal pending its decision in Califano v. Westcott, No. 78-437. If the Court affirms the judgment in Westcott, it should affirm the portion of the order challenged here. If the Court reverses in Wescott, then it will be unnecessary to consider the propriety of the relief ordered.

DISCUSSION: Appellant has raised serious questions about the proper form of relief which warrant plenary consideration if the equal protection question is given plenary consideration. The argument from the literal language of the statute cannot be controlling. There is no more support in the statute for requiring the payment of benefits to families with an unemployed "parent" than there is for requiring the payment of benefits to families with an unemployed "principal wage-earner." There are at least two gender-neutral ways of reformulating the Act, and congressional intent should be the central factor in determining which interpretation is correct. Appellant has

made a strong if not compelling case for the "two parent model." Full consideration of his contentions should not be too burdensome if the Court must, in any event, review the structure and function of § 407 in order to dispose of the Secretary's appeal.

I would note and set for argument with Califano v. Westcott, No. 78-437. There is a motion to affirm and a memo from the SG.

11/29/78 Merrill DC op. in No. 78-437; order in Jur. State.

December 8, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 78-437

CALIFANO, SEC. HEW

vs.

WESTCOTT

Note

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.				✓			✓						
Brennan, J.				✓									
Stewart, J.				✓									
White, J.							✓						
Marshall, J.				✓									
Blackmun, J.				✓									
Powell, J.				✓									
Rehnquist, J.							✓						
Stevens, J.													

December 8, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 78-689

SHARP

vs.

WESTCOTT

Also motion to affirm. Also motion of appellees for leave to proceed ifp.

Same judgment as 78-437

Note + Consolidate - One hour.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.	✓												
Brennan, J.							✓						
Stewart, J.	✓												
White, J.				✓									
Marshall, J.							✓						
Blackmun, J.				✓									
Powell, J.				✓									
Rehnquist, J.				✓									
Stevens, J.	✓												

BB 3/27/79

BENCH MEMORANDUM

To: Mr. Justice Powell

Re: No. 78-437, Califano v. Westcott
No. 78-689, Sharp v. Westcott

The first of these cases, No. 78-437, presents the question (1) whether a gender-based discrimination in Section 407 of the Social Security Act violates the Equal Protection Clause. The (2) second case, No. 78-689, raises issues concerning the remedy that should be ordered by the District Court if Section 407 is unconstitutional.

I

Section 407 provides that if a family meets the need criteria of the AFDC program, and if the father is unemployed, the family qualifies for AFDC assistance. By implication, families in which the mother is unemployed are ineligible. The DC held that this statute violates the rights of the appellees under the Equal Protection Clause. | §407

In the fourth draft of your opinion in Caban v.

Mohammed, No. 77-6431, you state the standard for assessing the constitutionality of gender-based statutory distinctions.

> "Gender-based distinctions 'must serve governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause." Printed Draft, at 7, quoting Craig v. Boren, 404 U.S. 190, 197 (1977).

Three pages later in the Caban draft, you cite with approval the reiteration in Reed v. Reed of the standard stated in Royster Guano Co. v. Virginia, 253 U.S. 412 (1920): such a statutory "classification 'must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"

The present case illustrates some of the difficulties with applying the foregoing standard. While it is obvious that some governmental objectives are themselves proscribed by the Equal Protection Clause, see, e.g., Zablocki v. Redhail, 434 U.S. 374, 398 (1978) (Powell, J., concurring) (miscegenation statute based on a classification "directly subversive of the principle of equality at the heart of the Fourteenth Amendment"), this leaves a wide universe of legitimate governmental objectives. It will be a rare statute indeed that cannot be said to serve one or more of these objectives, and yet, depending upon which of these objective one focuses upon, the statute may achieve the purpose with more or less completeness and more or fewer objectionable side effects. In

part this problem of multiple objectives can be dealt with by restricting judicial attention to the objectives actually entertained by the legislature when it enacted the statute. E.g., Trimble v. Gordon, 430 U.S. 762, 774-776 (1977).

If the legislative history of the statute indicates, however, that the legislature had multiple objectives that it sought to serve by enactment of the statute, restriction of attention to actual legislative purpose will not resolve the question. The parties to the present case, for example, suggest two different purposes that Congress had in contemplation when it enacted Section 407. Assuming that both purposes were important reasons for the passage of Section 407, you must decide how to accommodate such a situation to the analysis outlined above. (I will leave aside for the moment the difficult factual questions about legislative purpose that necessarily are raised in applying the equal protection standard set out above, and will assume that the purposes suggested by the parties are adequately evident from the legislative history of §407.)

The SG suggests that Section 407 was enacted to remove the incentives for paternal desertion created by the original AFDC program. Under that program, only needy children in single-parent homes were eligible for aid. This restriction of aid to single-parent families encouraged desertion by one parent; the SG says that experience showed that fathers often

deserted while mothers rarely did so. He also indicates that this experience was before Congress in the form of studies and surveys at the time that Section 407 was enacted, and that members of Congress referred to Section 407's purpose of removing the incentive for family dissolution.

The appellees, on the other hand, insist that the primary purpose of Section 407 was to extend the benefits of the AFDC program to the children of unemployed parents. They, too, cite statements by various members of Congress that seem to take this view of the purpose of the statute; in addition, they rely on the temporary (1961 - 1967) precursor of Section 407, which extended benefits to children of an unemployed "parent" rather than just an unemployed "father."

If the governmental objective is avoidance of family dissolution, and if experience shows that the only substantial threat is from paternal desertion, then Section 407 appears somewhat carefully chosen to accomplish that purpose. If, however, the governmental objective is aid to needy children of unemployed parents, then the gender-classification in Section 407 is much less adequate to the legislative purpose, and in fact frustrates that objective in those cases in which the mother rather than the father is unemployed.

Of course, the judgment that the statute serves one of multiple purposes less well than another does not necessarily mean that the statute is unconstitutional. A problem arises

only if the relationship between the statute and at least one of the objectives is too tenuous to satisfy the Equal Protection Clause. Even then, one must decide whether a more substantial relationship to another legitimate objective will save the statute.

I think that this case can be decided, however, without confronting that question. Even assuming that one of the objectives was the prevention of dissolution of families, and that almost always it is the father rather than the mother that deserts the family, it is not at all clear that conditioning relief on the unemployment of the father will accomplish the objective. The SG does not cite any evidence before Congress, or any statements by members during the consideration of §407, that indicated any empirical basis for the assumption that fathers usually or always desert because they, rather than the mother, have become unemployed. In the absence of such information, Section 407, even as a response to the problem of paternal desertion, appears to be a legislative incorporation of outmoded stereotypes of men as family breadwinners rather than a careful response to the problem at hand. Accordingly, it would be difficult to conclude that the use of the gender-based classification has a fair and substantial relation to the objective of minimizing family dissolution, much less to the objective of providing aid to children of unemployed parents.

Bruce's view

If the statute is not substantially related to the accomplishment of either of the objectives which it is said to serve, then the sorting out of the factual questions regarding legislative purpose need not be undertaken. As you have seen from the briefs in this case, there is at least some support in the legislative history for supposing each of the two suggested objectives to have been important to at least some members of Congress. I think it will be best if I wait for a specific instruction from you on this point before I take the time to read through the reports and debates on the statute.

Not necessary

II (78-689)

Upon finding the gender-based classification in Section 407 unconstitutional, the DC ordered as a remedy that benefits under that section be paid to any otherwise qualified family in which the mother or the father is unemployed. In No. 78-689, the appellant, the Commissioner of the Massachusetts Department of Public Welfare, contends that a much narrower remedy should be ordered. He argues that the DC should have mandated extension of Section 407 benefits be paid to otherwise eligible families in which the principal breadwinner is unemployed.

DC's remedy

Main position

Upon finding a portion of a statute unconstitutional, a DC under some circumstances may enjoin any enforcement of the statute. This in effect wipes the law off the books and leaves the legislature free to start over.

Under other conditions, however, the adoption of such a remedy may be unjustified. Here, for example, we are dealing with a social security program the benefits of which are extremely important to at least some recipients. Moreover, Section 1103 of the Social Security Act, 42 U.S.C. §1303, contains the following provision:

> "If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby."

Viewed in conjunction with the importance of Section 407 to the recipients of aid under the AFDC-UF program, I think that Section 1103 supports the adoption of a remedy that preserves the statutory program while substituting the appropriate gender-neutral classification. None of the parties to this appeal take issue with this conclusion.

What the parties do disagree about, as stated above, is the definition of the appropriate gender-neutral classification. The appellant argues that Section 407 benefits should be available to an otherwise eligible family with an unemployed principal breadwinner. The appellees, on the other hand, argue that benefits should be available to needy families with an unemployed parent.

The appellant's position on this point rests on several simple but persuasive arguments. First, it may be true that the constitutional flaw in Section 407 is that Congress

made an unfounded assumption that it was always the father's unemployment that creates family need and incentives for family dissolution. But when Congress, working on the basis of that assumption, provided for aid to needy families with unemployed fathers, it thought that it was providing for benefits upon the unemployment of the principal breadwinner. Therefore, the appropriate remedy is to substitute "principal breadwinner (or wage-earner)" for "father" in the statute.

Second, when Congress enacted the temporary precursor of Section 407, it provided for aid to needy families with an unemployed "parent." In the committee reports on Section 407, one unintended consequence of the use of the term "parent" in the temporary statutes was noted.

> "This program was originally conceived as one to provide aid for the children of unemployed fathers. However, some States make families in which the father is working but the mother is unemployed eligible. The bill would not allow such situations. Under the bill, the program could apply only to the children of unemployed fathers."

Since Congress was proceeding on the assumption that fathers are the principal breadwinners, its action in adopting Section 407 thus was tantamount to deciding that only the unemployment of the "pricipal breadwinner should establish eligibility under Section 407. In adopting a remedy for the unconstitutional legislative assumption, the courts should honor the underlying congressional intention.

Congress' intent

Third, the difference in the estimated costs of the

principal-breadwinner remedy and the DC's remedy is significant. The appellant estimates the cost of the former at an increase of $3.3 million over the current budget of $30 million for the Massachusetts AFDC-UF program. In contrast, he estimates that the DC's remedy will cost $23 million. He argues that other things being roughly equal, the courts should be reluctant to choose the remedy requiring the greater additional expenditure.

Wow!

The individual appellees, on the other hand, urge that the principal-breadwinner remedy suggested by the appellant requires a much more thoroughgoing rewriting of Section 407 than does the DC's remedy. Under the appellant's principal-breadwinner remedy, they point out, some families that are eligible under Section 407 as enacted by Congress will lose their eligibility if the unemployed father is not determined to be the principal breadwinner. Judicial extension of the statute to include persons not provided for by the original statute is one thing, the appellees argue, but judicial revision that excludes those eligible under the original statute is quite another. The courts will observe the proper limits on their role more closely if they refrain from such revision; in this case, that means simply ordering Section 407 benefits for the needy families of unemployed parents.

The problem with this argument is the change in 1967 from "any parent" to "father" in Section 407. This change, as

explained in the report quoted above, makes it clear to me that Congress did not intend the unemployment of any parent to suffice for eligibility. Rather, only the unemployment of the father counts. If the assumption on which the selection of "father" was based is constitutionally flawed, the remedial substitution still should be consistent with the congressional rejection of the "any parent" standard. Since the flawed assumption was that only fathers are the principal or important breadwinners in families, then, the appropriate substitution for "father" is "principal breadwinner."

The United States is also an appellee in No. 78-689. The SG's arguments in support of his contention that the DC has no authority to adopt the principal breadwinner remedy are unpersuasive.

The SG argues first that because Section 407 gives the Secretary of HEW authority to make regulations concerning the exact definition of unemployment for AFDC-UF eligibility, the Secretary's present regulations limit the remedial powers of the courts. In particular, he argues that

> "the regulations now in force require that each participating state adopt a definition of unemployed father that 'must include any father' who meets stated requirements. 45 C.F.R. 233.100. That regulation, with a sex-neutral construction, requires that a state plan include any parent who meets federal requirements of unemployment. No federal rule requires an 'unemployed' father (or parent) to show that he has been the principal wage-earner in the family." Br. of SG, at 7.

The SG's second argument is really just a variation of the

first. He contends that in the form of the Secretary's rulemaking authority under Section 407, Congress has already "prescribed a specific device for filing statutory gaps. That device is the issuance of regulations by the Secretary. The Secretary, not the Court, must decide whether and how 'unemployment' should be redefined in light of any constitutional flaw in the statute." Id., at 8.

There are a number of problems with the SG's argument. It contains, for example, at least one glaring non sequitur, quoted above, in the argument that a sex-neutral construction of the "any father" regulation must consist of substituting "parent" for "father." While gender-neutrality requires at least the substitution of "parent" for "father," this leaves open the principal question in this remedy phase of the case -- should the category "parent" be qualified to include only the "principal wage-earner or breadwinner" parent.

The critical flaw in the SG's argument, however, rests in his mistaken overestimation of the importance of the Secretary's rulemaking authority under Section 407. The Secretary's present regulations have been adopted pursuant to a statute now held to be unconstitutional in certain aspects. Assuming that the courts will adopt a remedy that reconstructs the statute to remove the unconstitutionality while remaining as faithful as possible to congressional intent, any regulations inconsistent with that reconstructed statute will

be invalid. It puts the cart before the horse to say that those existing regulations constrain the courts in devising the necessary remedial reconstruction of the statute.

Of course, after the courts have settled the classification to be substituted for "father" in Section 407, the Secretary will have to make corresponding changes in his regulations. But there is no reason I can think of why the courts should leave to the Secretary the final determination of the proper remedy for Section 407's gender-biased classification. This seems to me to be an essentially judicial task. Once this Court and the DC have settled on the adoption of either the "any parent" or the "principal wage-earner" classification as a remedial substitute for the "any father" category of Section 407, that new classification can be substituted in the Secretary's existing regulations as well until the Secretary can take the necessary administrative steps to revise the language of his regulations.

Yes

LFP/lab 4/16/79

file

To: Memo to File Date: April 16, 1979

From: L.F.P., Jr.

No. 78-437 Califano v. Westcott
No. 78-689 Sharp v. Westcott

This is a pre-argument memo to summarize my tentative thinking (see Bruce's memo of 3/27/79 that is persuasive):

Califano v. Westcott

Section 407 of the Social Security Act provides that if a family meets the need criteria of the AFDC Program, and if the father is unemployed, the family qualifies for assistance. But if the mother is unemployed, it does not qualify. The DC invalidated this as gender based discrimination.

In Caban, I stated that the standard requires that such a distinction must serve governmental objectives and "must be substantially related to the achievement of those objectives".

The SG argues that the principal objective in focusing on the father was to remove the incentive for the father to desert the home when he became unemployed. But certainly another primary purpose of Section 407 was to provide AFDC benefits to the children of unemployed parents.

The later objective is not served by Section 407.

But the difficulty with the gender based distinction is that it does not bear a substantial relation to the asserted purpose of keeping the unemployed father "in the house". It certainly bears no relation to the purpose of providing aid to the children of unemployed parents.

Even if, as a generality, fathers are more likely to be unemployed than mothers since more of them work, this is by no means invariably true - particularly now when the work force is composed to a major extent of women.

In sum, I find it difficult to defend the validity of the classification when it serves one of the purposes only marginally, and the other purpose not at all. I am inclined to affirm 78-437.

Sharp v. Westcott

This is a related case that we must decide only if we agree that Section 407 is invalid. The DC ordered as a remedy that benefits under that Section be paid to any otherwise qualified family in which the mother or the father is unemployed.

The Commonwealth of Massachusetts, the appellant in this case, contends that a narrower remedy should be ordered: namely, that eligibility under Section 407 should arise only when the principal breadwinner is unemployed.

In short, rather than authorize benefits when either the mother or father is unemployed (as the DC ordered), Massachusetts would require benefits only where the "principal breadwinner" is unemployed. It is argued that the DC's remedy will cost the state of Massachusetts $23,000,000, as contrasted with about $3,000,003 under its proposed resolution.

I am inclined to agree with Massachusetts. It is clear that one of the congressional purposes was to provide benefits when the primary family provider was unemployed. The vice in the statute is that it ignores the fact that the mother could occupy this role. If the remedy makes benefits turn on whether or not the "principal breadwinner" is unemployed, this basic purpose of Congress will be met.

I therefore am inclined to reverse the DC in 78-689.

Bruce

78-437 CALIFANO v. WESTCOTT
78-689 SHARP v. WESTCOTT

Argued 4/16/79

Appeals from D/Ct in Mass. invalidating § 407 + ordering a class remedy that would include mothers & fathers both - without regard to which is the principal wage earner.

(Byron + Potter - at oral argument - indicated that the DC had no authority to rewrite § 407 - either to add the "mother" or the "principal wage earner" language. DC should have simply enjoined the the section found invalid + leave revision to Congress)

Alsup (for SG)

If mother is employed her wages would be credited against the AFDC benefits.

The mothers in these cases met the unemployed status requirement - but were females

DC held gender based classification ~~violated~~ violated under E/P component of 5th Amend D/P

"Core of program was to provide aid to children" — Pres. Roosevelt in 1935.

This case involves 1967 Amend. to Act - but Alsup relied on history all the way back to '35.

If fathers in this case were to demont, the aid would ~~be~~ not be available.

John made this point ?

Responding to WHR, Alsup agreed that the class certified by DC would include many family situations not as appealing as these two test cases.

Johnson (Asst AG of Mass.)

Mass. appeals only from remedy ordered by DC. Ct rewrote § 407 so that the unemployment of either parent triggers benefits even if the other parent is the principal "breadwinner."

→ P.S. noted that under § 407, as now written, would require benefits when father is unemployed for requisite time even tho the mother was the principal wage earner. Then the DC's remedy would merely place mother + father in same position.

The principal purpose of program was to provide benefits to children. Johnson disagrees with SG's argument that purpose to encourage fathers not to desert the family. The purpose to aid children was emphasized by Pres Kennedy. Johnson thinks SG's reading of leg. hist. is wrong. Congress in '67 merely assumed that fathers would be principal wage earner in most cases.

Friedman (for Appellee)

Relies on Frontiero v Richardson 411 U.S. 677 and Weinberger v. Wiesenfeld 420 U.S. 636

In 1961 when ~~Act was~~ § 407 was adopted on Pres Kennedy's recommendation it was neutral as bet. father & mother. (Until 1961 "unemployment" was not a factor in determining eligibility.

Argues that the "principal wage earning" remedy would be contrary to language & history of Act.

P.S. notes that there is no gender discrimination in the payment of benefits: male & female children either receive ~~or~~ or do not receive benefits under same circumstances

Friedman answers that the need - that gives rise to benefits - is based on unemployment but only one parent (the father).

Argues that Wiesenfeld answers P.S.

Read

BRW asked if there is any Social Security case by this Court that, after invalidating a section of Act, went to order a remedy that in effect amends the Act itself.

BB 4/17/79

SUPPLEMENTAL MEMORANDUM

To: Mr. Justice Powell

Re: No. 78-437, Califano v. Westcott

I have the following brief comments following oral argument in this case.

1. Merits -- I do not think that the SG raised any arguments to strengthen his defense of the constitutionality of the statute. That defense rests fundamentally on the suggestion that the statute is addressed to the specific problem of fathers deserting their families, in order to meet the single-parent criterion for eligibility. The flaw in this argument is the sex-biased assumption that paternal desertion is always (or usually) caused by paternal rather than maternal unemployment. As I pointed out in my Bench Memorandum, there does not appear to be any evidence in the legislative record to support the empirical assumption that paternal desertion results from paternal unemployment. Where there is no evidence

adduced to support such a gender-biased classification as the one contained in the present statute, and where the present involvement of women in the labor force makes it likely that pressures for paternal desertion are often generated by maternal unemployment (as in the present case), I think that the Court should hold the statute unconstitutionally discriminatory.

2. Remedy -- It seems clear from oral argument that the question of remedy will divide the Court. I stand by my analysis of the problem in my Bench Memorandum, with the following caveat.

Justice Rehnquist did suggest in one of his questions at oral argument a possible way of reaching a compromise position. As I understood him, he suggested that the DC only certified a class in which the families had an unemployed mother, and a father who was not a part of the work force. If that is so, then relief ordered should not have gone beyond the limits of this class. Accordingly, the relief would be consistent with the principal breadwinner theory for reconstruction of the statute, since only families

in which the mother is the principal breadwinner would be granted relief. Two further questions -- whether the unemployment of a mother who is not the principal breadwinner, or that of a father who is not the principal breadwinner, should qualify the family for benefits -- would be left for later resolution.

There is some basis for Justice Rehnquist's suggestion about the class actually certified. The named plaintiffs in the DC did have the characteristics mentioned by Justice Rehnquist (unemployed mother, non-working father). And the motion for class certification which was granted by the DC described the class as "those ... families with two parents in the home ... who would otherwise be eligible for AFDC ... but for the sex discrimination in the federal statute ... which provide[s] for the granting of federally funded AFDC ... to families deprived of support because of the unemployment of their father, but not to families deprived of support because of the mother's unemployment." Since a family in which the mother is not the principal breadwinner is not "deprived of support" by her unemployment, those families, at least arguably, were not

part of the class certified. I hope that the Conference will discuss this possible approach to the remedy issue.

Bruce

BB 4/18/79

SUPPLEMENTAL MEMORANDUM

To: Mr. Justice Powell

Re: No. 78-437, Califano v. Westcott

The plaintiffs in this case did not seek retroactive benefits, so their only claim was for declaratory and injunctive relief.

78-437 Affirm 9-0 (WHR may dissent)
78-689 Affirm 5-4 (TM said he was "shaky"

78-437 Califano v. Westcott
78-689 Sharp v. Westcott

[4]

Conf. 3/18/79

The Chief Justice

Affirm - 78-437

As to 78-689 - "principal wage earner" remedy is answer if we can find way to achieve this
On second vote, Reverse 78-689

Mr. Justice Brennan

78-437 Affirm

Clear case of gender violation of E/P component of 5th Amend.

78-689 Affirm also (but tentative)

Mr. Justice Stewart

78-437 Affirm - under precedents (with which P.S. does not agree).

78-689 Reverse - The DC should not have - by ~~remedy~~ way of remedy - rewritten the statute. Should have gone no further than the declaratory judg & injunction. Here then entire portion of Act is invalid.
Reject Mass. proposal.

Invalidating 407 does not reinstate the 1961 Act

Mr. Justice White

Affirm 78-437
Agree with P.S.

Affirm 78-689 (tentative)
Not at all sure

Mr. Justice Marshall

Affirm 78-437

Not at rest on 78-689. ~~Inclined to agree with P.S.~~

Mr. Justice Blackmun

78-437 - Affirm

78-689 - Affirm
In Fronterio + Wiesenfeld we granted this kind of relief. (PS questioned this)

Mr. Justice Powell

78-437 - Affirm

78-684 - Reverse

Agree with P. S.

Mr. Justice Rehnquist

78-437 -

78-684 Reverse

Agree with PS + LFP

Mr. Justice Stevens

78-437 Affirm

Sex neutral - but is irrational.

78-684 Affirm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 2, 1979

PERSONAL

Re: 78-689 - Alexander Sharp, II, etc. v. Cindy Westcott, et al.

Dear Lewis:

Will you take on a dissent in this case?

Regards,

WEB

cc: Stevens
Potter

Mr. Justice Powell

Dear Chief,
If I will be glad to try a dissent.
If At the Conference I agreed with Potter that the DC should not have rewritten the statute. It should have given a declaratory judgment & issued an injunction, and left the rewriting to Congress.

The DC, in having undertaken to devise an optimum time remedy, should have treated as "the immediate wage earner."

Sincerely

May 3, 1979

78-689 Sharp v. Westcott

Dear Chief:

I will be glad to try a dissent.

At the Conference I agreed with Potter that the DC should not have rewritten the statute. It should have given a declaratory judgment and issued an injunction and left the rewriting to Congress.

The District Court, having undertaken to devise an affirmative remedy, should have focused on "the principal wage earner".

Sincerely,

The Chief Justice

lfp/ss

cc: Mr. Justice Stewart
Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 4, 1979

Re: 78-437; 689 - Califano v. Westcott

Dear Harry:

Please join me.

Respectfully,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 4, 1979

RE: Nos. 78-437 & 689 Califano v. Westcott &
Pratt v. Westcott

Dear Harry:

Please join me.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 4, 1979

Re: Nos. 78-437 & 78-689 - Califano & Pratt v. Westcott

Dear Harry,

Please join me.

Sincerely yours,

Mr. Justice Blackmun

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 4, 1979

Re: Nos. 78-437 & 689 - Califano v. Westcott &
Pratt v. Westcott

Dear Harry:

Please join me.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

L.F.P.
Received.

PBS-6/6/79

DRAFT OPINION

TO: Mr. Justice Powell

FROM: Paul

RE: Califano v. Westcott, No. 78-437; Califano v. Pratt, No. 78-689

DATE: June 6, 1979

Mr. Justice Powell, concurring in part and dissenting in part.

I agree with the Court that § 407 violates the equal protection component of the Fifth Amendment. In my view, however, the court below exceeded the proper limits of its powers when it ordered the extension of benefits to all families in which a mother has become unemployed. This extension reinstates a system of distributing benefits that Congress ~~clearly~~ rejected when it amended § 407 in 1968. Rather than frustrate the ~~obvious~~ clear intent of Congress, the court simply should have enjoined any further payment of benefits ~~on an~~ under the provisions found to be unconstitutional, ~~basis~~.

~~Because the Court today approves this order, I dissent.~~

> "Where a statute is defective because of underinclusion there exists two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." Welsh v. United States, 398 U.S. 333, 361 (1970) (concurring opinion).

In choosing between these alternatives, a court ~~must~~ should attempt to accomodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole. See id., at 365-366 and n. 18. It may not use its remedial powers to thwart the intent of the legislature even to achieve concededly legitimate objects.

The Court correctly observes that "the gender qualification [of § 407] was part of the general objectives of the 1968 amendments to tighten standards for eligibility and reduce program costs." Ante, at 10. It is clear that ~~In particular~~ Congress intended to proscribe the payment of ~~was concerned that~~ benefits ~~would be extended~~ to families where only one parent was unemployed and whose ~~while~~ the principal wage-earner continued to ~~produce income~~ work.

Are you repeat this thought at top of next pg., take out here?

It is indisputable that Congress ~~wanted~~ intended to prohibit payment of AFDC-UF benefits to families where the breadwinner remained employed. Yet the result of the Court's decision affirming the District Court's relief is to compel exactly the extension of benefits Congress wished to prevent. 1/

Refer to as note 1

The relief that perhaps would best approximate what Congress appears to have intended would limit payment of benefits to those families in which the principal wage-earner, regardless of gender, has become unemployed. But this approach presents ~~several~~ certain difficulties. It involves more than an extension of benefits to a class not previously covered: Some families currently eligible for AFDC-UF funds would be excluded. Moreover, only with great difficulty could the criterion of the "principal wage-earner" be implemented "within the administrative framework of the statute," Welsh, supra, at 366. The concept is not used anywhere in the Act, and its satisfactory definition ~~seems unlikely~~ by a court cannot be assured. Under these circumstances, the modification of the order sought by appellant properly was

Paul - Lets divide to a note to avoid breaking the flow of the discussion.

Rider A

constitutional flaw in the program is corrected. Unlike the relief approved by the Court today, it is not manifest that enjoining of the program would thwart the intent of Congress. The extension of AFDC benefits to families suffering only from unemployment was a relatively recent development in the history of the program, which Congress made permanent only on the understanding that payments would be limited to cases where the principal wage-earner was out of work. It is far from clear that Congress would have approved this extension if it knew that benefits would be paid whenever either parent became unemployed. In addition, the hardships caused by enjoining the program to those families which Congress ~~would choose~~ may decide to assist can be mitigated by ~~the~~ a legislative provision ~~of~~ for retroactive benefits. 2/

In sum, the relief approved by the Court today violates established principles governing the fashioning of equitable relief and ensures frustration of legitimate legislative goals expressed in § 407. Accordingly, I

FN1.

1. The Court suggests that payments to families where a breadwinner remains employed is not inconsistent with the Act, because in cases where a parent becomes incapacitated, benefits are paid regardless of the other parent's employment status or history. 42 U.S.C. § 606(a); see ante, at ___ n. 9. This overlooks the special circumstances involved when a parent suffers from an incapacity. In the great majority of such cases, the family must bear not only the costs of income lost through the one parent's unemployment, but also substantial medical expenses resulting from the disability.

2. The fact that none of the parties here has sought this step, a point ~~on~~ which the Court ~~places great emphasis~~ emphasizes, is irrelevant. This issue should turn on the intent of Congress, not the interests of the parties. A court no less is "infringing legislative prerogatives," ante, at 22, when it acts at the behest of the particular litigants before it, than when it chooses a remedy on its own initiative.

FIRST DRAFT

Califano v. Westcott, No. 78-437; Pratt v. Westcott, No. 78-689

Mr. Justice Powell, concurring in part and dissenting in part.

I agree with the Court that § 407 violates the equal protection component of the Fifth Amendment. In my view, however, the court below erred when it ordered the extension of benefits to all families in which a mother has become unemployed. This extension reinstates a system of distributing benefits that Congress rejected when it amended § 407 in 1968. Rather than frustrate the clear intent of Congress, the court simply should have enjoined any further payment of benefits under the provision found to be unconstitutional.

As Mr. Justice Harlan observed,

> "Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." Welsh v. United States, 398 U.S. 333, 361 (1970) (concurring opinion).

In choosing between these alternatives, a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole. See id., at 365-366 and n. 18. It should not use its remedial powers to circumvent the intent of the legislature.

The Court correctly observes that "the gender qualification [of § 407] was part of the general objectives of the 1968 amendments to tighten standards for eligibility and reduce program costs." Ante, at 10. It is clear that Congress intended to proscribe the payment of benefits to families where only one parent was unemployed and where the principal wage-earner continued to work.

> "From all that appears, Congress, with an image of the 'traditional family' in mind, simply assumed that the father would be the family breadwinner, and that the mother's employment role, if any, would be secondary." Ibid.

Yet the result of the Court's decision affirming the District Court's relief is to compel exactly the extension of benefits Congress wished to prevent. 1/

Rather than thus rewriting § 407, we should leave this task to Congress. Now that we have held that this statute constitutes impermissible gender-based discrimination, it is the duty and function of the legislative branch to review its AFDC-UF program in light of our decison and make such changes therein as it deems appropriate. Leaving the resolution to Congress is especially desirable in cases such as this one, where the

allocation and distribution of welfare funds are peculiarly within the province of the legislative branch. See Califano v. Jobst, 434 U.S. 47 (1977); Maher v. Roe, 432 U.S. 464, 479 (1977); Dandridge v. Williams, 397 U.S. 471 (1970).

We cannot predict what Congress thinks will be in the best interest of its total welfare program. The extension of AFDC benefits to families suffering only from unemployment was a relatively recent development in the history of the program, a development that Congress made permanent only on the understanding that payments would be limited to cases where the principal wage-earner was out of work. We cannot assume that Congress in 1968 would have approved this extension if it had known that ultimately payments would be made whenever either parent became unemployed. Nor can we assume that Congress now would adopt such a system in light of the Court's ruling that § 407 is invalid.

The Court emphasizes the hardships that may be caused by enjoining the program until Congress can act. There is the possibility, not mentioned by the Court, that other hardships might be occasioned in the allocating of limited funds as a result of court-ordered extension of these particular benefits. In any event, Congress has the option to mitigate hardships by providing promptly for retroactive payments. An injunction prohibiting further payments at least will conserve the funds appropriated

until Congress determines which group, if any, it does want to assist. The relief ordered by the Court today, in contrast, ensures the irretrievable payment of funds to a class of recipients Congress did not wish to benefit.2/

Because it is clear that Congress intended to prevent the result mandated today, and that the reexamination of § 407 required under our decision properly should be made by Congress, I dissent.

1. The relief that perhaps would best approximate what Congress appears to have intended would limit payment of benefits to those families in which the principal wage-earner, regardless of gender, has become unemployed. But this approach presents several difficulties, as the Court demonstrates. Ante, at 14-16. Under these circumstances, the modification of the order sought by appellant in No. 78-689 properly was rejected.

The Court suggests that payments to families where a breadwinner remains employed are not inconsistent with the Act, because in cases where a parent becomes incapacitated, benefits are paid regardless of the other parent's employment status or history. 42 U.S.C. § 606(a); see ante, at 15 n. 9. This overlooks the special circumstances involved when a parent suffers from an incapacity. In such cases, the family usually must bear not only the costs of income lost through the one parent's unemployment, but also medical and otherexpenses resulting from the disability that often are quite substantial.

2. The fact that none of the parties here has sought this step, a point which the Court emphasizes, is irrelevant. This issue should turn on the intent of Congress, not the interests of the parties. A court no less is "infringing legislative prerogatives," ante, at 15, when it acts at the behest of the particular litigants before it, than when it chooses a remedy on its own initiative.

Paul

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 11, 1979

Re: 78-437 - Califano v. Westcott
78-689 - Pratt v. Westcott

Dear Lewis:

Please add my name to your separate opinion.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 12 JUN 1979

Recirculated: _____

1st Printed DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-437 AND 78-689

Joseph A. Califano, Secretary of Health, Education, and Welfare, Appellant,
78-437 *v.*
Cindy Westcott et al.

John D. Pratt, Etc., Appellant,
78-689 *v.*
Cindy Westcott et al.

On Appeals from the United States District Court for the District of Massachusetts.

[June —, 1979]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

I agree with the Court that § 407 violates the equal protection component of the Fifth Amendment. In my view, however, the court below erred when it ordered the extension of benefits to all families in which a mother has become unemployed. This extension reinstates a system of distributing benefits that Congress rejected when it amended § 407 in 1968. Rather than frustrate the clear intent of Congress, the court simply should have enjoined any further payment of benefits under the provision found to be unconstitutional.

As Mr. Justice Harlan observed,

> "Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh* v. *United States*, 398 U. S. 333, 361 (1970) (concurring opinion).

In choosing between these alternatives, a court should attempt

to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole. See *id.*, at 365–366, and n. 18. It should not use its remedial powers to circumvent the intent of the legislature.

The Court correctly observes that "the gender qualification [of § 407] was part of the general objectives of the 1968 amendments to tighten standards for eligibility and reduce program costs." *Ante*, at 10. It is clear that Congress intended to proscribe the payment of benefits to families where only one parent was unemployed and where the principal wage earner continue to work.

> "From all that appears, Congress, with an image of the 'traditional family' in mind, simply assumed that the father would be the family breadwinner, and that the mother's employment role, if any, would be secondary." *Ibid.*

Yet the result of the Court's decision affirming the District Court's relief is to compel exactly the extension of benefits Congress wished to prevent.[1]

Rather than thus rewriting § 407, we should leave this task to Congress. Now that we have held that this statute con-

---

[1] The relief that perhaps would best approximate what Congress appears to have intended would limit payment of benefits to those families in which the principal wage earner, regardless of gender, has become unemployed. But this approach presents several difficulties, as the Court demonstrates. *Ante*, at 14–16. Under these circumstances, the modification of the order sought by appellant in No. 78–689 properly was rejected.

The Court suggests that payments to families where a breadwinner remains employed are not inconsistent with the Act, because in cases where a parent becomes incapacitated, benefits are paid regardless of the other parent's employment status or history. 42 U. S. C. § 606 (a); see *ante*, at 15 n. 9. This overlooks the special circumstances involved when a parent suffers from an incapacity. In such cases, the family usually must bear not only the costs of income lost through the one parent's unemployment, but also medical and other expenses resulting from the disability that often are quite substantial.

stitutes impermissible gender-based discrimination, it is the duty and function of the Legislative Branch to review its AFDC-UF program in light of our decision and make such changes therein as it deems appropriate. Leaving the resolution to Congress is especially desirable in cases such as this one, where the allocation and distribution of welfare funds are peculiarly within the province of the Legislative Branch. See *Califano* v. *Jobst*, 434 U. S. 47 (1977); *Maher* v. *Roe*, 432 U. S. 464, 479 (1977); *Dandridge* v. *Williams*, 397 U. S. 471 (1970).

We cannot predict what Congress thinks will be in the best interest of its total welfare program. The extension of AFDC benefits to families suffering only from unemployment was a relatively recent development in the history of the program, a development that Congress made permanent only on the understanding that payments could be limited to cases where the principal wage earner was out of work. We cannot assume that Congress in 1968 would have approved this extension if it had known that ultimately payments would be made whenever parent became unemployed. Nor can we assume that Congress now would adopt such a system in light of the Court's ruling that § 407 is invalid.

The Court emphasizes the hardships that may be caused by enjoining the program until Congress can act. There is the possibility, not mentioned by the Court, that other hardships might be occasioned in the allocating of limited funds as a result of court-ordered extension of these particular benefits. In any event, Congress has the option to mitigate hardships by providing promptly for retroactive payments. An injunction prohibiting further payments at least will conserve the funds appropriated until Congress determines which group, if any, it does want to assist. The relief ordered by the Court today, in contrast, ensures the irretrievable payment of funds to a class of recipients Congress did not wish to benefit.[2]

[2] The fact that none of the parties here has sought this step, a point

Because it is clear that Congress intended to prevent the result mandated today, and that the re-examination of § 407 required under our decision properly should be made by Congress, I dissent.

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which the Court emphasizes, is irrelevant. This issue should turn on the intent of Congress, not the interests of the parties. A court no less is "infringing legislative prerogatives," *ante*, at 15, when it acts at the behest of the particular litigants before it, than when it chooses a remedy on its own initiative.

Paul - add CJ's name with those of other "joins" + recirculate.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 15, 1979

Re: 78-437 - Califano v. Westcott, et al.
78-689 - Sharp, etc. v. Westcott, et al.

Dear Lewis:

Please join me in your opinion concurring in part and dissenting in part.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 20 JUN 1979

Recirculated: _____

1-4

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78–437 AND 78–689

Joseph A. Califano, Secretary of Health, Education, and Welfare, Appellant,
78–437 v.
Cindy Westcott et al.

John D. Pratt, Etc., Appellant,
78–689 v.
Cindy Westcott et al.

On Appeals from the United States District Court for the District of Massachusetts.

AND Mr. Justice Rehnquist

[June —, 1979]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, concurring in part and dissenting in part.

I agree with the Court that § 407 violates the equal protection component of the Fifth Amendment. In my view, however, the court below erred when it ordered the extension of benefits to all families in which a mother has become unemployed. This extension reinstates a system of distributing benefits that Congress rejected when it amended § 407 in 1968. Rather than frustrate the clear intent of Congress, the court simply should have enjoined any further payment of benefits under the provision found to be unconstitutional.

As Mr. Justice Harlan observed,

> "Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh* v. *United States*, 398 U. S. 333, 361 (1970) (concurring opinion).

In choosing between these alternatives, a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole. See *id.*, at 365–366, and n. 18. It should not use its remedial powers to circumvent the intent of the legislature.

The Court correctly observes that "the gender qualification [of § 407] was part of the general objectives of the 1968 amendments to tighten standards for eligibility and reduce program costs." *Ante*, at 10. It is clear that Congress intended to proscribe the payment of benefits to families where only one parent was unemployed and where the principal wage earner continue to work.

> "From all that appears, Congress, with an image of the 'traditional family' in mind, simply assumed that the father would be the family breadwinner, and that the mother's employment role, if any, would be secondary." *Ibid.*

Yet the result of the Court's decision affirming the District Court's relief is to compel exactly the extension of benefits Congress wished to prevent.[1]

Rather than thus rewriting § 407, we should leave this task

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[1] The relief that perhaps would best approximate what Congress appears to have intended would limit payment of benefits to those families in which the principal wage earner, regardless of gender, has become unemployed. But this approach presents several difficulties, as the Court demonstrates. *Ante*, at 14–16. Under these circumstances, the modification of the order sought by appellant in No. 78–689 properly was rejected.

The Court suggests that payments to families where a breadwinner remains employed are not inconsistent with the Act, because in cases where a parent becomes incapacitated, benefits are paid regardless of the other parent's employment status or history. 42 U. S. C. § 606 (a); see *ante*, at 15 n. 9. This overlooks the special circumstances involved when a parent suffers from an incapacity. In such cases, the family usually must bear not only the costs of income lost through the one parent's unemployment, but also medical and other expenses resulting from the disability that often are quite substantial.

to Congress. Now that we have held that this statute constitutes impermissible gender-based discrimination, it is the duty and function of the Legislative Branch to review its AFDC-UF program in light of our decision and make such changes therein as it deems appropriate. Leaving the resolution to Congress is especially desirable in cases such as this one, where the allocation and distribution of welfare funds are peculiarly within the province of the Legislative Branch. See *Califano* v. *Jobst*, 434 U. S. 47 (1977); *Maher* v. *Roe*, 432 U. S. 464, 479 (1977); *Dandridge* v. *Williams*, 397 U. S. 471 (1970).

We cannot predict what Congress thinks will be in the best interest of its total welfare program. The extension of AFDC benefits to families suffering only from unemployment was a relatively recent development in the history of the program, a development that Congress made permanent only on the understanding that payments could be limited to cases where the principal wage earner was out of work. We cannot assume that Congress in 1968 would have approved this extension if it had known that ultimately payments would be made whenever either parent became unemployed. Nor can we assume that Congress now would adopt such a system in light of the Court's ruling that § 407 is invalid.

The Court emphasizes the hardships that may be caused by enjoining the program until Congress can act. There is the possibility, not mentioned by the Court, that other hardships might be occasioned in the allocating of limited funds as a result of court-ordered extension of these particular benefits. In any event, Congress has the option to mitigate hardships by providing promptly for retroactive payments. An injunction prohibiting further payments at least will conserve the funds appropriated until Congress determines which group, if any, it does want to assist. The relief ordered by the Court

today, in contrast, ensures the irretrievable payment of funds to a class of recipients Congress did not wish to benefit.[2]

Because it is clear that Congress intended to prevent the result mandated today, and that the re-examination of § 407 required under our decision properly should be made by Congress, I dissent.

[2] The fact that none of the parties here has sought this step, a point which the Court emphasizes, is irrelevant. This issue should turn on the intent of Congress, not the interests of the parties. A court no less is "infringing legislative prerogatives," *ante*, at 15, when it acts at the behest of the particular litigants before it, than when it chooses a remedy on its own initiative.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1979

Re: Nos. 78-437 and 78-689 - Califano v. Wescott; and Pratt v. Westcott

Dear Lewis:

Please join me in your opinion, concurring in part and dissenting in part, in this case.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A B.	L. F. P.	W. H. R.	J. P. S.
					4/30/79			
Join I + P 6/15/79	Join HAB 6/4/79	Join L + P 6/11/79	Join HAB 6/4/79	Join HAB 6/4/79	typed dropt & 6/1/79	Conc in part + dissenting in part 6/8/79	Join L + P 6/20/79	Join HAB 6/4/79
					1st dropt 6/6/79 2nd dropt 6/12/79	1st dropt 6/12/79 2nd dropt 6/20/79		
				78-437 Califano v. Westcott				