11-11-1971

11-01-1971 Memorandum to the Conference

Harry A. Blackmun
Associate Justice of the US Supreme Court

No. 70-7082 - Carter, et al. v. Stanton, Director, et al.

John has had an extraordinary amount of difficulty with this case. Perhaps it is small wonder. It is an example of the problems attendant upon three-judge court jurisdiction and the theories this Court has spun about that jurisdiction.

When the appeal was up for initial consideration at Conference, my reaction was that it should be affirmed rather summarily, but with a short notation to the effect that we were not affirming on the ground of failure to exhaust administrative remedies. I had in mind something along the line of the treatment I gave to Engelman v. Amos. When I suggested that treatment in Conference, I met with opposition, particularly from the other side of the table, to the general effect that when there was something negative in the holding below, we had no alternative than to give the case full plenary treatment. I notice, however, the alacrity with which all of them joined the proposed per curiam in Engelman. I would have hoped that similar treatment could have been afforded to the Carter case. I think it could have been, but the difficulty is that it ties in with the two Swank cases out of Illinois.

At issue here is the Indiana regulation having to do with AFDC benefits. The concern is with the provision in the federal statute having to do with the "continued absence" of one parent. What the Indiana regulation does is to set up a six-month continuous absence measure before the application for assistance is to be filed. It goes on, however, to carve out an exception "under exceptional circumstances of need." The argument swirls around this provision. The applicants here, who are the appellants, claim that this sets up a flat six-month requirement, that the exception is meaningless in practice and that the approach is unconstitutional for a number of reasons.

The three-judge court concluded that the applicants failed to exhaust administrative remedies in that they failed to appeal the denial of assistance to the State Department of Public Welfare and from there to the State Board of Public Welfare. The evidence indicates that these appellate procedures were not carried out. The three-judge court, however, went on to hold that upon examination of the pleadings they find no substantial federal question involved and no federal jurisdiction under the governing statutes. As a consequence, the appellees' motion to dismiss was granted.

The exhaustion argument has its complications when one takes into consideration the cases decided by this Court in past years. There are flat holdings to the effect that the exhaustion argument is inapplicable with respect to an action under § 1983. If we should affirm on this tack, those cases will be affected and perhaps overruled, if not directly, at least by implication. This is the reason for my reluctance on this approach.

On the merits of the issue as to the presence of a substantial federal question, I am inclined to the view that none such is present. The purpose of the regulation is fairly clear, namely, to provide a workable standard to separate the genuine cases from those which are not bona fide. The six-month period is utilized. For me, the six-month standard is not a rigid one. The regulation contains an exception. It is true that it speaks of exceptional cases of need. The "need" language is of no consequence for the whole AFDC program is geared to need. The other language may seem to be somewhat stricter than is required, but overall I get the feeling that the framers of the regulation intended it to operate as an avenue for the needy case, and not to close the door entirely. In other words, I

lean toward a flexible and not a strict approach to regulations and even state statutes of this kind. The States have the obligation to administer and enforce these programs, and they must do so with a paucity of available funds. Generally they are criticized for not dispensing their bounty in a wholesale fashion to all comers and for requiring some kind of proof as to qualification. Under this Indiana regulation I get the feeling that the opportunity for assistance is there for the person who has actual need.

It is to be noted, perhaps, that in the Indiana structure the six-month requirement has no application to assistance rendered by the township trustee.

Without the jurisdictional problems, this would be my approach to this case, and I would affirm on the ground that no substantial federal question is presented. Acutally, I would be willing to strongarm the case and let it go just that way.

Just how the Conference will react to the jurisdictional issue, I do not know. Some may wish to go into it and all of its complexities, and, if so, we may straighten out some of the problems engendered by the prior cases or we may make them even worse. It is possible that we will end up saying there is no three-judge jurisdiction here and, thus, no right of direct appeal. This would mean that we probably would vacate the judgment below and remand the case for the entry of a new judgment so that the time may begin to run for appeal to the court of appeals. I think under the circumstances here this would be a most unsatisfactory way of disposing of the case, but I may not be able to oppose that result because of the decided cases of past years.

I should note that my reaction to the issue of substantiality is opposed to John's. This is due merely to a difference in our respective interpretations of the

six-month provisions of the regulation. I read them much more flexibly than he does, but of course his approach is an entirely valid one. I might add that I agree with his observation that it is likely the appellants will lose on the facts anyway if they ever get to the merits. This, for me, is another reason why I conclude that the case does not have very much substance.

If any of the others feel that way, I would be willing to go so far as to dismiss for want of a substantial federal question without vacation and remand for the entry of a new judgment. This is one way to get rid of the case. It probably deserves no better fate.

Question

1. Does the record disclose the presence of widespread fraud and evasiveness in the administration of this regulation and the AFDC program in Indiana?

H. A. B.

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