

ORIGINAL

In the  
Supreme Court of the United States

HELEN B. O'BANNON, SECRETARY OF  
PUBLIC WELFARE, PENNSYLVANIA,

PETITIONER,

V.

TOWN COURT NURSING CENTER, ET AL.,

RESPONDENTS.

No. 78-1318

Washington, D. C.  
November 6, 1979

Pages 1 thru 45

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HELEN B. O'BANNON, SECRETARY OF  
PUBLIC WELFARE, PENNSYLVANIA,

Petitioner,

v.

No. 78-1318

TOWN COURT NURSING CENTER, ET AL.,

Respondents.  
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Washington, D. C.,

Tuesday, November 6, 1979.

The above-entitled matter came on for oral argu-  
ment at 10:06 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice  
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

NORMAN J. WATKINS, ESQ., Special Deputy Attorney  
General of Pennsylvania, Pennsylvania Department  
of Justice, Harrisburg, Pennsylvania 17120; on  
behalf of the Petitioner

RICHARD A. ALLEN, ESQ., Office of the Solicitor  
General, Department of Justice, Washington, D. C.;  
on behalf of the Respondent Secretary of HEW,  
supporting Petitioner

APPEARANCES (continued):

NATHAN L. POSNER, ESQ., Fox, Rothschild, O'Brien  
and Frankel, 2000 Market Street, Philadelphia,  
Pennsylvania 19103; on behalf of the Respondents

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in O'Bannon v. Town Court Nursing Center, 78-1318.

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

ORAL ARGUMENT OF NORMAN J. WATKINS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WATKINS: Mr. Chief Justice, and may it please the Court:

Skilled nursing home services are publicly funded under both Title 18 and Title 19 of the Social Security Act. Title 18, commonly referred to as Medicare, sets forth the standards and conditions which skilled nursing homes must meet whether or not they participate in Title 18 or Title 19. The standards are set forth in Title 18. Title 18, Medicare, is primarily administered by the Federal Government, Department of Health, Education, and Welfare. Title 19, on the other hand, is primarily administered by the states that participate in Medicaid.

In this case, Pennsylvania's Department of Health is the responsible agency for determining whether or not Title 18 and Title 19 providers of skilled nursing care meet the conditions and standards which the statute and regulations require of nursing homes. The federal role in this process is basically one of oversight; however, with respect to Title 18

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53 providers in particular, the Federal Government retains and  
54 often exercises the independent authority to survey the facil-  
55 ities and make an independent judgment as to whether or not  
56 they meet the requirements established by Congress.

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58 The survey function is performed annually and  
59 generally involves a survey by professionals in the field to  
60 determine whether or not the facility meets all of the very  
61 specific conditions of participation in the program.

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63 Town Court, the respondent facility in this case, is  
64 a dual provider; that is, a participant in both Title 18 and  
65 Title 19. As such, the facility had dual responsibilities to  
66 both the Federal Government and the State of Pennsylvania.  
67 Since 1967 Town Court has participated in this role and has had  
68 a checkered history with respect to compliance with the statu-  
69 tory requirements.

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71 From 1967 to '73, the lower court acknowledged that  
72 Town Court's participation in the program was basically con-  
73 ditioned upon a number of plans of corrections that have been  
74 accepted by the governments to allow them to participate. In  
75 1974 the State of Pennsylvania determined that Town Court was  
76 so substantially out of compliance that it recommended that the  
77 facility be terminated, and it was.

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79 It was readmitted after successive applications in  
80 1976; however, later that year a grand jury was impaneled and  
81 returned indictments against the facility and its management

with respect to care. That prompted the Federal Government to conduct an independent survey of the facility, whereupon HEW found substantial non-compliance with the statutory requirements and requested Pennsylvania to conduct its own survey of the facility, which was performed. After successive conferences and negotiations and, indeed, surveys of the facility, Pennsylvania ultimately recommended to the Secretary of HEW that the facility be terminated. *Effective June 20, 1977*

Effective June 20, 1977, the facility was terminated, having been given 30 days prior notice by both the United States and the State of Pennsylvania. Indeed, seven major conditions prompted the action by the governments. These conditions are set forth in the appendix at page 295A, and the statutory references are included there. But they run the gamut from medical services to administrative responsibility being taken by the facility.

Town Court is provided with a series of administrative reviews post-termination, which it began to exercise after the action by the governments. However, before those procedures could be exhausted, this action was instituted. Town Court joined by six individual residents of the facility sued both the Secretary of HEW and the Secretary of the Pennsylvania Department of Public Welfare, charging that it was a violation of its, the facility's, due process rights and its patients' due process rights for the facility to be terminated without

prior notice and hearing; indeed without a prior evidentiary hearing be provided to the facility and independently to the patients.

After several hearings the District Court ruled against Town Court and against the patients, finding that the statutory procedures were sufficient for the facility and that the patients were entitled to no pre-termination hearings. The patients and the facility appealed. The Secretary of HEW cross-appealed because the District Court also ordered that the governments continue to make Medicare and Medicaid payments to Town Court.

QUESTION: And your client's predecessor did not appeal?

MR. WATKINS: That is correct, Mr. Justice Stewart. The view taken by my client's predecessor was, with respect to the funding order, which was the only adverse order, that our fate rested with the Federal Government. If the Federal Government was successful on its appeal, rightly or wrongly, my client's predecessor assumed that its obligation would also fall by the wayside. The Court of Appeals specifically took issue with that and that's a question, I think, that is really not pertinent to the merits. On the merits --

QUESTION: But it is a question that remains here, as to whether or not we have jurisdiction of your petition?

MR. WATKINS: That's correct. We have addressed that



question in our reply brief, the Solicitor General has addressed it in both his reply and opening briefs, and briefly, it's our position that the arguments which are being advanced here on the merits were advanced properly to the Court of Appeals, were decided by the Court of Appeals; indeed, the Court of Appeals took the position that it was deciding the case on behalf or against both Pennsylvania and the United States.

Pennsylvania as an appellee in the Court of Appeals on the issue of primary importance is clearly, under our view, entitled to seek review of an adverse ruling which she suffered in the Court of Appeals in this Court.

QUESTION: And the ruling of the Court of Appeals was in favor of the government, wasn't it, of the United States?

MR. WATKINS: Well, it's a little confusing. The ruling on the merits was against both the United States and Pennsylvania, basically holding that the patients had a due process right. It would seem to follow then that the funding order would have to be reversed, but my reading of the opinion indicates that the funding order was not reversed, and I think it's somewhat inconsistent. We pointed that out.

QUESTION: But the United States is a respondent in this court?

MR. WATKINS: Technically, the United States is a respondent; however, they have filed briefs in support of the position of the petitioner.

QUESTION: How about Town Court? Did the Court of Appeals grant the institution any rights?

MR. WATKINS: No, Mr. Justice Rehnquist. The Court of Appeals followed the precedents in that area and decided that Town Court had sufficient protections post-review that were granted by the statute.

QUESTION: And Town Court didn't petition this Court for certiorari?

MR. WATKINS: Town Court did not seek certiorari.

QUESTION: So Town Court is not here?

MR. WATKINS: Town Court is here technically as a respondent, I would assume, inasmuch as they were a party in the Court of Appeals. But they are not here seeking any relief.

The Court of Appeals addressed the cross appeals and issued two en banc decisions.

QUESTION: Just on the Town Court point, they have not filed anything at all, have they?

MR. WATKINS: That's correct. They have filed nothing.

QUESTION: How about in the Court of Appeals? Did they take a position with respect to whether or not the patients have standing?

MR. WATKINS: Yes, they took a position in support of the patients, but the primary thrust of their assertion, and they were independently represented, was that Town Court

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itself had this right. Thus if they were successful, the patients' interests were really of no consequence to them. But they did not seek review of the adverse ruling that they suffered in the Court of Appeals.

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The Court of Appeals issued two opinions, first as I mentioned, ruling that Town Court was adequately protected by the procedures set forth in the statute and regulations. The second, departing, in my view, from at least two other circuit courts, held that the patients, contrary to the facility, were entitled to pre-termination -- and when I refer to termination, I mean termination of the facility -- pre-termination evidentiary hearing.

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The court's rationale is not found in the opinion but rather in a companion case decided the same day, Klein v. Califano. In that opinion, the court recognized, indeed acknowledged and conceded, that Title 19 does not specifically guarantee -- or Title 18, for that matter -- does not specifically guarantee any rights to the patients, or indeed any role for the patients in the determination of whether or not a particular nursing home provider is qualified under the program. However, the court looked to three distinct provisions and inferred from those provisions that as a matter of policy and in view of the grave consequences that it perceived in the decision to terminate that the statute should be construed so as to protect this, quote, "property interest,"

unquote.

Further articulation of this position was given by Judge Adams in his concurring opinion which may well be, as the Solicitor General points out, the majority opinion in this case, because it was joined in by two members of the majority. But Judge Adams further expounded on this and noted that because of the prevalence of social welfare programs in today's society and because of these provisions in the statute, which I will get to, he perceived a landscape with three distinct points on it that created a property interest, indeed, quote, "a new type of property interest," unquote, that we all should be alert to.

With these rationales in hand the Court of Appeals then determined that the patients were indeed entitled to a pre-termination evidentiary hearing. As we point out, each of these provisions has no bearing whatsoever on the question and provides no basis for the ruling. The fact of the matter is that the recipients of skilled nursing home care are only entitled to receive skilled nursing home care from a qualified skilled nursing home. Indeed, if a nursing home does not meet the conditions of participation, it's not a skilled nursing home under Title 19 and 18.

The Court of Appeals overlooked this and found that the freedom of choice provision and the transfer limitations all created an aura of property. We submit that it is not for

the judiciary to lightly overlook the clear intent of Congress that the relationships between the patients and the government and the contractors and the government be distinct. The relationship between the contractor and the government is one which is specifically detailed in the statute and does not encompass any role whatsoever for the patients in determining the eligibility of the contractor.

Similarly, the contractor has no role in determining the eligibility of the patients, and that is the way Congress envisioned it. As Judge Friendly said, common sense suggests that there must be some floor below which no hearing of any sort is required, and I suggest that the Court of Appeals has dipped below that floor in failing to recognize that the entire thrust of Title 19 depends upon the qualifications of both the provider and the recipient, and here the Court of Appeals is granting a recipient a role in determining the qualifications of a provider, which Congress never envisioned.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Allen.

ORAL ARGUMENT OF RICHARD A. ALLEN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ALLEN: Mr. Chief Justice, and may it please the Court:

Mr. Watkins has discussed the scope of the Medicaid statutes and regulations, and we agree with that discussion, as

our briefs reflect.

I would like this morning, if I may, to focus not so much on the statutes and regulations as on the constitutional principles that the decision of the Court of Appeals seems to reflect, because although it's not entirely clear from the court's various opinions, its decision in this case seems to be based not so much on a misreading of what the statutes and regulations provide as upon what we contend is a basic misunderstanding of what the Constitution requires.

QUESTION: Mr. Allen, before you get into that, I notice in your reply brief, page 7, the statement, "HEW intends to institute rulemaking with respect to patient participation." How does that matter stand?

MR. ALLEN: My understanding is, Mr. Justice Brennan, that it is still under active consideration, and when I last checked, which was last week, they still intend to institute rulemaking. Exactly when is something I can't say.

QUESTION: But if they did and provide for patient participation, might we have a situation where we don't have to reach a constitutional --

MR. ALLEN: Well, we can only speculate as to what the rulemaker would provide with respect to type of patient participation in this case. As we stated in our reply brief, we believe that the constitutional issues are very important because we think a rulemaker should be free to consider the

various policy considerations on both sides, free from a judicial decree based on an erroneous view of its constitutional obligation.

QUESTION: Has HEW fixed any timetable?

MR. ALLEN: Not as yet.

QUESTION: Would this be a protracted proceeding?

MR. ALLEN: It would be in my view unlikely to be completed before this Court reached a decision on the question. That's my speculation.

QUESTION: A matter of months, you mean?

MR. ALLEN: Months, I would say. It would be an extended notice in comment rulemaking, with whatever judicial review followed from it.

QUESTION: You mean months after it began, or --

MR. ALLEN: Well, I'm only speculating, but this is a question of considerable importance. It would concern the interests of nursing homes throughout the Nation. I presume that there would be substantial comments on whatever notice of proposed rulemaking went out. The agency would have to digest these, the arguments, finally the agency would come out with a proposed rule, and in my experience these things are not done in two months or so.

QUESTION: And it hasn't begun yet?

MR. ALLEN: It has not.

QUESTION: You really wouldn't want to speculate that

it would be completed before the end of this present term of the Court, would you?

MR. ALLEN: I really -- my guess is as good as yours, Your Honor. My guess is that it's doubtful.

QUESTION: And of course, Mr. Allen, neither you nor anybody else knows what the rule may turn out to be.

MR. ALLEN: That's correct; that's correct.

Despite the considerable complexities of the Medicaid and Medicare statutes and regulations, the significant facts in this case are fairly simple. The statute provides eligible patients with a right to receive certain kinds of medical care from qualified providers like nursing homes, that is, providers that the Secretary of HEW or appropriate state officials have determined meet the statutory standards and requirements. If a home is found to be qualified, HEW or the appropriate state agency enters into an agreement with the home and the agencies, those agencies directly pay the home for services that the home provides to eligible patients.

In this case, HEW determined that Town Court Nursing Center was not a qualified provider within the meaning of the statute, and accordingly petitioner's predecessor attempted to terminate the home's participation, terminate the home's Medicaid agreement with petitioner's predecessor as HEW regulations required him to do.

The Court of Appeals acknowledged that the decision



to terminate the home would not affect the rights of any patient to receive qualified care under the statute from any other home found to be qualified.

QUESTION: This home was in Philadelphia?

MR. ALLEN: I believe it was; yes, Your Honor.

QUESTION: I was just wondering, there were therefore alternative providers, qualified providers?

MR. ALLEN: Well, there is some dispute as to the extent of alternative space at the time this matter was before the District Court.

QUESTION: This home, in other words, was not in a small town where there was not --

MR. ALLEN: It was not in a small town.

QUESTION: -- was no other nursing home around?

MR. ALLEN: No, there are other nursing homes in Philadelphia, very definitely.

QUESTION: How many patients were involved?

MR. ALLEN: I believe the home has some 190 patients, 90 percent of whom are Medicaid patients.

QUESTION: This would mean termination would require their transfer to other --

MR. ALLEN: In practical effect, it would mean that if the home were terminated, the patients would have to find another qualified nursing home in order to receive benefits under the statute.

QUESTION: And that the burden would be on the patients to do this, would it?

MR. ALLEN: Well, the state and HEW have services intended -- and do -- the State of Pennsylvania has a very effective service to assist patients to relocate to other homes.

QUESTION: Is this a fairly large number, relatively?

MR. ALLEN: 190?

QUESTION: Yes.

MR. ALLEN: I don't know that, Mr. Justice Brennan.

QUESTION: Mr. Allen, your brief states flatly on page 6 that it is in Philadelphia, 198 beds.

MR. ALLEN: It is in Philadelphia; yes, sir.

What the Court of Appeals held in substance was that because the decision to terminate a nursing home in the program has a significant effect on the patients' exercise of their statutory rights, the decision therefore constituted in some way a deprivation of the patients' statutory rights and therefore a deprivation of their property interests. Accordingly the Court of Appeals concluded that the patients have a right under the due process clause to notice and an opportunity to be heard on the merits of the decision to terminate the home.

It's our basic submission that this theory of the due process clause is incorrect. It would mean that government agencies would have to provide notice and hearings in an

almost infinite number of situations in which governmental action affects the exercise of people's statutory or constitutional rights. To take the theory to its logical conclusion, it would mean that if the government cancelled a defense contract, it would have to provide hearings to all of the defense contractor's employees who might be affected by that decision.

To take an example that's perhaps more pertinent in this context, suppose that a state medical licensing board sought to delicense a doctor on the grounds that he was professionally incompetent. Under the Court of Appeals theory, not only the doctor but all of his Medicaid patients would have a constitutional right to be heard on the question of the doctor's qualifications.

These and other examples, we submit, are no different in principle from this case, and I think it's interesting that the respondent patients have not responded, at least in their briefs, to the obvious implication of their position to innumerable other governmental decisions on in an alix context.

The fact that the Court of Appeals decision would have far-reaching implications, of course, does not necessarily mean that it was incorrect. Indeed, this Court has never directly faced the kind of claim of derivative constitutional rights that the patients are asserting in this case. Our contention that the Court of Appeals was wrong is based on the basic proposition that this Court's decisions reflect, that the

procedural protections of the due process clause must be confined by some limiting principles, that government could hardly function if it had to provide notice and evidentiary hearings to all persons affected by governmental action.

As this Court has said many times, the relevant question concerns the nature and not the weight of the interest that is affected. And it is our submission that in considering the nature of the interest that is affected, courts must also identify whose rights are being affected, whose rights are being primarily affected by the governmental action.

In this case, the termination decision is directed primarily against the nursing home, and no one disputes that the nursing home has a statutory right and a constitutional property interest that is affected, and therefore a right to some kind of notice and opportunity to be heard in the merits of the decision.

It is our submission that so long as the person whose rights are primarily affected by governmental action is given an opportunity to contest that action and a notice of the action, the due process clause does not require hearings on the same decision for other persons whose rights are indirectly affected by that action.

QUESTION: I suppose if the Court of Appeals were right and a defendant were convicted of a crime and incarcerated but decided not to appeal, a second cousin whom he'd been

sending \$30 a month to would have a right to appeal his conviction?

MR. ALLEN: That is our submission, Mr. Justice Rehnquist, of the logical implications of the Court of Appeals decision.

Now, at this point it might be asked, "Well, apart from the logical implications of the decision, what is the harm in giving patients some opportunity be heard in this matter?" Well, the harm is this: Let us assume, at least for the sake of argument, that a particular nursing home is in substantial noncompliance with the statutory standards and requirements, and thus poses a genuine threat to the health and safety of the patients. The most effective sanction that the regulatory agencies have for either inducing compliance by the home or for protecting the patients is to terminate the home's participation in the program. If agencies could not exercise their right until they gave hearings to all of the patients in the home, the effectiveness of that sanction would be largely nullified. The credibility of the sanction would largely evaporate.

I cannot put it better than the Court of Appeals to the 9th Circuit in rejecting a similar claim with respect to a claim by patients of a veterans hospital in a case we discussed in our brief *Moore v. Johnson*: Referring to the impact of the decision on patients of a decision to close certain

52 facilities, the court said: "Similar burdens always attend  
54 the extensive distribution of benefits by government. Ines-  
56 capably, few get exactly what they want while most, it is  
58 usually assumed, get more than what they would have otherwise.  
51 All would get less if invariably the complaints of the many  
50 required elaborate hearings with all the trappings that only  
18 lawyers and judges can fully appreciate."

11 Thank you, Your Honor. I would like to reserve the  
12 balance of my time for rebuttal by the petitioner.

12 MR. CHIEF JUSTICE BURGER: Very well.

13 Mr. Posner.

13 ORAL ARGUMENT BY NATHAN L. POSNER, ESQ.,

14 ON BEHALF OF THE RESPONDENTS

14 MR. POSNER: Mr. Chief Justice, and may it please  
10 the Court:

8 There is reference made here to a reply brief filed  
6 by the Solicitor General. I did receive a copy of it last  
4 night when I checked into my hotel, so I must confess to the  
2 Court that I haven't given it the consideration that I might  
ordinarily give a brief.

2 My order of priority is in the first instance to  
4 challenge the right of the petitioner to be heard in this  
6 matter. She is Secretary of the Department of Welfare of the  
8 Commonwealth of Pennsylvania. She was directed to continue  
10 payments at Town Court even after she declared the court to

be an unqualified provider.

The petitioner -- I am referring to the Secretary of the Department of Welfare -- filed no appeal or cross-appeal from that injunction. HEW was not involved in that injunction. There were no Medicare patients at the institution. Their appeal concerned Town Court under Title 18. The petitioner -- again I refer to the Secretary of the Department of Welfare -- characterizes herself as a stakeholder. Her attorney stated her position as follows: She took no position for or against the factual issues raised by the patients or HEW.

The Court of Appeals remanded this case to the lower court, and I refer to the case of the patients, only.

QUESTION: Do you represent both Town Court and the patients?

MR. POSNER: I represented Town Court in the original hearing; I represented the patients with permission of counsel for the patients, Mr. Coyle, who is seated in this courtroom.

QUESTION: Who do you represent here?

MR. POSNER: Here I represent only the patients at this time.

The Court of Appeals remanded the case involving the patients to the lower court, and it heard many witnesses with regard to the merits of the case.

QUESTION: When you say you represent the patients, I take it you mean by that that you represent each individual

of the 190 more or less patients?

MR. POSNER: I would like to think that, sir. As a matter of fact we only named six and we're asking that we be identified as a class for the whole 198, yes.

QUESTION: At this stage?

MR. POSNER: Not at this stage, but in the proceedings before the District Court which have not been completed. This case was --

QUESTION: Has there been a certification or is there a motion pending to certify class?

MR. POSNER: At this point nothing is before the court because during the course of the hearing, when the court was hearing evidence on our request for injunctive relief, an appeal was taken to the Court of Appeals in the interruption of the evidence at that time, and I will refer to that in just a moment, sir, because that's what the Court of Appeals had in mind when it remanded the case to the lower court.

It left to the lower court, when it remanded the case of the patients, the procedures, and I use their language, in the case which has been interrupted by the appeal from the preliminary injunction. I interpret that to mean that completion of the case before the lower court was then in order, and depending on how the court held concerning whether there was a violation of the Fourteenth Amendment, then the matter would again go back to the Court of Appeals and possibly to this



Court that the parties weren't satisfied with it.

Petitioner again took no appeal nor position and they come before this Court and seek review. And I ask: Review of what? The remanding of the case to the lower court for completion? Obviously he's not appealing that or reviewing that. Or does she rely on the issue raised by HEW? If she does, that issue concerns Town Court under Title 18, Medicare, and did not involve the patients. It was decided in favor of HEW. The issue was put to rest. No other issue remained.

Our argument is that the petitioner's obligation to the patients that we represent arises under Pennsylvania statutory law. This was not questioned by the petitioner before the Court of Appeals, and the court remarked about it. They stated, "Plaintiff has not cross appealed. The propriety of the order entered against her is not before us."

I say to this Court that HEW had its issue decided. HEW cannot be involved in a suit by the patients against the Commonwealth of Pennsylvania under our statutory law. They have no right, nor should they be permitted to attack the remand order for the completion of the case involving the Commonwealth of Pennsylvania.

Patients never sought any rights against HEW. Their rights have always been against the Commonwealth, and HEW has no right to interfere with their claim for protection.

QUESTION: Now, HEW was a party in the Court of Appeals?

MR. POSNER: Only as respects Town Court in taking an appeal to the Court of Appeals and it was decided in its favor. HEW was decidedly correct that they did not have the --

QUESTION: But a respondent can none the less petition for review, a respondent in the Court of --

MR. POSNER: There were of course appeals for HEW and we took --

QUESTION: Yes, but now in this Court --

MR. POSNER: In this court --

QUESTION: The United States is technically a respondent.

MR. POSNER: I don't think so, sir. I think this case lies between us -- and I say "us," the patients; we, the patients -- and the Commonwealth of Pennsylvania and as to whether or not the Fourteenth Amendment has been involved or should be invoked.

QUESTION: You think the United States is not a party at all?

MR. POSNER: That's right, sir.

QUESTION: Well, it did petition, didn't it, for certiorari?

MR. POSNER: Did not, sir.

QUESTION: Did not.

MR. POSNER: Only in the --

QUESTION: Only the State Secretary did?

MR. POSNER: Yes, sir.

QUESTION: Is there, Mr. Posner, any possibility of incompatibility between the rights of the patients and the rights of the nursing home?

MR. POSNER: If that occasion should arise, sir, right now their interests are parallel. They believe a hearing should take place. Should some issue arise, and it has not arisen, Mr. Coyle, who is seated in this courtroom and whose name appears on this brief, will take over on behalf of the patients. Until that time, I believe our courses are parallel and at this point I am representing only the patients. But should there be any slight suggestion, sir, I personally would walk out and would ask Mr. Coyle, or he would demand that I walk out. So I see no problem there, sir.

QUESTION: Is there any incompatibility really between the position of HEW and the present position of the Secretary of the Commonwealth?

MR. POSNER: Incompatibility between --

QUESTION: Aren't their interests basically the same?

MR. POSNER: I would suppose to some extent the answer must be yes to that, sir. But let me put it this way -- Oh, I am sorry.

QUESTION: So that the -- the Third Circuit really had presented to it all the arguments by HEW that this Court

is now being presented?

MR. POSNER: No, sir. HEW was not concerned with the violations of the laws of the Commonwealth of Pennsylvania. Our case, the patients' case is strictly against the Commonwealth of Pennsylvania.

QUESTION: Well, we're not concerned with the violation --

MR. POSNER: Well, that's the only problem that is before this Court today, as I see it.

QUESTION: Well, I thought it was your claim that the laws of the Commonwealth of Pennsylvania were what conferred a property right.

MR. POSNER: That is right, sir.

QUESTION: And the Constitution of the United States is what confers a due process right not to be deprived of that property with a hearing.

MR. POSNER: That is right, infringement under the Fourteenth Amendment.

QUESTION: Isn't that your argument?

MR. POSNER: That is correct, sir.

Shall I proceed?

QUESTION: Yes, as far as I am concerned.

MR. POSNER: The legal issues involved here are few but I think it resolves itself, if you please, as to whether or not these patients are entitled to a pre-termination

hearing before they are removed from their present home to a non-designated place not yet selected by the authorities. I say the issue therefore is one of due process.

QUESTION: Do the authorities in Pennsylvania have a legal obligation under their statute to tell them where to go?

MR. POSNER: Well, sir, there's a real question about it. The patients in the first instance should be able to find their home according to the authorities in Pennsylvania.

QUESTION: Did these patients who are now in the home select this home, or were they mandated there by the state?

MR. POSNER: To a large extent, sir, I would say to a great majority, they selected this home, either themselves or their relatives or by referral of physicians or by hospitals. You see, hospitals usually refer patients to a skilled nursing institute when their program cannot encompass the treatment of such patients, which require just constant nursing care.

We have what is known in Pennsylvania as the Medical Assistance Program which does not permit transfer of patients to another facility without first affording those patients a factual hearing as to whether the move is for the welfare of the patients, and during the course of this argument, I am going to constantly say to Your Honors that the welfare of the patients has been forgotten by both HEW and by the Commonwealth of Pennsylvania. They are only interested in rules and regulations which I will refer to.

52 QUESTION: You don't have any doubt, do you, that it's  
54 none of our business how Pennsylvania construes its laws?  
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55 MR. POSNER: I don't think it is any of your busi-  
56 ness, if Your Honor puts it that way, as to how Pennsylvania  
57 construes it, but if they construe it contrary to the law of  
50 the land --  
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10 QUESTION: What do you mean, the law --

11 MR. POSNER: -- becomes a violation of the Fourteenth  
12 Amendment due process clause, then it becomes the business of  
13 this Court.

14 QUESTION: Then you are saying any time that this  
15 Court thinks that any state has construed a state statute  
16 pertaining to contracts, torts or anything else contrary to the  
17 way that statute should have been construed, it raises a  
18 Fourteenth Amendment question?  
19

20 MR. POSNER: I think anything, and I will not restrict  
21 it to contracts, sir, anything that involves, as I will argue,  
22 life, liberty, and property dealing with personal rights that  
23 is offended or affected by a state contrary to its own sta-  
24 tutes therefore becomes a violation of the Fourteenth Amend-  
25 ment and we have the right to request a Federal court to enjoin  
26 the commonwealths from acting contrary to the wishes of those  
27 people.  
28

29 QUESTION: What if the State of Pennsylvania had a  
30 statute of limitations provision applying a two-year statute  
31

to a certain type of cause of action. The Pennsylvania court said that statute applied in a particular case. Could you bring that case here on a Fourteenth Amendment claim, saying that under the -- that Pennsylvania had misapplied its statute of limitations law?

MR. POSNER: I won't answer that question, if Your Honor pleases, because I am concerned now with something much more serious, the immediate removal from a home of people that regard this as the only home they have in the world.

QUESTION: Well, what about the claim of a widow who has missed a substantial negligence recovery because of the statute of limitations bar? Isn't that a fairly serious thing?

MR. POSNER: I think it might be very serious, sir, and whether that is a violation of the Fourteenth Amendment, I don't know. I couldn't tell Your Honor at this point that that would or would not be a violation. But if there comes a problem, I will try to answer it.

QUESTION: Mr. Posner, you mentioned that as a matter of Pennsylvania statutory law the patients have a right to a hearing before they're transferred to another facility?

MR. POSNER: That is correct, sir.

QUESTION: Do you rely on that statute as giving them a right to, statutory right to participate in this proceeding?

MR. POSNER: Statutory right to participate in this

proceeding, sir?

QUESTION: Yes.

MR. POSNER: When you say the matter before the Supreme Court?

QUESTION: Well, but I mean a hearing, to participate in a proceeding to determine whether or not the home shall be disqualified?

MR. POSNER: Definitely, sir, pre-termination hearing so that they can offer --

QUESTION: Really, one of your arguments then is it is a matter of Pennsylvania law, you're entitled to the hearing you seek?

MR. POSNER: That is correct, sir. And I will show you that the Code of Federal Regulations also provides for that hearing.

QUESTION: What is to prevent, preclude, or hinder the home from calling, one at a time, every one of the patients as a witness in the proceeding to disqualify the home? Would that not accomplish --

MR. POSNER: If Your Honor pleases, in this very case, five witnesses were called. Every one of them experts, to testify concerning their experience in the field and why this home was most proper and fitting to be a skilled nursing home and should be licensed. As a matter of fact, later in my argument I will state to Your Honors that despite what HEW has



directed the Secretary of Welfare to do in Pennsylvania, the authority, as Mr. Watkins very well put it, the determining factor is Department of Health, and the Department of Health has given us the license. There is a license to Town Court in this matter that they can exist as a nursing home.

The only problem is that the Secretary of Welfare will not honor that statement by the Department of Health because HEW says well, let them go somewhere else. Now, I am anticipating an argument I intended to make in the future, but I think it's most important to point that out in this court at this time.

We, patients, say that this is a legitimate nursing home. We the patients say that the Commonwealth of Pennsylvania through its Department of Health has given a license to this place to operate, and it is in existence today.

QUESTION: The nursing home did have a hearing, did it not?

MR. POSNER: Did not have a hearing, sir.

QUESTION: No hearing of any kind?

MR. POSNER: No. They're only entitled, according to the Court of Appeals, to a post-termination hearing.

QUESTION: Well, you're not concerned with the deprivation of Pennsylvania license in this case, are you?

MR. POSNER: No, sir, but what I'm trying to say is --

QUESTION: Well, maybe the federal standards are

different from the state standards.

MR. POSNER: Pardon me?

QUESTION: I say, maybe the federal standards are different from the state standards.

MR. POSNER: That may be, sir, but we are not trying to qualify under federal standards for these patients. These patients --

QUESTION: Well, you are to the extent that you want Medicare and Medicaid.

MR. POSNER: No, sir. These patients are entitled to assistance under the Pennsylvania law through an act of the Legislature of Pennsylvania which gives the right to them to secure assistance, which means nursing care, et cetera, and a provider agreement is entered into between the Commonwealth of Pennsylvania and a nursing home for skilled nursing care to these people. HEW has nothing to do with that. These people have no connection with HEW. Their only claim here is that the Commonwealth of Pennsylvania is defeating them of their rights to maintain their home.

QUESTION: By violating its own law?

MR. POSNER: By violating its own law? I would say, sir, the Secretary of Welfare is adhering to the request of HEW. The Department of Health says this is a very proper place for these patients to be. We'll give them a license to operate, and they have given them a license.

32  
34 This is not a place that you would say is to the  
33 detriment of these people. It is perfectly proper, and if they  
35 had to be removed from another home to another place, your  
31 Department of Health in Pennsylvania would definitely take the  
30 position that this was a proper nursing home for them to go to  
18 because they are a licensed nursing home.

19 QUESTION: Well, those are all a question of  
11 Pennsylvania law that we have nothing to do with.

18 MR. POSNER: I submit to Your Honor you have nothing  
12 to do with the Pennsylvania law. Mr. Chief Justice Burger has  
16 stated that on many occasions. But where there has been a  
13 violation of the Pennsylvania law so that it affects a person's  
15 rights under the Fourteenth Amendment, it becomes a federal  
11 matter. That is my position.

10 QUESTION: Well, that's just a jump to a conclusion,  
2 so far as I can see.

8 MR. POSNER: Well --

4 QUESTION: Well, your point is that if a state con-  
6 strues its law, statutory or common law or state constitutional  
2 law, in a way that contravenes the Federal Constitution, then  
8 it becomes a matter for this Court?

3 MR. POSNER: That is correct, sir.

3 QUESTION: I suppose that's your argument, isn't it?

1 MR. POSNER: That is my argument, sir.

QUESTION: Now, going back to this hearing, the post

hearing, what was to prevent in that hearing from having every one of the patients in the home come in and take part in it in the sense of justifying?

MR. POSNER: That's just the situation, sir. In that post hearing which is now two years old and hasn't taken place and we have one five years old that hasn't taken place, the patients will have been removed to another place. You couldn't effect the status quo anymore. The damage to them will have been done.

QUESTION: Who do you say is responsible for not having completed that hearing?

MR. POSNER: The post hearings? As far as the nursing home is concerned? HEW.

We have an action instituted in the District Court of Pennsylvania through one lawyer representing this home which takes the position that this Court has taken, and I am referring to the horse trainer case that Your Honors recently ruled upon, that the failure of the government, HEW, to grant that post-termination hearing in due time forbid them from proceeding in any fashion toward the decertifying of this home. But that is a matter before the District Court now.

What I must do here, sirs, I must draw not a picture, a sketch, if you will, of what these patients call home, and why the removal of them from that home is a deprivation of their life and liberty.

Their world, if the Court please, these patients -- they are 75, 80, 85 years of age -- has been reduced to the surroundings within the home. The other patients, the nurses, the attendants. Visitors, relatives, occasionally visit them. They are chronically ill persons. They are infirm. They suffer from many diseases, from cancer to cardiovascular problems. They know each other, and they know each other's problems. They talk together about their aches and pains, and even world problems.

Despite the fact that they are ill and infirm, if the Court please, the small world that they have is their home, the only home they know. The people in there are their friends. It had been reduced to that. The nurses in there know them. They don't apologize because of the serious condition that causes a nurse to take care of a situation that embarrasses the patient.

They are not there to await death, because in the minds of all people, most all people, hope springs eternal. They hope they will get better.

Suddenly, this home is decertified. What does it mean to them? They have to go elsewhere. Will their friends go with them to these other places, and where will they go? No one has the answer. Imagination, fear creeps into the minds of these people. Will the next place have windows, for instance?, "Will the nurses understand my problems?" Where will

it be? "Another city miles away from the few visitors I have? What will be the conditions there?"

This is a real fear, I submit to Your Honors. Their home has been destroyed. Can the real fear of transfer trauma affect the health of these people? Keep in mind --

QUESTION: Does the --

MR. POSNER: -- the serious condition of these people, as it was.

QUESTION: Does transfer trauma come, is it life, is it liberty, or is it property?

MR. POSNER: I say transfer trauma, sir, to a large extent in the case of a seriously ill patient, can mean life. The shortening of that patient's life by one day is a deprivation of life, as far as my argument goes. I think it is also a breach of liberty where the government, HEW in this case, has taken the position which I will argue, if I get the opportunity, that we're only interested in the monetary moneys that we supply to your state. We have no interest in the psychic effects or benefits that might accrue to these people because of the money.

QUESTION: But I think the Court of Appeals said you had a property interest.

MR. POSNER: They did, sir.

QUESTION: So you say you have life, liberty, and property?

MR. POSNER: Oh yes, sir.

I say to Your Honors, in the medical testimony even in this case is to the effect that mortality -- we had a doctor testifying, a psychiatrist of note, if Your Honors please -- can bring about many serious conditions, such as heart attacks, cerebral hemorrhage, high blood pressure which might bring on death in an elderly person. So doctors say that the patients will suffer as a result of removal. If true, I ask this Court, haven't these patients been deprived of not only their property rights, the home in which they live, the only home they know, but the shortening of life, whatever life still remains to them?

QUESTION: Is it not possible that the State of Pennsylvania and the Department of Health and Welfare has an obligation to see to it that adequate care is provided that will not bring on any of this train of circumstances?

MR. POSNER: That is right, sir, and that a pre-termination hearing is their obligation to demonstrate that. And all I am saying to this Court, and Your Honor has summed it up, the Court of Appeals said this case was interfered with. It wasn't completed. No appeals were taken by the petitioner. Send it back to the lower court, let them complete the hearing that they started. If they decide there is no violation of the Fourteenth Amendment we don't belong before the Supreme Court of the United States. But if they decide that there was an interference with these patients' rights, that it was a

deprivation of life, liberty, and property, then we may be back here again. But certainly at this stage of the proceedings, without the completion of the testimony to demonstrate that these patients will be hurt and hurt badly, and that has already been testified to by Dr. Linden, as I noted, a psychiatrist of 32 years' standing, who examined two to three hundred of the patients in this home, over a period of years, who felt that high mortality rate might take place as a result of transfer trauma, who felt that this place was proper and sufficient for the needs of these people.

I say that we have a situation here where HEW says, "We don't have to find these people a home. We're only going to put in money to the state. We have no obligation to these people." And they don't, sir. The obligation is from the Commonwealth of Pennsylvania for these people.

So when we say to HEW, "Why don't you tell us what kind of a home you can find for them," they say it's none of our business. "Let your Department of Health in Pennsylvania make that decision."

We go to the Department of Welfare in Pennsylvania and say, "What kind of a home are you going to send these people to?" They say, "That's up to the Department of Health." We go to the Department of Health and they say they're all right where they are. "We've licensed this place; we think it's a proper place."



QUESTION: But, of course, the state standards for licensing the place are quite different from HEW's standards for eligibility for Medicaide.

MR. POSNER: No, sir, the code -- no, sir.

QUESTION: Well, they're not in --

MR. POSNER: The code provided -- the Code of Federal Regulations, as stated by HEW, is to the effect that hearing shall be granted --

QUESTION: No, no. I'm talking about the standards. I asked you about the standards.

MR. POSNER: Oh, the standards? I would assume that the standards that's under 19 are the same, almost, as the --

QUESTION: They're not identical.

MR. POSNER: -- standards under 18, sir.

QUESTION: Standards for licensing under the state of Pennsylvania as a nursing home, I would presume, are at least somewhat different from the standards of eligibility for Medicaide?

MR. POSNER: No, sir. Eligibility --

QUESTION: They are identical, are they?

MR. POSNER: Eligibility for Medicaide is under the Pennsylvania statutes, and I would refer to it if I have enough time, sir, but it is under the Pennsylvania act, the determination of what is needy and who is medically ill is their determination, not HEW's under Title 19.

QUESTION: I am talking about the quality of the provider.

MR. POSNER: The provider agreement, as a matter of fact.

QUESTION: I am talking about the quality of the provider, the -- however, if you don't understand my question, you don't.

MR. POSNER: I do understand your question. I am trying to find an answer to you, sir, because you have nursing homes that qualify both under 18 and 19.

QUESTION: I'm sure you do.

MR. POSNER: The disqualification of a home, the decertification of a home, comes about if there's a violation of 18 and they then say you're disqualified under both 18 and 19. We say the patients are not affected by that. They have a right under the Pennsylvania act to secure medical assistance, which includes nursing homes.

QUESTION: That's your basic argument; I understand it.

MR. POSNER: And that's the reason I hesitate in answering your question.

Gentlemen, I think we are toying with a segment of society that has been neglected. These people don't know where they're headed. The answer of HEW is, "We give your state money, so therefore we have a right to interfere."



Respondent makes apparently two claims in that regard: The first is, as I understand it, that the order that his proceedings in the District Court were interrupted. I assume he is suggesting that the order of the District Court was not appealable. He failed to point out that he appealed from that order, and it is indeed that appeal that brings the petitioner to this Court, because as we have pointed out, we participated as appellee in the Court of Appeals, responding to his appeal on the issue of primary importance, that being the patients' due process rights.

Secondly, he concedes that if HEW is properly here, then of course plenary review may be granted over the question presented in the certiorari petition, but he argues that HEW is not properly here because they never sued HEW on this issue.

I ask the Court to look at the complaint. The prayer for relief very specifically runs against both HEW and Pennsylvania, and well it should, because HEW provides over half of the funding for the Medicaid patients which my learned opponent is representing.

QUESTION: What is the specific order against Pennsylvania?

MR. WATKINS: The order against Pennsylvania and HEW is that Medicaid funding be continued until the patients are relocated.

QUESTION: This is a prospective order to pay money?

MR. WATKINS: Yes. Yes, it is.

QUESTION: Against the state?

MR. WATKINS: Against the state and HEW. Indeed, it would have to be against HEW because, as I said, they provide over half of the funds that are involved. So that the fact that there are no Medicare patients is of little consequence, and is easily explained -- easily explains why HEW was sued by these Medicaide patients, because HEW has an extremely large role in the administration of Medicaide, and without them as a defendant here, the relief could not have been complete.

QUESTION: Was any Eleventh Amendment question ever raised?

MR. WATKINS: No, Mr. Justice White.

My opponent asserts in the alternative that his claim ~~is~~ predicated only upon state law, a contract theory which we have addressed in the briefs, and state law, which he has not pointed out here. He has yet to point to a provision in Pennsylvania law that requires a hearing for these patients before their Medicaide certification -- before the nursing home certification is terminated. In fact there is none.

QUESTION: Well, I understand his argument. His point is that the failure of -- any failure to provide for a hearing for the patients is the violation of the Federal Constitution. That's what I thought he was arguing.

MR. WATKINS: That is what I assumed he was arguing

until this morning, when I believe that he argued that it was not federal law that he was concerned about; he was concerned about provisions of state law which, if they existed, of course, would be protected by the Fourteenth Amendment. The fact of the matter is he has pointed to none; there are none. We have supplied the Court with a copy of the precise contract which was utilized between the State of Pennsylvania and Town Court Nursing Center which in the clearest of terms points out that the contract is terminable forthwith should the facility fall out of compliance with federal and state regulations governing the operation of such facilities.

Finally, I should point out that throughout the proceedings, the state law questions never surface from the respondents, never have the patients asserted that Pennsylvania was breaching its own law by terminating the facility, and indeed, the first mention of any such, the first allusion to this is in this Court, and as I pointed out, no specific provisions were pointed out. Indeed, they couldn't be because they don't exist.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:06 o'clock a.m., the case in the above-entitled matter was submitted.)

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