

The Burger Court Opinion Writing Database

O'Bannon v. Town Court Nursing Center
447 U.S. 773 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

June 17, 1980

Re: 78-1318 - O'Bannon v. Town Court Nursing Center

Dear John:

I join.

Regards,

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 23, 1980

RE: No. 78-1318 O'Bannon v. Town Court Nursing
Center

Dear Chief:

I voted to affirm in the above and believe I was alone for that disposition. I am attempting to put together an opinion to support that disposition.

Sincerely,

Bill

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 23, 1980

RE: No. 78-1318 O'Bannon v. Town Court Nursing Center

Dear Chief:

You are correct. I will be writing a dissent in
the above.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 2, 1980

RE: No. 78-1318 O'Bannon v. Town Court Nursing Center

Dear John:

I shall in due course circulate a dissent in the
above.

Sincerely,



Mr. Justice Stevens

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Burger

From: Mr. Justice Brennan

Enclosed: 11 M 5
1980

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1318

Helen B. O'Bannon, Secretary
of Public Welfare, Pennsylvania, Petitioner,
v.
Town Court Nursing Center
et al.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit.

[June —, 1980]

MR. JUSTICE BRENNAN, dissenting.

Respondents have a constitutionally protected property interest in their "legitimate entitlement to continued residency at the home of [their] choice absent specific cause for transfer." *Town Court Nursing Center, Inc. v. Beal*, 586 F. 2d 280, 286 (CA3 1978) (Adams, J., concurring), quoting *Klein v. Califano*, 586 F. 2d 250, 258 (CA3 1978). The statutory and regulatory scheme gives a patient the right to choose any qualified nursing home. 42 U. S. C. §§ 1395a and 1396a (a) (23). Once a patient has chosen a facility, the scheme carefully protects against undesired transfers by limiting the circumstances under which a home may transfer patients. 42 CFR § 311 (c) (1979). And a qualified nursing home, which must have met detailed federal requirements to gain certification, 42 U. S. C. §§ 1395x (j) and 1396a (a)(28), cannot be decertified unless the Government can show good cause. See 42 U. S. C. § 1395cc (b)(2). Thus the scheme is designed to enable a patient to stay in the chosen home unless there is a specific reason to justify a transfer.

Respondents chose a home which was, at the time, qualified. They moved into the home reasonably expecting that they would not be forced to move unless, for some sufficient reason, the home became unsuitable for them. The Govern-

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 9, 1980

Re: No. 78-1318, O'Bannon v.
Town Court Nursing Center

Dear Harry,

I cannot join what is said on pages 27-35 of your opinion for the Court. Accordingly, I have prepared the enclosed brief concurring statement. I may well decide to withdraw this statement, depending upon what else may be written in this case, by you or by others in concurrence.

Sincerely yours,

?S.

Mr. Justice Blackmun

Copies to the Conference

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

From: Mr. Justice Stewart

Circulated: 9 APR 1980

1st DRAFT

~~Recirculated:~~

SUPREME COURT OF THE UNITED STATES

No. 78-1318

Helen B. O'Bannon, Secretary
of Public Welfare, Penn-
sylvania, Petitioner,
v.
Town Court Nursing Center
et al.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Third Circuit.

[April —, 1980]

MR. JUSTICE STEWART, concurring.

It is clear to me that under the relevant statutes the residents of a nursing home do not have a property right in the continued certification of the home in which they reside. See *Board of Regents v. Roth*, 408 U. S. 564, 576-578; *Perry v. Sindermann*, 408 U. S. 593, 599-603. Moreover, I agree with the Court that claims of deprivation of the residents' lives or liberties are not before us. Accordingly, I concur in the result.

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 4, 1980

Re: No. 78-1318, O'Bannon v. Town Court
Nursing Center

Dear John,

I am glad to join your opinion for
the Court.

Sincerely yours,

P.S.
J

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 23, 1980

Re: No. 78-1318 — O'Bannon v. Town Court
Nursing Center

Dear Harry:

I should have indicated to you earlier that I had put aside further study of this case until arguments were over. I had made no decision not to join your carefully drafted opinion.

Sincerely yours,



Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

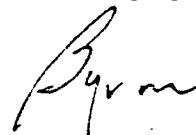
June 3, 1980

Re: 78-1318 - O'Bannon v. Town Court
Nursing Center

Dear John,

Please join me.

Sincerely yours,



Mr. Justice Stevens

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 24, 1980

Re: No. 78-1318 - O'Bannon v. Town Court
Nursing Center

Dear Harry:

Please mark me as "out" in this case.

Sincerely,

JM

T.M.

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 2, 1980

Re: No. 78-1318 - O'Bannon v. Town Court
Nursing Center, et al.

Dear John:

Please note on your opinion that I did not
participate.

Sincerely,

JM

T.M.

Mr. Justice Stevens
cc: The Conference

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

From: Mr. Justice Blackmun
 APR 4 1980

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1318

Helen B. O'Bannon, Secretary
 of Public Welfare, Pennsylvania, Petitioner,
 v.
 Town Court Nursing Center
 et al.

On Writ of Certiorari to the
 United States Court of Appeals for the Third Circuit.

[April —, 1980]

MR. JUSTICE BLACKMUN delivered the opinion of the Court. The principal respondents here are elderly nursing home patient-residents, whose care is paid for through the Medicaid program of the Commonwealth of Pennsylvania and the United States. These respondents claim property, life, and liberty interests tied to continued residence in the nursing home in which they live. Those interests, they say, are threatened by state and federal efforts to disqualify the home as a Medicaid provider. The issues before us are whether the claimed interests do in fact exist so that the individual must be afforded procedural due process before the home is disqualified.

I

Titles XVIII (Medicare) and XIX (Medicaid) of the Social Security Act, as amended (the Act) establish programs that channel federal funds to aged, disabled, and poor persons in need of medical care.¹ Through the Department of Health,

patients

¹ Title XVIII and Title XIX came into existence with the Social Security Amendments of 1965, 79 Stat. 286, 291, 343. Title XVIII, as amended, appears at 42 U. S. C. § 1395 *et seq.*, and Title XIX, as amended, at 42 U. S. C. § 1396 *et seq.* The Medicare program focuses

To: The Chief Justice
 Mr. Justice BRENNAN
 Mr. Justice STEWART
 Mr. Justice WHITE
 Mr. Justice MARSHALL
 Mr. Justice POWELL
 Mr. Justice REHNQUIST
 Mr. Justice STEVENS

From: Mr. Justice BLACKMUN

Circulated:

Recirculated: APR 17 1980

R. 21
 2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1318

Helen B. O'Bannon, Secretary
 of Public Welfare, Pennsylvania, Petitioner,
 v.
 Town Court Nursing Center
 et al.

On Writ of Certiorari to the
 United States Court of Appeals for the Third Circuit.

[April —, 1980]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The principal respondents here are elderly nursing home patient-residents, whose care is paid for through the Medicaid program of the Commonwealth of Pennsylvania and the United States. These respondents claim property, life, and liberty interests tied to continued residence in the nursing home in which they live. Those interests, they say, are threatened by state and federal efforts to disqualify the home as a Medicaid provider. The issues before us are whether the claimed interests do in fact exist so that the individual patients must be afforded procedural due process before the home is disqualified.

I

Titles XVIII (Medicare) and XIX (Medicaid) of the Social Security Act, as amended (the Act), establish programs that channel federal funds to aged, disabled, and poor persons in need of medical care.¹ Through the Department of Health,

¹ Title XVIII and Title XIX came into existence with the Social Security Amendments of 1965, 79 Stat. 286, 291, 343. Title XVIII, as amended, appears at 42 U. S. C. § 1395 *et seq.*, and Title XIX, as amended, at 42 U. S. C. § 1396 *et seq.* The Medicare program focuses

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 17, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 78-1318, O'Bannon v. Town Court Nursing Center

The central focus of this case is whether Medicaid-recipient nursing home patients have a property interest that entitles them to be heard prior to decertification of their home as a Medicaid provider. I have circulated a much-too-long proposed opinion and John has circulated a concurrence in the judgment. I write this memorandum in an attempt to explain my reasons for writing the draft as I did, and to highlight the principal differences between John's approach and mine.

A. Structure

Basic to the structure of analysis in my draft (although not necessarily critical), is my proffered assumption that the patient has some form of property interest in "continued residence at his home." P. 23. I obtained the concept of "continued residence" from Potter's opinion in Perry v. Sindermann, 408 U.S. 593 (1972), in which the Court recognized that an untenured professor might have a "property interest in continued employment." Id., at 599. In my view, since the patients cannot be moved by the Government from Town Court at will under usual circumstances (just as Professor Sindermann could not be removed at will from his job), it would seem to follow that they have some form of property interest in "continued residence" at the home. (The opinion need not, and does not, actually hold that they do; I simply assume it.) Since decertification necessarily destroys this underlying interest, I find it necessary to ask whether the underlying interest is conditioned upon the continuing certification of the home. The language of the statute indicates that the underlying interest is so conditioned, but all the "new property" cases have looked beyond the statutory language.

Completely aside from the need to deal with the patients' underlying property interest in continued residence at Town Court, the patients make a strong argument (strong enough to convince seven judges of the Third Circuit) that

this case falls into the mold of the Court's prior cases in which property interests were constitutionally recognized. After all, the patients have had a "justifiable expectation that [they] would not be transferred except for misbehavior or upon the occurrence of other specified events," Vitek v. Jones, slip op., at 7 -- viz., decertification of the facility for cause. It arguably could follow that they are thus "entitled . . . to the benefits of appropriate procedures in connection with determining the conditions that warranted [their] transfer." Id., at 8.

Of course, there are significant differences between this case and the prior cases. This led me to conclude both that the patients' underlying interest in continued residence at Town Court is conditioned on continuing certification of the facility and that the patients' reliance on the "occurrence of . . . specified events" cases should be rejected. I attempt to identify the differences I find important and explain why they are constitutionally significant at pages 27-35.

As I read John's concurrence, his analysis departs from mine in several critical respects. To begin with, he does not accept my basic analytic framework of asking whether a conceded property interest in "continued residence" is conditioned upon continued certification. I am not certain whether John disputes my assumption that the Government cannot remove individual patients at will from their home under usual circumstances or whether he disapproves my characterization of these limitations as giving rise to an underlying interest in "continued residence" at Town Court. If John takes the former position, I think he misreads the statutes. If he takes the latter position, I do not understand why he rejects the characterization I have derived from Perry. I think the characterization is a fair and accurate one and that the analysis it triggers comports with the notion that we must explore the "dimensions" of the claimed property interests. Board of Regents v. Roth, 408 U.S., at 577.

The issue, as characterized by John, is "whether nursing home residents . . . have a property interest in the continued certification of a particular facility." This characterization seems a bit arid to me; as a practical matter, the patients surely think of their "interest" in terms of a right to "continued residence" at the only home

they know; to them, "certification" is nothing more than a bureaucratic abstraction. In any event, if one accepts my underlying assumption that the patients have some form of interest in continued residence at Town Court, John's characterization of the issue does not solve the problem I have attempted to address. For even if the patients have no interest in "certification," decertification will deprive them of the underlying interest in continued residence they concededly have.

B. The Reasons for Decision

However the issue is framed, it is clear that John and I focus on different considerations in addressing the "property interest" issue. To John, it appears to be determinative that "the parties in this case" (I assume John means the home and its patients) do not have a contract requiring the home to retain its certification. I would be uncomfortable with this approach. Homes like Town Court live off Medicaid and Medicare recipients, who constitute some 50% of all nursing home occupants in the United States. Thus, the vast majority of certified homes have nothing to lose from executing a contract barring them from withdrawing as a Medicaid and Medicare provider for a year or so into the future. And as I attempt to illustrate in footnote 50 (witness also the behavior of Town Court in this case), homes are looking for every opportunity to avoid or delay decertification. Since a contract with patients will advance these goals at no real cost, we can expect that, under John's analysis, such contracts will frequently appear. Thus, it would seem that if John's theory of this case is adopted, we shall be holding as a practical matter that nursing home patients are entitled to due process when a home is decertified. Moreover, John's analysis would seem to lead to undesirable results in other contexts. One might ask, for example, whether a client has the right to a hearing on his lawyer's disbarment if the lawyer and client have executed a contract under which the lawyer agreed to remain a member of the bar for two more years.

John also emphasizes that no statute gives the patients the "right to have any particular facility . . . remain qualified." I have difficulty envisioning a statute that might create such a "right," but in any event I think that this point has little relevance when the home has every

desire and intention to remain certified (after struggling for several years to obtain that status). Whatever the relation between the patients and the home, here we are talking about governmental disruption of the patients' statutorily bestowed right to continue to receive services "from [an] institution . . . who undertakes to provide him such services." 42 U.S.C. § 1396(a)(23).

It can be answered, of course, that the patients' right to remain in a particular home is limited by the statute to "any institution . . . qualified to perform the . . . services." Id. For reasons previously outlined, however, I think this response begs the question. I find it necessary to explore in greater detail whether the limiting characterization of the statute is to be accepted here. This approach reflects my belief that our existing rules can carry us only so far. The "at will" cases (e.g., Bishop, Roth, Meachum) establish a fairly clear line beyond which protected interests will not be recognized. The "specified restriction on removal of a present benefit" cases (e.g., Arnett and Vitek) establish another fairly clear line beyond which protected interests must be recognized. For cases that do not fall easily into either category, however, some new mode of analysis must be devised. I sought to fill that void by analysing the problem in functional, rather than formal, terms.

I continue to agree with Bill Rehnquist's observation at conference that this case necessarily requires us to make new law. I have attempted to justify the new law this decision makes on the basis of reasons of substance recognized in the Court's precedents.

H.L.A.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 23, 1980

Re: No. 78-1318 - O'Bannon v. Town Court Nursing Center

Dear Chief:

Although I have not heard from everyone, it is apparent to me that my approach to this case will not command a Court. I therefore suggest that it be considered for reassignment. I make this suggestion now rather than delay any longer because we are through with oral arguments and the Term is drawing to a close.

Sincerely,



The Chief Justice

cc: The Conference

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

From: Mr. Justice Blackmun

Circulated: JUN 18 1980

Recirculated: _____

No. 78-1318 - O'Bannon v. Town Court Nursing Center

MR. JUSTICE BLACKMUN, concurring in the judgment.

Although the Court reaches the result I reach, I find its analysis simplistic and unsatisfactory. I write separately to explain why and to set forth the approach I feel should be followed.

The patients rest their due process claim on two distinct foundations. First, they assert a property interest in continued residence at their home. Second, they claim life and liberty interests tied to their physical and psychological well-being. According to the patients, because each of these interests is threatened directly by decertification, they are

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

From: Mr. Justice Blackmun

Circulated:

Recirculated: JUN 23 1980

Printed
 1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1318

Helen B. O'Bannon, Secretary
 of Public Welfare, Pennsylvania, Petitioner,
 v.
 Town Court Nursing Center
 et al.

On Writ of Certiorari to the
 United States Court of Appeals for the Third Circuit.

[June —, 1980]

MR. JUSTICE BLACKMUN, concurring in the judgment.

Although the Court reaches the result I reach, I find its analysis simplistic and unsatisfactory. I write separately to explain why and to set forth the approach I feel should be followed.

The patients rest their due process claim on two distinct foundations. First, they assert a property interest in continued residence at their home. Second, they claim life and liberty interests tied to their physical and psychological well-being. According to the patients, because each of these interests is threatened directly by decertification, they are constitutionally entitled to a hearing on the propriety of that action. Unlike the Court, I find it necessary to treat these distinct arguments separately.

I

In my view, the Court deals far too casually with § 1902 (a)(23) of the Social Security Act, 42 U. S. C. § 1396 (a)(23), in rejecting the patients' "property" claim.¹ That provision

¹ I agree with the Court that 45 CFR § 205.10 (a)(5) (1976) does not help the patients. Even assuming that provision might otherwise be relevant, it merely prescribes procedures that must attend removal of a benefit. Thus, it has no bearing on whether a property interest exists.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 18, 1980

78-1318 O'Bannon v. Town Court-Nursing Center

Dear Harry:

Thank you for your helpful memorandum of April 17. As you have devoted far more time and thought to this than I have, I hesitate to be too positive. But you are entitled to know my present thinking.

In my view, the patients do not have a property interest in "continued residence." For me, the question whether the patients have such an interest is the first--and the dispositive--issue. It is true that the regulations protect patients from unwarranted relocation. 42 C.F.R. § 442.311(c). (I am a bit concerned that neither the parties nor CA3 explain why these regulations drafted for intermediate care facilities apply to patients receiving skilled-nursing-facility-care at Town Court.) But the regulations are designed to restrain abuses by care-providers, and I don't think that they create a reasonable, mutual expectation that the patient can continue to receive care at any particular facility. Cf. Greenholtz v. Nebraska Penal Inmates, 47 U.S.L.W. 4581 (May 19, 1979); Bishop v. Wood, 426 U.S. 341 (1976).

Indeed, the statutory provision for care "from any institution . . . qualified to perform the service . . . required," 42 U.S.C. § 1396(a)(23), strongly suggests to me that a patient has no legal expectation of receiving care from a facility determined to be unqualified. The statutory and regulatory scheme gives the patients a right to monetary benefits, perhaps even to a certain level of care, but no right to apply those benefits toward residence in an unfit facility. I therefore conclude that such a qualified expectation of continued residency cannot give rise to a property interest of any kind.

If there should be a Court for holding that there is a property interest, and I were to reach the due process analysis, I would remain with my understanding of the approach we have followed in other procedural due process cases. See, e.g., Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Mathews v. Eldridge, 424 U.S. 319 (1976).

Sincerely,



Mr. Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 2, 1980

78-1318 O'Bannon v. Town Court

Dear John:

Please join me.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 2, 1980

Re: No. 78-1318 O'Bannon v. Town Court Nursing Center

Dear John:

Please join me in your opinion in this case.

Sincerely,



Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 9, 1980

Re: 78-1318 - O'Bannon v. Town Court Nursing
Center

Dear Harry:

My analysis of this case is very different from that set forth in your opinion. I therefore am presently planning to file a separate concurrence along the lines of the enclosed preliminary draft.

Respectfully,



Mr. Justice Blackmun

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 Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens
Circulated, APR 9 '80

Recirculated: _____

78-1318 - O'Bannon v. Town Court Nursing Center

MR. JUSTICE STEVENS, concurring.

Under federal statutes, eligible Medicare and Medicaid recipients may receive benefits to pay for their care at any skilled nursing home that has been certified as "qualified" under the applicable regulations. 42 U.S.C. § 1396(a)(23). Those regulations specify the conditions for qualification and provide a mechanism by which such facilities can be decertified when they are not providing acceptable patient care. If they wish to continue receiving Medicare or Medicaid benefits for their care, nursing home residents must transfer to another home after their home has been decertified. Neither the statutes nor the regulations explicitly grant Medicare or Medicaid recipients a right to be heard in connection with the decertification of a facility. The question presented by this case is whether nursing home residents nevertheless have a life, liberty or property interest in the continued certification of a particular facility that entitles them,

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

From: Mr. Justice Stevens

Circulated: JUN 2 '80

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1318

Helen B. O'Bannon, Secretary
 of Public Welfare, Penn-
 sylvania, Petitioner,

v.
 Town Court Nursing Center
 et al.

On Writ of Certiorari to the
 United States Court of Ap-
 peals for the Third Circuit.

[June —, 1980]

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether approximately 180 elderly residents of a nursing home operated by Town Court Nursing Center, Inc. have a constitutional right to a hearing before a state or federal agency may revoke the home's authority to provide them with nursing care at government expense. Although we recognize that such a revocation may be harmful to some patients, we hold that they have no constitutional right to participate in the revocation proceedings.

Town Court Nursing Center, Inc. (Town Court) operates a 198-bed nursing home in Philadelphia, Pa. In April 1976 it was certified by the Department of Health, Education, and Welfare (HEW) as a "skilled nursing facility," thereby becoming eligible to receive payments from HEW and from the Pennsylvania Department of Public Welfare (DPW), for providing nursing care services to aged, disabled, and poor persons in need of medical care. After receiving its certification,¹ Town Court entered into formal "provider agreements" with

¹ The certification in 1976 was Town Court's second; it had first been certified in 1967. It was decertified in 1974 as a result of substantial non-compliance with both state and federal requirements.

Changes 5-4, 13, 14

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

From: Mr. Justice Stevens

Circulated: _____

2nd DRAFT

Recirculated: JUN 11 '80

SUPREME COURT OF THE UNITED STATES

No. 78-1318

Helen B. O'Bannon, Secretary
 of Public Welfare, Penn-
 sylvania, Petitioner,
 v.
 Town Court Nursing Center
 et al.

On Writ of Certiorari to the
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 peals for the Third Circuit.

[June —, 1980]

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 23, 1980

MEMORANDUM TO THE CONFERENCE

Cases held for O'Bannon v. Town Court Nursing Center,
No. 78-1318

There is one case being held for O'Bannon.

The petitioner in Tracy v. Pennsylvania Department of Public Welfare, No. 79-5179, is a Medicaid recipient. When her child was delivered by Cesarean section, it was checked over by a hospital pediatrician, who also cared for the child after the delivery. The pediatrician initially submitted a bill to DPW for \$10.00. That bill was paid. He later submitted another bill for his services in the delivery room of \$55.00. DPW refused to pay that bill. Although it is not altogether clear why it did so, it may have been relying on a state Medicaid manual that limits reimbursement for pediatric services in connection with a birth to \$10. Instead of appealing the Department's determination, the physician then billed petr. She refused to pay the bill on the advice of her caseworker, who told her (correctly, the state argues*) that under Medicaid regulations a doctor is prohibited from making any attempt to obtain reimbursement from the patient. The doctor then turned the bill over to a collection agency, which allegedly began harassing petitioner. No legal action was ever instituted to compel payment, however, and petitioner has not paid the bill.

In order to avoid further harassment and to protect her credit rating, petitioner sought an administrative hearing before a DPW hearing examiner, seeking an order

*/ Petitioner notes that there are currently several class actions pending on this issue in which Medicaid recipients are suing doctors who have attempted to collect from them on bills that Medicaid refused to pay.

that payment be made directly to her doctor. The hearing examiner dismissed petitioner's appeal on the ground that she had not been denied medical assistance in any way and that the doctor was the only party who had standing to seek an administrative hearing. On appeal, the Commonwealth Court affirmed the order of the hearing examiner, reluctantly holding that petitioner had no dispute with the department, but only with her physician. The court also expressed the hope, however, that the Department would resolve the entire matter informally, as it should have done in the first place. The Pennsylvania Supreme Court denied a writ for discretionary review and petitioner filed a petition for certiorari in this Court.

In that petition petitioner argues that standing to challenge DPW's payment decision was conferred by Medicaid statutes and regulations that give a recipient the right to a hearing whenever medical assistance (defined to include financial benefits) has been denied. DPW argues in response that there was no denial of assistance, inasmuch as the doctor was not allowed to pursue petitioner for payment of her bill. The Department also suggests that the case is moot, since in the four years it has been in litigation no court action to collect the debt has been instituted and the debt has not been paid.

Although this is a closer case for me than O'Bannon, I think a discretionary "deny" is in order. There is no indication that problems like this are not ordinarily resolved, as the Commonwealth Court suggested, by more informal means than an administrative hearing. Moreover, one of the key issues--whether a doctor has a right to seek reimbursement from a Medicaid patient, see n.*/, supra--is currently in litigation and has not yet been fully addressed by the lower courts.

Respectfully,