In the

Supreme Court of the United States

LORENZO WILLIS, a Minor,
by WILLIE WILSON, Next Friend,

Petitioner,

vs. No. 70-5344

PRUDENTIAL INSURANCE COMPANY
OF AMERICA,

Respondent.

Washington, D. C.
February 28, 1972

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v.	:	No. 70-5344
PRUDENTIAL INSURANCE COMPANY OF AMERICA, Respondent.	:	

Washington, D. C.
Monday, February 28, 1972

The above-entitled matter came on for argument at 11:40 o'clock a.m.

BEFORE:

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

APPEARANCES:

E. FREEMAN LEVERETT, ESQ., For the Petitioner
P. O. Box 896
Elberton, Georgia 30635.

A. FELTON JENKINS, JR., ESQ., For the Respondent
2500 Trust Company of Georgia Building
Atlanta, Georgia 30303.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 70-5344, Willis against Prudential.

Mr. Leverett.

ORAL ARGUMENT OF E. FREEMAN LEVERETT, ESQ.,

ON BEHALF OF THE PETITIONER

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

The Court granted certiorari in this case to review a decision of the Supreme Court of Georgia, holding that the beneficiary clause of the Serviceman's Life Insurance Act of 1965 should be construed according to Georgia law, and on that basis the words "child or children" as used in the federal act were held to include legitimate children only and to exclude the illegitimate children of the deceased serviceman.

This case commenced with the filing of a suit in the Superior Court of Elbert County, Georgia in July, 1969 against Prudential Insurance Company of America, the respondent, seeking the recovery of the ten thousand dollar proceeds of a policy written under the act. At the time of filing suit, the petitioner, Lorenzo Willis, was the two-year old illegitimate Negro son of a 15-year old mother, Janice Willis, and a 20-year old serviceman, Johnny Cleveland Simpson, who was killed in Vietnam in September,

1968. The deceased was not married, but prior to his death had orally acknowledged the child as his own. He had also signed the statement agreeing to pay the lying in expenses, and he had prior to his death contributed to the care and support of the child.

In addition, the paternity of the child had been recognized by the Social Security and Veterans Administrations for the purpose of paying Social Security and compensial benefits. At the time of entering the service, the serviceman, the deceased, did not designate a beneficiary by name but simply checked a block on the form which specified that payment is to be made "in the order of precedence set forth in the law."

The act in this instance provides that the proceeds shall be paid in this order of precedence. First, to the designated beneficiary. Secondly, to the widow or widower. Third, to the child or children. Fourth, parents. Fifth, executor or administrator. Sixth, next of kin under the laws of the serviceman's domicile.

Following the death of the deceased in action, his father offered to assist in securing the benefits for the petitioner and papers were turned over to him for this purpose. But instead of securing the benefits for his grandson, the grandfather obtained them for himself, although his application noted that there was an illegitimate son.

This action has been filed on behalf of the minor. Following depositions, requests for admissions, and motions of summary judgment were made, the Superior Court of Elbert County granted summary judgment on behalf of the petitioner and denied it to the respondent. That court relied upon lower federal court decisions interpreting the Federal Employees Group Life Insurance Act, which it held that illegitimate children could take their time, the four or five cases interpreting the Serviceman's Life Insurance Act had not been decided on, had not been reported.

The Court of Appeals of Georgia, the immediate appellate court, affirmed using the same approach to statutory construction. But on certiorari the Supreme Court of Georgia relying upon three prior decisions, two involving the F.E.G.L.I. and one decided four months earlier involing the S.G.L.I., held that the words "child or children" should be construed according to Georgia law as found with respect to wills, contracts, inheritance, and deeds, and under these provisions "child or children" would include legitimate children only.

Two justices dissented.

I'd like to address some remarks preliminarily to the motion to dismiss in this case on the ground that the writ was improvidently granted. This Court granted

certiorari on November 9th of last year. In early December Congress passed and on December 15th the President signed an amendment to the Serviceman's Group Life Insurance Act, HR 9097, Public Law 92-185, which undertakes to define the terms in question here, among others, with respect to the instant problem, "child" is defined to include an illegitimate child as to the father only if about six situations are met.

First, that the father must have acknowledged the child in a writing signed by him. Secondly, the father must judicially have been ordered to contribute to the child's support, or the father must have been prior to death judicially declared to be the father. Fourth, proof of paternity be established by a certified copy of a public record of birth or baptism showing that the father was the informer and that he listed himself as father. Lastly, proof of paternity can be established from service department or other public records showing that the father with his own knowledge was named as father of the child.

Q Could your client come under any of these?

MR. LEVERETT: No, sir, I do not think so. The father did not acknowledge him as such in writing. In the record there is a statement that he signed at the doctor's office stating that he would be responsible for the lying in expenses, but he did not acknowledge the child as his,

only inferentially as it may arise from that statement.

Q The problem I have is this. Your brother on the other side tells us that because of the enactment of this new legislation this case is no longer worthy of consideration by this court on certiorari because congressional statute has now cleared the matter up. But putting that point to one side, you tell us that federal law to be applicable and hasn't Congress by that statute declared what the federal law is?

MR. LEVERETT: If they have declared it, this does not of course affect this case because the language of the statute express and so declare the amendment. Second, it does not eliminate the constitutional question that is involved in this case as to equal protection. That would still be applicable because you still have imposed a burden upon an illegitimate child that is not imposed upon a legitimate child. And under the rationale of Oyarma v. California you can see that the parents can be penalized for illicit relationships. Can Congress itself impose the burden, the onerous procedural burden, upon the child where he is not responsible for the situation?

Q Are you contending then that conceivably the application of the new act of Congress could be unconstitutional in some circumstances?

MR. LEVERETT: My contention is, Mr. Justice

Rehnquist, that the new statute does not cover the facts of this case, except it would exclude the child in this instance. But we also expect to show, I think it is apparent, that the act of Congress really would not cover the great majority of situations arising and likely to arise under the Serviceman's Group Life Insurance Act because of the fact that it's so seldom that there is a formal acknowledgement or that there has been a judicial determination.

Admittedly, the statute purports to say unless it has, illegitimates are excluded. It applies to it in that sense. But we say that still does not avoid the constitutional question. That resolves the statutory interpretation question, but it does not resolve the Constitution question.

Q It does follow as my brother Rehnquist's question suggests then that your ultimate claim is that that statute is unconstitutional. Or if the statute had been in existence at the time that your claim arose, you would still be making your constitutional claim and it would be implicit in that claim that the statute was constitutionally inadequate. Would that not be true?

MR. LEVERETT: That is correct.

Q Don't you--I thought all the statute required was some definitive proof of parenthood.

MR. LEVERETT: It requires--

Q Which you could make in this very litigation.

MR. LEVERETT: No, sir. We could not meet it here.

Q Why?

MR. LEVERETT: Because of the fact that this necessitated some action on the part of father which the father in this case had not done. He had not taken any action that would have brought him under--

Q You mean under the new federal statute it is not enough just to have proof of parenthood?

MR. LEVERETT: No, sir. It is not like the Veterans Benefit Act of 38 U.S.C. 101 which simply says that although the proof is satisfactory, it is of a particular and specific type of proceeding that the father must have done prior to his death. He must have formally acknowledged him in writing. That was not done here. There must have been a judicial determination or he must have filled out a--

Q What about the mother here?

MR. LEVERETT: The mother--the federal statute does not reach the situation of the mother. It deals only with the acts necessary--

Q What about the testimony of the mother?

MR. LEVERETT: That would not suffice at all

under the new federal statute, the '71 act. It would necessitate some specific action by the father in order to be brought within the coverage of the 1971 amendment.

Q So that once the father is dead, all chances of coverage under that amendment disappear.

MR. LEVERETT: That is correct. So, unless he has done something before his death to bring him within one of the five or six categories of the federal statute which had not been done in this case--in other words, if this federal statute had been in effect at the time of the death of the deceased, we could not come within it because the deceased had not done any of the things to bring--

Q In effect, then, Congress has said that it's not a denial of due process of law to--for the federal government or for the federal law to distinguish between unacknowledged and acknowleged illegitimates.

MR. LEVERETT: Well, they have not said so expressly but--

Q They passed this law which did make that distinction.

MR. LEVERETT: That's right. That's right, sir. In that respect they have.

Q And it is true, Mr. Leverett, that once the father has died without having gone through some acknowledgement procedure, your problems of proof do become

exacerbated?

MR. LEVERETT: That is certainly true. But, by the same token, where there has been an acknowledgement orally or whether there has been as in this case a written statement agreeing to be responsible for lying in expenses, we submit that that satisfies all reasonable requirements of proof. And to require this other burdensome and onerous requirement that the federal statute sets forth is to impose upon an illegitimate an onerous burden that is not imposed with respect to legitimate and that comes within the rationale of the Oyarma case.

Q But if you say that the federal law controls this case and as my brother Stewart says, where do you find the federal law?

MR. LEVERETT: No, sir. The federal law does not control this case--rather, the federal '71 statute does not control it.

Q No, but the federal law does.

MR. LEVERETT: All right, sir, our position has been is that it becomes a question--

Q How do you construe the word "children" in this insurance policy?

MR. LEVERETT: We construe it in the light of the context in which the statutory term appears. The word gathers meaning from the context in which it is used. And

since we expect to show that the act of Congress here--

Q After the statute had passed, the word "children" would not include unacknowledged illegitimates.

MR. LEVERETT: I'm not sure that, Mr. Justice White, whether you're referring to the 1971 amendment or the original '65 act.

Q The '71 amendment.

MR. LEVERETT: Under the '71 amendment it's the identically same factual situation that we have here, was to arise today, the '71 amendment would cover it and would preclude the child from recovering unless the 1971 amendment is declared to be unconstitutional.

Q Well, really, it's your position then that the '71 amendment, far from broadening the construction that you contend governed before actually narrowed it.

MR. LEVERETT: The '71 amendment is relevant to my case only to the extent that the contention is made that certiorari should be dismissed as improvidently granted because of the fact that since Congress has now solved the problem as to the future, the problem has become one of an isolated character, not meeting the requirements of the Court for certiorari adjudication. That is the only way in which the '71 amendment is relevant here.

Q On the merits of your argument, you are arguing that federal law prior to the '71 amendment supports

recovery by your client. And then we look at the '71 amendment and we see that under it your client could not recover. So, we must assume that if you're right as to what the federal law meant before, the '71 amendment narrowed the definition of children rather than expanding it.

MR. LEVERETT: Correct, sir. Correct, sir.

We submit that the case relied upon for dismissal, Rice v. Sioux City Cemetery, is not applicable. In that case after argument and affirmance by an equally divided court, the Iowa Legislature passed a statute which prohibited the very act of discrimination complained of. The court reasoned that this statute had rendered the pending case of such isolated significance that the question was not likely to arise again and hence it would not warrant adjudication.

We submit instead that this Court's more recent decisions in Jones v. Alfred H. Mayer Company, 392 U.S., and Sullivan v. Little Hunting Park in 396 U.S., support the retention of jurisdiction here. In both of these cases several--

Q Would you say that Reed against Reed of last term would also support your position?

MR. LEVERETT: That one I have not read.

Q I suggest you look at it.

MR. LEVERETT: All right, sir.

In both of these cases, civil actions had been instituted under Section 1982 complaining of racial discrimination in the leasing and in the sale of real estate. These suits were based upon transactions that occurred prior to the passage of the 1968 Fair Housing Act. In the Mayer case certiorari was granted prior to passage of the act and the case was decided after passage. But in the sllivan case certiorari was granted and a decision was rendered after passage. In both cases this Court rejected the contention that certiorari should be dismissed as improvidently granted. In the Sullivan case this was said. But petition of suits were commenced on March 16, 1966, two years before that act was passed. It would be irresponsible judicial administration to dismiss a suit because of an intervening act which has no possible application to events long preceding its enactment.

Another case is U. S. v. Yaezel in 382 U.S. 341, which involved a Texas statute that said that a wife could not bind her separate property by contract, a married woman. The Texas statute was subsequently repealed but not until after there had been a small Business Administration Loan made in which the wife co-signed with the husband. This Court granted certiorari and despite the fact that the state statute in question had been repealed for quite a number of years; no question was even raised as to the

propriety of certiorari.

The 1971 act covers only situation where there has been either, generally speaking, a formal acknowledgement in writing or a judicial determination or some similar type of proof. Here none of those requirements would be met; so, very clearly the constitutional question that looms underneath this case is still present, even with respect to the 1971 amendment to the act.

There are approximately 3.4 million members of the armed services covered by this act, according to the VA. It has been pointed out by the commandant of the Marine Corps in the Warner case from Virginia that the great majority of servicemen do not designate a beneficiary by name.

I think it's also reasonable to assume that the majority of cases probably have already arisen; as we diminish our participation in Vietnam, the number of cases, of course, will certainly slacken off.

There have been 10 or 12 cases recorded under this act in the last two or three years in petition for certiorari filed in the Supreme Court of Georgia by the respondent in this case. Reference was made to the fact that there was numerous cases coming up under this section in which this question was involved.

This brings me to the merits of the case. With

respect to the question of the merits, I think the case can be most easily disposed of as one of statutory construction. The statute here says "child or children." It doesn't say "legitimate children." And there is no occasion for interpolating into it, as one federal court pointed out, something that is not there. The statutory terms should be construed, we submit, in accordance with the context in which they appear. When this is done the inclusion of illegitimates is compelled.

This is so, we say, because the statute was designed as a substitute source of income for dependents. This purpose is served just as much with respect to illegitimates as it is with regard to legitimates.

Contrary to what we said in our brief, I think the legislative history of the 1965 act does bear this out. Certainly the committee reports are solid on the subject. But the statements on the floor from the floors of the two Houses of Congress do support this. There are repeated references to the fact that this--reference to dependents, to survivors. A Senate version which would have limited the benefits to illegitimate children only if designated as beneficiary was expressly rejected in favor of a House version which contained no such limitation.

The cases also have recognized that this is the purpose of the S.G.L.I. as well as the F.E.G.L.I. And in a

committee report--

MR. CHIEF JUSTICE BURGER: We'll suspend until after lunch, counsel.

[At twelve o'clock noon a luncheon recess was taken.]

- - -

AFTERNOON SESSION - 1:00 o'clock

[Same appearances as heretofore noted. Justice Powell not sitting.]

MR. CHIEF JUSTICE BURGER: You may continue, counsel.

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

At the noon recess I was making reference to a House committee report which accompanied a 1970 amendment to the Serviceman's Group Life Insurance Act which raised the coverage from $10,000 to $15,000. In this report express reference was made to the fact that insurance was designed to provide support for dependents. Respondent relies upon certain statements made in the House and Senate committee reports accompanying the 1971 amendment which we have previously discussed, this effect.

The existing law does not define the terms "widow, widower, child, or parent" for S.G.L.I. purposes, thus presumably leaving such definition to local state law. This is relied upon as showing a sort of retroactive legislative intent. This statement, we submit, has no particular efficacy in this case, because it was not a statement made contempraneously with passage of the 1965 act but rather made six years later in connection with an amendment which was aimed at solving the very problem at

which this statement was directed. The United Mine Workers case in 330 U. S., The United States v. Wise in 370 U. S., this Court held that statements made not contemporaneously with passage of legislation but rather in subsequent years by legislators who were endeavoring to amend that legislation have little or no weight or value as far as interpreting the statute.

Moreover, the statements here made were not independent determinations or statements made by Congress but rather this was simply a parroting the language of the letter from the Administrator of Veterans Affairs who sponsored this legislation. And in his letter of transmittal he used this same language which was quoted verbatim in the two committee reports as well as in the statement referred to on the floor of the House of Representatives.

Lastly, this statement which says presumably the question will be referred to state law not only is contrary to the majority of cases--there are three lower federal court cases, two of them decided since my brief was filed, or at least they were not annotated at the time that the brief was filed--they are all contrary to the statement made by the Administrator. And, moreover, on its face this statement reflects uncertainty. And in the DeSylva v. Ballentine case this Court held that statements made by an administrative agency which adopted more from adapt as

to the meaning of the statute rather than from a confident interpretation of the statute, that this would be given little effect because of the fact that the administrative agency itself is in obvious damage to the question.

Q What do you do with DeSylva?

MR. LEVERETT: I'm coming to that now. DeSylva, we say, is distinguishable because of the fact that that dealt with a subject matter that is entirely different than the subject matter here. And the DeSylva case, of course, dealt with the copyright act. The question there had to do only with the creation of a right, not the devolution of the right at death. Here the subject matter is servicemen and that is a category which this Court has held--

Q Wasn't that a question of whether the right to renew a copyright descended to illegitimates as well as legitimate children?

MR. LEVERETT: That is correct. And the Court resolved it by referring to state law. But on the basis of a determination that this was really a question of inheritance, that Congress really intended in the copyright act to establish rights of inheritance and consequently you would refer to state law. And, of course, under California law the illegitimate can take. But here the question relates to a relationship that is peculiarly federal, and that is the relationship between a serviceman and the

government. In every case in which this Court has ever decided a question dealing with a serviceman, it has resolved it solely as a matter of federal law. We have referred to thos cases in our brief. There are three of them that involve the N.S.L.I. Act of 1940, which is the National Serviceman's Life Insurance Act of 1940. Two of those cases, the Woodward and the Wissner case, dealt with the designation of beneficiaries. In every one of those cases this Court resolved the question as a matter of federal law without referring or even mentioning state law.

A person does not become a federal instrumentality or agent by writing a book or poem or music. But he does become an instrumentality of the federal government when he joins the armed services or is drafted.

Q If this case came up today, if a serviceman died today would your beneficiary be covered?

MR. LEVERETT: No, sir, because there was no formal acknowledgement. This 1971 amendment constitutes an act of Congress that specifies who is a child, who is considered a child. And absent a successful attack upon the constitutionality of the 1971 amendment, the petitioner here would be excluded because of the fact that his father did not formally acknowledge him or there had been no judicial determination.

Q What should an appellate court do when the

question before it is, What does a statute mean? What does the word "children" include? And, pending appeal, there is a statute which says what it means, should the appellate court take the law as it is when the case is decided or what?

MR. LEVERETT: I don't think you could say that because Congress decided in 1971 that illegitimate children would be included only in four or five different specific categories that it must have meant the same thing in 1965 when it just used the words "child or children."

Q What if it didn't though? What if the law is changed? Then you say it may not be applied retroactively, is that it?

MR. LEVERETT: Yes. We could see that because the 1971 amendment expressly said that it shall not apply in the last section.

Q To prior cases.

MR. LEVERETT: That's right.

I would like--

Q Mr. Leverett, let me interrupt you in one respect. The section under which you are operating doesn't hesitate to go to state law in at least two of the categories, does it, sepcifically?

MR. LEVERETT: In one category where it deals with next of kin, according to the laws of the domicile of

the serviceman's--or, rather, according to the laws of the serviceman's domicile. Now, suppose you might say that you have to go to state law to determine who is the executor or administrator. But our point is, expressio unius argument, that where Congress referred to the first state law in S.G.L.I., it expressly so said. In this instance it did not in 1965.

Q In the fifth category it goes to the executor or the administrator of the estate, which means it would then descend according to state intestacy laws.

MR. LEVERETT: That's right, sir.

Q Or under his will. So, there are two categories in which it clearly goes under state law.

MR. LEVERETT: But by express reference to the state law. With respect to the constitutional question on the matter of the classification generally, we say that the Labine case is distinguishable because of the subject matter. The classification might well be constitutional in the context of intestate succession and not constitutional when applied to a federal statute having welfare type connotations.

But I think the easiest resolution, as far as the constitutional issue is concerned, is the additional challenge to classification on the ground that this classification is really a racial classification because of

the peculiarities of the history of slavery in this country. In the Griggs case this Court held that former procedures and practices and tests that were neutral on their face but bound to be discriminatory in operation were prohibited by the Civil Rights Act of 1964 where this heavier burden placed from the ethnic minority was found to be a consequence of past discrimination in education. And we submit that this same principle applied to the equal protection clause in the Constitution and invalidates the discrimination here, at least in a state having a history of Negro slavery and racial discrimination.

That the classification falls more heavily on blacks can hardly be subject to dispute. The statistics in this record indicate that in 1957 the ratio of illegitimates between blacks and whites for the country as a whole was about two to one. But in Georgia it was eight to one, in Mississippi twenty-six to one, in Louisiana and Alabama about seven and a half to eight to one.

Q Suppose it were 51 to 49 percent. Would you make the same argument?

MR. LEVERETT: Well, there would certainly be weakening somewhat.

Q There is bound to be a differential, isn't there, one way or the other?

MR. LEVERETT: To some extent. But when it is

so great as to suggest a very particular reason for it, we submit that that of course doesn't change the character of the difference.

In 1880 two-thirds of all Negroes born in the United States were illegitimate and in some communities today nearly half or more of all Negroes are illegitimate. In 1963, 24 percent of all non-white births in the United States were illegitimate.

Q In this particular case, Mr. Leverett, the proceeds of the policy were paid out, were they not?

MR. LEVERETT: To the father of the deceased serviceman.

Q Was he black or white?

MR. LEVERETT: He was black.

We have attempted to show in our brief how the institution of slavery was partially responsible or in large part responsible for this greater instance of illegitimacy. And we submit that where we have here as in this case, number one, the indisputed fact that the incidence is greater; number two, that it is the continuing effect of this past discrimination that the classification must follow.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Leverett.

Mr. Jenkins.

[Continued on page following.]

ORAL ARGUMENT OF A. FELTON JENKINS, JR. ESQ.,

ON BEHALF OF THE RESPONDENT

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

I'm Felton Jenkins from Atlanta, Georgia, and I represent the respondent, The Prudential Insurance Company of America in this case. Mr. Leverett I think has fairly stated the facts that are involved here. There are, however, two points that I would like to make just to be certain that the Court understand.

It's not clear from the record before this Court that petitioner here is in fact the illegitimate son of the deceased serviceman. As was pointed out, there is no written or public acknowledgement. There is no father listed on the birth certificate and the records of the Social Security Administration and the Veterans Administration do not show that the petitioner has been recognized as the son of this deceased serviceman, at least so far as this record is concerned. We do not contend that he's not the illegitimate son; we just want to point out that there is some question of fact on that point.

Q The Georgia trial court found that he was.

MR. JENKINS: The Georgia trial court found that he was.

Q And that was upheld by the Georgia Court of

Appeals.

MR. JENKINS: Yes, sir, it was.

The second point that I wanted to make concerns the question which is before this Court. It has been stated in the briefs, I think. The question is the meaning of the word "child or children" in Serviceman's Group Life Insurance Act. That is, in fact, the ultimate question that has to be decided, but the specific question before the Court, so Prudential contends, is whether or not reference should be made to state law to determine the meaning of that term. And Prudential does not contend--and I want to make this clear to the Court--that we do not contend that in every situation the word "child" does not include illegitimates. All we are saying is that reference should be made to state law and then the law of that particular state would govern it.

Of course, it has been pointed out that in California an illegitimate would be entitled to the proceeds. So, we do not contend that that is the issue here.

There are three points that I would like to cover in my argument, and basically they have been discussed by Mr. Leverett. The first point is we contend that the writ of certiorari should be dismissed as having been improvidently granted. As the Court knows, it was granted

on November 9, 1971, and approximately a month later Congress adopted this 1971 amendment. This amendment speaks directly to the question which is before the Court, the meaning of the word "child or children." The amendment specifically takes care of that question. That question just simply will not come up again. And Mr. Leverett has raised the point and from some of the questions from the Court, there may be a question of whether that 1971 amendment is constitutional. We, of course, would contend that it is constitutional. But whether it is or not, that's not a question which is before the Court in this case. That question may later come up, and it very easily could, I guess. But it's not before the Court here.

The question which is before this Court has been solved, has been resolved by this 1971 amendment. And that question simply will not come up again. We have cited in our brief the case of Rice v. Sioux City. It's quoted in our brief and there are several passages quoted from the case. I don't need to take the Court's time by going into that. Mr. Leverett mentioned the case of Jones v. Mayer Company. He contends that that case in effect goes against the Rice case and shows that this Court should go ahead and consider this question.

But in that Jones case there was a question of the interpretation of whites under 42 U.S.C., Section 1982,

and that concerned the refusal to sell a home or rent an apartment on the basis of race. While that case was being considered Congress adopted the Civil Rights Act of 1968 and the Court held that it should go ahead and consider the case which was before it because the 1968 act had no effect on this section which was under consideration by the Court, the 1982 section.

Of course, here Congress--the act that Congress has adopted, the 1971 amendment, speaks directly to the question which is before this Court. It defined the very term which this Court is asked to consider. For those reasons we feel the writ should be dismissed as having been improvidently granted.

The second point that we would like to make concerns the question of reference to state law. Obviously we rely on the case of DeSylva v. Ballentine. That case, of course, does involve the federal copyright act. It does not involve an act dealing with servicemen. But we don't feel that that's any distinction. And petitioner has tried to distinguish the case on two grounds. He says that the copyright act deals only with creation of literary and artistic rights or the passing on of those rights. But this Court's opinion, at page 582 of that decision, pointed out that the evident purpose of this section 24 which was under consideration in that case is to provide for the

author's family after his death, the very same question or the very same purpose that petitioner contends the Serviceman's Group Life Insurance--

Q Can I ask you, please, under the federal act as amended "child" includes an illegitimate child under certain circumstances.

MR. JENKINS: Yes, sir.

Q So, it's not that the word "child" doesn't ever include an illegitimate child.

MR. JENKINS: That's correct, Your Honor.

Q It sets up some standards for proving whether the child is actually a child.

MR. JENKINS: That's correct, Your Honor.

Q Has it been denied in this case that this child is a child of the deceased serviceman?

MR. JENKINS: As I pointed out initially, it's not clear in our position. We don't contend that he's not the child. We simply say that there is a question of fact on that point, simply because there has been no written acknowledgement; no father was listed on the birth certificate; there has been no judicial determination of that fact.

One thing I might mention here--

Q What if it were admitted?

MR. JENKINS: Under the 1971 amendment, I don't

know whether they would fall under any of the categories or not.

Q Let's assume that they didn't, that an admission-but the aim of the act is to have satisfactory proof of whether the--

MR. JENKINS: Yes, sir, that's correct.

Q --child is a child.

MR. JENKINS: Right, right.

Q Do you think the act would forbid then making the child in this case a beneficiary under the policy, even though the insurance company defendant admitted that he was a child?

MR. JENKINS: Mr. Leverett makes that position, and I don't know whether I want to agree with it or not. One of the categories here, if he has been judicially ordered to contribute to the child's support--well, I guess that couldn't happen after his death. I think I would have to agree with you, Your Honor; I don't think in this case he would fall under any of the categories once the deceased serviceman died.

Q And it wouldn't make any difference even if the defendant conceded it.

MR. JENKINS: I don't think so under the meaning of this act. I guess at that point you'd have a question of statutory interpretation. Just from reading the act I

don't think that a situation like that would be covered under the terms.

Q Even if under state law this child would be treated as a child; let's assume that an oral acknowledgement was satisfactory under state law.

MR. JENKINS: Right. I think that's correct under the working of this statute. There again you might get back into the constitutional argument that Mr. Leverett says is present, that this 1971 amendment is unconstitutional. But here again that question is not before the Court in this case. It may conceivably come up at some point. But it is not before the Court in this case.

Q Presumably even if your client were to admit the fact that the petitioner was a child, you're not in a position to make admissions for the father who is also claiming under the policy.

MR. JENKINS: The next person down the line--yes, sir, I'm sure that person would certainly have some objection to it.

Back to the DeSylva v. Ballentine decision, we simply say that there is no real difference between the federal copyright act and this Serviceman's Group Life Insurance Act. They both have basically the same purposes.

Another point is Mr. Leverett has always contended that the Serviceman's Group Life Insurance Act

has as its purpose to look after the people who were dependent upon the deceased serviceman. Well, that's a little bit false in that the deceased serviceman can name anyone that he wants to to receive the benefits under that policy. He doesn't have to name anyone who is a member of his family. Under the old National Service Life Insurance Act the serviceman could name someone that he wanted to, but he had to name someone who had been within his family. There were specific categories that he could not go outside of. Of course, in this case he could name anyone he wanted to.

Our point is that there is just no real difference between the federal copyright act and this Serviceman's Group Life Insurance Act.

Q At any time up to the point of his death he could have changed the beneficiary and made the mother of these children the beneficiary, could he?

MR. JENKINS: Yes, Your Honor.

Q One of the children or both?

MR. JENKINS: Or any one he wanted to, yes, sir; that's correct.

Q Is there anything in the record here that shows the relationship between the deceased serviceman and his father? Other than that they were father and son, does it show any particular dependency or lack of it?

MR. JENKINS: Your Honor, I don't think that it does. The deposition of the father was taken, and the son lived in his father's home up until the time he left to go in the service. I don't think there was anything specific on that point.

The next point that I'd like to make is this question of congressional intent. Obviously when Congress makes some comments about the intent of an act after it has passed, it's not as strong as those comments would have been had they been made at the time that the act was passed. But when you're looking for congressional intent, you try to find whatever you can and very clearly when the Court adopted this 1971 amendment, they spoke directly to that question and they said that presumably under the old law we must look to state law. And, of course, on the floor of the House of Representatives the same comment was made. And I can't argue with Mr. Leverett on the point that that's not as strong an indication of congressional intent as would be present if those same comments had been made back in 1965. But here again we have to look to what we have.

Q Under the '71 act the same rule would apply if he designates beneficiaries as his children, if he just says "my children"?

MR. JENKINS: I'm not sure if I--you mean if he

named the child?

Q The problem here is that he didn't name his beneficiary.

MR. JENKINS: Right. He just checked that block that says to follow in accordance with the precendent set forth in the law.

Q What if he says my children?

MR. JENKINS: Well, Your Honor, I'm not sure I know the answer to that. Under the form he should not make that designation. There is a block to check that he wants it to go in accordance with the precedence set forth in the law, and if he doesn't the next line down says, "Name relationship," something of that nature. So, he should know to write in that name. You'd have another question of his intent if he just put down the word "children," because there again, I think, you probably would look to--what does the word "child" mean? And you'd be right back into state law under this DeSylva v. Ballentine.

Q Let me be sure that I understand you. If he had requested that the beneficiaries just be "my children," no name, would they have accepted that as a beneficiary designation? A private insurance company will not do so.

MR. JENKINS: Your Honor, that's a question I don't really know the answer. I would think they would not.

Q Does this act permit it?

MR. JENKINS: Well, no, it really doesn't. If the serviceman did it, supposedly he has got a sergeant or someone there over him telling him how to fill out the form and he shouldn't fill it out that way; he would have filled out the form incorrectly. If he did it, I would think that the children in that situation would not be entitled to the benefits of the policy. I am not trying to avoid your question, but that's a question that is not in this case and to be honest with the Court, I don't know the answer to it specifically.

We come now to the question of violation of the 14th Amendment, the due process and equal protection clause. The Court has heard a good bit of argument today on that point in view of the Louisiana case which preceded this case. And I don't want to replow all of that ground. Obviously, we contend that the decision of this Court in Labine v. Vincent controls the situation here. Of course, in that case the question was the interpretation of the Louisiana intestate succession statute, and the Court held that the state had the right to make a distinction between legitimate and illegitimate children in that situation, and the Court distinguished the Labine situation from the situation present in Levy and Glona which was decided a couple of years before.

Obviously we contend that we come within the decision by this Court in Labine. There are two things, however, that I would like to point out on this question. The present case, this case here, presents really a stronger situation toward holding that the act is not--that the designation, it seems to me, is not unconstitutional than was present in either Levy or the Labine case or the Louisiana Stokes case which preceded this case. In all of those three cases there was some impediment that the Court has used the term "barrier"--"insurmountable barrier"--and I suppose if you really look at those cases maybe the barrier is not insurmountable. There are certain things in each of those situations that could be done. But there is some barrier in each of them.

In Levy, for example, the tort feasor could go free if there were no one there to prosecute the action. In Labine the father could not give the illegitimate his full estate. He was limited to only one-third or one-fourth. In the Stokes case, which this Court heard this morning, the father could not even acknowledge the child under Louisiana law as being his child.

Now, in this case none of those impediments are present. The serviceman here could simply have named anyone that he wanted to and could have named that illegitimate child to receive the full $10,000. There is

no barrier whatsoever here.

Q When was the policy issued?

MR. JENKINS: Well, it's a group policy and it's issued to the Veterans Administration. I am not sure of the date of that. I guess back in 1965. The form that this serviceman signed he signed in May of '69, I guess--'67, excuse me. And then the child was born in June of that same year.

Q Where was he between May and June?

MR. JENKINS: I don't think that the record shows that--well, no, it does because he was on his basic training, that's right, and he had come home for some time; I am not sure of the exact time he came home. He then went to Vietnam, as I recall the way he was killed. But--

Q He went to Vietnam after the child was born?

MR. JENKINS: I think that's correct, Your Honor. I hesitate and I'm not absolutely certain on that point. But I think that is correct. In any event, he knew about the child before he died, came home and said he saw the child; he also wrote some letters making reference to the child. So, he clearly knew about the child and could have made that designation had he wanted to.

So, first of all, we contend that this case is a stronger case than any of these other three cases. And the next point is that there is a reason for the distinction

between legitimates and illegitimates, and that's really the thing that the Court had looked to and I guess should look to, is whether or not there is any reasonable basis for making this distinction. And obviously, as this Court pointed out in the Labine case, the reason for the distinction is to encourage the family unit, to strengthen the family unit. We might disagree--and obviously some people do--with the merits of doing this to further the family unit. But that's not the purpose of the Court, to try to say this is a bad thing or this is a good thing. The Court held in Labine that this was a decision that the Court--that the individual states could make. And for that reason we submit that there is a valid reason, a valid distinction, for distinguishing between legitimate and illegitimate children.

In closing, I'd just like to emphasize again that Prudential feels strongly that this is not a case which the Court should decide in view of this 1971 amendment. We feel that so far as this case is concerned, all of the issues which are before the Court in this case have been solved by the 1971 amendment. The 1971 amendment may raise some additional problems, but those problems are not before the Court in this case.

Q So, under the '71 amendment, if the illegitimate child offers proof that he was actually a

child of the dead serviceman, the court just won't hear him unless he offers the kind of proof specified in the statute.

MR. JENKINS: This is spelled out in the act; that's correct. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Jenkins.

Mr. Leverett, do you have anything further?

MR. LEVERETT: Nothing further.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:30 o'clock p.m. the case was submitted.]

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