TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

ELLIOT L. RICHARDSON,
SECRETARY OF HEALTH, EDUCATION,
AND WELFARE,

Appellant,

vs. No. 70-53

RAYMOND BELCHER,

Appellee.

Washington, D. C.
October 13, 1971

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Appellee.

Washington, D. C.,

Wednesday, October 13, 1971.

The above-entitled matter came on for argument at 2:11 o'clock, p.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

APPEARANCES:

RICHARD B. STONE, ESQ., Assistant to the Solicitor General, for the Appellant.

JOHN CHARLES HARRIS, ESQ., 1500 Belleview Boulevard, Alexandria, Virginia, for the Appellee.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 53, Richardson against Belcher.

[Discussion off the record; announcement.]

MR. CHIEF JUSTICE BURGER: Mr. Stone, you may proceed.

ORAL ARGUMENT OF RICHARD B. STONE, ESQ.,

ON BEHALF OF THE APPELLANT

MR. STONE: Thank you, Mr. Chief Justice, and may it please the Court:

This case, which is on direct appeal from the United States District Court for the Southern District of West Virginia, is in a somewhat unusual posture, in that a single-judge District Court has declared unconstitutional Section 224 of the Social Security Act.

In the more normal instance, of course, an adjudication that a Federal statute is unconstitutional would originate and direct appeal would be taken from a three-judge court.

This Court has held, however, in a closely similar context, in Flemming v. Nestor reported at 363 U.S., and in other cases as well, that a three-judge court is not mandatory under 28 U.S.C. 2282, when an action based on the alleged unconstitutionality of the Federal statute does not seek to enjoin the operation of a statutory scheme but merely to require the payment of some benefit afforded by that scheme. And the Court has invariably entertained direct appeals in

these circumstances.

No question has been raised by the other side as to jurisdiction, and I take it that there is none.

In this case the provision in question, Section 224 of the Social Security Act, provides that social security disability benefits which correspond roughly to lost earnings resulting from the claimant's disability must be reduced according to a fairly complex formula, by virtue of the recipient's simultaneous receipt of periodic workmen's compensation benefits under a State or Federal Workmen's Compensation plan. In the ordinary case, of course, it's the State plan.

The offset provision only applies, for purposes relevant here, if the total of the claimant's social security disability benefits and his workmen's compensation benefits exceed 80 percent of his average monthly earnings, and that's gross earnings without taking into account tax computations, prior to injury.

Q Over any particular period?

MR. STONE: Excuse me?

Q Over any particular -- 80 percent of what earnings?

MR. STONE: The average monthly earnings as computed on a five-year period.

And benefits are only reduced insofar as they exceed

80 percent of those earnings. And of course the actual effect, for anyone whose tax status puts him -- causes him to pay income tax in excess of 20 percent of his gross salary; actually it comes out even with the 80 percent, it comes out with more in take-home pay than he had prior to his injury.

The appellee in this case, Mr. Belcher, became disabled in 1968 and was awarded $330 a month in social security disability benefits, without regard to any workmen's compensation, as the Secretary had no notice of his receipt of workmen's compensation at that time, and that award was made in October of 1968.

Three months later, the Department of Health, Education, and Welfare notified Mr. Belcher that his federal benefits would be reduced by $104 a month because of his simultaneous receipt of $203 per month in State workmen's compensation benefits.

This scheme is quite simple, without the offset Mr. Belcher would have received a total of $534 in social security and workmen's compensation benefits, which would have been 100 percent of his prior gross earnings. And as a result of the offset his benefits totaled $430 or exactly 80 percent of his average prior earnings.

Mr. Belcher requested a hearing to challenge the reduction in his federal benefits, and a hearing was held before a Hearing Examiner, at which the appellee was represented

by an attorney, who I believe represents him here in this Court today.

The Hearing Examiner upheld the reduction, and this ruling became, in the normal course of HEW administrative rulings, the final decision of the Secretary of HEW.

Appellee then brought suit in the United States District Court under Section 405, 42 U.S.C. 405(g), to review the Secretary's administrative decision.

I take it that at no point in the court below or in the administrative process has Appellee denied any aspect of the factual or legal basis which underlay the Secretary's determination that Section 224 applied to him in precisely the manner in which HEW applied it, nor has Appellee raised any question whatsoever as to the procedural rights, such as an evidentiary hearing, which have been fully afforded to him.

His sole contention and sole ground of the decision in the District Court below was that it is unconstitutional, as a substantive matter, for Congress to reduce social security disability benefits by virtue of workmen's compensation benefits. In upholding the appellee's claim, the court below stands alone and is at odds with eight other District Courts, at least eight other District Courts that have routintely ruled on this question, and with a recent decision of the Sixth Circuit Court of Appeals, which has upheld the constitutionality of Section 224.

Now, the court arrived at its decision that Section 224 is unconstitutional on essentially two grounds.

The first of these grounds, I believe, can be dealt with rather briefly, and I think reflects a misconception of certain decisions of this Court which ought to be pretty readily apparent here.

In Goldberg v. Kelly, at 397 U.S. 254, this Court held that when the administrators of a State welfare program -- in that case it was the Aid for Dependent Children program -- determined that a particular recipient no longer qualified for benefits under the statutory standards governing that program, those benefits cannot be cut off until the recipient has been given some sort of an evidentiary hearing.

This Court reasoned in Goldberg that a welfare recipient in the AFDC program has at least a sufficient right, whether you call it a property right or whatever you call it, in those benefits so that it violates standard notions of procedural due process to cut off those benefits summarily without any kind of a proceeding.

Q And there is no claim here, as I understand it, that there was any deficiency in procedural due process?

MR. STONE: No, no claim whatsoever, Mr. Justice Brennan.

It may be said, I suppose, that what Goldberg did was to put to final rest a theory that really the government

had not attempted to make in the welfare context for some time, that those benefits are really a privilege rather than a right, and that that automatically cuts off any procedural difficulty in simply taking them away. And I think that that doctrine has been laid to rest, and those abstractions, happily, are not at issue here.

However, this District Court, through a process that is not entirely elaborated and which is somewhat mystical to me, reasons on the basis of Goldberg v. Kelly that Congress cannot build into the statutory formula for computing social security disability benefits, which it analogizes to welfare benefits, any circumstances which would reduce the maximum allowable benefit.

Now, without going into the applicability of Goldberg v. Kelly to social security programs, a question which will soon be before this Court, on which certiorari was granted yesterday, I gather, I think it is safe to say that Goldberg v. Kelly, which dealt entirely with procedural rights not in question here, in no way implies a limitation on the legislative authority to devise a reasonable substantive formula for determining the proper amount of social security benefits owed to any claimant.

In other words, from Goldberg v. Kelly, which, if applied to this case, I suppose might preclude HEW from cutting out the claimant's benefits without hearing, it is many very,

very long steps to the notion that that claimant has a vested interest if the maximum amount of benefit which the statute ever even potentially afforded to him, or the notion that Congress can attach no other qualifications to the statutory standard which governs the amount of benefits owing to the claimant.

Q And HEW couldn't do anything about it?

MR. STONE: Excuse me?

Q Assuming they had a hearing, they had lawyers, and they had everything else; they couldn't do anything but just what they did, is that right?

MR. STONE: That's right. That's right, Mr. Justice Marshall, this is the statutory standard, and it is the statutory standard which Mr. Belcher brings to question here, and on which the district judge ruled.

As a matter of fact, it shows in the record that the -- this hearing process was, I suppose, essentially a little useless, since the ground that was being claimed was the unconstitutionality of the statute, and the Hearing Examiner noted several times that you don't seem to bring into question anything about your applicability to the statute.

Now, it's interesting to note, just to put this into perspective, that when disability benefits were first introduced into the Social Security program in 1956, recipients were required to offset the full amount of workmen's compensation

benefits regardless of whether the total of disability and workmen's compensation exceeded any specified limit. That provision was temporarily repealed in 1958, and then re-enacted in 1965, with the current proviso that the benefits will not be reduced unless the total of the two types of programs equals 80 percent of prior earnings.

Q Why do you think there was this variation in Congressional treatment?

MR. STONE: The legislative history --

Q You talked about --

MR. STONE: Yes, we talked about --

Q -- infrequency behind the repeal, but why was it put back in?

MR. STONE: It was repealed in 1958 essentially because there was testimony in legislative hearings to the effect that there really were not that many instances of duplication. I point out that the workmen's compensation program has very much expanded since then. It was thought that the offset was somewhat experimental when it was passed in 1956. In 1958 Congress was persuaded in some way that there simply weren't enough instances of duplication to merit having to go through the administrative difficulty of enforcing these offset provisions.

Now, between 1958 and 1965 there were volumes and volumes of testimony, to which we refer in our brief, to the

effect that in fact there was a serious amount of duplication. The State workmen's compensation coverage had grown by leaps and bounds, and that this duplication was posing a serious problem both from the point of view of purposes of the Social Security Act, which I shall discuss shortly, and from --

Q Wasn't there, Mr. Stone, an increase in State workmen's compensation benefits over that period?

MR. STONE: An increase in the number of -- the amount of State coverage as well in the amount of benefits --

Q Yes.

MR. STONE: -- provided.

Now, I think it is also worth noting that, though I think it is quite clear that Congress did not have to do so, it did in fact restrict the offset provision contained in Section 224 to persons whose injuries occurred after the date of the statute and thus who had not come to rely upon the receipt of a certain amount of income, which would then be, later on, lowered.

Appellee's injury occurred in 1968, and so that in order to attack the application of Section 224 in his case, he must argue, as I suppose he does, either that the original Section 224 was unconstitutional in its inclusion of an offset provision, or that the temporary repeal of that provision in some way forever precluded Congress from restoring an offset or from reducing the maximum allowable benefit with respect to an

individual claimant.

I think it is not an exaggeration, and does not need much elaboration, to say that the holding of the court below on this point that Congress cannot, in effect, include an offset provision in this kind of statute or reduce benefits which are theoretically potential in the statute would throw into chaos a great number of the social security and welfare programs in force today, virtually all of which, by necessity, compute their benefits in terms of offset in reductions which are geared to the legislative view of need, and which are designed to provide the most effective distribution of limited funds.

Q On that theory, why wouldn't Congress have an offset for any kind of private return?

MR. STONE: Well, that's exactly what I'm getting into now, Mr. Justice Blackmun.

The second ground which the District Court relied upon, and which appellants raise to invalidate Section 224 is based upon the claim that Section 224 discriminates invidiously between workmen's compensation -- recipients of workmen's compensation benefits, whose social security disability benefits may be reduced in certain circumstances, and recipients of any other type of relief, such as tort recovery and private insurance proceeds whose social security disability benefits are not thereby reduced.

Now, with respect to this argument, which I suppose is really the key argument in the case, I would like, at the outset, to reiterate two very well-known and related equal protection concepts, which have been repeatedly affirmed by this Court, and which are quite clearly, I would even say perhaps classically applicable to the circumstances of this case.

One of these is the concept that legislative reforms, such as Congress had in mind in the offset provision of Section 224, is not invidiously discriminatory merely because it does not go far enough. In other words, even if the reasons which Congress had in mind when it formulated the offset provision, such as to avoid excessive benefits and encourage the rehabilitation of workers, even if those reasons are equally applicable to recipients of other kinds of disability recovery -- and I will show shortly that Congress did not believe that they were equally applicable -- Congress' failure to require the offset of these other benefits does not, by itself, render Section 224 unconstitutional.

This Court's, I suppose, classic statement of that was Williamson v. Lee Optical Company, at 348 U.S., in which the Court said that the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

In this case, the legislative history, which we have

referred to at length in our brief, shows, I think, clearly that the problem which was most acute in Congress' mind was in fact the high percentage of disability recipients whose simultaneous workmen's compensation benefits brought their combined receipts -- from those two sources -- well above their pre-injury salaries and incomes.

And I guess it's natural enough that Congress would have focused primarily on workmen's compensation, since these programs have really become very, very widespread, are now in operation in all States and jurisdictions of the United States; and in many States are in fact compulsory.

Q What about the argument that this man had casualty insurance?

MR. STONE: Well, the --

Q He would get both?

MR. STONE: If he has casualty insurance or indeed receives from any kind of program other than a workmen's compensation program, he would get them both. And I am about to explain --

Q Would you then go into that?

MR. STONE: I am just about to do that, Mr. Justice Marshall. That will be the bulk of the rest of my argument, in fact.

Just to bear in mind the second, and this is perhaps the most important concept applicable in this area altogether,

is that in a context which does not involve what this Court has called fundamental constitutional rights, and a context in which the classification is not suspect in any grounds, for example, of race or religion, which I clearly take it that no one claims that this classification is.

In that context a statutory classification is not invalid merely because it is rough or imperfect in some respect, but only if that classification cannot be rationally justified on any ground whatsoever. This Court has quite recently applied that notion in the area of social welfare in Dandridge v. Williams, cited at 397 U.S., and of course in Flemming v. Nestor, at 383 U.S.

In Dandridge, the Court held valid under the equal protection clause a statutory scheme which premised eligibility for assistance under the Aid for Dependent Children program on the basis of the number of dependent children, but then set a maximum amount of benefit that could be recovered regardless of the number of children.

And I submit that this case, in which the offset provision in question is not even applicable unless the very standard of need which Congress has defined, which is 80 percent of prior earnings, has been met. It is considerably easier to decide, really, on both of the grounds raised by the appellees in the court below than is Dandridge v. Williams, and is far easier to decide than Flemming v. Nestor.

Indeed, I think that appellees in the court below raised a number of interesting questions with respect to what Mr. Justice Marshall has just asked. A number of interesting questions with respect to the wisdom of Congress' decision to apply Section 224 to recipients of workmen's compensation only.

But I think that their arguments have in no way cast doubt upon the constitutionality of Section 224, because the abundant legislative history in this area shows that Congress indeed had a perfectly plausible, even if debatable, rationale for singling out duplicating benefits arising from workmen's compensation programs.

Q Does the history show that Congress addressed any attention to these other things, casualty awards and so on?

MR. STONE: What it shows, Mr. Justice Brennan, it shows light reference, some reference to these other problems, and we have cited those in our brief. Its primary focus was on the workmen's compensation problem, but I think it is important to note that the reasons why it especially wanted to avoid duplication in the workmen's compensation area are not applicable to these other areas. So that Congress did focus on certain specific reasons which would not have been applicable to the other areas.

At every stage of the history of this provision,

Congress considered volumes of testimony to the effect that if excessive duplication of benefits were allowed, many States would eliminate or seriously curtail the coverage of their workmen's compensation programs.

And the reason for this is that the States will inevitably want to avoid excessive duplication and to encourage rehabilitation. And that theory would not be true of the disabled workers themselves. It's perfectly natural that the disabled workers themselves are perfectly happy to get better benefits after their injury than before. They are not going to have any particular interest in rehabilitation, really, only the State administering a State-run program is going to be watching out for that interest.

So that alternative routes to federal coverage will really only be cut off in areas which are governed by the States.

Q Mr. Stone, if this decision would stand as it is now, is it conceivable that one response of the States might be to just adopt this type of a statute in their workmen's compensation programs, and require a deduction of any amount received from Social Security?

MR. STONE: It's possible that they could do that, Mr. Chief Justice. The regulations, incidentally, the HEW regulations quite clearly provide for that circumstance. There are one or two States which already do that. And in those

circumstances the benefits are not offset. State workmen's compensation benefits are not offset if the State itself has an offset provision geared to the federal program. Otherwise you would get involved in an endless roundabout argument that would have no conclusion, and I guess Congress just took it upon itself to -- and HEW took it upon itself to foreclose that possibility.

Q It's certainly a logical thing, if this sort of thing was very widespread, that with the States under financial pressure, they would rather have the deduction the other way, than as decided by the District Court here.

MR. STONE: That's right. That's right.

I would add another rationale which we illustrate in our brief, is that Congress has really, from the inception of the Social Security program, attempted not to discourage potential claimants from procuring protection through private means, such as insurance.

It appears that this consideration, the interest in maintaining other alternative methods to federal protection, has really outweighed Congress' interest -- with respect to private insurance, tort recovery, and so on, has outweighed Congress' interest in avoiding duplicating benefits.

Indeed, if you take as the over-all rationale, which I think comes quite naturally out of the legislative history, that everything Congress has done in this area has reflected

an interest in encouraging the maintenance of non-federal sources of this recovery, with this interest in mind the decision to require offset in the case of workmen's compensation recoveries but not in other cases seems sensible enough, even if its conclusions are arguable.

Q But if you strike down the statute, Congress might very well equalize it by saying we'll deduct everything.

MR. STONE: I'm not sure whether they would say that we will deduct everything, or that the offset provision would simply be eliminated and they would cover everything, which would have a most unfortunate effect in many ways; or whether simply they would reduce benefits across the board in some way. I think it's very speculative as to what they would do.

There are, in any event, other rationales in support of Section 224, several of which are developed by the Sixth Circuit in the Lofty v. Richardson case, decided at 440 F. 2d, to which I refer the Court. Many of those are quite interesting suggestions of possible rationales.

I have focused here, and we have focused primarily in our brief on those rationales which were quite clearly before Congress when it considered the statute. Not that it is necessary to support a statute in this area purely on the basis of actually considered rationale.

Q What was originally the purpose of expanding social security to cover disability payments?

MR. STONE: Well, I don't entirely know the answer to that, Mr. Justice White, but from what I have been able to gather, this occurred in a time in which there was not as widespread a coverage under workmen's compensation claims as before, it was part of the on-going --

Q And they were too low?

MR. STONE: Yes, and they were too low.

-- and it was part of the on-going Federal Social Security program to cover as many areas of hard-core need as the Federal Government could.

Q But it was the shortcomings in other areas which prompted it in the first place, I suppose.

MR. STONE: That is my understanding. And those shortcomings have, to some extent, been alleviated in recent years, though I suppose it's not to a point where federal coverage is no longer necessary. At least Congress has not made --

Q But, in any event, under the present law, social security will bring them up to some proper percentage of their --

MR. STONE: Of their prior earnings. In fact, pretty close to their entire take-home. Eighty percent of gross.

In conclusion, I believe that we have established that the only real questions raised by appellee and by the

court below are not as to whether Section 224 is constitutional, but simply as to whether it is the wisest scheme which Congress could have adopted. That is debatable. I think it's quite a wise scheme in fact.

In any event, that issue is not before this Court, and for that reason I believe that the judgment below should be reversed.

MR. CHIEF JUSTICE BURGER: Mr. Harris.

ORAL ARGUMENT OF JOHN CHARLES HARRIS, ESQ.,

ON BEHALF OF THE APPELLEE

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

The District Court, interpreting Goldberg v. Kelly as determining that welfare was a property right and therefore protected by the due property clause, held that to distinguish between welfare and social security was illogical and grossly inequitable.

It further held that Section 224 of the Social Security Act arbitrarily discriminated between the disabled worker and other disabled persons, and therefore violating the due process clause of the Fifth and the Fourteenth Amendments.

In addition to this, the District Court also stated that the workmen's compensation law in the State of West Virginia is very unique insofar as it is a voluntary law, where the employer and the employee voluntarily go into this

particular Act and go under the Act, and therefore, as such, the highest court in the State of West Virginia has held that this is an integral part of the contract between the employer and employee.

And the act of receiving benefits or not receiving benefits under the Social Security Act, and in this particular case Mr. Belcher, his payments were reduced in violation of his contract with his employer, as covered under the Compensation Act of the State of West Virginia.

Q Does the worker have the option, at any time when he's hurt, to sue or to get workmen's compensation?

MR. HARRIS: No, once the election is made, he loses his right to sue. He loses his common-law right.

Q When is the election? When he goes to work?

MR. HARRIS: Actually it's, in most cases -- in this particular case here it was a union election. But otherwise I presume the burden is on the employer to accept the workmen's compensation law and then posting a notice to the employees saying that "I am under the law, and therefore if you work for me, why, you are waiving your common-law right."

Q The compensation payments are from private insurance or from State funds?

MR. HARRIS: It's a State fund.

Q State fund.

MR. HARRIS: But the contributions come from the

employers.

Q Yes.

MR. HARRIS: It is not public funds, it is administered as a trust fund, with the money coming from the employers.

Q So you're saying, I take it, then, that there are no State costs in that situation?

MR. HARRIS: There is no State cost.

Q Except as it might come in indirectly by the -- just the welfare payments or something of this kind? No direct State cost.

MR. HARRIS: No, it is a fund administered by the -- the funds that are received from the employer, and each employer pays a premium, if you want to call it that, on the payroll that he pays to his employees. It's very similar to the other States if they have an insurance policy,the rate is applied to the amount of payroll, and that's the basis of their insurance payment to the insurance company; the premium.

Q Mr. Harris, since the employee, from what you have just said, apparently makes no contribution, pays nothing for it, doesn't that distinguish it from private insurance for which the employee would have to be paying out his own funds?

MR. HARRIS: Yes, it does. It does differentiate between private insurance for which he would pay the premium,

but it doesn't differentiate from other States where the employer pays the premium on the workmen's compensation insurance.

In other States, and there are only six States that have State funds; the other 44 States do have insurance. The employer buys insurance, pays for it fully, and this covers the employee in the event of industrial accident.

Now, the appellant contends that Goldberg, which is the basis of the decision in the District Court, was strictly applied to a procedure requirement; and further they contend that the discrimination was justified, in justifying the discrimination against disabled workers as compared to other disabled people. They say this was justified so otherwise it would not weaken workmen's compensation laws.

And quite the contrary is true, as pointed out by Mr. Chief Justice here, that the States are and will in the future reduce their workmen's compensation benefits and therefore weaken the law, to enable less money from them and more money from the Federal Government in the form of the social security laws.

Q Tell me, why would the States do that? If it doesn't cost the State anything?

MR. HARRIS: I would say that the State is subject to the same pressures from employers, from the organizations -- I notice in the brief here most of the opposition to the

repeal of this particular section, Section 224, came from the National Association of Manufacturers; it came from the Chamber of Commerce. And I think the same thing could apply in a particular State where the National Association of Manufacturers, Chambers of Commerce, other employers could pressure the legislators to reduce the amount of payment for disability under social security and in fact save them the expense, since the rates are based on experience, and the more injuries the more losses the more the employer will pay for his contribution to social security -- or to workmen's compensation.

Now, Flemming vs. Nestor, which was decided in 1960, upheld the refusal of social security benefits to a deportee, and then went on to say that: This is not to say, however, the Congress may exercise its power to modify the statutory scheme free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary government action afforded by the due process clause.

And of course, mentioning this particular case of Nestor, they said: Such is not the case here. The fact of a beneficiary's residence abroad, in the case of a deportee, a presumably permanent residence, can be of obvious relevance to the question of eligibility.

And this was the decision in Nestor.

Nestor held that Congress could not arbitrarily change the scheme of social security. In the same particular --

Q Well, my, if Nestor held that Congress could constitutionally strip him of any benefit whatever if he moves abroad --

MR. HARRIS: If he moved abroad. But this --

Q What happened there? I just wonder, if Congress can go that far, is this going that far?

MR. HARRIS: This is a question of eligibility, as to whether he was eligible. This particular --

Q I know, but the practical effect was that notwithstanding, as I recall the facts in that case, I don't think I go along with that; but my recollection is that he spent some 30 years in this country, hadn't he, when he was deported? And he had been contributing all those years to social security, and Congress said, because he was deported -- he was a Communist or something, as I remember it --

MR. HARRIS: Yes.

Q -- and we, this Court held that he constitutionally be stripped of all his benefits.

MR. HARRIS: I believe the Court based their decision on whether he was eligible.

Q Well, I don't see that that has -- the plain fact is he lost all his benefits, didn't he? And what we have involved here is a reduction of them.

MR. HARRIS: This is true, he did lose his benefits, but the Court did rule he wasn't eligible.

In this particular case, the man is eligible, and in 1965, when he was under the Act, they did reduce his benefits.

But, in this particular, in the same decision they quoted Senator George, when this original Social Security Act was put into being, and he said:

"It comports better than any substitute we have discovered with the American concept that free men want to earn their security and not ask for doles -- that what is due as a matter of earned right is far better than a gratuity.

"Social Security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect."

Now, although Goldberg vs. Kelly spelled out procedure requirements, the decision rested on due process clause of the Constitution. And in doing so, made welfare a property right that could not be deprived without due process of law.

Now, in this particular case, the argument from the appellant is that we must go back and get our due process of law --

Q Is this a property right or a statutory entitlement? In Goldberg.

MR. HARRIS: Well, as the Constitution would say, a property right. In the case of Loving, it was liberty without due process of law; and Loving went to the Supreme Court of Virginia, and when they came here they weren't looking for more procedure, they were looking for a wedding license. And this Court gave them a wedding license.

Q What do you want here?

MR. HARRIS: We are looking --

Q Do you want a hearing?

Q What's the purpose?

MR. HARRIS: Do I --

Q Do you want a hearing from this Court?

MR. HARRIS: No, no, we're not looking for a procedure. I believe the procedure is gone. We're attacking -- or we're asking for an affirmation of the opinion of the District Court which says that this particular Section 224 of the Social Security Act is unconstitutional.

Q In that it denies due process?

MR. HARRIS: Not on the basis of due process; on the basis that this was a property right protected by the Constitution.

Q Wasn't Goldberg due process?

MR. HARRIS: Goldberg was due process. But I was pointing out, in the Loving case --

Q Well, are you arguing due process or property

right protection; that's all I ask you.

MR. HARRIS: We're arguing both.

Q Well, where does due process come in?

MR. HARRIS: Due process is that sometimes procedure will not give you your answer. You can be deprived, you can carry all the procedure you want --

Q Well, exactly what were you deprived of?

MR. HARRIS: You mean as far as due --

Q I mean as to due process.

MR. HARRIS: I believe, as I pointed out, in the Loving case, that they had exercised -- they had all the due process they could get, all the way up to this Court; but it still didn't give them what they wanted.

Q You're not asking for a marriage license here, are you?

MR. HARRIS: No, I'm not looking for a marriage license, but I'm saying that the due process was not necessarily a procedure, or a hearing. We're looking for protection of rights. If we go back to the District Court for a hearing on this, as to whether he should lose his property right, we would then determine whether he would be properly rehabilitated if he doesn't get the full amount of his workmen's compensation, or whether it would weaken the system of workmen's compensation.

These are the factors that the government relies on,

as the purpose for the Section 224 of the Act, that if this is not in there it will weaken the workmen's compensation system and it will not enable the worker that's disabled to be rehabilitated.

So we're looking for due process, but a procedure will not benefit us. We want to protect the rights that are protected under due process. And the due process is the Act of Congress, that Congress is taking away from this man something which he has earned, and therefore a hearing will not do us any good; what we need is an overturn of the statute that takes this property away from him.

Q Well, aren't social security taxes, though, based on some estimate of prediction about how large the taxes ought to be to maintain a solvent fund? And based on how long people normally stay out of work for certain kinds of injuries, and things like that?

MR. HARRIS: Well, it's definitely --

Q Isn't there any actuarial consideration?

MR. HARRIS: Actuarial. It's very, very definitely an acturial situation.

Q But if the prediction is distorted by people staying away from work longer than they normally would, because of payments from other sources, isn't that a consideration?

MR. HARRIS: It is a consideration. Whether it's a

sufficient consideration is another thing. There's a lot of things that could be considered.

Q But hasn't this Court said it doesn't have to be a perfect classification if it's a rational classification?

MR. HARRIS: But is it not discriminatory if they pick on one small section? Doesn't the trial court mention the Fourteenth Amendment,--

Q But you --

MR. HARRIS: -- equal protection of the law.

Q Didn't I understand you virtually to concede that if deduction were made for every type of benefit privately secured as well as this, you would have no complaint?

MR. HARRIS: I would agree. I believe in this particular point --

Q But with regard to the private kind, they don't pay for this.

MR. HARRIS: They do -- the -- if a man is injured and he's eligible for the disability provisions of Social Security --

Q I'm speaking of the workmen's compensation. He doesn't pay for -- the employee does not pay for that insurance coverage. Now, isn't --

MR. HARRIS: But there are other benefits which this man can receive that he doesn't pay for, but his social security is not reduced.

For instance, VA payments, if he receives any pension from the Veterans Administration; if he receives a tort settlement. In some cases they talk about maybe it would stop him from malingering if he didn't receive sufficient amount of money. But if he receives a tort settlement -- if he is fully disabled and he receives a tort settlement, he could receive up to a half million dollars, and still collect the disability provisions of Social Security.

He can get welfare, and this is often the case; that he gets welfare, including Aid to Dependent Children, which he doesn't pay anything for. But his Social Security is not reduced.

Now, there's one thing that is very interesting here. Mr. West, my associate, gave me a letter that was sent to him by the Department of Health, Education, and Welfare, and it reads:

Dear Mr. West: According to our records --

Q Is that in the record?

MR. HARRIS: No, it is not. This is just --

Q Then I think we don't want --

MR. HARRIS: This is just an idea of the fairness, I'm not --

Q Well, if it isn't in the record, we don't want it read.

MR. HARRIS: All right. Well, anyway, what it says

-- I mean what they're doing in this particular case is saying that the benefits are reduced because of the workmen's compensation, where the payment to the wife is $1.70 a month, and to the children $5.10 a month, the man's workmen's compensation benefits were $25 a month -- that's $25 a week, and he's on welfare. He can't live otherwise.

In the case of food stamps, if he gets food stamps his benefits are not reduced. He pays nothing for this.

In this particular case, Mr. Belcher was a member of the retirement plan for the United Mine Workers, and at age 55 -- he's only 53 -- at age 55 he could collect a pension. But still his benefits, his social security would not be reduced.

If he has investment income, if he owns property and from this property is getting rental income -- now, this, in some way you might say this would cost him money; but his benefits from social security would not be reduced by that.

If the relatives give him gifts, if he's supported by others, this doesn't cost him anything, and he gets that, he gets no reduction in his social security.

In addition, under the Act, he can go to work on a trial basis for up to nine months, earn as much as he pleases, and the money he makes during those nine months does not reduce his social security disability.

Also, in addition, unless his income is from substantial gainful employment, and they usually fix this at

$50 a month during the time he's getting his disability, then his payments are not reduced for that income that is not substantial gainful employment.

Now, what I haven't mentioned here is the private insurance. If he buys private insurance, private accident and health insurance, it's not reduced for that.

Also, in addition, there's one other thing, if he has life insurance and a waiver of premium on it, when he's disabled he pays no more premium, which, in effect, is a dividend to him from the company: the company pays his premiums for him.

So these --

Q Let me get one thing straight. If a State does not have a State fund, but the employers buy their workmen's compensation insurance from private companies, and a man is injured and he is collecting workmen's compensation under one of those privately insured plans, from his employer --

MR. HARRIS: Right.

Q -- is his social security reduced?

MR. HARRIS: His social security would be reduced.

Now, the one thing that is misleading --

Q But it wouldn't be if he had bought his own disability insurance?

MR. HARRIS: No, it would not. Any of these other things that I mentioned here --

Q But the deduction is made for all kinds of State

workmen's compensation programs?

MR. HARRIS: Only workmen's compensation.

Q That's what I mean.

MR. HARRIS: All right.

Now, there's one thing that's misleading. The formula is very involved as to determine just how much the reduction would amount to. But the law says that basically it will be reduced to 80 percent of his earnings, but not less than zero.

Now, in some cases it does get down to zero, it gets down to close to zero. In the case here, this person is getting -- it's reduced down to $1.70 for the wife and $5.10 for the children. So it can be reduced down much lower than the 80 percent.

Q But it isn't reduced to the extent that it was under the original Social Security Act?

MR. HARRIS: No, the original eliminated the entire -- but again this was repealed.

All right. One thing, one further thing on this is that there's some conversation, or some reason given here that maybe rehabilitation is the reason for this, that you want to discourage people from malingering, or you want them to be rehabilitated and become productive again. This is only paid for disability, it's not paid for anyone -- for total disability, but anyone who is not totally disabled doesn't get any benefits

under this particular section of the Act.

Now, to establish whether you're disabled, it requires that you must be -- there must be a medically determinable physical or mental impairment that can result in death or which has lasting or can be expected to last for a continuous period of not less than 12 months.

So we're not talking about someone malingering.

Now, again, too, the Act is going -- is administered to the extent that in the event that this man is malingering, they can -- and I imagine under Goldberg you have to give him due process of law, give him a hearing -- but they can remove his benefits from him, if he is well.

Again it would be a medical determination.

So, as far as workmen's compensation, there could be malingering, because it's not -- it's a temporary basis.

But in this particular case, under Social Security, it must be a serious injury or --

Q How long does workmen's compensation normally last? Say in a permanent disability case, would it go on for more than two years? Or one year?

MR. HARRIS: If -- yes, it could go on for more than that. It depends. Often you get a permanent award. Now, if a man loses a leg, you get during the time -- until such time as he gets his award, he gets weekly payments, and after that he gets an award of maybe 200 weeks for the loss of the leg.

Q But not for life?

MR. HARRIS: For life? It could go on for life.

The workmen's compensation is paid for by the employer and it is really a purchase of insurance. And if you want to consider it, it's part of the cost of labor. In West Virginia, the court, the highest court of the land, ruled that it is a contract, part of the contract between the employer and the employee. Therefore it is part, in West Virginia it is part of the income or salary of the employee. So, in effect, he does pay for it. He pays for the -- through the cost of labor he does pay for his workmen's compensation. Even though the money never passes through him, it passes strictly to the fund from the employer.

Again, as far as -- going back to the Nestor case, we're saying that Congress cannot be arbitrary. If Congress had a specific purpose that was impartially applied to all people who would be disabled, then I would be perfectly agreeable that this was a good law. But arbitrarily they are picking on the individual who is working and disabled as opposed to the individual who is not working and disabled.

Now, I have my own opinion as to where this particular exclusion came into the -- how this particular exclusion came into the Act. And I think probably in 1956 that someone was delegated with the job of coming up with an accident or disability provision for the compensation, for the

Social Security Act.

And looking to see where they would find what would be the proper terms to put in there, they picked up accident and health insurance. And in every accident and health policy there is an exclusion for workmen's compensation.

Q Mr. Harris, why don't you get to the legislative history instead of your opinion as to what might have happened?

MR. HARRIS: Well, I don't -- I wouldn't -- no, I have the legislative history. The Act was passed in 1956, or this amendment to the Act. The only thing I can determine is, why would they exclude only workmen's compensation?

MR. CHIEF JUSTICE BURGER: Well, I think you've been over that ground pretty well now, Counsel; and if you haven't any more, I suggest you draw yolu argument to a close.

MR. HARRIS: Okay.

Well, there is no plausible rationale for the discrimination between this worker who is injured as a result of employment and others who may be injured otherwise, and therefore cannot -- are not excluded, or not reduced or offset by the workmen's compensation benefits.

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

Do you have anything, Mr. Stone?

MR. STONE: Mr. Chief Justice, I have nothing further.

MR. CHIEF JUSTICE BURGER: There are no questions, apparently.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:00 p.m. the case was submitted.]