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In the

Supreme Court of the United States

MARION P. MORRIS,
on behalf of LINDA MORRIS,

Petitioner,

vs.

ELLIOT L RICHARDSON,
Secretary, Health Education
and Welfare,

Respondent.

No. 71-6698

Washington, D. C.
January 17, 1973

Pages 1 thru 29

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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MARION P. MORRIS, on behalf of LINDA MORRIS, Petitioner,	:	
vs.	:	No. 71-6698
ELLIOT L. RICHARDSON, Secretary, Health, Education and Welfare, Respondent.	:	

Washington, D. C.
Wednesday, January 17, 1973

The above-entitled matter came on for argument at 10:39 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. R. McCLELLAND, Legal Aid Society of Charleston, 1026 Quarrier Street, Charleston, West Virginia, for the Petitioner.

WALTER H. FLEISCHER, Civil Division, Department of Justice, Washington, D. C., for the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 71-6698, Morris against Richardson.

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

ORAL ARGUMENT OF E. R. MC CLELLAND

ON BEHALF OF THE PETITIONER

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

I think I would be remiss if I did not first convey my appreciation to the very honorable Clerk and his staff for their assistance to us in this matter; and they are very nice, very nice.

The facts in this case, as I understand, are not in dispute by any of the parties here, so I will be very brief and cite only those things which I consider pertinent to the case.

One, that in the year 1957, Mr. Morris qualified for and started receiving Social Security benefits; that in the year 1965, Linda Gail Kinder was born, and a few months after that, was sent to the home of the grandparents -- in this case, Mr. Morris -- and to reside with them continuously thereafter until the present time, as a matter of fact.

In October of 1966, Mr. Morris and his wife adopted Linda Gail; in 1968, there was a reapplication for Social

Security benefits by Mr. Morris on behalf of Linda Gail, which was, and what is an issue here.

The pertinent parts of the Social Security Act that we talk about today, one has to do with Section 202(d)(1) and (3). These are the ones that set up eligibility for children.

(d)(1) here states that a child shall be entitled to benefits if the child is living in the home of the petitioner, and that he is contributing more, at least 51 percent of the support, and so forth, of the child.

Section (3) has to do with eligibility, and again, Linda Gail is qualified under that Section. In that Section, it starts out saying that "shall be deemed" to be dependent; this has to do with the dependency clause.

Another issue here is 202(d)(8). In 1960, when the Social Security Act relative to dependency allotments was first passed, Congress saw fit to give benefits to children born of qualified Social Security recipients.

Subsequent to that and shortly after, they put in the Section pertaining to adopted children, if the child lived in the home of the petitioner, or recipient, at least one year prior to the time that he shall have reached his old age or disability, or what have you.

In 1967, subsequent to the date of the adoption of Linda Gail, Congress amended this particular Section and put in this 202(d)(8); and they started talking about children

adopted by an eligible beneficiary recipient.

Here, the key one in which we are interested today and upon which this Court accepted this case has to do with child placement. Congress said that if a child can -- on the adoption, at the adoption proceedings -- was supervised, or was handled through a public or private child placement agency, then this child, adopted child, could qualify for benefits.

I might also add here that on October the 30th of 1972, that Congress again amended this Section 202(d)(8), and we are now back to where we were in 1960, which means that unless a child shall have lived in the home of the petitioner for not less than one year prior to the time that he reaches eligibility for old age assistance or the date that he would become eligible for request for disability benefits, that the child cannot qualify.

QUESTION: Because of that 1972 amendment, it is the Government's position in this case -- and that amendment, incidentally, came along after we granted certiorari in this case -- it is our position in this case that the writ should be dismissed; I trust you will address yourself to that argument.

MR. MC CLELLAND: It is the very next item, sir.

QUESTION: Right; very good; in your own time, by all means.

MR. McCLELLAND: Pertaining to this and the fact that respondent has raised this issue of whether or not this writ was improvidently granted, I would like to say this, that I am happy that the question was raised because that does bring -- at least I would hope that it would bring -- this new amendment before this Court for consideration today.

One --

QUESTION: Why don't we get the new amendment before us?

MR. McCLELLAND: I say, sir, that I would hope that you would, the fact that we are considering that at this time.

QUESTION: Has there been any administrative action under the law as changed?

MR. McCLELLAND: So far as this is concerned, the answer is negative. So far as other cases that have been started, the answer is yes, sir, there has.

QUESTION: We have only this case before us.

MR. McCLELLAND: You have only this case before you, that is true, sir.

QUESTION: No one is trying to apply this new statute to Linda Gail's situation?

MR. McCLELLAND: No, sir.

QUESTION: On the Government's theory, Linda Gail doesn't get benefits either under the law that's before us

here or under the new law, so there is no occasion to apply anything new. The result would not be different from the Government's point of view.

MR. McCLELLAND: That's correct. That's correct.

Further, that by virtue of the repeal of this particular section in the Social Security Act, that this client, Linda Gail, would not be affected, and for several reasons. One of them was that her application for benefits was timely filed. In other words, she applied for benefits under this new section in February of 1968, the year that particular section went into effect, I think in January or December -- January of 1967.

The rights of many people, or individuals,similarly situated as Linda Gail would be in this particular instance have not been affected by the repeal of this new Act in Social Security, new 202(d)(8). There are other cases pending now on that section. No later than I think last week or week before last a new case was started in my own home county affecting the same.

And also this new Act will affect only a small class of plaintiffs because those that are not within this classification of having lived with the beneficiary for, let's say at least a year prior to his eligibility, would be affected; the others would not.

QUESTION: If the 1972 amendment (inaudible)

Linda Gail would have been ineligible, is that not true?

MR. McCLELLAND: Sir, on issues that I am bringing forward here today and the issues of discrimination against adopted children, they would not be affected either way.

Let's assume that you should decide at this particular moment, right now, that this case has been improvidently granted, I could and I am sure that I would be requested to do so, to go home and ask Mr. Morris to go out and reapply, that the issues of the Fifth Amendment as affects after-adopted children must go before this Court for determination, sir. That is one of the cruxes in this case.

The case was first started, and the court below, the District Court, the District Court judge decided to take the same position as the Hearing Examiner. He didn't go into this. Only briefly was it brought up in the Appellate Court.

Those questions are still here. I would bring this case next week under the new one because the same issues are there, sir.

QUESTION: The same (Inaudible).

MR. McCLELLAND: Yes, sir. Yes, sir.

And I might also add that this question of the Fifth Amendment was considered in the cases below.

QUESTION: Is it your position, Mr. McClelland, the same Fifth Amendment issues are here under the amended

statute?

MR. McCLELLAND: As it affects after-adopted children, sir, as against children born as issue of the recipient.

QUESTION: Or/and as against pre-adopted children.

MR. McCLELLAND: Yes, sir.

QUESTION: That it's a basic denial of equal protection of the laws included in the due process clause in the Fifth Amendment.

MR. McCLELLAND: That's exactly right, sir. Yes, sir.

There are a couple of things I would like to say, and I will get into this particular question right quick and try to take most of my time on that.

As Mr. Justice White told Mr. Reynolds here yesterday, he said, "And your fifth argument is the fact that the Circuit Court of Appeals held against you, and so forth," I will say that here in addition to this, the case of Hagler v. Finch which was relied on by the Fourth Circuit and their holding in this case, together with strong reliance on the part of the Respondent in his brief here.

There is a literal statement in that court opinion that I would like to read to the Court here. Now, in the Hagler case, of course, this Court denied certiorari. But after having admitted that this child, there was no abuse involved so far as the adoption of this child was concerned,

the Court said this:

"The Haglers, lacking guidance through the statutory maze of 402(d) wandered into a trap designed to snare only the undeserving. Their plight suggests a need for more flexible statutory requirements. Yet Congress, not the Court, should be the source of any new statutory provisions."

So the two cases that obviously are relied on here is the Fourth Circuit holding the way they did and the Ninth Circuit holding the way that they did.

The main thrust of my argument -- I will get away from the cases that have been decided and have been cited in the brief and so forth, like Levy and Weber and Stanley and so forth, and get to one that was recently decided by this Court no longer than less than a month ago, as a matter of fact, on December 18, I think it was, where they affirmed the case of Davis v. Richardson, 342 F. Supp. 588 it was. There we are talking again in terms of an illegitimate child.

I will not go into the facts of that case; it is too recent to this Court. You are sort of familiar with it and what you decided, and so forth. I will stay away from the holdings relative to Social Security and welfare. But (1) and (2) I would like to read because as a guideline for me.

(1) The due process clause of the Fifth Amendment prohibits as to the Federal Government statutes creating arbitrary discriminations which have no rational basis in

legitimate governmental purposes.

And (2) that although current Congress has great latitude to make clarifications in the area of economic and welfare legislation, a provision must have some rational basis or be pertinent to some proper objective of Congress in order to withstand challenge of the due process clause.

Your Honor, the fact that Congress has seen fit to deny after-adopted children which they have done the benefits that are now accruing to those children that have been previously adopted or children that will be born to the Social Security recipients subsequent to his receiving benefits I think falls decidedly within this classification.

When Congress considered this thing and reading the Congressional Record on what they had to say, now, Senator Allott got into the question of will this cause abuse and cause individuals to go out and adopt children to supplement their own income? There are two things I would like to mention on that. Senator Curtis also had some observations on that.

One of them is they took their external expert there and he came back and said, well, look, there would be maybe a fraction of one percent involved should we grant full benefits to these adopted children. They admitted on the floor that they each knew of personal cases where it seemed unjust to not give these individuals the privilege of being

entitled to these benefits.

I think, sir, and this is my --

QUESTION: It was Senator Allott's bill, was it not, that put the limitation upon the eligibility of after-adopted children that you are here attacking, that is, that it had to be approved by a child-placement agency. And that was his bill.

MR. McCLELLAND: That's correct, sir.

QUESTION: So when he was talking about no substantial possibility of abuse, he was talking about no substantial possibility of abuse under his bill which became law and which you are now attacking. So I don't know that his remarks are very helpful to you.

MR. McCLELLAND: No. I am only --

QUESTION: The bill that he sponsored --

MR. McCLELLAND: In this particular instance, sir, I am not attacking the bill. I am all in favor of his bill. But I am attempting to attack and starting to attack the question of abuse in this particular instance as it would affect this question of consideration between the two classes of individuals.

QUESTION: Well, the problem in this case is that the law which was, as I understand it, had its genesis in a bill sponsored by Senator Allott and supported by Senators Curtis and Dominick and obviously by a majority of both Houses

ultimately that that bill contains in it a limitation for eligibility of adopted children that those adoptions had to have taken place under a child-placement agency. That's the nub of the question, isn't it, in the case, that provision of the law?

MR. McCLELLAND: Yes, sir.

QUESTION: And it has been held by the agency that a court, a juvenile court or any other kind of a court, is not a child-placement agency within the meaning of that provision of the Federal law. That's what the issue here is, isn't it?

MR. McCLELLAND: Yes, sir.

QUESTION: Congress had two objectives, did they not: First, to prevent people who were in this position receiving benefits from exploiting the potential benefits that would be paid to the adopted child and to see also that the adopted child was not taken into homes that were not adequate.

MR. McCLELLAND: Correct, sir.

QUESTION: Now, hasn't the Court said many times in many cases that the fact that a regulation may occasionally reach some blameless person when it's aimed at a larger target of preventing abuses, it will be sustained?

MR. McCLELLAND: That also is correct, sir.

But what I am saying here this morning, sir, is that the possibilities and the probabilities of a grandparent adopting a child for the purpose of obtaining money, I think

is just too far remote for such a consideration.

QUESTION: Congress doesn't try to legislate on specific cases. It legislates for the generality of situations.

MR. McCLELLAND: Mr. Chief Justice, of the 200-some-odd cases that we have relative to adoptions that we have had since I have been with this particular program in the last six years, more than 50 percent of them have been grandparents adopting children. I would dare say that no one of those grandparents, whether the child be legitimate or born out of wedlock, the question of money does not enter into it. It's a question of love and affection on the part of grandparents. That goes back to the beginning of man, I am sure this Court is well aware of that.

QUESTION: What is the purpose, then, of their adopting the grandchild?

MR. McCLELLAND: For the purpose of providing a home for them, generally, sir.

QUESTION: Can't they do that without adoption?

MR. McCLELLAND: They could do that and in many instances they do do it. But when --

QUESTION: Might it also be to give the child a name and making the child legitimate?

MR. McCLELLAND: That's correct. For those born out of wedlock, that's true, sir.

QUESTION: But that does not apply to those born in

wedlock.

MR. McCLELLAND: But it does do, however, sir, in the absence of a natural parent, it does provide for them and give to them short of going out and getting and requesting the guardianship tha legal rights to the child to order certain things done on their behalf.

QUESTION: Well, are you suggesting that all the grandparent-grandchild adoptions are situations where a natural parent is absent in death or something?

MR. McCLELLAND: As a general thing, sir, I will say this, that the children come to a grandparent during times of adversity regardless of what that adversity happens to be.

QUESTION: Under the law of West Virginia, does an adoption alter in any way the status of an illegitimate child and may render it legitimate?

MR. McCLELLAND: Yes, sir. Yes, sir. Under our laws --

QUESTION: Adoption by a grandparent or a stranger? Or is it just limited to adoption by the parents, natural parent?

MR. McCLELLAND: Any adoption, sir, under our adoption laws puts the adopting parent in the same position exactly as if that child had been born in lawful wedlock in any and every respect. Our courts and our laws have been in following that classification, have gone just as far as they

possibly can in doing that.

QUESTION: Mr. McClelland, would you follow up a little bit on Mr. Justice Black's question to you just what is it besides financial benefits that a grandparent gets from legally adopting a grandchild that he couldn't do without simply having the grandchild live in his home?

MR. McCLELLAND: Well, for one thing, sir, authorization for medical attention, surgical attention and that sort of thing. For the responsibility of the child as a parent rather than, let's say, as a foster parent or just as a friend, as a babysitter.

QUESTION: What tangible elements flow from that responsibility?

MR. McCLELLAND: That this child then becomes for all intents and purposes a natural child, that the name is changed, that in the records no reference will ever be made by anybody in the future that this child was not a child born of this actual marriage. They receive the rights of inheritance. The natural parents lose that same right. All the rights and responsibilities under an adoption in West Virginia flow to an adopting parent and to the child just the same as if the child had been born in lawful wedlock.

As pertains to when we are talking about benefits and so forth, had in this particular instance Mr. Morris -- at the time he adopted this child, of course he could not have

taken advantage of going through a child-placement agency. He adopted the child a year previous to the time this law went into effect, a year or two maybe. If he had chosen to, say, as the Fourth Circuit put it, well, he could have given this child to the welfare department and then the welfare department could have given it back to him and that would have been all right, then there would have been compliance with this requirement. But, sir, if he were going to give her to the welfare department or child-placement agency under our laws the best thing for the child, according to law, he may or may not have gotten the child back. If they could have found a good home for it, they would have placed this child elsewhere.

QUESTION: Are you implying Mr. Morris' home wasn't a good home?

MR. McCLELLAND: No, sir. No, sir. I am saying that a placement agency could have done that, or our welfare department which is about the only thing we have in the State of West Virginia at all that comes close to being a child-placement agency or public placement agency.

But had he done this, had he set up his home as a foster home and said, "Now, you send this child over to me as a foster child," since the parents were then gone, he would have gotten more money by the foster home placement angle than he would have in Social Security benefits. It's a difference of about $8 a month.

The question of the real issue of why we are here, I would like to catch you right quick with before my time is up.

MR. CHIEF JUSTICE BURGER: (Inaudible) since your time has expired now, Counsel.

MR. McCLELLAND: Thank you, sir.

And that has to do with the question of our court here and whether or not this is properly heard before our Juvenile Court and whether or not that is a placement agency. And since my time is almost up, your Honor, I respectfully request of this Court that that question, I think is fully covered really within our brief and I would ask that this thing of child placement agencies as it relates to the West Virginia law would be considered by this Court on brief.

Thank you so much for your consideration.

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

Mr. Fleischer.

ORAL ARGUMENT OF WALTER H. FLEISCHER

ON BEHALF OF RESPONDENT

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

I think that a short review of the development of the provision dealing with benefits for adopted children may be helpful in assessing both whether there are issues which ought to be decided now despite the repeal of the disputed provision after certiorari was granted, and also on the merits of those issues.

Before 1960, child benefits were not payable unless the child was born or adopted prior to the wage earner's disability. In 1960 the Act was amended to permit payment to natural children born after the disability and also to adopted children who were adopted within two years of the disability if the adoption proceedings had been started prior to the disability or the child was already living with the wage earner.

Petitioner was not entitled to the benefits under that 1960 provision. And the idea of the 1960 provision as stated in the committee reports was to assure that benefits will be paid to such children only when there is a basis for assuming that the child lost its source of support when the worker became disabled or died. And further, Congress said that its purpose was to guard against abuse through adoption of children solely to qualify them for benefits.

Both, in our view, are perfectly proper concerns of Congress, and the question is whether the later 1968 provision bears a rational relationship to those concerns.

Now, you will also see the relative emphasis Congress has given these considerations has changed over the years and particularly between 1968 and 1972 provisions. And this is one reason that we disagree that the constitutional issue would be the same under the 1972 amendments as it is under the 1968 amendments, and therefore this is one reason

we don't think that this broad issue is appropriate for decision now.

Now, in 1968, Congress liberalized the provision of Section 202 dealing with adopted children of disability beneficiaries by providing benefits for not only those whose adoption was contemplated at the time of the disability, but after adopted children met certain tests, particularly that the adoption be court decreed and that it be supervised by a child-placement agency. It was felt that those two requirements would provide adequate protection against adoptions for the purpose of obtaining benefits, though they would cover certain hard cases which had arisen under the old provision.

It will be noted that the 1968 provision somewhat departed from the earlier idea that the statute should aim only at taking care of children who lost their source of support when the wage earner was disabled. But the 1972 amendments move back in that direction. They still allowed benefits based on later court-decreed adoption irrespective of the time the court decrees the adoption, but they do so only when the child lost the source of support because his parents retired or became disabled. That is, they provide that the child must have been living with the wage earner for a year prior to the disability, receiving at least half his support from the wage earner.

QUESTION: What is involved here is the law as it

was in the period 1968 to 1972.

MR. FLEISCHER: Correct.

QUESTION: And the issue here, as I understand it -- you tell me, please, if I misunderstand it -- is the validity -- it boils down in net balance to the validity of the regulation that says that a court is not and cannot be a child-placement agency. That's the specific issue, isn't it?

MR. FLEISCHER: Yes, and this attacks (inaudible)

QUESTION: (Inaudible) impact in this West Virginia case where the criminal court in this county acted as a juvenile court and where the court got their local policeman to make an investigation of the home,and the claim is that not to allow this kind of a situation is a deprivation of due process of law.

MR. FLEISCHER: Yes, sir. I think that's correct. That's what is left of this case. This particular case is not moot. We were aware of no other case pending --

QUESTION: Could you tell me why the new 1972 amendment does not apply to this case?

MR. FLEISCHER: Yes, Mr. Justice White. Section 111(b) of the 1972 amendment provides a specific time clause, and while it's a bit ambiguous the Social Security Administration has interpreted that clause to mean that as to applications filed before the 1972 amendments became law, that the applicant gets the best of the two.

QUESTION: If by some possibility the applicant was disqualified under the 1968-72 provisions, he could still take advantage of the 1972 Act if he qualified under that?

MR. FLEISCHER: Yes. But I must say that it is quite clear that this plaintiff does not.

QUESTION: Yes, I understand.

MR. FLEISCHER: Now, that's why this case is not moot. The issues stemming from the placement agency requirement are of no general or prospective importance. There may be a few applications still pending which raise it, but --

QUESTION: The 1972 provisions would not be applied to disqualify someone who had qualified under a previous --

MR. FLEISCHER: That is correct.

Now, turning to the merits, I believe that both the Petitioners -- well, I should say one other thing about the viability of this in cases before turning to the merits.

And that is that the entire controversy in the courts below, both statutory and constitutional, was based on the particular feature of the adopted child benefit provision, that is the supervision feature. The broader challenge to Section 202 as discriminating between adopted and natural born children was not considered below. So this is really the first court which has had it. And both because of that and the change in philosophy between the 1968 and 1972 amendments, we don't believe it should be decided here first.

QUESTION: Before you move on to the merits, your initial argument here is that we ought to dismiss this writ as having been improvidently granted. (Inaudible) changed, and because it is beyond the confines of this particular case it has very little impact, if any. But you are not making the argument that this particular case is moot.

MR. FLEISCHER: That is a correct statement.

QUESTION: The rights of the parties still depends on the decision of this case.

MR. FLEISCHER: Yes.

QUESTION: When you get to the merits, how many counties are there similar to this in the country?

MR. FLEISCHER: I simply can't say. The record doesn't disclose it, Mr. Justice Marshall, and it --

QUESTION: Wouldn't it be important to find out how many children are denied this benefit solely because they happened to be in a county that's like this one?

MR. FLEISCHER: Well, I don't believe, Mr. Justice Marshall, that this plaintiff is denied solely because of that reason. Really, the reason that issue arises is because of the prospective nature of the 1968 amendments. Had the adopted parents -- had the 1968 amendments been law when this adoption took place, there could have been qualifications. Now, in passing the amendments in 1968, perhaps unfortunately Congress did not go back and try to pick up the prior adoptions.

But we would submit that when it was passed in 1968 it was a reasonable provision for the future, and the fact that it didn't go back and pick up all the earlier cases did not make it unconstitutional. So I don't believe we do have to know how many counties there are in this circumstance. But if it were relevant, unfortunately the record does not disclose that and I don't know the answer.

QUESTION: You don't know of any other actual cases that depend on this?

MR. FLEISCHER: No, Mr. Justice White. Counsel has represented this morning that there is one other, and I don't doubt that that may be so.

QUESTION: Well, can I take judicial notice that there are many counties in this country that don't have child placement bureaus?

MR. FLEISCHER: Well, even assuming that's so, that doesn't mean that an out-of-county agency can't supervise the adoption.

QUESTION: Well, suppose they don't?

MR. FLEISCHER: Well, in the first place --

QUESTION: I guess the child should move to another county.

MR. FLEISCHER: Well, I don't know that there is any basis for the supposition in the first place. And in the second place, assuming that the number is small, the fact that

legislation does not cover every case to which its rationale should apply, I don't believe is a basis for constitutional invalidation under such decisions of this Court as Jefferson v. Hackney and McGowan.

Now, I believe both of the Petitioner's constitutional arguments depend heavily on criticism of the congressional determination that it ought to guard against adoptions for the purpose of obtaining benefits. I would like to give a practical commonplace illustration of why this danger is inherent in the situation of post disability adoptions.

Let's suppose, for example, both a grandparent and an aunt and uncle of a child are considering adopting the child. Let's suppose that in the particular case the aunt and uncle might be able to better educate the child and provide him a home with children his age and for other reasons might be a more suitable home. Now, the grandparents are responsible and upstanding citizens. They may well pass the State adoption test, and their petition might be granted. But Congress reasonably might not want this decision influenced by the desire to get additional Social Security benefits.

So it is not only the case of the crass attempt to use the child, which is protected against by the placement agency case, but in addition situations such as I have described. And allowing benefits in the case of post disability adoptions only where the court decreed the adoption and the

adoption was supervised by a placement agency, is a very rational way of being sure that the motivation isn't Social Security benefits, but instead the one specified by the State's adoption laws.

Now, that this is so is brought home by a decision of the New Mexico Supreme Court which we cite at page 18 of our brief called Gutierrez. This was a grandparent case, and in that case it was only because the State welfare agency pursued the case all the way up to the highest court of the land that an adoption for the purpose of obtaining Social Security benefits was stopped.

Now, of course, Petitioner can urge that the congressional evidence in avoiding this kind of situation is excessive. There is really no way of knowing statistically how often it occurs. Or that Congress was too cautious and bent over too far backward in having Social Security considerations intrude into the adoption process. But we would submit that those arguments ought to be directed to another branch of government and they don't show the irrationality of the test Congress set up or its lack of relationship to the goals of Congress.

Now, to be sure this classification may not be perfect. This particular case may show that it isn't. There would seem to be some difficulties, also, however, with what appear to be the principal available alternatives, either

reducing the protection of both children and the public trust or having Social Security Hearing Examiners try to decide the subjective motivation of the adoptive parents on a case-by-case basis.

Furthermore, an after-born natural child is not situated identically to a post disability adoptee and hence the distinction is proper. First, the possibility of the subordination of the child's interests aren't present in the case of the natural born child. And, second, in terms of the wage earner -- the loss of the wage earner's support, there may be a difference. In the case of a natural child later conceived, it can't be assumed that the conception was based on a decision which considered the ability to support the child. However, if there is a later adoption, we can assume that the adopting court would not issue the decree if there were not an ability to support the child.

I would close by saying that we would consider the attack on the child-placement supervision requirement as it applies to the particular situation in West Virginia due to lack of the agency in some counties a little wide of the mark. Again, it seems directed to showing that the Act created an inequity in this individual situation which isn't sufficient to invalidate the statute.

But moreover, the distinction flows from the fact that Congress addressed the problem in 1968 in a prospective

fashion and didn't save the day for all prior adoptions.

QUESTION: In this particular case, suppose they moved to a county that did have a placement service and qualified and then moved back to this county, what would happen?

MR. FLEISCHER: You mean, if the adoption in the first place had been in a county where --

QUESTION: They are living in a county where they can't get it and they moved to a county where they can get it and they do get it, then they moved back to the county where they couldn't get it. What happens?

MR. FLEISCHER: I would think that if the adoption is valid under State law that the move was not solely for purposes of --

QUESTION: I am just trying to find some way this time they could get it. So they could get it by moving to another county and then moving right back.

MR. FLEISCHER: Well, I am not certain, Mr. Justice Marshall, that the adoption can now be undone and reinstituted. I did look this point up under West Virginia law, and I simply can't ascertain whether that's possible. However, one thing is clear, and that is that West Virginia does not like to revoke an adoption already granted. And I think it would be difficult. But the law doesn't directly address the point.

Unless there are questions of the Court --

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

Do you have anything further? You have two minutes, Mr. McClelland.

MR. McCLELLAND: Well, your Honor, on the question of adoptions and placements here, there is no way that I could give justice to that in two minutes, and all I can say is I will thank you for your consideration.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:25 o'clock p.m., oral argument in the above-entitled matter was submitted.]