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In the  
Supreme Court of the United States

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EUGENIO AND ALICIA JIMENEZ, etc., )  
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Appellants, )  
 )  
v. )  
 )  
CASPAR W. WEINBERGER, )  
 )  
SECRETARY OF HEALTH, )  
 )  
EDUCATION AND WELFARE )

No. 72-6609

Washington, D.C.  
March 18, 1974

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CASPAR W. WEINBERGER, :  
SECRETARY OF HEALTH, :  
EDUCATION AND WELFARE :  
:  
-----X

Washington, D.C.

Monday, March 18, 1974

The above-entitled matter came on for  
argument at 10:04 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:

MRS. JANE G. STEVENS, Legal Assistance Foundation of  
Chicago, 64 East Jackson Boulevard, Chicago, Illinois 60604  
For the Appellants

DANNY JULIAN BOGGS, ESQ., Office of the Solicitor  
General, Department of Justice, Washington, D.C.  
For the Appellee

C O N T E N T SORAL ARGUMENT OF:PAGE:

MRS. JANE G. STEVENS  
For the Appellants

3

DANNY JULIAN BOGGS, ESQ.,  
For the Appellee

18

REBUTTAL ARGUMENT OF:

MRS. JANE G. STEVENS

36

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 72-6609, Jimenez against Weinberger.

Mrs. Stevens, you may proceed whenever you are ready.

ORAL ARGUMENT OF MRS. JANE G. STEVENS

ON BEHALF OF THE APPELLANTS

MRS. STEVENS: Mr. Chief Justice and may it please the Court:

The discrimination challenged by the Plaintiffs in this case is the discrimination between legitimate children born after their father had become eligible for Social Security benefits and illegitimate children born after their father had become eligible for Social Security benefits.

If Eugenio and Alicia Jimenez, the Plaintiffs herein, were legitimate children, they would now be receiving Social Security benefits, but because they are illegitimate, they are absolutely barred from receiving benefits, even though they have lived with their father all their lives and have been supported by him all their lives in that he has been their sole caretaker since their mother left the home.

This discrimination between legitimate and

illegitimate children is arbitrary and irrational. It is a violation of the Equal Protection guarantees as embodied in the Due Process clause of the Fifth Amendment.

The Secretary of Health, Education and Welfare defends the discrimination on two grounds, that it is reasonable because illegitimate children are less likely to have received support from their fathers than legitimate children and that it serves the valid governmental purpose of preventing fraud.

In fact, it is not rationally related to the purpose of the Social Security Act and it is not a rational means of preventing fraud.

QUESTION: Mrs. Stevens, if all children, legitimate as well as illegitimate, born after the date of onset of disability were excluded from coverage, would you be here?

MRS. STEVENS: I would be here but in slightly different posture. I think that exclusion also would be irrational in light of the purpose of the Act.

In fact, before 1960, all children had to have been born and have met these requirements before the father became disabled or aged, but Congress made a change in 1960 to allow children, legitimate children, to prove their dependency and their other eligibility requirements at the time that application was filed on their behalf and now, as



a result of that change, only illegitimate children are excluded.

QUESTION: Well, is your posture then, one that the difficulty with the statute is that it is overly inclusive?

MRS. STEVENS: Well, I think, your Honor, that the exclusion here -- if I may put it that way -- is over inclusive. The Government says that they have excluded afterborn, illegitimate children in order to prevent fraudulent claims and they have excluded with the possibly fraudulent claims a large group of, in fact, valid claimants.

QUESTION: Doesn't that often happen in line drawing?

MRS. STEVENS: I believe it does happen, but I think that when there are less drastic means for sorting out the fraudulent from the valid claims, that those less drastic means have to be employed. The hearing that would be required would be relatively simple. The Social Security Administration is clearly able to distinguish between fraudulent and nonfraudulent claims and the reason it is clear, your Honor, is that there are 24 states that allow illegitimate children to inherit from their fathers by the laws of intestate succession and in those states, children defined the way these children are defined, that is,

children born and otherwise eligible after their fathers become eligible for benefits, are allowed to present their claims and the Secretary, it seems, in those states is perfectly capable of sorting the fraudulent from the non-fraudulent claims.

Therefore, it is our position that this blanket exclusion cannot be necessary to sort out the fraudulent claims.

QUESTION: When you speak of "fraudulent claims," are you referring to those that would involve the question of paternity?

MRS. STEVENS: That would be, I believe, your Honor, the major problem of proof, because --

QUESTION: That would be the "major," you say?

MRS. STEVENS: There is also the issue or the possibility of the question of whether or not the child had been supported but that is something that children who are previously born have to prove, too, so the only possible fraud that the Government could be depending on would be children who were not, in fact, the children of the fathers and, as this Court has pointed out, although it is difficult to prove paternity, paternity proof cannot be an excuse for a blanket exclusion of an entire class.

QUESTION: In those states that allow inheritance by illegitimate children, such illegitimate children are not

ineligible under the federal statute, are they?

MRS. STEVENS: That is correct, your Honor. They are not ineligible.

QUESTION: That is, if they have been recognized by the state courts. Is that it? Or if --

MRS. STEVENS: If they merely live in a state in which they would be allowed to inherit by the laws of intestate succession, they are eligible to receive these benefits.

QUESTION: Regardless of whether or not they have been found to be illegitimate children by the state courts?

MRS. STEVENS: I imagine that in the probate proceedings --

QUESTION: Yes.

MRS. STEVENS: -- that might be an issue, but they are eligible regardless of what has happened prior to the death of the father. I think --

QUESTION: But in those states, in other words, the federal administrator and the administrative process has the aid of the fact-finding of the state courts. Is that right?

MRS. STEVENS: Not necessarily, your Honor, and I think this points up a very important factor of this law. The law depends on the law of intestate succession for



giving benefits to children whose parents are still alive and so the process by which the state will make that decision has not yet been effected. In fact, the law, this federal law, this federal program, is depending on the state law of intestate succession for the disposition of benefits while the father is still alive so that that process has not yet come into play and I think that if the federal statute were to depend on a state law for definition of familial obligations, it would be more reasonable for the federal statute to depend on laws that control support while the father was still living and this Court said only last year that once a legitimate child has been given a right to support by the father, an illegitimate child must be given that right also.

And I think that that decision in Gomez v. Perez should be controlling in this situation. It is not only -- in fact, the Plaintiffs in this case will be eligible to receive benefits under this section after their father dies because his acknowledgment of the children, while it came after the onset of disability and therefore does not qualify the children now, will have come before his death and so it will qualify him after he dies, in an irrational and arbitrary manner.

QUESTION: What kind of benefits are these involved here? He is still living and he is what, disabled?

MRS. STEVENS: He is living. He is disabled, yes, sir. The disability benefits.

QUESTION: The disability benefits. They would go directly to the legitimate children. This isn't any sort of Aid to Dependent Children Program, is it?

MRS. STEVENS: No, this is the Social Security OASDI Program and the benefits would go to the children, to these illegitimate children.

QUESTION: Directly.

MRS. STEVENS: Directly. Probably in his name, because he is their guardian. It would go directly to him.

The issue that the Government depends on largely is that illegitimate children are less likely to have been receiving support than legitimate children and that, therefore, this is a rational distinction, is in fact, irrelevant in this case because the section at issue makes dependency or the right to support a requirement of eligibility for all children.

The general likelihood of illegitimate children to support is completely irrelevant because no one legitimate or illegitimate can receive benefits who doesn't have the experience of or the right to support.

Now, the right to support is adequate because legitimate children never have to prove dependency.

Illegitimate children under Section 216(h)(3)

have to have been acknowledged or declared by a court to be eligible to be their father's children or beneficiaries of a court support order and any of these children have a right to support.

Those who have not been acknowledged have to have had experience of support so the general likelihood of illegitimate children to receive support cannot be relevant. Even if this Court would remove this bar excluding afterborn illegitimate children, no child would become eligible who did not have the right to or the experience of support.

Therefore, that argument on the part of the Government is completely irrelevant.

QUESTION: In your view, is it irrational to have a presumption that legitimate children are likely to be receiving support -- more likely to be receiving support than illegitimate children?

MRS. STEVENS: I am not contesting that presumption, but the presumption that includes them and excludes illegitimate children on the same basis, a presumption that operates generally for the entire class and doesn't allow any of them to offer proof of their particular situation, I believe, has an irrational effect.

QUESTION: In other words, if the legitimate children were not required to prove a dependency status, but illegitimate children were, you would apparently have no

trouble with that.

MRS. STEVENS: Well, your Honor, I believe that, in fact, illegitimacy is a suspect classification and would request that this Court recognize illegitimacy as a suspect classification and if it were so recognized, then a requirement that illegitimate children prove dependency when legitimate children did not have to, I think, would be a discrimination because in that case, the state would have to prove a stricter -- would have to defend the requirement against a stricter constitutional standard.

The argument that the Government is left with, because of the irrelevancy of the support, is the prevention of fraud argument and I think that in recent cases this Court has indicated that an exclusion of an entire group of recipients solely for the purpose of preventing fraud and promoting administrative efficiency is not permissible.

This is to create an irrebuttable presumption essentially identical to that created -- to that invalidated by this Court in the United States Department of Agriculture versus Murry, just last year. In Murry, a section of the Food Stamp Act declared ineligible any household containing a person over 18 years of age who had been claimed as a dependent for federal tax purposes by someone not eligible for food stamps and this Court found that that section was not a rational measure and that it rested on an irrebuttable

presumption often contrary to fact and therefore, violated due process requirements and I think that the irrebuttable presumption which is created in this case, which excludes the Plaintiffs and others like them, is similarly often contrary to fact and in violation of due process because these children are not allowed to offer the proof that they meet the requirements of Section 216(h)(3).

If they were legitimate or if they had been born before their fathers became eligible for benefits, they would be allowed to offer their proof and should it be satisfactory to the Secretary, they would be found eligible for benefits.

Now, they are totally and absolutely barred from offering that proof.

The discrimination against illegitimate children here challenged violates the constitutional guarantee of Equal Protection judged by the traditional standards because it is not rationally related to the purpose of the Act. The purpose of the Act is not simply to replace support lost at the moment the wage earner ceases being able to work. If that were true, legitimate afterborn children would still be barred and they are not.

I think that the standard must fall for still another reason and that is that it is a discrimination based on the status of illegitimacy and illegitimacy is properly a suspect class.



Several weeks ago, this Court, in Johnson versus Robison indicated the traditional indicia of suspectness and said that the CO class at issue in that case was -- did not possess an immutable characteristic determined solely by accident of birth but illegitimate children possess exactly that, an immutable characteristic determined solely by the accident of birth.

QUESTION: Of course, in many states, children who are born illegitimate can be legitimated through ---

MRS. STEVENS: That is true, your Honor, but not at their own desire or control. They can be legitimated but their parents, who put them in the illegitimate status to begin with, must make the decision to do that.

QUESTION: But unlike race or sex or maybe other things, being born abroad, for example, it is not immutable, to that extent, at least.

MRS. STEVENS: It is not as immutable, but to the degree -- in terms of the control of the persons so classified, it is immutable. There is no way an illegitimate child can have the status changed and --

QUESTION: Well, of course, what is meant by that standard, I suppose that a conscientious objector would argue that he has no control over his own status. That is the way his conscience reacts. It is not a volitional choice on his part.

MRS. STEVENS: I would think that that kind of conscience -- that the choice of one's conscience is something that one has more control over, although you wouldn't change it at a whim to obtain a benefit. It is something that you may rethink and something that you may change.

A status at law over which you have no control is something that you cannot change.

QUESTION: Well, would the father have increased benefits if this child were legitimated?

MRS. STEVENS: If this child received benefits, the family altogether would -- the family in which --

QUESTION: No, no, perhaps I don't understand the scheme. I had the impression that, were this child eligible, that would mean the father's payments would be larger. Is that right?

MRS. STEVENS: The child would receive benefits.

QUESTION: The child, is that it?

MRS. STEVENS: That's right.

QUESTION: Well, now, if this child were legitimated, would it now receive benefits?

MRS. STEVENS: Yes.

QUESTION: Oh, it would?

MRS. STEVENS: Yes. But there is no way that the child can be legitimated now because the mother of the child left the father years ago. The only way that he could

legitimate the child would be to marry the child's mother.

QUESTION: But suppose he adopted the child?

MRS. STEVENS: It is not certain that he could adopt the child, your Honor, but he certainly, he could attempt to adopt the child.

QUESTION: Well, if he succeeded, would the child then be eligible?

MRS. STEVENS: I think that the child would be eligible, if he did that. However, it isn't clear that he could adopt them and the Secretary has suggested that the purpose of this entire section is to discourage the manipulation of events solely in order to obtain benefits and if he were to adopt this child for no other reason than to obtain benefits, surely this would be the kind of manipulation of events that the Secretary says this section is meant to prevent.

QUESTION: Well, that is to say that nothing can be done to make this child eligible for benefits, if illegitimate at the time of the -- or born after the injury that the father suffers.

MRS. STEVENS: If he were not to adopt them.

QUESTION: Yes.

MRS. STEVENS: Then there would be no other way except through a move to remove this bar, yes, that is true, your Honor. The other --

QUESTION: Your view of what the Secretary would do in case of an adoption -- that is, you suggest he would regard that as a manipulation -- his view is certainly not an immutable view of the matter, is it?

MRS. STEVENS: His, the Secretary's?

QUESTION : Yes.

MRS. STEVENS: I hope not, your Honor.

However, in Stanley versus Illinois, I believe that this Court stated that to force a father to adopt his natural child in order to go around a burden that was placed on him only as the father of an illegitimate child would be an unjust and arbitrary burden to place on him when a father of a legitimate child, in a similar situation, would not have this burden.

It is also true, your Honor, that the father of the children in this case is an elderly, disabled, impecunious gentleman and it is not certain that the courts of Illinois would allow him to adopt a child for those reasons.

The other indicia of suspectness that the Court pointed to was that the saddling of a class with disabilities in the history of purposeful unequal treatment and a position of political powerlessness so as to command extraordinary protection from the majoritarian political process and it is surely clear that illegitimate children are in a situation of political powerlessness; although they are frequently

legislated against as a group, they have no legislative power as a group. They are a discreet and inferior minority who have no political power to defend themselves against this kind of arbitrary --

QUESTION: Would you say legitimate children had political power?

MRS. STEVENS: I think they have more political power, your Honor, because they are not discriminated against in this way. There are situations in which legitimate children are discriminated against as children as opposed to adults but there are more valid and reasonable distinctions between children and adults than between children who differ only because of the marital status of their parents.

The children in this situation -- the illegitimate children -- are classified solely by an accident of their birth and they cannot change it. They have no control over it. They have suffered as a result of this classification a stigma from which they will never recover and stigma is, I believe, a characteristic which this Court has sought to counteract by granting stricter judicial scrutiny to those classes of people who have suffered from that kind of stigma, particularly in a situation where the law in question will perpetuate the stigma and perpetuate the historical suffering of the class, as this will do, legitimate siblings of these children will be able to receive



benefits. In fact, they have legitimate siblings who are receiving benefits and to distinguish between the legitimate and illegitimate siblings is only to perpetrate the stigma that these children must suffer because of their parents' marital status.

The statutory section challenged here should therefore be subject to strict scrutiny and be upheld only if it is crucial to a compelling state interest, which it clearly is not. The Government has been able to show, indeed, no rational purpose for this classification, much less a compelling state purpose.

The Plaintiffs in this case are identically situated to children who would be able to receive benefits except for the fact that their father and mother never married and this fault, if you will, of their parents should not be used to deprive them of rights which they would otherwise have.

I'd like to reserve the rest of my time for rebuttal, your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mrs. Stevens.

Mr. Boggs.

ORAL ARGUMENT OF DANNY JULIAN BOGGS, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I would like, if I might, to begin by tracing more exactly what the statutory scheme at issue here is. I believe it has become somewhat more confused during the opposing argument and I believe that it is crucial to, perhaps the key point of this agreement between the two sides here which on the purpose of the Social Security Act as a whole.

We contend that while any look at the Social Security Act can tell you that it does not derive with a Aristotelian logic from some first principle, the basic purpose is to replace support which was lost due to the act of disability retirement or death.

Counsel opposite contend to the contrary, that its basic purpose is to pay people who have a right to support or who have actual support.

So let us look now at what the statutory scheme actually says. It begins that in order to gain benefits, one must be a child and child is then defined as essentially persons who may inherit under state intestacy laws as a child, which brings in, essentially, all legitimate children and it brings in those illegitimate children who meet the various state law qualifications which entitle them to inherit. In three or four states, this is any illegitimate child from the moment of birth. In most states, as I believe your Honor asked, it requires some statutory

action.

It may be merely a written acknowledgement; it may be merely open and notorious holding out. It may require a certain court action. But in any event, the child has to meet one of these qualifications.

Now, any of these qualifications would give it the right to inherit which, as we have indicated in our brief, was one of the original indications of the Social Security Act. Payments were made not to persons but to an estate and specifically this estate payment was phased out in favor of continuing payments, basically to those people who could inherit.

Then, in 1965, Congress said, well, there are other people who we feel should be able to get benefits and despite an advisory council report which they rely on which did use the phrase, "right to support" or "experience of support," they wrote in specific statutory criterion and they said, "If, before the parent became entitled," that is, before he became disabled, before he died, or before he became actually 64 -- I think, because they wanted to give you a one-year period before that 65 -- but if, before that, one of these things has happened, then you can get benefits.

If the father acknowledged you in writing, no judicial scrutiny required, a simple written acknowledgement; if there is a paternity order; if there was a support order

or if he was living with you or contributing to your support.

Now, in any of these cases, it could be a reasonable assumption or a preponderant assumption that you were getting support at that time and that, therefore, you lost support when that event took place. But I would point out that contrary to the argument made by counsel opposite, in the case of the acknowledgement or in the case of the simply living with, there is no necessary experience of support. There is no necessary right to support. There is, rather, the congressional judgment that this class of people probably lost support.

We further point out that this kind of judgment runs throughout the law. For example, legitimate children who would otherwise qualify, do not qualify if they were adopted by someone else, because in such a case, I think Congress reasonably judged that they probably did not lose support.

As another example, children who become married, even though they may be under 18, they may still have a right to support, they may still have an experience of support, but in judging that group, Congress decided that those people probably did not lose support and therefore, that class could be excluded.

So that what we have here is a general Congressional scheme which can be traced, I think, through

categories of the Social Security Law far outside children. I think one can examine almost any provision and find this kind of judgment which says, the question we look at is who is likely to have lost support and will --

QUESTION: Up to this point, no illegitimate children are excluded. I mean, up to this point of the Act, as you talk about it. Isn't that right?

MR. BOGGS: Well, not no illegitimates, illegitimates who fail any one or all of four tests.

QUESTION: Well, are all illegitimate children excluded up to this point at any space?

MR. BOGGS: Are all illegitimates? No, your Honor.

QUESTION: Well, why after the man becomes disabled did you?

MR. BOGGS: Well --

QUESTION: Did Congress do it?

MR. BOGGS: I would say, your Honor, that the -- in fact, the line I was beginning was that the real item which needs to be explained is not why we deny payments to these illegitimates, because, by definition, since they were born after the man became disabled, they could not have lost support due to his disability.

The question rather is, why do we allow payment to those persons who can inherit, which include both



legitimates and illegitimates and as I have suggested, persons who can inherit under state law essentially also suffer a loss that the Social Security Act, we believe, may provide compensation for because since the father could not continue earning and provide an estate, since the Social Security Act no longer adds to that estate as it did up until 1939, those persons who can inherit, whether they are legitimate or illegitimate, those persons who can inherit, do suffer this loss for which we believe there can be compensation so that, essentially, we base the reasonableness of this on two points.

The first is that it is a reasonable judgment to say that, in general, people --

QUESTION: Well, before the man becomes disabled --

MR. BOGGS: Yes, sir.

QUESTION: Right?

MR. BOGGS: Before he becomes disabled.

QUESTION: There is no distinction between illegitimate and legitimate children and that illegitimate children are not excluded per se.

MR. BOGGS: Not -- not per se. They may have to meet one of various tests which legitimates would not have to meet so that --

QUESTION: But not per se.

MR. BOGGS: -- for example --

QUESTION: And then once the man is injured, that all changes.

MR. BOGGS: No, sir, we would suggest that it does not. Once the man is disabled or dead or reaches the age of 65 --

QUESTION: Well, let's leave dead out. Dead is not in this case.

MR. BOGGS: Well, I -- it is not in this case, but I would suggest briefly, your Honor, that it --

QUESTION: Well, is the man --

MR. BOGGS: If the rules suggested by counsel opposite were adopted, which I take it would mean that any of these tests could be met after the entitling event, for example, a paternity order after death would qualify a child.

QUESTION: I am just on one narrow point.

MR. BOGGS: All right, your Honor.

QUESTION: Once he becomes disabled, any illegitimate child born a moment after that is in bad shape.

MR. BOGGS: Well, your Honor --

QUESTION: Right?

MR. BOGGS: It -- it --

QUESTION: Right?

MR. BOGGS: It depends on where he lives. First off, in --

QUESTION: In Illinois.

MR. BOGGS: In Illinois, he has some difficulties, yes, your Honor.

QUESTION: Difficulties?

MR. BOGGS: Well, that --

QUESTION: Well, why?

MR. BOGGS: Because --

QUESTION: Why?

MR. BOGGS: Because, your Honor, he cannot have lost any support.

QUESTION: But, I mean, just by accidental --

MR. BOGGS: That is, after the disability.

QUESTION: Just by accident of birth, he is born a day afterwards.

MR. BOGGS: Well, your Honor, I suggest that the Social Security Laws, as with many laws, are replete with that type of line. For example, a widow, a wife --

QUESTION: I am only asking why?

MR. BOGGS: The reason, your Honor, is --

QUESTION: That's what I want to know.

MR. BOGGS: -- that he cannot have lost any support. If he was born the day before, he would have had a reasonable expectation to have been supported, to have lost support because of that disability.

QUESTION: That would be true of a legitimate child, as well.

MR. BOGGS: Yes, it is, your Honor, and that is the reason that we make and perhaps, are required to make the additional argument with regard to inheritance, so that this, we believe, is not simply a discrimination between a legitimate and an illegitimate, it is a discrimination between persons who can inherit and persons who cannot inherit, a distinction which this Court, in Labine versus Vincent, has upheld in allowing that distinction to be based in part upon the question of legitimacy of birth.

QUESTION: What about this discrimination between the illegitimate child born the day before and the illegitimate child born the day after?

MR. BOGGS: Well, your Honor, we believe that on the face of that distinction, that there is no Equal Protection problem with that, that that arises in any type of line-drawing proposition.

For example, if I could give you two other examples from the law, one we allude to in our brief, which is that a woman who is married to a man who dies within nine months of their marriage cannot get widow's benefits.

Now, it is true that at eight months and 30 days, I don't know that her dependency is any less than at nine months and one day, but we believe that Congress had a reasonable purpose in that case to prevent people from getting benefits by marrying people essentially on their

deathbed and you have to draw a line.

Another example which is even closer to this is as follows: a husband or a parent, in order to receive benefits on the account of his wife or his child, must have been receiving one-half of his support at the time of entitlement, just like in our case, at the time of disability, so, for example, a man who is not dependent on his wife when she becomes disabled, but does become dependent on her later, he loses. He cannot receive Social Security benefits and the reason is that at the time of her entitlement, he lost no support. If he had been dependent on her the day before she became disabled or became age 65, he would receive benefits.

Now, granted, in any given case, the result may appear harsh. As a matter of fact, any time a person misses out under just one part of a rule, he can easily say, as counsel does here, well, we could qualify if you would take out this one rule. But as we, I believe, have shown, this distinction is one that is rationally related to the purposes of the Social Security Act which is to replace support which was lost at the time of the person's ceased earning. That is, death, disability, or age 65.

We would also like to take issue with the contention that the primary purpose of this is merely administrative efficiency, merely to prevent fraud. They



have argued this at quite considerable length and, while certainly, we believe that it has an additional aspect which is that an action such as an acknowledgment may more likely be considered reliable or more likely be considered valid if it occurs at a time when that action in itself is not the thing which creates an entitlement to benefit and, in addition, when that action carries with it no other accompanying burdens or reasons, for example, in the adoption instance which was alluded to somewhat, the Secretary would have no objection, in fact, to an adoption where court scrutiny would be required that it would be in the child's best interest, an adoption would also place the parent under a number of other burdens and obligations and give the child other rights, other than simply qualifying him for Social Security benefits so that in that case, the statutory criteria are tied to other indicia which would indicate the family relationship.

Finally, the point was argued that this distinction is made only because illegitimates are less likely to have received support than legitimates and thereby raising the idea that this should be, in fact, judged on an individual basis. But as we have pointed out, it is not a distinction generally between legitimates and illegitimates on the basis of their having been likely to have received support.

Those persons born after a death, disability, or age 65 could not have received support and that is the basic distinction. Then those legitimates and those inheriting illegitimates or people who are legitimated, who thereby become legitimate even if, in their state they could not have inherited as illegitimates, any of those people who thereby acquire inheritance rights thereby are also allowed to receive Social Security benefits.

QUESTION: Mr. Boggs, the district court in this case upheld this legislation fully, as I read the opinion, upon the proposition that it is designed to prevent fraud. Do you read its opinion that way?

MR. BOGGS: That is the primary basis upon which it relied, perhaps the only basis on which they relied. I, in fact, don't know whether the argument we are presenting here was presented in that complexity.

QUESTION: Well, I am just referring to their opinion, the court's opinion.

MR. BOGGS: Yes, that is what I am saying, that that is what one could gather from their opinion.

QUESTION: And you haven't spent -- maybe I missed it -- you haven't devoted much time in your argument to that.

MR. BOGGS: No, we -- I would say that we tried to present what we believe is the strongest argument for

upholding it, which is the one that we have presented to date. Certainly, we recognize that there are severe problems with an argument based solely on a discrimination based on a fraud rationale when additional investigation may be required in some circumstances.

We think that, however, when the distinction made is based upon a status such as the acknowledgment or the contribution occurring before the entitling event, we believe that that is not solely a fraud-based rationale but it is a rationale based on what the basic entitlement of the Social Security Act is.

QUESTION: Well, except I think that you have agreed that the justification for the legislation that would be based upon the support not having been available prior to the event. It has nothing to do with legitimacy or illegitimacy. It has to do with being afterborn.

MR. BOGGS: Yes, sir.

QUESTION: And, therefore, that certainly does not support this legislation, does it? Because it doesn't have -- it is wholly irrelevant to legitimacy or illegitimacy. In other words, an afterborn, legitimate child who has never had any support --

MR. BOGGS: Right, he does not --

QUESTION: -- by definition because he hasn't been in existence, he fully shares under the statute.

MR. BOGGS: He does not recover, however, because of his lost support at the time of the disability. He recovers because of his ability to inherit. That would be our understanding.

QUESTION: But he gets --

MR. BOGGS: I would suggest --

QUESTION: But if the hypothesis is that he has never had any support, never had any expectation or fact of support since he wasn't in existence and hadn't been born, that cuts across legitimate and illegitimate children. It is equally true of both and I don't think it is -- I don't see how you can argue that it supports this distinction between legitimate and illegitimate children.

MR. BOGGS: Well, your Honor, I take it you are then saying that -- it would appear to me that --

QUESTION: I am just asking.

MR. BOGGS: Okay. Well, we would indicate that, as we pointed out in talking about the 1939 Amendment, at that time persons who could have gotten money from the parents' estate, that possible benefit was taken away and instead, life payments were made as a substitute for that, so that in our case, the legitimate and the illegitimate who can inherit -- in half the states and more if he is legitimated -- that child, by the '39 Amendment, lost his potentiality to get that money from the parents' estate and

we feel it was not irrational at all for Congress to say that those children, though perhaps they do not qualify under the theory we just stated, also have right to receive similar benefits during life so that would be the way that we make that distinction.

QUESTION: What happens after he dies, with the illegitimate child?

MR. BOGGS: Your Honor, a death benefit would be paid. Again, payments after death would be made to persons who met the qualifications at the time of death so that, for instance, these children would, in fact, be able to receive benefits after their wage earner died because in that case, they would have -- assuming he meets the test which is that he was supporting them, he was contributing to their support at the time of his death, those children then did lose benefits, did lose support and that class of children probably would have lost support as a result of the entitling event.

QUESTION: So they do inherit money? These illegitimate children, they --

MR. BOGGS: No, your Honor, they do not inherit. They do not inherit. They receive --

QUESTION: They get it after death.

MR. BOGGS: No, they receive continuing benefits. They receive --



QUESTION: After death.

MR. BOGGS: Yes, they receive --

QUESTION: The illegitimate children.

MR. BOGGS: If he met one of these tests.

QUESTION: Right. But they can't get it before death. Right?

MR. BOGGS: Because between --

QUESTION: No, because of the inheritance laws.

MR. BOGGS: No.

QUESTION: Well, that is what you just said.

MR. BOGGS: No, your Honor.

QUESTION: You said the reason that you didn't give it to the illegitimate children was because they couldn't inherit. Is that what you said?

MR. BOGGS: That is the reason they do not receive that particular benefit.

QUESTION: That's right.

MR. BOGGS: But, for example, if they were not acknowledged or if he was not contributing to them, they would not receive the death benefits, either.

QUESTION: Well, these children -- well, I just want my facts straight.

MR. BOGGS: All right.

QUESTION: These children here --

MR. BOGGS: Eugenio and Alicia, right.

QUESTION: If they are alive when this man dies, they will get Social Security benefits. Right or wrong?

MR. BOGGS: If his actions to date constitute an acknowledgement, they would. If the question is, his contribution, then his contribution would have to continue until the time of their death, time of his death. But if his actions to date constitute an acknowledgement, then they would receive Social Security benefits.

We believe that the indications that we have set out thus far do show that the statute has, while perhaps not, as I have indicated, a basis in Aristotelian logic from a first principle, as this Court has said, in the field of social benefits, there may be a need for rough accommodations, though they may be somewhat illogical under a strict logical test, or unscientific.

In the Social Security Act, and not just in the children's sections, Congress has made many distinctions, as we pointed out, in the wives' benefits, in the husbands' benefits, to try to limit benefits to persons who probably had lost support.

As yet another example, children beyond the age of 18, when they may have no right to support, when they may have no experience of support individually, still receive benefits if they are students, because Congress has judged that, on the whole, those people are more likely to have been

supported.

Now, a 21-year-old who is not a student cannot come in and offer proof that he was supported, cannot offer proof of his individual dependency because Congress has made the judgment that that is the classification that is to be made and so we would urge upon the Court here that this is not, in fact, a distinction made against illegitimate children on the grounds of their illegitimacy. It is the distinction made first between those who are likely to have lost support and those who are not likely to have lost support at the time of the entitling event and that, secondly, it is the payment which is made to persons who can inherit under valid state laws and who thereby suffer a loss which we believe Congress is entitled to compensate for.

QUESTION: Mr. Boggs?

MR. BOGGS: Yes?

QUESTION: Does Illinois require the father of an illegitimate child to support it?

MR. BOGGS: I believe that it does. Certainly, after this Court's decision in Gomez, any state which requires a legitimate child to be supported, which is virtually all of the states, would require the father of an illegitimate child to support it and that, of course, is one reason why if the Court follows the rationale that a right to support is all that is needed, then every illegitimate child, whether they

had ever been [in] any kind of contact with the father, ever since the moment of conception, would also be entitled to benefits and that, of course, is the Norton case which is presently pending on a jurisdictional statement here and that is why that if -- if the true gravamen is that you can never say legitimate is different from illegitimate, then not only these children would receive benefits, but children who had never had any contact with the fathers so that the -- and, as we indicated, running across the law there is the feeling that right to support is not sufficient. It may frequently coincide but is not in itself sufficient nor the basis of the Social Security Acts benefit payments.

If there are no further questions --

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

Do you have anything further, Mrs. Stevens?

REBUTTAL ARGUMENT OF MRS. JANE G. STEVENS

MRS. STEVENS: May it please the Court:

I think that the Counsel for the Secretary has depended on two -- if I may say so -- flawed arguments.

The first is that the likelihood that the purpose of this section is to provide support for those most likely to have lost support and I think that the clear fact that legitimate children born after the onset of disability, who never had support from current earnings, are eligible, must indicate that that cannot be the purpose of this

distinction. Legitimate children who have had no experience of support are eligible to receive these benefits.

And the other buttress of the Secretary's argument is that the distinction is based on the distinction between those who can and those who cannot inherit under the laws of intestacy and there are two weaknesses in that argument.

The first is in the legislative history. In 1965, when they added this section to the Act, Congress stated -- I will read a quote to you from Senate Report 404 in 1965 -- "The committee believes that in a national program that is intended to pay benefits to replace support for a child when his father retires, dies or becomes disabled, whether a child gets benefits should not depend on whether he can inherit his father's intestate personal property under the laws of the state in which his father happens to live."

That was not, in fact, the intent of Congress. The purpose of adding Section 216 in the first place was so that this federal program would not depend exclusively on the state laws of intestate succession.

And the other weakness of that argument is that this is not a means for deciding who will receive benefits after a wage earner dies, but who will receive benefits while he is still alive and would be, but for his disability or age, supporting the children and, therefore, it would be



rational, perhaps, to depend on laws providing support but not on the laws of intestate succession.

In fact, Mr. Jimenez, in this case, has acknowledged these children formally in writing and they will be eligible to receive benefits when he dies and, in fact, even if he had not acknowledged them in writing, they would be eligible to receive benefits when he dies because he is living with them and living with them is a means to qualify under this section.

The likelihood of support is simply not relevant in a section which makes necessary for eligibility, acknowledgment or a court order which would give a right to support or the experience of support or living with. No one will qualify under this section who has not the right to or the experience of support, no matter when he was born in relation to his father's age or disability and therefore, I think that the argument on which the Secretary now, apparently, entirely depends, is an argument without merit and I therefore, respectfully request that this exclusion of afterborn children be stricken from the section.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Stevens.

Thank you, Mr. Boggs. The case is submitted.

[Whereupon, at 10:54 o'clock a.m., the case was submitted.]