ORIGINAL

In the

Supreme Court of the United States

JOSEPH A. CALIFANO, JR.,
SECRETARY OF HEALTH, EDUCATION,
AND WELFARE,
APPELLANT,
V.
GRACE AZNAVORIAN, ET AL.,
APPELLEES.
AND
GRACE AZNAVORIAN, ET AL.,
APPELLANT,
V.
JOSEPH A. CALIFANO, JR.,
SECRETARY OF HEALTH, EDUCATION,
AND WELFARE,
APPELLEE.

Nos. 77-991 and
77-5999
(consolidated)

Washington, D. C.
November 6, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, Appellant, v. GRACE AZNAVORIAN, ET AL., Appellees. and GRACE AZNAVORIAN, ET AL., Appellant, v. JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, Appellee.	Nos. 77-991 and 77-5999 (consolidated)

Washington, D. C.
Monday, November 6, 1978

The above-entitled matters came on for argument at 10:04 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

PETER BUSCEMI, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, on behalf Joseph Califano, (pro hac vice.)

PETER A. SCHEY, ESQ., Legal Aid Foundation of Los Angeles, 1550 West Eighth Street, Los Angeles, California 90017, on behalf of Grace Aznavorian, et al.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 991, Califano, and the consolidated case.

Mr. Buscemi, you may proceed.

ORAL ARGUMENT OF PETER BUSCEMI, ESQ.,
ON BEHALF OF JOSEPH A. CALIFANO, JR., SECRETARY OF
HEALTH, EDUCATION, AND WELFARE

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

The principle issue in these consolidated cases is whether the Constitution forbids Congress from providing that certain Federal welfare benefits should be paid only for those months during which the recipient is in the United States for at least part of the month.

The cases are here on appeal from the United States District Court for the Southern District of California. The named Appellee in No. 77-991, Grace Aznavorian, receives benefits under the Supplemental Security Income program. That program was established in 1972, and it was designed to consolidate and improve upon the previously existing cooperative Federal State Aid programs for the aids to the blind and disabled.

The Social Security Administration was assigned the task of administering the new program and the Federal Government agreed to bear the entire cost of providing basic monthly

benefit levels for persons who could establish financial need and who could satisfy the requirements of age, blindness or disability provided in the statute.

The benefit levels under the Supplemental Security Income program are set by reference to the cost-of-living in the United States. In 1974, Aznavorian's monthly benefits were $146. Today, after several cost-of-living increases, they are approximately $190 a month.

I would like to emphasize at the outset that the Supplemental Security Income program involved in this case is a Federal welfare program involving Government grants to persons needing public financial assistance to live in the United States. It is completely unrelated to the Social Security Old Age, Survivors, Disability Insurance program. Unlike that program which is funded out of a trust fund from employer and employee contributions, the Supplemental Security Income program is funded out of general revenues and its only similarity to the Social Security Insurance program is that they both are administered by the Social Security Administration.

Aznavorian began receiving benefits on January 1, 1974, the date that the SSI program became effective. She was converted from her previous coverage under a California welfare program for the disabled and, therefore, she began receiving benefits immediately. Shortly, thereafter, on July 21,

1974, she left the United States and traveled to Guadalajara, Mexico. She did not return to the country until September 1, 1974, and as a consequence of that trip she lost her SSI benefits for August and September of 1974. The Social Security Administration refused to pay benefits for those months because of Section 1611(f) of the Social Security Act, which is the statutory provision that is at issue in this case.

Congress adopted Section 1611(f) because it wanted to insure that Federal Welfare benefits were paid only to people who actually need them to live in the United States. The legislature did not forbid SSI recipients from traveling abroad. It provided only that,where otherwise eligible persons decide to take foreign trips for an extended period of time,they may not receive welfare benefits for the time they are outside the country. This purpose to provide public assistance only to persons who need it to support themselves in the United States is accomplished by Section 1611(f). That section contains two sentences. The first sentence provides that "no person shall be considered eligible for SSI benefits for any month during all of which he or she is outside the United States." Aznavorian lost her SSI benefits for August 1974 because of the operation of this sentence.

The second sentence of 1611(f) provides that "once an otherwise eligible recipient is outside the country for 30 consecutive days, he is treated as remaining outside the

country until he has returned to the United States and stayd here for 30 consecutive days." Aznavorian lost her benefits for September 1974 because of the operation of this second sentence.

Now, I would like to make one thing clear about the way the second sentence of Section 1611(f) operates, before I go any further. If a person is outside the country for 30 consecutive days, he is treated as remaining outside the country until he returns and stays in the United States for 30 consecutive days. But this does not mean that he cannot receive SSI benefits for any of that 30-day waiting period. If the 30-day waiting period expires before the end of the month, the person can receive his full SSI benefits for that month. Thus, a person, for example, who leaves on June 10th and returns to the United States on July 20th, if he is still in the country on August 19, thirty days later, he will receive benefits for the full month of August. The provision is designed only to equalize treatment between people who are outside the country for a full calendar month and those who are out for a period longer than 30 days, which spans two calendar months, and therefore they are in the country for part of each.

QUESTION: In your hypothetical case, he would lose benefits for one month only, is that it?

MR. BUSCEMI: In my hypothetical, yes. He would lose benefits only for the month of July.

QUESTION: I am sorry. I am puzzled about the hypothetical case. He wasn't out for the whole month of July in your hypothetical case, so why would he lose --

MR. BUSCEMI: He was outside the country for 20 days and then the remaining 10 days of the month, or the remaining 11 days of the month, he is treated as being outside the country, under the second sentence of Section 1611(f).

QUESTION: I see.

MR. BUSCEMI: Now, it is the Secretary's position that Section 1611(f) is rationally related to the legitimate Government purpose of limiting welfare payments to persons who actually need them to live in the United States. Appellees in the District Court believe, however, that the operation of Section 1611(f) involves an unconstitutional infringement on the right to travel outside the United States. Appellees, after exhausting their available administrative remedies, filed this class action and alleged that the suspension of SSI benefits to otherwise eligible recipients who are outside the country for 30 or more consecutive days, is an improper penalty on the exercise of what she called "the fundamental constitutional right to foreign travel."

Now, District Court did not completely accept Appellee's position. It observed that international travel has traditionally been subject to more controls than interstate travel and said that the right to travel internationally

should not be equated or put on an equal footing with the right to travel interstate.

However, the court did decide that the right to international travel is a basic constitutional right and, therefore, that any governmental restriction, no matter how minor on such travel, must bear a fair and substantial relationship to a legitimate Government purpose.

The court concluded that Congress could have chosen less drastic means to prevent fraudulent claims for SSI benefits and to insure that such benefits were paid only to United States residents. The court, therefore, declared Section 1611 (f) unconstitutional and directed the Secretary to pay Aznavorian the benefits she would have received in August and September of 1974, had it not been for her trip to Mexico.

We believe that the District Court erred in applying this unusually stringent standard of review to Section 1611(f). The Court has repeatedly held that statutory classifications of this kind in social welfare programs should be sustained if they bear a rational relationship to a legitimate governmental purpose. Indeed, in Califano v. Jobst, decided just last term, the Court made clear that the validity of a particular classification must be measured against the rational basis standard, even if the classification may have some incidental effect on a constitutionally protected right, in that case the right to marry.

Another case decided last term, Califano v. Gautier Torres, demonstrates the District Court error in this case in assigning a special constitutional status to the right to travel abroad. As the Court said in Gautier Torres, "the right to international travel does not enjoy the same degree of constitutional protection as the right to travel interstate. The right to travel outside the country is protected by the Due Process Clause of the Fifth Amendment and, as such, can be regulated within the bounds of due process." This statement runs directly counter, we submit, to the District Court's holding in this case.

Now, the District Court cites three Supreme Court cases for its proposition that an especially strong showing is required to justify any infringement on the right to travel abroad. None of those cases support the result reached below. Kent v. Dulles, the first of the cases, was a statutory interpretation case that simply held that the Secretary of State did not have the power, under the statutes passed in 1952 and 1956, to deny passports solely on the basis of personal beliefs, political views, political expressions. Aptheker v. Secretary of State recognized Congress' right to regulate travel abroad, but simply held that a particular exercise of that power, the Subversive Activities Control Act, went too far by making it a crime for any member of any Communist organization to use or even apply for a passport.

Finally, Zemel v. Rusk, cited by Appellees in the District Court, not only acknowledged the congressional power to regulate travel outside the country, but upheld the constitutionality of the Passport Act of 1926 to the extent that it was interpreted to permit the Secretary of State to refuse to validate passports for persons who want to travel to particular countries if the Secretary found that such travel might be injurious to American foreign policy positions.

In none of those cases, did the Court indicate that there was a special standard that needed to be applied any time there was an infringement on the right to travel abroad.

It is worth pointing out, I think, that Section 1611(f) does not prohibit any foreign travel. It is absolutely neutral with respect to trips of 30 days or less. And, with respect to longer trips, the Congress has chosen to provide only that no SSI benefits will be paid for months during all of which the recipient is outside the country.

As a practical matter, of course, the SSI recipient's ability to travel abroad for lengthy periods is limited by financial factors that are unrelated to Section 1611(f). In order to receive SSI benefits at all,the recipient must demonstrate that he has less than $1500 in personal resources. Foreign trips lasting longer than the 30-day period are unlikely to be within the financial reach of most SSI recipients. And if such trips are made possible in some cases by the

availability of accommodations with friends or relatives outside the country, this is precisely the kind of situation in which the payment of SSI benefits to persons outside the country would be inappropriate.

We believe, as I said before, that Section 1611(f) is rationally related to a legitimate congressional goal, providing financial aid to persons who need it to live in the United States. We also think, as we stated in the brief, that it is related to the purpose of paying SSI benefits only to United States residents, a purpose that Appellees concede is a legitimate one.

Section 1611(f) makes it unnecessary for the Social Security Administration to decide each time a recipient leaves the country whether that person is abandoning his United States residence. The Social Security Administration simply stops payments after the recipient has been outside the country for a full month. We believe that this is a rational legislative judgment that should be upheld.

Now, we have also argued in our brief that the District Court's award of retroactive monetary relief was improper because Congress did not choose to waive sovereign immunity for claims that benefits were unconstitutionally denied under -- even when they were denied in accordance with a statutory provision. We have also argued that the District Court's limitation of relief to the currently needy members of the

class was a legitimate exercise of the District Court's equitable discretion.

Unless the Court has questions on the first part of the brief or any of these other two, I would like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Schey.

ORAL ARGUMENT OF PETER A. SCHEY, ESQ.,

ON BEHALF OF GRACE AZNAVORIAN

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

This case offers this Court a first opportunity to provide plenary review to this nation's income maintenance program. It likewise provides a first opportunity to provide plenary review to an international right to travel case, since Zemel v. Rusk case in 1965.

The income maintenance program, also known as the SSI program, provides the subsistence for 4½ million American citizens. These persons are elderly persons who were either disabled at birth or disabled later in life --

QUESTION: Does it make any difference what the factual situation is, in that respect, for the basic question before the Court?

MR. SCHEY: We believe it does make a difference, Your Honor, because many of these persons, elderly persons

over 65 years of age worked arduously throughout their lives but they simply were unlucky enough not to work in the right kind of employment, the kind of employment which would have covered them under Title 2 of the Social Security Act. Had they engaged in employment under Title 2 of the Social Security Act, they would not only be able to travel freely around the world, they would be able to reside any place that they so desire.

QUESTION: That's because of statutory provisions.

MR. SCHEY: That is correct.

QUESTION: But your submission, if Congress decided otherwise, in these other programs -- Your submission would be that would be invalid, too?

MR. SCHEY: That is correct. I think that our same arguments would apply should the same restrictions apply to Title 2. I raise this because Mrs. Aznavorian, who worked as a seamstress for most of her life here in the United States, is simply not fortunate enough to have that covered by Title 2. At this point, she is an elderly person, living with illness, who chose to go to Mexico --

QUESTION: This is Equal Protection you are arguing now?

MR. SCHEY: We believe that the case could be analyzed under either an Equal Protection or a Due Process approach. We believe that the result would be the same under

either approach.

QUESTION: I have great difficulty when you say that they both apply. I prefer if you pick one of them.

MR. SCHEY: We believe that the primary analysis and the primary analysis presented in our brief is a Due Process analysis.

QUESTION: That's what I thought, but that's not what you are arguing now.

MR. SCHEY: I was just mentioning her status vis-a-vis the employment to highlight what we feel is the discriminatory. --

QUESTION: We can't deal with highlights. We deal with statutes.

MR. SCHEY: Yes, Your Honor.

I may point out that Mrs. Aznavorian traveled to Mexico intending to return to the United States within one month. The record reflects that she was aware of the limitations on her right to travel. The record also --

QUESTION: You talk about the right to travel as though that is established as a matter of constitutional law, that there is a right of international travel. Thats one of the contested issues in this case, isn't it?

MR. SCHEY: Yes, it is, Your Honor.

QUESTION: As one who many years ago was influenced in his legal education by somebody who nobody has heard of any

more, Professor Hofeld, I have often been concerned about this throwing around loosely of the word "right." If somebody has a right, somebody on the other side must have a duty.

Now, it has been held, hasn't it, at least in some cases that the international travel by a citizen of the United States or a resident of the United States is no more than a freedom. Isn't that correct?

MR. SCHEY: Your Honor --

QUESTION: As contrasted with interstate travel which has been established as a constitutional right.

MR. SCHEY: Your Honor, we believe, contrary to the Secretary, that the cases of Kent, Aptheker and Zemel clearly establish -- And, in fact, that 750 years of Anglo-American jurisprudence clearly establish a right to leave the boundaries of this country and to reenter the boundaries of this country.

While the case of Aptheker, which also decided the constitutionality of a statute, did not utilize language wedded to a strict two-tier analysis, the language utilized is interesting. If I may just quote one or two sentences: "Even though the Government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties, when the end can be more narrowly achieved."

QUESTION: That doesn't talk about rights. It talks about liberties. And liberty is a synonym for freedom.

MR. SCHEY: That is correct, Your Honor.

QUESTION: That's directly from Shelton v. Tucker.

MR. SCHEY: That is correct. And it is interesting to note that the case of Shapiro v. Thompson relies in its adoption of a heightened scrutiny standard, relies on precisely the same cases which the case of Aptheker relied on. In fact, it relies on precisely the same pages of the same cases that the Aptheker case relied on.

QUESTION: Mr. Schey, your reference to the Kent, Aptheker and Zemel cases, which are obviously in controversy here between you and your opponent, brings to my mind this question, which is highlighted by the language on page 16 of 381 U.S., from Zemel v. Rusk, where the Court says that "the claim is different from that which is raised in Kent and in Aptheker for the refusal to validate Appellant's passport does not result from any expression or association on his part."

Don't you think it is fair to say that all three of those cases did have some sort of First Amendment overtones to them?

MR. SCHEY: Well, Your Honor, I do agree. I think that all three cases did have First Amendment overtones. --

QUESTION: And claims.

MR. SCHEY: -- However, the Court in Zemel very clearly stated at page 16, "We cannot accept the contention of Appellant that it is a First Amendment right which is here involved." To the extent that the Secretary's refusal to validate

passports acts as an inhibition, it is an inhibition action. And there are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.

Now, clearly, though -- and I should also point out, Your Honors, that in a concurring opinion in the case of Aptheker, Justice Black, in contrast to the majority opinion, relied on the First Amendment and felt that it was unnecessary to invoke the Fifth Amendment, as the majority had done.

QUESTION: Didn't Aptheker involve prohibition, complete prohibition, at trial?

MR. SCHEY: No, it did not, Your Honor. That is one of the arguments that the Secretary makes here. The Secretary's argument throughout is that no more than a rational basis test should apply here. And he draws that conclusion by saying that the impact here is only indirect, it is not direct.

However, this Court recognized -- it certainly recognized in Shapiro v. Thompson --

QUESTION: No, I am talking about Aptheker.

MR. SCHEY: And it also recognized in Aptheker and in Kent and in Zemel --

QUESTION: Aptheker did not involve complete --

MR. SCHEY: -- an absolute prohibition. It did not, Your Honor. All that it involved was the fact that he could not get a passport. In fact, in Zemel, which was the only case

that this Court has ever decided in which it found that the Government interest --

QUESTION: You can travel without a passport?

MR. SCHEY: That is absolutely correct, Your Honor.

QUESTION: Don't you sort of go to jail if you do?

MR. SCHEY: No, you don't. And that was decided in, I believe, 1976, in the case of U.S. v. Laub in this very Court. In fact, in that case, in U.S. v. Laub, which is cited in our briefs, the Government and the parties agreed that hundreds of persons had traveled -- not only thousands had traveled without passports -- but that hundreds had traveled through the years in violation of the area restrictions that were involved --

QUESTION: How many people do you think have committed robberies and haven't been arrested?

MR. SCHEY: Your Honor, the issue in Laub was not whether or not the people had been caught or not --

QUESTION: I am talking about Aptheker.

MR. SCHEY: Your Honor, in Aptheker, the person was not precluded from traveling. There was no direct prohibition on his right to leave the country. The sole question was whether or not he could leave the country with a passport. It was an indirect prohibition, and the same was true in the case of Zemel v. Rusk, which, of course, in that case the Government interest was extremely large. The Cuban missile crisis was occurring at the time. And, nevertheless, Mr. Zemel

could still travel to Cuba, which is where he wanted to go. I am not saying that that is right or wrong, but that is the reality. What the case decided -- and, in fact, what every case -- this Court very clearly said in the case of Memorial Hospital v. Maricopa County, that in order to find infringement -- and it is said in the abortion cases --

QUESTION: What international travel was involved in that case?

MR. SCHEY: In which case, Your Honor?

QUESTION: Maricopa County case.

MR. SCHEY: Your Honor, that was not an international case. However, I believe that the importance of that case, as the importance in Aptheker, Kent and Zemel, is that this Court does not require a total flat prohibition on the exercise of a right before it finds an infringement of that right.

QUESTION: First of all, you have to find a right, under the Constitution. Now, are you suggesting that the freedom to leave our country and travel internationally is the precise equivalent of the right to travel from state to state?

MR. SCHEY: No, we are not claiming that.

QUESTION: They are quite different, aren't they?

MR. SCHEY: That is correct, Your Honor.

QUESTION: It is unthinkable that a passport be

required to travel from New York to Ohio, and yet it is accepted that a passport is required to travel from New York to France.

MR. SCHEY: That is absolutely correct, Your Honor.

We do not take the position that the international ability to travel back and forth across the frontiers has the equivalent constitutional weight that interstate right to travel has. And I think that the decisions of this Court indicate that. I should also point out, though, that this Court and lower courts for the past 20 years -- and a number of the cases are cited in our brief, about half a page of cases -- have cited the interstate and the international cases interchangeably, in recognizing --

QUESTION: From the way you have just answered my question, you would concede that that was mistaken or too loose on the part of those courts.

MR. SCHEY: That is correct, Your Honor. We feel that in the case of Aptheker this Court defined the travel as "a fundamental liberty." And they then went on, unlike what the Secretary suggests, "that they merely applied a rational basis test." That is absolutely false. The Government argued a rational basis test in Kent, in Aptheker in Zemel and in Laub, and in all four of those cases this Court rejected the terminology of a rational basis test. This, in fact, marks the fifth occasion in which the Government has requested that

this Court adopt no more than a rational basis test when analyzing the fundamental liberty of traveling across our borders. In every one of the prior cases, that request was denied. In fact, in Aptheker, the lower court specifically applied a rational basis test. In Aptheker and Zemel, the dissent in this Court specifically applied a rational basis test.

We believe that, while not arguing that the same heightened scrutiny,that the strictest scrutiny which applied in Shapiro should apply in this case. We have argued --

QUESTION: Here you are equating again interstate travel with foreign travel, when you speak of Shapiro.

MR. SCHEY: Your Honor, we are not arguing -- My statement was that we are not arguing that the strictest of scrutiny standards which were developed in Shapiro do apply here. Instead, we are arguing that this Court should recognize, as it has done in matters of marriage, as it has done in matters of abortion, as it has done in matters of illegitimacy, that here involved is a basic liberty. And in all of those cases, as Mr. Justice Blackmun pointed out in Mathews v. Lucas, Mr. Justice Stevens in Califano v. Jobst, the two cases just cited by the Secretary, in looking at the relationship between the purpose of a governmental restriction and the means implemented to effectuate that purpose, those cases which both involved Social Security benefits stated, "We must look at the

reasonably empirical judgments of the presumptions involved."

The Jobst case, cited by the Secretary, said, "We must look to see whether tradition and common experience support the presumptions." We would argue, Your Honors, that neither reasonable empirical judgments nor tradition and common experience, nor any of the tests outlined in Aptheker, would support this statute.

The Secretary argues that the purpose of the statute -- and his primary argument -- is that it implements the residency requirements. When we carefully examine the statute, it is patently clear that it comes nowhere close to doing anything even superficially related with implementing a residency requirement. First of all, the statute has no legislative history whatsoever and no legislative study whatsoever.

QUESTION: Is this provision, or isn't it, equivalent to a provision that would say "these benefits are payable but only for the purpose of spending in the United States"?

MR. SCHEY: Well, Your Honor, if that's what the statute intends to accomplish --

QUESTION: Would it be equivalent to that, or not? Would you be making the same arguments if the statute said that on its face?

MR. SCHEY: No, I think I would then be making different arguments about the validity of that kind of restriction. We would probably then be discussing balance of payments

deficits.

QUESTION: Would you still be arguing that it violated what you called a right to travel?

MR. SCHEY: Well, Your Honor, I think, under those circumstances, we would have to examine, as I think we have to do under these circumstances, the legitimacy of the purpose. We may assume that under those circumstances the purpose would be legitimate, requiring expenditure of funds only in the United States.

QUESTION: Would you be here if the statute said that?

MR. SCHEY: Yes, I think we would, because we would still have to analyze whether or not the statute effectuated those purposes. Under the present Social Security program, there is absolutely no restriction on where a person spends their money. We would still have to examine whether or not --

QUESTION: That's an Equal Protection argument.

MR. SCHEY: In the hypothetical that you are placing, as to whether or not a -- would the statute read "restricting money to be expended within the United States," -- would we still be here? I think we would still have to look to the degree to which that infringed on the right to travel.

QUESTION: Do you think this Court is bound by the purposes or the goals that the Government professes to give for this statute?

MR. SCHEY: No, I do not. I believe that this Court could examine any reasonable goals which Congress may have intended by the statute. I think, however --

QUESTION: Because the statute, on its face, doesn't particularly say, does it, what the purpose is?

MR. SCHEY: No, but the legislative history, in both the Senate report and in the House report, which are cited in our briefs, they state -- and unfortunately there are only about two sentences which describe the purpose of the statute -- but in both the Senate and House reports, the purpose of the statute is outlined as being to restrict the SSI recipients from taking on residence outside of the United States for one month or longer.

QUESTION: What would be the purpose of that?

MR. SCHEY: Well, certainly, one purpose may be, as you are suggesting, to limit expenditures of SSI money within the United States.

QUESTION: Because if people took up residence outside, then you could have a residence requirement and you would save a lot of money.

MR. SCHEY: That is correct, but it should be noted, however, that the underlying purpose appears to be a legislative judgment that SSI programs and need-based programs which are adapted to levels of income, levels of cost of living, etcetera, should be limited to persons who reside within the United States.

It is interesting to note that the Congress said absolutely nothing about expenditure; what they limited was the person's ability to travel.

QUESTION: They also, rather specifically limited the person's right to receive funds when they are outside the country, didn't they? Which is certainly one of the purposes Congress had in mind, that if a person stayed outside the country more than 30 days that person would not receive Social Security benefits. Congress has expressed that purpose in so many words in the statute you are challenging.

MR. SCHEY: That is absolutely correct.

QUESTION: So, certainly that fulfills Congress' purpose, does it not?

MR. SCHEY: That is correct. I think, though, that in so limiting receipt of SSI benefits, again, the clear purpose of Congress appears to have been to limit it to residents within the United States.

QUESTION: Why do we need to worry about what it appears to be, when we have spelled out in so many words in this statute that you are challenging? Do you think Congress, just kind of in a fit of absentmindedness passed this statute?

MR. SCHEY: No, I think that -- I think, and what we are requesting this Court to come to conclusion, that in balancing the infringement on the right to travel that the statute would have against the purpose that Congress was attempting to

achieve, namely to limit SSI payments to persons who reside within the United States, that Congress simply did not give sufficient concern to the impact on the right to travel. They did not, for example, limit your ability, if you live anywhere close to the Mexican border or if you live anywhere close to the Canadian border. Nothing in the Act anywhere suggests that you cannot spend your entire income across the border.

QUESTION: That argument isn't based on failure of this particular statute you are challenging to conform to the overall congressional purpose. That's based on when it violates a constitutional substantive right.

MR. SCHEY: That is correct.

QUESTION: Let's get back for a moment to this right to travel. As I read this statute, it is aimed at people who travel, light and remain there. You wouldn't say that's protected, would you?

MR. SCHEY: I am not sure I understand.

QUESTION: A person who moves to Guadalajara, marries and lives there for the rest of his life and becomes a citizen.

MR. SCHEY: Yes, I see what you mean.

QUESTION: That isn't protected, right?

MR. SCHEY: Absolutely not, Your Honor.

QUESTION: Now, if somebody leaves and travels to Mexico and stays there for five years, is that protected by the right to travel?

MR. SCHEY: Your Honor, we feel that it is necessary to examine the extent of the infringement. We feel that the Secretary can and he already does --

QUESTION: Then you agree that the Secretary can look into that?

MR. SCHEY: Absolutely, and he already does, Your Honor. The Secretary already has a whole series of objective criteria --

QUESTION: Would you try to limit your answers to the length of my question?

MR. SCHEY: Yes, Your Honor.

QUESTION: How far can the Secretary go in order to inquire into whether or not you are coming back?

MR. SCHEY: Your Honor, the Secretary already has a set of criteria which he uses. Persons who are going to travel are required to inform the Secretary that they intend to travel. And we have no problem with that. They are required --

QUESTION: But doesn't that interfere with his right to travel?

MR. SCHEY: No, because we do not feel --

QUESTION: Then the right isn't absolute, is it?

MR. SCHEY: That is absolutely correct, Your Honor.

QUESTION: What are you arguing?

MR. SCHEY: We are arguing, Your Honor, that in

-- given the purposes for which we assume,and Government statistics appear to support, that most persons travel. In 1972, a Government study -- and unfortunately the most recent one accomplished -- indicates that 50% of the approximately 8 million persons who travel are traveling to see family and friends. We assume that elderly SSI recipients, for the most part, are not traveling for business reasons. They are traveling --

QUESTION: I thought you said there was no legislative history on this section.

MR. SCHEY: There is not, Your Honor.

QUESTION: Well, if there is none, why are you arguing this point, if you don't have anything? It seems to me this is stuff that should have been presented to Congress.

MR. SCHEY: Well, Your Honor, I would agree. I would think that these matters should have been considered.

QUESTION: Are you going to present it to Congress or are you going to present it to us and get us to rewrite the Act?

MR. SCHEY: No, we are not asking you to rewrite the Act, Your Honor. We are asking you to find that in its balancing efforts Congress did not give sufficient weight to the infringement that this statute would cause on the right to travel.

Your previous question, concerning the time, the

Secretary already has alternative means. The one test that appears over and over again in Kent, in Aptheker, in Zemel is are there alternative means? Does the Government have alternative means for accomplishing the same purpose? The Secretary already has those means and we have no problems with them. Those means adopt objective criteria. Is the person maintaining a home in the United States? Is the person's family remaining in the United States? How long does the person intend to travel? Does the person have a return ticket?

We believe that those objective criteria which mandate a duty -- the Secretary has a separate duty under a separate statute, Section 1613 of the Social Security Act, to measure residence. That duty is never suspended. When persons come back to the United States and they have to wait that additional thirty days before they can get the very money upon which they survive --

QUESTION: Under this section, Counsel, under this particular section, is there a limit on the earnings that the recipient may make?

MR. SCHEY: There is a limit on the earnings and I believe that to be an amount substantially less than the current grant level, which is $189.

QUESTION: Is it as convenient for the Government to check on those earnings if the recipient is in Yugoslavia?

MR. SCHEY: Your Honor, the recipient has a statutory

duty to report to the Secretary changes in circumstances.

QUESTION: We know that some people do not fulfill that.

MR. SCHEY: That is correct, but it is interesting to note that the Secretary relies on the assertions of the recipient in order to fulfill his duties. As the District Court correctly pointed out --

QUESTION: They are not limited to that reply, are they? The Government is not limited.

MR. SCHEY: Absolutely not, Your Honor. And they could call in the recipient for an interview and they could require affidavits from other persons to substantiate --

QUESTION: If he is on the payroll of some other company receiving several thousand dollars, something in excess of the permissible limit, they might find it out that way, is that not so? How do they find it out if he is in Yugoslavia or the Soviet Union?

MR. SCHEY: I think it is important to recognize, Your Honor, that we believe that clearly at some point travel becomes residence abroad. We clearly believe -- and the Secretary has regulations already adopted to meet those situations. The Secretary already has a whole set of objective criteria, because all he does when a person travels for 30 days is he does not suspend their benefits -- Excuse me, he does not terminate their benefits, he simply suspends them.

His obligation to test their residency is maintained throughout their travel. It is maintained when they come back. He says -- and the Secretary admits in the record -- that his tests are, quote, "easy," unquote, to administer.

So, when a person returns to the United States and they are required -- And Mrs. Aznavorian unexpectedly becomes ill.

QUESTION: Who is this?

MR. SCHEY: Mrs. Aznavorian, the Plaintiff in the case. She unexpectedly becomes ill. She knows about the 30-day requirement. She returns to the United States after a 38-day trip. As a result, she loses two months worth of benefits which she relies on. Her whole income, which pays for a home, her shelter, her clothing, is lost for two months.

QUESTION: Does it make any difference, on the principles you are arguing, whether it is 38 days, 68 or 128 days?

MR. SCHEY: We believe, Your Honor, that at a certain point it should become clear to the Secretary, utilizing the objective criteria that he already has to utilize,that a person has abandoned their residence within the United States. Residency is not a brand new concept and, interestingly enough, the Secretary never argues anywhere that if the District Court's opinion is upheld that he will be incapable of determining residence. He solely argues

sovereign immunity, because he already has the tests to determine residencey. He has the test to determine acquisition of residency. He has a very detailed test to determine the abandonment of residence.

As to the point that Mr. Chief Justice raised about the honesty of the applicant, the District Court recognized, as this Court recognized in a number of other cases, that when the Government attempts to establish a bright line rule for the purpose of avoiding fraud, which is one of the primary purposes the Secretary argues here, the section prevents fraud. In this case, the person can just as easily be dishonest about falling under the bright line rule. They can be just as dishonest about that; in fact, we believe it would be far easier to be dishonest about whether you fall into the bright line rule than it would be to be dishonest about whether or not you are maintaining a residence in the United States. That would certainly be more difficult to be dishonest about because they are very objective criteria which can be looked at.

So, in order to prevent dishonesty in the program, the Secretary creates this rule, which very effectively prevents SSI recipients, elderly persons, from traveling for very, very personal reasons. And yet, the rule allows persons to be just as dishonest as to whether or not they intend to leave or they don't intend to leave.

MR. CHIEF JUSTICE BURGER: Your time has expired now, Counsel.

MR. SCHEY: Thank you, very much, Your Honor.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Buscemi?

MR. BUSCEMI: I would be glad to answer any questions that the Court has, but I have nothing further to add at this time.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:48 o'clock, a.m., the case was submitted.)