

ORIGINAL

In the
Supreme Court of the United States

JOSEPH A. CALIFANO, JR.,
SECRETARY OF HEALTH,
EDUCATION, AND WELFARE,

APPELLANT,

V.

NORMAN J. BOLES, ET AL.,

APPELLEES.

No. 78-808

Washington, D. C.
April 25, 1979

Pages 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH A. CALIFANO, JR.,
SECRETARY OF HEALTH,
EDUCATION, AND WELFARE,
:

Appellant,
:

v.
:

No. 78-808
:

NORMAN J. BOLES, ET AL.,
:

Appellees.
:
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Washington, D. C.

Wednesday, April 25, 1979

The above-entitled matter came on for argument at
11:25 o'clock a.m.

BEFORE:

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

APPEARANCES:

HARRIET S. SHAPIRO, ESQ., Office of the Solicitor
General, Department of Justice, Washington, D. C.
20530; on behalf of the Appellant

HERBERT SEMMEL, ESQ., Center for Law and Social
Policy, 1751 N Street, N. W., Washington, D. C.
20036; on behalf of the Appellees

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Califano v. Boles, No. 78-808.

Mrs. Shapiro, I think you may proceed when you are ready now.

ORAL ARGUMENT OF HARRIET S. SHAPIRO, ESQ.,

ON BEHALF OF THE APPELLANT

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

This case is here on direct appeal by the government from a decision of the District Court for the Western District of Texas. This is another case questioning the constitutionality of the Social Security Act. The particular provision involved here is the marriage requirement for mother's benefits.

The wage earner, Norman W. Boles, lived with Margaret Gonzales, who is the claimant, from 1963 to 1966, but they were never married. Their son, Norman J. Boles, was born in 1964. In 1966, the wage earner left Margaret Gonzales and his child and he married Nancy Boles in 1967. There were two children born in this marriage and the wage earner died in 1971. All three children are receiving children's benefits on Norman W. Boles' account.

Mother's benefits are paid to the widow of a

wage earner who has an entitled child in her care. For that reason, Nancy Boles is getting mother's benefits and Margaret Gonzales was denied mother's benefits because she was never married to the wage earner even though her son is receiving benefits and is in her care.

The District Court read this Court's decision in *Weinberger v. Wiesenfeld* as holding that mother's benefits are for the child, to give him the care of his surviving parent. The court found that Norman J. Boles, the child, had himself been denied mother's benefits because of his illegitimacy and that that denial was inconsistent with the equal protection component of the due process clause of the Fifth Amendment. It therefore declared section 202(g) of the Social Security Act, the mother's benefits provision, unconstitutional to the extent that it limited benefits to widows and divorced wives. The Court enjoined the Secretary from denying mother's benefits to the named plaintiffs or to the class which consists of all illegitimate children and their mothers who are ineligible for mother's benefits solely because they were never married to the wage earner.

All the children in the class, like Norman Boles, are getting children's benefits. Their only claim is that they have been injured by the failure to pay mother's benefits to their mothers with whom they are living.

The two requirements for mother's benefits that are particularly important here are, first, that they are paid to the widow or to persons that Congress has decided should be treated as if they were widows. That, of course, is the marriage requirement. Second, the widow must have in her care a child getting benefits because of his relationship to the wage earner. That usually, of course, will be the widow's child, but it doesn't have to be. It is the child's relationship to the wage earner, not to the person that is caring for him that counts, and the child's legitimacy has nothing to do with the widow's entitlement.

These two requirements serve analytically different purposes. The first, the marriage requirement, defines the class of those who are likely to have been dependent on the wage earner during his life, and that class includes all the people that Congress believed were most likely to have lost support when the wage earner died. But loss of support is not itself enough. The second, the child in care requirement, defines the group within the larger class who, because of special circumstances, are entitled to the replacement of lost support. If you don't show membership within this particular sub-group, then Congress felt that even though you may have lost support when the wage earner died, you

should make up that support through your own efforts.

Analytically, the child in care provision is very similar to the age requirement for elderly widows. The theory behind mother's benefits is that a wife with an entitled child in her care should have the same option that she had before her husband's death, that is, either to stay home, supported by her husband, to take care of the children, or else to work and help to support the family. The theory is that she shouldn't lose this choice when the wage earner dies, and that is why she gets the benefits.

The important point is that the class definition, the marriage requirement sets the outer limits of those Congress found likely to have lost support. The group definition is a limitation on the class. It defines the people within the class who are entitled to the replacement of lost support.

Ms. Gonzales never married the wage earner. She can't meet any of the other tests that Congress has used to identify people who are so likely to have lost support at the wage earner's death that they should be treated as though they were married.

There is no indication in the record, in fact, that these tests were inaccurate as to Ms. Gonzales. There is no suggestion that she was in fact supported by the wage earner, that she lost any support when he died. Since

she doesn't belong to the class that Congress has identified as likely to have lost support, she is not entitled to benefits.

This Court's cases strongly support our analysis of the statute. The Court has frequently accepted the Social Security Act's use of marriage to show the likelihood of support, and it has rejected claims that marriage is too inaccurate or imprecise an indicator of the likelihood of support to serve as a basis for denying claims. And it has also refused to require that people who cannot meet some particular part of the marriage requirement should be entitled to prove that they were in fact dependent, and there is no reason to reach a different result here.

The court below believed that *Wiesenfeld* required a different result. It said that this Court held there that mother's benefits are for the child so that he can receive the care of the surviving parent. But that misreads *Wiesenfeld*. The Court there was focusing on the class definition for mother's benefits, the definition of the individual's likely to have lost support when the wage earner died. It found that husbands as a class are as likely to have lost support when the wage earner dies as are wives. *Wiesenfeld*, therefore, supports our loss analysis of the statute because it recognizes that being

entitled to mother's benefits depends on membership in the class likely to have lost support when the wage earner died. That is the reason that Wiesenfeld was controlling in Goldfarb.

QUESTION: What if we disagreed with you on that? What if we thought the statute was -- the purpose of the statute was to benefit children --

MRS. SHAPIRO: Well, if you --

QUESTION: -- and this is discrimination against the illegitimate?

MRS. SHAPIRO: As long as you recognize that this is a benefit that is paid to the mother in recognition of a likelihood of support, then the answer is clear.

QUESTION: That is agreeing with you.

MRS. SHAPIRO: Yes.

QUESTION: That is agreeing with you. I said what if we disagree?

MRS. SHAPIRO: If you feel that the case involves an intent to discriminate against illegitimate children, then we lose. I am not sure --

QUESTION: Except on the prospective payments.

MRS. SHAPIRO: Well, the class action and the retroactive payments, yes. I am not sure that even in that case the appellees should win, because I am not sure that if you say that this -- you have to look at this from the

point of view of the child, the statute doesn't really make any sense. You can't look at this as a statute that says mothers of illegitimate children don't get benefits and mothers of legitimate children do. The statute simply doesn't operate that way. The cases we have cited in our reply brief show that the relationship to the wage earner plus having in your care an entitled child, and if you say that any illegitimate -- the mother of any illegitimate child gets benefits, that means that illegitimate children get an advantage that legitimate children don't and you turn a statute -- you require the statute to favor illegitimates.

It seriously distorts Wiesenfeld to read it as meaning that the mother's benefit is really a child's benefit. The Wiesenfeld child was not a party to the case. The Court didn't consider his loss of support or need for the replacement of lost support. He was already getting benefits based on those needs. It was the surviving husband that was claiming the benefits. It was his loss of support and his relationship to the wage earner that made him entitled to benefits.

Neither is it fair to read Wiesenfeld as meaning that Social Security Act benefits are somehow designed to recognize the emotional trauma suffered by a child who loses a parent and for that reason entitled him to the

care of his surviving parent who could not have stayed home to care for him before the death.

Appellees here are not arguing that this Court's decision approving the use of the marriage requirement as wrong. They don't even argue that the decisions applying the marriage requirement in the particular context of mother's benefits are wrong. They are not saying that Salfi was wrongly decided or that De Castro was. They argue only that the requirement cannot be used to deprive illegitimate children of mother's benefits because it is a classification based on illegitimacy. But it is not a classification based on the child's legitimacy. It is a classification based on the caretaker's likelihood of lost support that has a disparate effect on illegitimates. That is not enough to show a denial of equal protection.

Appellees must show in addition at least that their explanation of the statute's purpose explains its operation better than our's does. The examples given in our reply brief show that the way the statute operates can only be reasonably explained in terms of the replacement of lost support. It is not a grant of benefits to mothers of legitimate children and a denial to mothers of illegitimate children. Our examples show that Congress here, as it did throughout the Social Security Act, chose to pay benefits only to the people who could show both

that they are in a class likely to have lost support and they have a special need for the replacement of that support. The legitimacy of the child being cared for is totally irrelevant.

There is another example of this. When a woman dies leaving young children, the surviving wage earner's mother or other relative often moves into the household to care for the children and she is then supported by the wage earner. If the wage earner then dies, the grandmother gets no benefits. She has the same problem that Ms. Gonzales has here. She can't show that she is a member of any class Congress concluded was likely to have lost support when the wage earner died. It makes no difference whether the children are legitimate or not in this example.

Appellees' argument boils down to a claim that a statutory scheme that is neutral as regards legitimacy must be turned into one that favors the mothers of illegitimate children. This favoritism is demand in the name of equal protection.

This case presents an extreme example of the risks of seemingly minor changes in the benefits system established by Congress. First, it distorts the statutory purpose of providing benefits only to those most likely to have been supported by the wage earner. Second, the extension of benefits to an additional group means that

the real purpose of the benefits may be lost. Neither the new group nor the group that Congress defined may actually get enough support to stay home to care for children. This is because the statute limits the total amount payable on any given wage earner's account in any one month. The maximum will always be reached when three survivors are being paid. So when you have a widow and a child being paid benefits in one household and an entitled children in another household, you will have reached the statutory maximum. If you add the mother of the entitled child, then the benefits that were previously payable will have to be reallocated and the benefits that were going to three people, the same benefits have to go to four people.

QUESTION: Mrs. Shapiro, is that true in the case of adding a divorced wife to the widow, when the class is increased, does that same apply? I got the impression from your --

MRS. SHAPIRO: The same principle applies. The only people that are outside of the family maximum are the aged divorced wives.

QUESTION: In this benefit scheme, if you have a widow with a child and a divorced wife with a child, you divide the maximum four ways instead of the other way?

MRS. SHAPIRO: That's right.

QUESTION: I see.

MRS. SHAPIRO: And Congress concluded that in that situation they were willing to make that division, but --

QUESTION: If the courts were to --

MRS. SHAPIRO: -- will undercut the purpose of the statute because it will increase the number of situations in which you will have spread your benefits so thinly that they won't provide support so that nobody can stay home.

QUESTION: If the Court should disagree with you and agree with the lower court on the basic issue of whether the larger class should be further enlarged to include unmarried -- persons who never married the wage earner who had children by the wage earner, you then have a kind of a tricky job of rewriting the statute, it seems to me, because now it starts out the widow and every surviving divorced mother. But I don't understand you to have questioned the remedy in the sense that the Court had the power not merely to hold the classification unconstitutional to say no benefits shall be paid pursuant to this statute because it is discriminatory. Rather, what the Court held was we are going to enlarge the class beyond the class described by Congress and pay benefits to people Congress didn't authorize payments for. You don't question the District Court's power to grant that

kind of relief, if I understand you.

MRS. SHAPIRO: No, we don't. That is the kind of relief that this Court has granted in the past in cases in which it found that particular --

QUESTION: Of course, in other cases they have construed mother to mean mother and father -- I don't know what --

MRS. SHAPIRO: That's true.

QUESTION: But here I don't know what you do. I don't know what word has a different meaning. You have got to just inject a new word into the statute.

MRS. SHAPIRO: What the District Court said was you can't apply the statutory requirements only in the case of illegitimate children living with their mothers who were denied benefits, that it just by kind of main force and awkwardness pulled out that group and said that group gets benefits.

QUESTION: And you don't question the power of the court to have done that? I just want to be clear about that.

MRS. SHAPIRO: No, we don't. We don't question their power. We certainly question the advisability of it.

QUESTION: I understand, and that they say they are on the merits and the sovereign immunity point and the

others.

MRS. SHAPIRO: Yes.

QUESTION: But I just wanted to focus on that one aspect.

MRS. SHAPIRO: That's correct.

QUESTION: But even if it was right on the merits that this is an unconstitutional legislative scheme, couldn't it be argued, following up my brother Stevens, that that would be the end of the court's function, not to rewrite the statute to give benefits to other people but simply to say this is what Congress has enacted and is constitutionally invalid?

MRS. SHAPIRO: That is certainly --

QUESTION: But you do not --

MRS. SHAPIRO: It would be an option. I think that it would be very hard on the mothers who are now getting benefits.

QUESTION: Of course, it would be, but if it is unconstitutional, it is unconstitutional.

MRS. SHAPIRO: Yes.

QUESTION: And isn't that the end of a court's function?

MRS. SHAPIRO: It is not the way this Court has felt their function -- that that was the end of their function in cases like Wiesenfeld or Goldfarb in which

they found the statute was unconstitutional and expanded the benefits.

QUESTION: In any event, you don't question the remedy in this case, as I understood your answer to my brother Stevens' question.

MRS. SHAPIRO: That's right.

QUESTION: And you don't get there if you are right on the merits?

MRS. SHAPIRO: That's right.

If the Court has no further questions, I wish to reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Semmel.

ORAL ARGUMENT OF HERBERT SEMMEL, ESQ.,

ON BEHALF OF THE APPELLEES

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

I believe a simple example illustrates the discriminatory effect on illegitimate children of the marriage requirement for mother's benefits. If we have a wage earner who lives with a woman, has a child with that woman, lives with and supports that child every day of the child's life until the wage earner dies, but has never married the mother, that family unit is deprived of mother's benefits and the child is deprived of the

opportunity for the care of the mother afforded by mother's benefits.

On the other hand, we have a wage earner who marries a woman and while she is pregnant deserts her, never sees the child, never supports the child and dies, that family unit is entitled to mother's benefits and that child receives the benefit of the care of the mother which mother's benefits makes possible.

The distinction between the two groups is simply that in one case the mother and the father marry and in the other case they have not married, and that is precisely the kind of statute which visits the sins of the parents on the child by depriving the child of the benefit, the social welfare benefit merely because of the lack of marriage of the parents, and the bar here is absolute.

This is not a case like Lucas, where the illegitimate child can come in and prove dependence or where the child and the mother can come in and prove that they had actually been supported by the father of the child at the time of his death.

QUESTION: Isn't the difference between the classes -- it depends on marriage, doesn't it, not on illegitimacy?

MR. SEMMEL: That is almost invariably the case in all --

QUESTION: Well, you have dreamed up some examples here. Suppose a man lives with a woman and has a child but they aren't married and then for some reason they have a divorce, an agreed upon divorce, at least they cease living together, and then he marries another woman and then he dies and the woman has been taking care of his illegitimate child before he died. Now, I take it she is entitled to benefits and the child is, too?

MR. SEMMEL: Under those unusual circumstances --

QUESTION: Well, you call them unusual. It is no more unusual than the one you dreamed up.

MR. SEMMEL: Well, I am not --

QUESTION: Anyway, the answer is yes?

MR. SEMMEL: The answer is, yes, that under those circumstances --

QUESTION: Somebody gets --

MR. SEMMEL: -- the wife who has a child of her husband, it is not her own, would receive benefits --

QUESTION: So the line isn't drawn on illegitimacy?

MR. SEMMEL: The line is drawn on illegitimacy if we define the class, Mr. Justice White, which is -- the class is children living -- the general classification is children living with their mothers which encompasses almost all children. I believe only yesterday, Mr.

Justice Stevens, in his dissent in the Cabban case, noted that virtually all children live with their mothers. The example which you pose is kind of an exception to the normal living pattern. So the general classification is children living with their mothers and then all illegitimate children are barred from the benefit because their mothers haven't married the father. All legitimate children living with their mothers receive the benefits --

QUESTION: But you are using your definition of the class in effect to explain how the statute operates, and actually your definition of the class is narrower than the operation of the statute.

MR. SEMMEL: The definition of class in some respects is narrower in every possible application of the statute. But in every illegitimacy case that has been before this Court virtually in which the discrimination has been stricken, there has been some group of illegitimate children who qualify and this Court has always looked at the class by comparing legitimate children and illegitimate children similarly situated.

QUESTION: I just gave you some illegitimate children who were not excluded from this benefit.

MR. SEMMEL: That's correct.

QUESTION: And any man who has been living with the woman and they are not married and she dies and they

had children, it could very easily end up in the situation I just mentioned to you.

MR. SEMMEL: That is correct. But we have had other cases in this Court in which some illegitimate children were not excluded from benefits, but the Court nevertheless held that discrimination between legitimate children and illegitimate children similarly situated was unconstitutional. In the Weber case, for example, involving workmen's compensation benefits, legitimate children and acknowledged illegitimate children received benefits, other illegitimate children did not and the Court held that that discrimination was unconstitutional.

In Jimenez case, we had legitimate children and illegitimate -- some classes of illegitimate children receiving benefits, other illegitimate children did not, and again this Court held by looking at illegitimate children and legitimate children similarly situated, that there was an unconstitutional discrimination.

In fact, in every case involving the Social Security Act, there are always some illegitimate children who receive benefits because there is a provision in the Act that children who are illegitimate solely because of a defect in a bona fide marriage between their parents are considered legitimate. So we always have some illegitimate children receiving benefits, yet this Court

in two definite situations has stricken discrimination against illegitimate children in the Social Security Act, and that is true in almost every other kind of case in which this Court has found discrimination against illegitimate children.

There have been some, in some cases the number may be small, in others the number may be large, in which some illegitimate children have gotten benefits.

We would submit that here the crucial distinction which relates to this entire argument of the government on the likelihood of support, if the Court examines the Jimenez case on the one hand and the Lucas case on the other hand and similarly, in a different context, Trimble v. Gordon on the one hand and Lalli v. Lalli on the other hand, the distinction is the absolute bar based on the failure of the mother and father to marry.

So if this was a statute as we had in Lucas, in which the family could come in and have an opportunity to demonstrate that in fact there was support for the family, that would be a different case and might be proper and constitutional under Lucas, because what Lucas and Jimenez illustrate is that the likelihood of support argument sustains differential treatment only in presuming that all legitimate children are supported but requiring an additional showing by illegitimate children, but that

it does not sustain an absolute bar to illegitimate children in a particular category.

QUESTION: Mr. Semmel, if I understand you correctly, you are saying that this statute, what you consider a constitutional defect in the statute would be cured if the mother, the unmarried mother were given the opportunity to prove that at the time of the wage earner's death she was receiving support of the wage earner?

MR. SEMMEL: I believe that that is the holding in the Lucas case.

QUESTION: Now, if you concede that and if there were empirical evidence that Congress considered -- and I don't know whether there is or not -- that that is true in only 2 percent of the cases of unmarried mothers, most unmarried mothers who have not been living with the wage earner for a matter of years prior to his death are not then receiving his support, then I would think you would have to admit that this classification was a rational classification.

MR. SEMMEL: We would not concede that, Your Honor, as long as the touchstone was illegitimacy, that --

QUESTION: But the touchstone isn't. The touchstone is marriage. The outer limit of the class is was the person ever married to the wage earner. And if you concede that this would be saved by making special

provision for those mothers of illegitimate children who could prove actual dependence, then it seems to me your argument must really rely on an assumption that a very significant portion of the members of your class were in fact receiving support from the wage earner at the time of death. And you didn't even allege that as to your client, as I remember the pleadings.

MR. SEMMEL: Your Honor, the pleadings don't allege that because the case came up on a review of the determination of the Social Security Administration.

QUESTION: Yes.

MR. SEMMEL: Because of the marriage requirement, any question of support became irrelevant and therefore no evidence was submitted in the administrative process and none would have been relevant had it been offered.

We would submit that not only isn't there any empirical evidence but that the statutory history shows that Congress never had that in mind at all.

QUESTION: Well, it would have been relevant in the District Court, would it not? You say this isn't just simply a denial of a benefit you are appealing from or you might well be precluded by one of the preclusion sections. If you are challenging the constitutionality of a provision, I would think the sort of evidence that

you and Justice Stevens had your colloquy about would have been admissible.

QUESTION: At least you would have to make some effort to show that Congress was quite irrational in ever having thought what the government suggests it thought about --

MR. SEMMEL: Well, I think there are two answers to that. One is that statutory history shows that Congress was irrational in the sense that they were acting out of an intent to exclude illegitimate children as part of a general statutory purpose of discrimination against illegitimate children.

QUESTION: Well, if you are right on that, the government concedes you win, I take it.

MR. SEMMEL: I think that is correct.

QUESTION: If you can spell out a legislative history of purpose to discriminate against illegitimate children.

MR. SEMMEL: Yes, I would like to do that, Mr. Justice --

QUESTION: But I take it your total argument is that you can't spell that out. You say they affect the impact on illegitimate children is sufficient to invalidate the statute.

MR. SEMMEL: That is correct. We would say

either way the statute should be invalidated. But I would like to take perhaps the remaining moments before they break to touch on that question of the intent of Congress here.

If we go back to 1939 when Congress first enacted survivors benefits, the original Social Security Act was simply for retirement and then in 1939 survivors benefits were first enacted. At that time, illegitimate children were excluded. Children's benefits that were provided were provided only for legitimate children.

The Social Security Advisory Board, beginning in 1940, expressed itself on that question, pointed to the inequities and urged Congress to correct it. It wasn't until 1965 that Congress first moved to make some change in the total exclusion of illegitimate children. But even in 1965, when they did it, they surrounded the change with a number of discriminatory provisions. One of them was a provision that if by adding illegitimate children's benefits to the total package on the wage earner's account, the total benefits would exceed the maximum and then illegitimate children lost all their benefits first, rather than dividing it proportionally as in almost any other case, and that was stricken by this Court in the summary affirmance of both the Davis and Griffin cases.

The second kind of discrimination was before this Court in the Jimenez case where we were dealing with a very small class of children born after the disability of the father, and under the statute illegitimate children were not entitled to benefits and legitimate children were entitled to benefits, and this Court found that that was unconstitutional.

And Congress, by leaving the mother's benefit provision with a marriage requirement continued the discriminatory effect of that on illegitimate children that went back to 1939 when illegitimate children were totally excluded from the statute. And it made sense, of course, to Congress to use the term widows because it was only widows and legitimate children that were involved in the benefit package at all, but that form of discrimination carries over along with these other requirements.

Again, the provision in the Act that says when legitimate children -- excuse me, when illegitimate children are illegitimate only by reason of the invalid but good-faith marriage of the parents, they are deemed legitimate and the mother is then deemed a wife under the same circumstances. That again I think indicates that what we had was a general statutory scheme of hostility to children because of the failure of their parents to marry. Part of that has been removed by Congress and

part of that has been removed by this Court, and this mother's benefit is one of the last vestages of that scheme.

QUESTION: When was the divorced former wife and children put into the statute? That was added.

MR. SEMMEL: I believe that was during the -- I don't recall the date, Your Honor. I would --

QUESTION: But that was in addition, wasn't it, a later addition?

MR. SEMMEL: That was in addition to the --

QUESTION: A later addition.

MR. SEMMEL: -- illegitimate children and so on. It came not long after the original mother's benefits provision.

QUESTION: The original widow.

MR. SEMMEL: The original widow. Originally it was solely the widow, that is the woman who was married to the wage earner at his death.

QUESTION: Right.

MR. SEMMEL: Mr. Chief Justice, I was advised by the Clerk that you would take a recess at this time. Would you prefer me to stop now?

MR. CHIEF JUSTICE BURGER: At 12:00 o'clock

MR. SEMMEL: I'm sorry.

I would just like briefly to comment on the

Wiesenfeld case. I think it is not accurate to state that that case focused on the husband.

MR. CHIEF JUSTICE BURGER: We will resume at that point at 1:00 o'clock.

(Whereupon, at 12 o'clock, noon, the Court was recessed until 1:00 o'clock p.m.)

AFTERNOON SESSION -- 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Semmel, you may resume.

MR. SEMMEL: Thank you, Mr. Chief Justice.

The holding of this Court, I submit, was very clear in the Wiesenfeld case that the mother's benefit was intended to benefit the child. In fact, the government in that case made the same argument that they assert here, that this was essentially spouse's support and it was proper for Congress to distinguish between support for wives who are normally supported by their husbands as contrasted to support for husbands who are often or perhaps more often than not not supported by their wives, and that was then asserted by the government as the justification for the classification. The Court's decision finds that the benefit was for the child and therefore we have discrimination based on sex because women workers do not get the same benefits for the children as male workers would and therefore there was implicit rejection of the notion that the intent of the statute was for spouse's support.

Now, the fact that a marriage requirement is used in the statute does not mean that there is no either intended or effect discrimination against illegitimate children. The very definition of an illegitimate child

is a child whose mother and father have not been married, and this Court has stricken down on several occasions statutory provisions which discriminate against illegitimate children even though --

QUESTION: Mr. Semmel, can I go back to the Wiesenfeld case for a minute. Discrimination there was concededly against husbands as opposed to wives. There wasn't any claim of discrimination against any set of children, was there?

MR. SEMMEL: The discrimination was against women workers --

QUESTION: All right.

MR. SEMMEL: -- because on their death their children lost the opportunity for the care of the parent.

QUESTION: But the victim of the discrimination was the parent.

MR. SEMMEL: I believe the holding of the Court is that the victim of the discrimination was the child because the child lost the opportunity for the care of the parent.

QUESTION: You don't think it was a sex discrimination case at all?

MR. SEMMEL: Yes, it was, Your Honor, but the discrimination was --

QUESTION: The only difference in sex was at

the parent level. It didn't matter whether the children were male or female, did it?

MR. SEMMEL: That is correct, but the sex discrimination was against the woman worker, not against the--

QUESTION: It was an irrational sex discrimination because they purported to justify it on the basis of the different status of the different children, but still the person being discriminated against was one parent or the other, wasn't it?

MR. SEMMEL: That's correct, but it was the working parent that was being discriminated against.

QUESTION: And here it is the mother -- isn't it correct to say that here the person who is being discriminated against is the mother of the illegitimate child?

MR. SEMMEL: No. That would be the case if you accepted the government's notion of what this statute is all about, mother's benefits. Here, if you look at the structure of the statute, we submit that it is clear, and that is what Wiesenfeld said, that we have a discrimination against children because the mother's benefits were intended to provide the child with the opportunity for the care of the mother in the home and that the child is the beneficiary, just as the child is the beneficiary of --

QUESTION: The child is a beneficiary indirectly but not in a statutory sense.

MR. SEMMEL: Even in a statutory sense, because in order for this benefit to be payable, the mother must have a child in her care. The child must be receiving children's benefits. It is only when care of child is involved that mother's benefits are payable. As this Court noted in Wiesenfeld, and as the statute makes clear, Congress did not intend to provide benefits for widows under age sixty. They were expected to go out into the labor market during their normal working life and earn their living. It is only when the widow has a child in her care that the --

QUESTION: Would the child have any remedy if the mother took the money and spent it on clothes or alcohol or something like that?

MR. SEMMEL: There is certainly no remedy under federal law in that case. There might be problems with state law. But that is also true, Mr. Justice Stevens, with children's benefits, but children's benefits are also paid in most cases to the mother. She could spend that money however she pleases.

QUESTION: But she is a trustee for the child with those benefits and she must use the money for the benefit of the child, doesn't she? Maybe not, I don't know.

MR. SEMMEL: I don't believe there is any

specific legal requirement that she do that. It is conceivable, again under state law, if she --

QUESTION: The child would have no claim if she took all that money and spent it on clothes for herself?

MR. SEMMEL: Well, Your Honor, I can't say that the child would have no claim.

QUESTION: You don't think there is any difference between the two?

MR. SEMMEL: I think in fact the child might have the same claim, for example, against the mother if she took mother's benefits and then didn't stay home and take care of the child.

QUESTION: Suppose the child is independently wealthy, maybe inherited a lot of money from somebody.

MR. SEMMEL: The child --

QUESTION: Still financial -- poverty isn't a test of whether they get benefits, if I remember it correctly, is it?

MR. SEMMEL: Poverty is not a test of eligibility.

QUESTION: You could have an independently wealthy child, it might be 15 years old and have a very successful newspaper route or something and he doesn't need the money, and the child's benefit, he is entitled to it but he is not entitled to the mother's benefits. Isn't that a difference?

MR. SEMMEL: If the child actually has income from earnings which exceed the earnings maximum, the benefits to the child would be reduced, too, similarly if the mother goes out and works, even though she is eligible for mother's benefits, she might not be paid any because of the earnings test in the Social Security Act might reduce all of her benefits to zero.

QUESTION: Well, your case wouldn't be really -- it wouldn't be any different, would it, if you just said this was intended to benefit both the mother and the child? Wouldn't your case be the same? The government's might not, but wouldn't yours be the same?

MR. SEMMEL: I would think that it would be the same because --

QUESTION: Why get in a big argument about whether it was intended to benefit the mother at all? It seems a matter of common sense that it did benefit the mother quite a bit, but it also seems like a matter of common sense that it benefited and was aimed to benefit the child.

MR. SEMMEL: I think that is correct, Mr. Justice. I agree with that, so long as one of the major purposes is benefit for the child. If the illegitimate children are then deprived of that benefit, then I think our constitution claim is sustained.

Once we have a classification -- let me just go back one moment and just comment again on the marriage requirement as the classification of illegitimacy. The Social Security Act, for example, never speaks directly in terms of illegitimacy versus legitimacy, but this Court has stricken provisions of the statute on that ground. The Social Security Act always talks in what we might call neutral terms, which is children who inherit on intestacy under state law and that effectively at least until the Trimble decision barred illegitimate children. Similarly in the New Jersey Rights Organization case, we had a statute which provided welfare benefits to families consisting of husband, wife, and children, and this Court struck that as discrimination against illegitimate children as well. So there is no magic in the term illegitimacy being written into the statute. This Court has always taken a look at how the statute operated in practice.

The classification of illegitimacy then requires in a constitutional test a little closer look, a little closer scrutiny than is sometimes given to other social welfare benefit cases. I think this Court has made it clear in every one of its decisions in point. And the point that Mr. Justice Stevens raised earlier concerning a situation in which Congress may find that

only 2 percent of all mothers of illegitimate children were supported by the father, of course, Congress has not made that finding, there is nothing in the record, nothing in the legislative history that indicates Congress ever considered that, nor could it have considered that because when mother's benefits were adopted, illegitimate children were ineligible for children's benefits and therefore ipso facto they were also not receiving mother's benefits and therefore Congress could not have ever taken up this question in point in enacting mother's benefits.

But we would submit that even if Congress had taken that kind of consideration, that the total exclusion of all illegitimate children is not justified by the administrative convenience. And that was essentially the holding of this Court in the Jimenez case, where it was argued that after born illegitimate children could be excluded because relatively few children were involved and there was an element of administrative convenience in proof of paternity or support, and I believe what the cases require is a closer look at how the purpose can be achieved.

If the purpose is to exclude families where the father was not supporting the family, then that can be achieved by giving the family the opportunity to prove that they were receiving the support. If only 2 percent

of the families provide that proof, then only 2 percent of the families will get the benefit.

QUESTION: I don't understand the government to be arguing it as a matter of administrative convenience, but rather that this is a large class of persons, most of whom probably were not receiving support from the wage earner at the time of the wage earner's death and therefore they don't come within the notion of substituting benefits for prior support. I don't think it is a matter of administrative convenience because there are a lot of people who might be able to prove they were getting support, a grandmother, a third cousin, or a good friend or something who wouldn't be eligible for social security simply for that reason, because the social security system operates on a bunch of rules and large classes are defined in terms of probability.

MR. SEMMEL: That's correct, but the difference between third cousins and grandmothers and so on and illegitimate children is of constitutional significance and this Court has had ten cases in which it has held various forms of discrimination against illegitimate children to be unconstitutional. That is just not the case with third cousins or grandmothers. And when you get to that classification, then the appropriate test is to look carefully at the purpose to be achieved and to

meet that test without a total ban, total bar to benefits for the class of illegitimate children, and that is the failure of this statute because it bars all benefits to illegitimate children, it bars those benefits whether or not the father had ever supported the children, whether the father had ever supported the mother, and because of that reason alone, the statute falls as unconstitutional.

In the remaining moments, I would like to comment just for a moment on the class action aspect of the case. I did not intend to argue on the retroactivity which I believe is well covered in the briefs.

With respect to the class action, I merely want to emphasize the limited nature of the class relief and the importance of the class relief. Essentially, the class relief here merely requires the Social Security Administration to notify all families in which illegitimate children are receiving children's benefits of the decision of the Court so that they will know that now they may come in and apply. They will still have to meet all of the other statutory requirements for mother's benefits. They will still have to --

QUESTION: And that is based on 1331, isn't it? That is the only way you can get that kind of relief?

MR. SEMMEL: We would submit that we can obtain it either on 1331, if 205(h) is not a bar to that --

QUESTION: Didn't we hold in Salfi that it was a bar?

MR. SEMMEL: In Salfi the Court -- Salfi involved a decision which ordered the payment of benefits to all members of the class.

QUESTION: And didn't we say you couldn't bring that under 1331 by reason of the preclusionary provision?

MR. SEMMEL: That's correct, but I submit that the difference is that 205(h) is the counterpart to 205(g) which provides for judicial review of claims for benefits. And what 205 precludes is a claim that is reviewable under 205(g). There is no way that either the appellees here or any other potential recipient could file a "claim" with the Social Security Administration asking the administration to notify all the class members, and that is why we need the jurisdiction of the federal courts under 1331 --

QUESTION: Well, lots of people need the jurisdiction of the federal courts but they don't get it because Congress hasn't given it to them.

MR. SEMMEL: That's correct, but here Congress has provided in 1331 for federal court jurisdiction in constitutional claims. That is only reduced by section 205(h) to the extent that something is a claim under 205(g). We would submit that this notice requirement is not a claim for benefits under 205(g) and therefore not precluded

by 205(h).

The other side of that would be that if it is a claim under 205(g), then the District Court had jurisdiction under 205(g) and that a class relief is permissible under 205(g). I know that has been submitted and argued in the Elliot case which is awaiting decision.

QUESTION: Those two arguments are mutually inconsistent, aren't they? You can go either one or the other but not both?

MR. SEMMEL: That is correct. Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mrs. Shapiro?

ORAL ARGUMENT OF HARRIET S. SHAPIRO, ESQ.,

ON BEHALF OF THE APPELLANT -- REBUTTAL

MRS. SHAPIRO: First, just as a matter of clarification, the child benefit must be used for the child. The representative payee received the payment on behalf of the child and is supposed to use it for the child.

The main point I want to make is that --

QUESTION: Before you leave that, what about the mother's benefit?

MRS. SHAPIRO: Well, the mother's benefit is for her own use and she can use it as she wishes.

QUESTION: I see.

MRS. SHAPIRO: I may have misunderstood Mr.

White's question to me earlier. I gather that what you were asking was that if the Court should disagree with our position and consider the benefit to be a child's benefit, what then. The answer would be that there are really in that case two -- it is not a discrimination against illegitimates, if you look at it from the point of view of the child, what the statute is doing is saying that in the situation where the mother was not married to the wage earner --

QUESTION: Mrs. Shapiro, suppose the statute said that mothers of illegitimate children do not get these benefits, but mothers of legitimate children do?

MRS. SHAPIRO: Well, then --

QUESTION: Would your position be the same? It doesn't sound to me like it would.

MRS. SHAPIRO: Then you are saying it would be intentional discrimination against --

QUESTION: I thought that is all you answered, if that kind of thing, you would agree, it is illegal.

MRS. SHAPIRO: If it is an intentional discrimination against illegitimate children --

QUESTION: And I take it that part of the submission of your colleague on the other side is that that is exactly what the statute is.

MRS. SHAPIRO: But the problem --

QUESTION: Do you disagree with that?

MRS. SHAPIRO: Yes. The question there I guess would be that if you take that position, then is illegitimacy a sufficiently accurate indicator of the likelihood of lost support, so that you can ignore the possibility that there might have been situations in which the child's mother -- the wage earner was supporting the unmarried mother of his children.

QUESTION: Well, that might be almost as good as marriage or non-marriage, wouldn't it?

MRS. SHAPIRO: Well, the --

QUESTION: I mean certainly you know that there is not a very perfect fit in any of these classifications.

MRS. SHAPIRO: That's true. I guess the point is that comparing this case with Lucas, in Lucas it was significant that there was an opportunity to prove actual dependence but that may well be because the chances of a wage earner supporting his illegitimate children is greater than the chance that he was supporting the mother of his illegitimate children. So you have a different kind of a relationship between the policy and the statute here than you would there.

QUESTION: Mrs. Shapiro, I am somewhat puzzled by your concession that intent makes any difference. It seems to me that Congress knew what it was doing in all

of these cases, and if the test were phrased in terms of mothers of illegitimate children, the mother no longer living with the wage earner, not having lived with the wage earner at the time of his death, it seems to me there would be the same probability and I guess maybe what Mr. Justice White was implying, the same probability that the wage earner was not supporting that particular mother bea use you really have the same setup whether you describe her as the mother of an illegitimate child or as a person that is not a wife.

MRS. SHAPIRO: Well, the problem -- if it is the intent to discriminate or whether it is simply a disparate effect of the use of a perfectly proper method of distinguishing between people who are likely to have been supported and people who weren't --

QUESTION: Well, it is always an intent to discriminate if you say that Class A gets benefits and Class B doesn't get benefits. You are always discriminating intentionally against Class B, and the people in Class B, no matter how you phrase the statute, are still a large group of mothers who are not living with the wage earner who happen to have children by him at some earlier point in time. Does constitutionality depend on how they phrase the statute?

MRS. SHAPIRO: No, the constitutionality depends

on whether what Congress is doing is trying to distinguish between people who were likely to get support and who were not.

QUESTION: In both cases I assume they were.

MRS. SHAPIRO: Okay. If that is what they were doing, then the fact that this perfectly proper reasonable statutory distinction has a disparate effect on illegitimate children is not enough to constitute a denial of equal protection. That is the way we read *Washington v. Davis*.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, counsel. The case is submitted.

(Whereupon, at 1:20 o'clock p.m., the case in the above-entitled matter was submitted.)

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