

ORIGINAL

In the

Supreme Court of the United States

UNITED STATES

APPELLANT,

V.

PATRICIA ILENE CLARK, GUARDIAN
FOR SHAWN D. CLARK AND
TRICIA D. CLARK ,

APPELLEES .

No. 78-1513

Washington, D. C.
October 31, 1979

Pages 1 thru 47

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES : :
 : :
Appellant, : :
 : :
v. : No. 78-1513
 : :
PATRICIA ILENE CLARK, GUARDIAN : :
FOR SHAWN D. CLARK AND : :
TRICIA D. CLARK, : :
 : :
Appellees. : :
-----: :

Washington, D. C.,

Wednesday, October 31, 1979.

The above-entitled matter came on for oral argument
at 10:02 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.;
on behalf of the Appellant

EDWARD L. MERRIGAN, ESQ., 600 Connecticut Avenue,
N.W., Washington, D. C. 20015; 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 first this morning in United States v. Clark.

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

ORAL ARGUMENT OF HARRIET S. SHAPIRO, ESQ.,
ON BEHALF OF THE APPELLANT

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

This case is here on appeal by the government from a judgment of the Court of Claims requiring the payment of survivorship benefits to two illegitimate children of a deceased federal employee. The Court of Claims found that the children were entitled to payments even though they could not meet the eligibility requirements of the Civil Service Retirement Act. It relied upon its decision in a previous case in which it concluded that the statutory requirement denied equal protection to illegitimate children.

The government contends here, first, that the Court of Claims had no jurisdiction to award benefits in this case; and, second, that in any event the statutory requirement is constitutional.

George Isaacson was a federal employee when he was killed in an automobile accident in 1974. He was

unmarried but he was survived by two illegitimate children, Shawn and Tricia Clark, who are represented by the appellee here.

Isaacson had recognized them and was subject to a court order requiring him to make monthly payments for their support. Although he had lived with them for a few years, he had stopped living with them more than two years before his death.

The Clark children applied for benefits under the Civil Service Retirement Act. That act provides for the payment of monthly benefits to the surviving children of covered federal employees. The statute defines the child to include adopted children as well as step-children and recognized natural children who lived with the wage earner in a regular parent-child relationship.

The Civil Service Commission and the Office of Personnel Management, which is the successor of the commission, have consistently interpreted the statute as denying benefits to step-children and to illegitimate children who were not living with the employee when he died. Since the Clark children ---

QUESTION: Mrs. Shapiro, when you say that, though, haven't they proposed the elimination of the lived with requirement?

MRS. SHAPIRO: There is a proposal that was

passed by the House last week, a bill --

QUESTION: Doesn't that come from the Commission?

MRS. SHAPIRO: Yes. The Commission proposed this statute which would amend the act to make payments to dependent children, but would provide that either a child who lived with or who received contributions from the employee would be considered dependent.

QUESTION: When you say that the act has consistently been construed to require that the lived-with requirement be met at the time of the death of the wage earner, how many examples would there be in the reported materials that we could look at in some way or another of cases in which there was a lived-with at some prior time but not at the time, the date of death? Would there be other cases like this?

MRS. SHAPIRO: I don't believe there are a significant number. I'm not sure.

QUESTION: I just don't have any feel for how often this problem arises.

MRS. SHAPIRO: It's a consistent administrative interpretation.

QUESTION: But does that mean twice, or a hundred times? Do we know?

MRS. SHAPIRO: As far as --

QUESTION: Or once, maybe; just this case, possibly.

MRS. SHAPIRO: I know that it's more --

QUESTION: Normally they do things as of the date of death, but I'm just wondering how often it really is significant. That's what's hard to --

MRS. SHAPIRO: I'm not sure that it has been litigated before.

QUESTION: I think what bothers me is your use of the word "consistent," because if the Commission is now behind this proposed legislation, they're receding from what may have been a consistent position.

MRS. SHAPIRO: The legislation is based on the Court decisions. It's not that they have made an administrative determination.

QUESTION: Does the Commission interpret the act as passed by Congress or just make recommendations for changes?

MRS. SHAPIRO: Well, the Commission, it interprets it in administrating the act and paying benefits.

The Clark children sued in the Court of Claims under the Tucker Act challenging both the Commission's interpretation of the act and its constitutionality as so interpreted.

They argued first that they were entitled to benefits under the act because they had once lived with Isaacson. Alternatively, they argued that the act as interpreted by the Commission denied them equal protection because they could not qualify for benefits by proving that they were actually

dependent on their father.

After this suit was filed but before it was decided by the Court of Claims, that Court decided another case challenging the lived-with requirement in the Civil Service Retirement Act. That case was Gentry v. United States. Gentry involved a child who had never lived with a Federal employee, and the court in that case found that the statutory requirement was unconstitutional. So when it decided this case, the Court of Claims followed Gentry.

The government didn't seek to ask, didn't ask this Court to review this decision in Gentry because we lost track of it after the Court of Claims remanded the case for further findings by the Commission. We learned of the entry of the final judgment only a few days before our time to petition for certiorari expired, and substantially after the time to note an appeal. By that time, we knew that the Clark case and others were coming along and that the Commission was working on legislation.

In November of 1977, the District Court for the District of Columbia decided Proctor v. United States and enjoined the Commission from applying the lived-with requirement to illegitimate children, so the Commission began paying benefits under that order, from and after December first, 1977.

Finally, in the only class action so far, Jenkins v. the Office of Personnel Management, the District Court for the District of Columbia ordered the Office of Personnel Management to pay benefits retroactively to February 1972. That order imposed a much heavier burden on the resources of the Retirement Fund. That factor, plus the importance of the retroactivity question for other Federal benefit programs, has led to our decision to seek review in this Court in this case.

I propose to focus today on the question of whether the Court of Claims had jurisdiction to decide this case.

QUESTION: Do I understand, Mrs. Shapiro, that the Clark children are now, for the reasons you gave us, receiving benefits?

MRS. SHAPIRO: They are receiving benefits under the decision of the Court of Claims. They have not received the lump sum that would take them from the time their father died up till the time the stipulation for the entry of judgment was entered. They are currently receiving \$187 a month.

I intend to rely primarily on our briefs for the issues raised by the appellee concerning this Court's jurisdiction and the correctness of the agency's interpretation of the act. I would like to discuss the jurisdiction of the Court of Claims and I have a few comments to add to the discussion in our brief on the merits.

QUESTION: I would like somewhere along the line to have you discuss the other suggestion that lived-with may be applied to some period other than at the time of death.

MRS. SHAPIRO: Well, our argument on that really is fairly simple. The purpose of the statute is to replace the support that was lost when the wage earner died, and the lived-with requirement as interpreted by the agency is that the time when the support was lost was at the wage earner's death for children who were living with the wage earner at that time. If they stopped living with the wage earner, as the Clark children did, several years previously, that is the point at which the statute assumes the support was lost.

QUESTION: What if they never lived with the father but he arranged for them to be somewhere else and paid for all their living?

MRS. SHAPIRO: Well, then, they are not qualified under this action because they were not living with him in a regular parent-child relationship when he died, or at any time.

QUESTION: So the support factor vanishes under that language?

MRS. SHAPIRO: Well, the theory behind the statute is that for illegitimate children, the easiest and simplest and most accurate way of determining whether there was support is by simply looking to see whether they were living with the

wage earner.

QUESTION: Well, on the contrary, if a man can show cancelled checks over a period of ten years and a tax deduction every year for support, that would be pretty good evidence, wouldn't it?

MRS. SHAPIRO: It would be an alternative way of proving the --

QUESTION: The support factor, as distinguished from the lived-with factor?

MRS. SHAPIRO: That's right, but the congressional judgment was that, as this Court has frequently recognized, the classifications may be minimally inaccurate in some situations. You don't focus on the facts of the individual case, you look to see whether the classification for the general universe is reasonable.

QUESTION: Theoretically, they could live with the father without receiving any support from him, with a grandmother paying the father for all their care?

MRS. SHAPIRO: It certainly is theoretically possible. The congressional judgment was that in the usual case, the illegitimate child who is living with his father is the one who is most likely to be supported, and that's the situation in which payments are to be made, and these other unusual situations fall outside the statute.

QUESTION: What about legitimate children?

MRS. SHAPIRO: Legitimate children are deemed to have been supported whether or not they're living with the wage earner.

QUESTION: Or whether or not they are in fact supported?

MRS. SHAPIRO: Right. The statute, as the statute in Lucas, is somewhat overinclusive for legitimate children.

QUESTION: What do you suggest the Congress do to avoid the problems of proof in individual cases?

MRS. SHAPIRO: They provided for a live-with requirement --

QUESTION: Why?

MRS. SHAPIRO: Because it's an accurate indicator of support in the generality of cases.

QUESTION: In the generality, but -- so the only advantage was to avoid individualizing cases?

MRS. SHAPIRO: That's right. And the Census report that we cited in our reply brief indicates that in fact, it's an accurate indicator in all but 4 percent of the cases.

QUESTION: Well, there's the 4 percent, and you don't think that, you just don't think that it's necessary in illegitimacy cases to individualize?

MRS. SHAPIRO: That's what we get from reading

Lalli in combination with Lucas and Jimenez, that although the statute may be somewhat unjust in individual cases, as long as it's finely tuned and substantially related, it's constitutional.

QUESTION: But it isn't finely tuned with respect to this one captive area of children, is it?

MRS. SHAPIRO: At most, they are 4 percent of the total universe, and that's a finely-tuned statute.

QUESTION: I think the 4 percent figure is somewhat misleading, isn't it? Does that include the children who have been acknowledged by the illegitimate father?

MRS. SHAPIRO: Yes, it includes --

QUESTION: And it isn't limited to that, is what I mean. That's all illegitimate children, isn't it?

MRS. SHAPIRO: That is --

QUESTION: And the statute already excludes illegitimate children who have not been acknowledged by their father, and the only relevant statistic on the additional requirement of lived-with would be not only those who lived with their parent, but also had been acknowledged, and your figure doesn't take that into account at all.

There's 4 percent of all illegitimate children, is what you're -- live with their never-married mothers.

MRS. SHAPIRO: Right.

QUESTION: But isn't the universe cut down to those who've been acknowledged by their father by the statute?

MRS. SHAPIRO: But even so, there's no more than 4 percent of any illegitimate children who are receiving support payments from their fathers, so that --

QUESTION: I just don't see how that's relevant to the lived-with requirement, when you -- in other words, if you struck the lived-with requirement out entirely, you'd still have the 4 percent figure.

MRS. SHAPIRO: That may mean that the lived-with requirement is somewhat over-inclusive.

QUESTION: Probably -- well, may I ask you this on the lived-with requirement: Is the congressional judgment, is it your theory that the congressional judgment, if you have a child, an illegitimate child who is acknowledged by his father and lived with the father for a particular period of time and then stopped living with him, that it's reasonable to assume that the father then discontinued support? Because he didn't in this case.

Is there any example that we know of anywhere where a father both acknowledged his child and lived with him for a substantial period of time and left, and then stopped supporting him? It seems to me the law would not permit him to stop supporting him, under that set of facts. And how could Congress

have reasonably assumed that he would then just walk away from the child and have no further obligation?

MRS. SHAPIRO: Whether or not there was a court order, it doesn't necessarily follow that he complied with it.

QUESTION: But which is the more probable? That you have both a formal acknowledgement and a family relationship, and then the father abandons the child -- wouldn't there normally be any -- and he continues to earn money, he's got a job and he's paying -- a government job in this case -- and you would think the Congress reasonably thought that in the normal run of cases, he would stop providing any support for the child.

The only case we know about is this one, which it didn't happen in.

MRS. SHAPIRO: That's the congressional judgment.

QUESTION: Do you think that the Congress actually made that judgment? You see, they'd make a contrary judgment if you construe the statute to mean lived with at any time. But that's critical to your case, your construction of the statute, that Congress really thought that?

MRS. SHAPIRO: That's correct, and this is the construction that the Agency has followed --

QUESTION: Consistently followed in at least one case.

QUESTION: And didn't the Court of Claims also construe the statute that way in the Gentry case? In holding it unconstitutional?

MRS. SHAPIRO: No, in the Gentry case, that issue was not involved because the Gentry children had not lived with their father at all.

QUESTION: Ever?

MRS. SHAPIRO: Yes.

QUESTION: Yes. But by implication I suppose they did it here, didn't they?

MRS. SHAPIRO: Well, here they didn't -- they followed Gentry.

QUESTION: I mean, they wouldn't have held it unconstitutional if they had construed the statute in the way suggested by my brother Stevens' question?

MRS. SHAPIRO: That's true.

QUESTION: Correct?

MRS. SHAPIRO: That's true. This case is not a statutory construction case.

QUESTION: It's a constitutional case.

MRS. SHAPIRO: It's a constitutional case, right.

QUESTION: And they wouldn't and certainly in logic wouldn't have held it unconstitutional had they construed the statute the other way?

MRS. SHAPIRO: That's true.

QUESTION: What would be the situation of an illegitimate child whose father having acknowledged, as here, was a military officer or Foreign Service officer moving from one place to another all over the world, and so he arranged to have the children, when they were in their teens, for example, to be in private schools in the school year and summer camps in the summer ---

MRS. SHAPIRO: That would be considered to be living with in a normal parent-child relationship. It's not --

QUESTION: It would be?

MRS. SHAPIRO: Yes, it would be. It's not that they have to be under the same house, same roof.

QUESTION: That's not consistent with the answer you gave me earlier. You said in a hypothetical case of a man who paid their support but had them live somewhere, they would be out.

MRS. SHAPIRO: Well, if the situation is that they are in school or in summer camp or in another situation that's similar to what happens with normal, in a normal parent-child relationship --

QUESTION: Do you know whether there are any administrative decisions that would be consistent with your answer in these cases?

MRS. SHAPIRO: I'm not aware of any that go along this line.

QUESTION: I got the impression from your earlier discussion that lived with meant precisely that, lived with in the normal, what you said, normal and ordinary parent-child relationship.

MRS. SHAPIRO: I don't think that sending a child to school with the intent, on summer vacations or when it's feasible, they will resume the normal relationship of living together in the same house, is inconsistent with living with in the normal parent-child relationship.

QUESTION: All we're dealing with is children under 18 years of age, are we not? It's not the question about a 30-year-old child who might have lived with for 18 years and then simply became emancipated?

MRS. SHAPIRO: No, no, and the statute does have a provision as the Social Security Act does for children over 18 who are in school and for students, they are continued, the benefits continue until they reach 22, I believe it is. But the point is that what the act is looking for is an indication that this is a normal family relationship that these children are being treated as children usually are, that they go to school and go to camp, that they're still children in the family.

QUESTION: If the people in these hypothetical

situations were treated that way, then they are making an individualized judgment and not a rigid, categorical judgment. If they're going behind the lived-with requirement in considering evidence that the father is really paying for their support but doesn't want to maintain or can't maintain a home, familial home --

MRS. SHAPIRO: I think you've got two different situations. The situation that I thought you were referring to originally is a situation in which the child is living either in a foster home or in some other situation --

QUESTION: Let's say living with his grandmother, but the father is paying abundantly for his support.

MRS. SHAPIRO: With no intent that they're ever going to resume living together --

QUESTION: Just exactly what I've told you.

MRS. SHAPIRO: Well, in that case, that doesn't sound to me -- again, this is something for the Agency -- but it doesn't sound to me like the normal parent-child relationship, in contrast to the situation where you're sending a child to school, or sending him to camp, and when he's through with that he comes home. They are two distinct situations.

QUESTION: Well, did you say that there's an acknowledged illegitimate child living with the father at the time of his death but he isn't supporting the child. Does

that, is that a regular, would that be construed to be a regular parent-child relationship?

MRS. SHAPIRO: If he's living with him; yes.

QUESTION: Well, he isn't supporting him, he's just living with him. As a matter of fact, he isn't supporting himself.

MRS. SHAPIRO: Well, the statute doesn't specifically say "support." The statute says --

QUESTION: It says "regular parent-child relationship."

MRS. SHAPIRO: Yes, but --

QUESTION: What do you mean by that?

MRS. SHAPIRO: That refers to the living with.

QUESTION: So it isn't open to the government to deny benefits on the ground that the father isn't actually supporting the child?

MRS. SHAPIRO: Not if he's living in the same household with him, or in this other situation.

The Tucker Act gives the Court of Claims jurisdiction over a claim against the United States founded on the Constitution or an act of Congress. There must be money already due the plaintiff from the government before the Court of Claims has jurisdiction. If it has jurisdiction because money is due, the Court of Claims may also grant prospective relief, but

only as an ancillary remedy.

This means that the Court of Claims here could properly order the government to put Shawn and Ericia Clark on the Civil Service annuity rolls only if they had an accrued claim based on some statute or on the Constitution against the government for money already due them, and they did not.

The Court of Claims believed that the children's claim for accrued benefits was based on the Civil Service Retirement Act read in the light of the Constitution. But that makes an unconstitutional intent to deny benefits into an intent to grant benefits. Whether or not the statutory denial of benefits to the illegitimate children who were not living with the wage earner is constitutional, that denial is what Congress enacted, and only Congress and not a court can change it into a statutory direction to pay benefits.

A court can decide that the lived-with requirement unconstitutionally discriminates against illegitimate children, so that the act can no longer be enforced as written. And if a District Court reaches that conclusion, it can enjoin the agency from continuing to make the unconstitutional discrimination required by the act. But of course, that's an independent injunction power that the Court of Claims doesn't have.

QUESTION: What would that mean, Mrs. Shapiro, they just don't pay any more child benefits?

MRS. SHAPIRO: Well, that's one alternative.

QUESTION: That's the alternative, isn't it, that you recommend? Pay no more child's benefits until the statute is made constitutional?

MRS. SHAPIRO: That's if, in a suit in the Court of Claims, our submission is that the Court of Claims is the wrong court in which to be presenting this claim.

QUESTION: It has no jurisdiction?

MRS. SHAPIRO: It had no jurisdiction, because there was no accrued claim --

QUESTION: It's jurisdiction is for claims for money based upon the constitutionally raised action?

MRS. SHAPIRO: Exact.

QUESTION: But your position is that the plaintiff should then go to another forum and get an injunction against paying any child benefits to anybody? That's what would have to be done if the --

MRS. SHAPIRO: In fact, that the --

QUESTION: You think that's what Congress would have wanted in this situation?

MRS. SHAPIRO: In this particular situation, these for the Clark children are presumably part of the Jenkins class, and the Jenkins case is in the District Court -- it's in the Court of Appeals now.

QUESTION: But you argue there, do you, does the Government argue there that all child benefits should cease until Congress remedies the situation?

MRS. SHAPIRO: No, what we're arguing in Jenkins is that the benefits have been, they have been paid since December first, 1977 under the Proctor decision.

QUESTION: Without statutory authority, according to your present argument.

MRS. SHAPIRO: That's right.

QUESTION: Your argument there, I take it, then, is that no benefits should be paid.

MRS. SHAPIRO: The argument there is that no benefits should be paid before December 1, 1977.

QUESTION: But why even currently? What's the statutory authority for current benefits?

MRS. SHAPIRO: It's not a statutory authority. That's the standard doctrine of severability. As I say, when a court finds that the denial of benefits, that the discriminatory treatment is unconstitutional, then it can, as an alternative to holding that no benefits are payable, it can direct that benefits be paid either to all children -- well, in this situation you could have either benefits paid to all legitimate children who meet the lived-with requirement; that is, you apply the qualification equally to all children.

QUESTION: Well, assume these plaintiffs were not in the Court of Claims but were in the Federal District Court, and assume they win on the merits: What remedy would be appropriate in the Government's view?

MRS. SHAPIRO: If these children were in the District Court?

QUESTION: Yes.

MRS. SHAPIRO: Well, then the Court would have two alternatives, and we would not argue that the lived-with requirement should be applied to all children. We would agree that it would be appropriate under the injunction power to require payment to these children, even though they couldn't meet the statutory requirements.

QUESTION: The Court would have the alternative of saying, of enjoining any payments to any children at all?

MRS. SHAPIRO: Any payments to any --

QUESTION: That alternative was illustrated in a case last term in which Justice Powell disagreed with the holding of the Court.

MRS. SHAPIRO: I believe that's --

QUESTION: Mrs. Shapiro, we have had a number of cases, you can almost learn who has been Secretary of HEW from the cases, Weinberger, Matthews, Califano, et cetera, and many of them have involved challenges to congressional limitations

on payments to illegitimate children. Have any of them up to now ever been brought in the Court of Claims?

MRS. SHAPIRO: I don't believe so, I don't think they have.

QUESTION: Some were three-judge courts, perhaps all of them; I'm not sure.

MRS. SHAPIRO: Yes. I'm not sure that all of them were.

QUESTION: In answer Mr. Justice Stevens in what remedy would be available in the District Court, you said the Court would have a choice and it could order the payment of benefits. How about back benefits?

MRS. SHAPIRO: No. That is barred by sovereign immunity, and that's the same argument in the District Court. It's not a jurisdictional argument because the District Court does have the jurisdiction --

QUESTION: But you say that even if the District Court decided that you'd been incorrectly construing the act and that you should have been paying these benefits the entire time, the District Court could not enter a judgment for past benefits?

MRS. SHAPIRO: Precisely.

QUESTION: Because as you construe the act, Congress has not waived sovereign immunity to that extent?

MRS. SHAPIRO: That's exactly right, yes, that the waiver of sovereign immunity under 5 USC 702 extends only to injunctions for the future.

QUESTION: Is there some authority for that?

MRS. SHAPIRO: This is what we --

QUESTION: Apparently the Court of Claims disagrees with you.

MRS. SHAPIRO: Well, we read this Court's decision in Teston, Edleman v. Jordan certainly suggests that result.

QUESTION: On your hypothesis, responding to Mr. Justice White, the only remedy then to enforce the judgment of Claims would be to get a private bill in the Congress?

MRS. SHAPIRO: For retroactive benefits. The Court of Claims, as I say, is the wrong court, but if you had a decision in the District Court you could get future payment, but for retroactive payments, it's only Congress, whether it's a private bill, whether it's amendment of a statute saying that they intend to have it be paid retroactively.

QUESTION: At time the Court of Claims, not in these situations but in some where back payments were involved, have in their opinions recommended that the Congress enact a private bill, have they not?

MRS. SHAPIRO: I'm not sure; perhaps, but that certainly would be an alternative.

QUESTION: It was established as an arm of Congress, of course, originally.

MRS. SHAPIRO: My time has expired.

MR. CHIEF JUSTICE BURGER: Mr. Merrigan.

ORAL ARGUMENT BY EDWARD L. MERRIGAN, ESQ.,

ON BEHALF OF THE APPELLEE

MR. MERRIGAN: Mr. Chief Justice, may it please the Court, just a brief word about the facts, Your Honors, and I think the Court fully understands this case from the questions that you propounded to the Government, the two Federal employees involved in this case, one was the father, Mr. Isaacson, the other was the lady involved, Miss Patricia Ilene Clark, both worked for the Veterans Administration at Fort Harrison, Montana, and they commenced to live together in 1965 and early 1966, and during the period of time they lived together they had the two children, Shawn Clark and Tricia Clark.

They continued to live together with the children in a regular husband-wife, parent-child relationship for the world to know through 1971. In 1971 Mr. Isaacson moved out of the common dwelling and Mrs. Clark brought a paternity action in the Court in Montana. Mr. Isaacson while alive appeared in that case, was represented by counsel. The Court entered a paternity order against Mr. Isaacson which specifically declared him to be the father of these two children. Then by stipulation

and judgment of the Court, he was ordered to pay \$5,000, representing the back support payments he owed the children for the time he had moved out of the house. He then stipulated and was ordered by the Court to pay \$120 a month for their future support. He then stipulated and was order by the Court to make them the beneficiaries of two life insurance policies, one a New York Life Insurance Company policy and the other his Federal Government Employees Group policy.

He make all of the support payments to the children from that time forward to his death, not directly but by deductions or allotments out of his Federal salary, up to the time of his death in 1974 in an automobile accident.

QUESTION: Sir, would you say that he was doing what was suggested in some of the hypothetical questions? That is, he was providing support for them without providing a familial home for them.

MR. MERRIGAN: He did everything for the children except marry the mother and continue to actually live with them physically until the date of his death, from about 1972 to '74. He was a father in every sense of the word, by Court order, by support payments, by living with them for a long period of time, and the Government in this case, in its reply brief, concedes that there is no need under the lived-with requirement of the statute for a permanent living-with.

The Government concedes that it can be a temporary or a periodic separation in that relationship without breaking the chain, supposedly. This has never been judicially declared, but the Government concedes it in its reply brief.

QUESTION: But the difference of opinion between you is that the lived-with has to be at the time of the death?

MR. MERRIGAN: Well, I think if you construe the statute itself --

QUESTION: And you say not?

MR. MERRIGAN: -- Mr. Justice Stewart, if you construe the statute --

QUESTION: Well, isn't that, have I correctly identified the difference of opinion?

MR. MERRIGAN: That's the difference. When we sued in the Court of Claims, we specifically asked the Court to award a judgment here based on an act of Congress with the lived-with requirement in the law, because we say that the lived-with -- it says "lived with," it doesn't say "lived with or living with" in the statute, it says "lived with." And here the Court and Government and everybody involved concedes that they lived with, there was that open to the world, lived with in the past.

I think the problem that we run into in this case is the construction given to the statute by the Civil Service

Commission, which says --

QUESTION: Well, then, by the Court of Claims?

MR. MERRIGAN: Well, not really by the Court of Claims.

QUESTION: How could they have held it unconstitutional had they not construed it the way the Government does?

MR. MERRIGAN: Well, I think the statute was declared unconstitutional in Gentry. There's no long discussion of the constitutionality in our case because they simply adopted --

QUESTION: No long discussion of it, but as a matter of logic, how could they have?

MR. MERRIGAN: They simply held that the lived-with requirement, as I am going to try to point out to Your Honor in a moment, is simply a total bar to any recovery for illegitimates in 90 percent of the cases, by the very term "illegitimate," meaning that the father and mother are not married. In more than 90 percent of the cases the father is either married to somebody else, or he's a bachelor who doesn't want to marry the mother and is therefore living somewhere else, and so if you can't meet the lived-with requirement with the father, you're totally barred from benefits at all.

QUESTION: But you're now arguing that your clients can meet the lived-with requirement?

MR. MERRIGAN: We say that in this case, truly,

jurisdiction in this case, I think, this case should be settled in our judgment, if we can propose to the Court, that if you looked at the statute and construed that they had lived with for the period of time that we just referred to, that there was this support, that they did meet the requirement of the statute and therefore the Court of Claims clearly had jurisdiction, because we're suing on an act of Congress, we're including the lived-with requirement and therefore they're entitled to judgment under 28 USC 91.

QUESTION: You are seeking to support the judgment on a different ground than the Court of Claims gave you judgment?

MR. MERRIGAN: I say that this Court could, if it wanted to, avoid the constitutional question in this case, say that the statute properly construed should have granted judgment here without reaching the constitutional question.

QUESTION: What if the father had lived with the child for the first three months of its life and then not lived with it for the subsequent 17 years, 9 months of its life, and the child was 18 at the time of the father's death?

MR. MERRIGAN: When you start these types of requirements in the statute obviously, as you change the facts, it gets either worse or it gets better.

QUESTION: Yes. Isn't that just why Congress has to draw lines?

MR. MERRIGAN: Well, Congress didn't draw the line at lived with or living with. The amendment that is now proposed in Congress today talks in terms of living with, meaning that --

QUESTION: Well, no one has any claim under an amendment that is proposed in Congress today, do they?

MR. MERRIGAN: I don't say that we're relying on the amendment as proposed today. The statute today speaks in terms of lived with. The amendment proposed in Congress today is talking in terms of living with.

QUESTION: But the Agency construction of the present language is living with?

MR. MERRIGAN: Living with. I think they changed the act of Congress. And what I am trying to say to Your Honor is that if we wanted to avoid the constitutional issue in this case, as we originally sued in our petition to the Court of Claims, is that these children truly in this case meet the statutory requirements. If that be true, everything that Ms. Shapiro said this morning about the jurisdiction of the Court of Claims automatically falls, because we are suing on an act of Congress.

QUESTION: Did the Court of Claims reject your construction of the statute in Gentry?

MR. MERRIGAN: No, Your Honor.

QUESTION: I know you weren't in Gentry, but was that issue before the Court of Claims?

MR. MERRIGAN: No, it was not because the children never lived with the parent in Gentry.

What happened is, by the time --

QUESTION: But the Court of Claims, in effect, then, in this case rejected your statutory claim?

MR. MERRIGAN: No, the Court of Claims did not pass on it, Your Honor. What happened is, we moved --

QUESTION: What makes you think it didn't?

MR. MERRIGAN: What I think happened in our case, Your Honor, is this: Between the time we filed our petition in the Court of Claims and the time they rendered summary judgment, this statute had been declared unconstitutional five times.

QUESTION: Are you suggesting that any Federal Court has the authority to reach a constitutional issue without first passing on a necessarily included statutory question?

MR. MERRIGAN: I think in this case, if Your Honors will look at the judgment in this case, which is of course in the appendix, what happened here, the Court of Claims had previously ruled the lived-with provision to be unconstitutional, and therefore, rather than reconstrue or apply the provision

in our case, they deemed it to have been declared unconstitutional in the past.

QUESTION: Doesn't that mean they were adopting the Gentry approach?

MR. MERRIGAN: There's no question but that the Court of Claims in our case ruled that the statute was unconstitutional. I am suggesting to Your Honors that we have been swept, under the facts of this case, if you construe this statute to mean lived with to cover the facts of our case, that we meet the terms of the statute without the constitutional issue being raised, and if that be true, there's no question but that the Court of Claims had jurisdiction under 28 USC 1491; there's no question that this Court would not have jurisdiction under 1252 of Title 28 because, of course, there is no constitutional issue raised if you would decide this case on that basis.

But I am not trying to avoid the constitutional issue, because when you move on to that issue in this case, the lived-with requirement which is the only test as to whether or not an illegitimate child can recover, for all practical purposes, is a total bar to almost all illegitimates, because what it means, in most cases, is, an illegitimate child is a child of a mother and father who are not married, in more than 90 percent of the cases do not live together. Under the laws of

most States, the mother has custody of the child. In most cases the father is either living with another wife or living as a bachelor who does not want to live with the woman who had the child, and so the poor child is left without a father, without the ability to live with, without the ability to meet the test in any circumstance.

So by making the lived-with requirement alone the test, it's the equivalent of striking out most illegitimates' ability to recover under the statute at all, and I think that's what's made five courts in the Federal system, two of them three-judge courts, declare this statute uniformly unconstitutional.

Some of the questions Your Honors have asked make it clear a Federal employee, for example, who did want to live with the child, who was assigned to Saudi Arabia in his government job would be over there, the child would be here with the mother. Not eligible.

A government employee who has no home, who travels all the time, the child lives with the mother: No ability for the child to recover the benefits.

In other cases where the parents lived together for a long period of time, ten years, twelve years, and then the father suddenly moves out in a spat with the mother, no ability for the child to recover because he can't show he was physically

living with the child at the moment of death.

Now, the Government says children can protect themselves against that, that they can insist that they live with the father. Well, here is a three-year-old child, six-year-old child, "Mother, I insist on living with my father to protect my Federal annuity." Or, "Father, I insist on you letting me move in with you to protect my Federal annuity." That's what the Government is asking us to do in this case.

Your Honors, as far as the statute itself is clearly enacted by Congress to protect dependents who are looking to the deceased employee for support. In this case we have the order of the Montana Court decreeing support. We have the support being made throughout the employee's life, right up to his death through allotments out of his Federal salary, so there's no guesswork on the part of the Government as to whether he was supporting the children, it came from his salary.

Then we have the father in the life insurance policy, the Federal Group Life Insurance policy, paying after death for the support of the children, and yet they have been denied the benefits in this case on the ground that they simply did not physically live with him at the moment of death.

The Government says perhaps spurious claims are prevented by this sort of a statute. Well, let's take the case that is so well known today of young women moving in with

a Federal employee, let's say bringing in a small child that she had from some other relationship, and then the Federal employee dies. So the mother says, "Chance for a Federal annuity. This child was the Federal employee's child; we were living with him at the time of his death, and therefore I want the annuity."

Under the statute, that's all she had to say if she's willing to lie, because then she could show they were living together in a regular parent-child relationship --

QUESTION: She has to prove the father acknowledged the child.

MR. MERRIGAN: No, not under this statute.

QUESTION: Well, she does have to prove that the child or children were the --

QUESTION: Issue.

QUESTION: -- the issue of the father. But as you say, that can be proved by her perjury, I suppose.

MR. MERRIGAN: It could be proved spuriously. That is the only suggestion I'm making, Your Honor. I'm not trying to say that this sort of claim should be set up, but I think the statute promotes it.

QUESTION: What about the word "recognize" the step-child or recognize natural child: Doesn't that mean recognize by the natural father?

MR. MERRIGAN: Recognized --

QUESTION: I just assumed it did.

MR. MERRIGAN: Right.

QUESTION: So the sheer hypothetical case, the woman would not recover?

MR. MERRIGAN: The woman could recover on other grounds, because adopted children or stepchildren could be included in the same lived-with requirement, but I say, all I'm trying to say, Your Honor, is that opens the door for spurious claims on the ground that children that were not really the children of that particular father were living with him at the time of death, and the mother then can fabricate a claim around it.

All I am trying to say is -- I'm not trying to say this should be allowed; I'm not trying to say that a spurious claim is a sound claim. What I am trying to say is that this particular type of statute promotes that particular type of claim.

QUESTION: But she would have to perjure herself both as to the question whether the father was the actual father and as to whether he recognized the child.

MR. MERRIGAN: Well, Your Honor, I think that's true.

QUESTION: I mean, presumably there are an awful lot of lawsuits, you can imagine, that could go off on an unjust

result as a result of perjury which wasn't detected by the finder of fact.

MR. MERRIGAN: I raise the possibility only because one of the defenses for this statute here is that it was enacted to promote and -- to protect the Government, rather -- against spurious claims.

QUESTION: Well, you don't need a broad holding here to support your position. All you need is that a child who has been legally recognized by a Court, your finding --

MR. MERRIGAN: No question, Your Honor. No question. I think we fit, in this particular case, every requirement that could possibly be made for an illegitimate child. There was the living together; there was the parent-child relationship; there was the decree of the Montana Court; and there was the support payment, not only through death but after death through the insurance.

QUESTION: How does the Commission construe the word "recognized" -- does it require some formal act of recognition by the father or by a court? How does it construe it?

MR. MERRIGAN: I truly don't know that, Your Honor, because --

QUESTION: But in all these hypotheticals you give, the recognition is rather important, isn't it?

MR. MERRIGAN: Well, it is rather important. I would --

QUESTION: You have an easy case, but you've been arguing with a rather broad brush, I suggest.

MR. MERRIGAN: The word "recognition," I think, is clearcut in any case where you have an order of filiation --

QUESTION: It's clearcut here, yes.

MR. MERRIGAN: -- such as you have in Montana.

QUESTION: Yes, but this example you gave of moving in and dying and the wife coming along and saying what you say she said --

MR. MERRIGAN: I want you to understand, Your Honor, that that idea didn't only originate with me. It was discussed in the Proctor decision; it was discussed in the Gentry decision, as things that could happen.

QUESTION: All you are saying today is that there must be a court order, so far as you are concerned?

MR. MERRIGAN: Certainly, where there is a court order there can be no further doubt. I think the other thing is the showing of actual support, that he contributed to support, and what the Government is now proposing to Congress and it's already passed the House and is well along in the Senate is that there be a living with as opposed to lived with, and that there be a showing that he contributed to the support of the

child prior to death.

I suggest to you that that is going to require a rather case-by-case determination. It is not exactly the uniform presentation that would usually be required under these other statutes.

So, Your Honors, where I think we find ourselves in this case is this: Here we have five Federal courts in the past that have uniformly held the present statute to be unconstitutional, and as a result, all of the children in those cases are now recognized to receive their benefits under the statute.

On the right, we have the Agency itself seeking an amendment to the law that will protect all children in the future, and that may be the law before this Court acts in this case. So we find ourselves right in the middle of the law as it has been interpreted by other Federal courts uniformly in the past, and as Congress is changing it in the future, and we urge this Court for all of the reasons I stated either to uphold the Court of Claims decision on the constitutional issue, or to construe this statute and avoid the constitutional issue, to say that under the facts of this case as conceded on the record by the Government, these children would be entitled to judgment under the statute, even with the unconstitutional provision in it.

On the jurisdiction of the Court of Claims, just briefly, there is no question but that the Court of Claims under section 1491 of Title 28 has clearcut jurisdiction over any claim based on an act of Congress. It has clearcut jurisdiction on any claim based on the Constitution of the United States. What the Court of Claims ruled in Gentry is that this particular provision is a relatively minor provision of the statute which was enacted by Congress to provide support to children of deceased Federal employees. It was a severable provision, and it severed this provision, and with that severed provision out, then it granted judgment based on that act of Congress.

And I urge the Court that that is correct law --

QUESTION: That's not the act that Congress legislated?

MR. MERRIGAN: Well, Your Honor, the Court of Claims has jurisdiction to render judgments on the Constitution as well as on the --

QUESTION: There's nothing in the Constitution that entitles your clients to payment of any kind for anything.

MR. MERRIGAN: Well, the claim based on the Constitution here would be that they are entitled to judgment under this statute as interpreted in accordance with the Fifth Amendment.

QUESTION: But not as an --

QUESTION: Do you think the Constitution would require the Treasury to draw a check for your clients without any act of Congress in establishing a social security system?

MR. MERRIGAN: No, I don't think that's true at all, Your Honor. I think --

QUESTION: Then how can you say this is a claim founded on the Constitution?

MR. MERRIGAN: I say that this is a claim founded on the act of Congress with the power of the Court of Claims to sever an unconstitutional provision from that statute. In the Teston case, for example, Your Honor, which is the case that was referred to by Mrs. Shapiro, in that case there was a claim by Federal employees that they had been misclassified by the Civil Service Commission.

Well, there was no statute that gave them any right of recovery based on a misclassification of position, and therefore there was no statute. Here the judgment of the Court of Claims is firmly grounded on the very statute Congress passed.

QUESTION: But you say they had to declare that it was unconstitutional in order to get to it?

MR. MERRIGAN: Not the whole statute, Your Honor.

QUESTION: You know, this is a large statute. They

had to declare one section of the statute unconstitutional.

MR. MERRIGAN: They declared a tiny sentence in this statute.

QUESTION: Well, a section of the statute --

MR. MERRIGAN: A section of the statute was --

QUESTION: -- which bore on your clients rights.

MR. MERRIGAN: That's right. But what I am trying to say to Your Honor, then, they then pegged their decision very firmly on that act of Congress with the voided provision out of it, and I think that there they do have the right, because they do have the power to consider claims based on the Constitution as well as acts of Congress, to look at an act of Congress, to declare a section which is clearly violative of the Fifth Amendment void, and then to grant a judgment against the United States founded on that act of Congress.

QUESTION: . . . Is it correct to say that your argument comes down to whether the statute is severable, whether that section is severable, and if it is, then you say the jurisdictional question is resolved?

MR. MERRIGAN: I think that's correct.

QUESTION: That was the Court of Claims' argument in Gentry?

MR. MERRIGAN: That's entirely correct.

QUESTION: That was their own conclusion?

Without being able to cite any prior authority to that effect?

MR. MERRIGAN: I think the Court of Claims did cite some authorities to that effect, although they escape my mind at the moment.

QUESTION: Yes, it may have.

QUESTION: The Court of Claims certainly has had a propensity throughout its life to try to expand its jurisdiction, hasn't it?

MR. MERRIGAN: Well, I hope we won't find this case as the limiting factor on that propensity.

QUESTION: Do you recall Judge Skelton's concurring position?

MR. MERRIGAN: I do recall it, Your Honor.

QUESTION: Did you present that position in your case or not?

MR. MERRIGAN: We relied on Gentry totally, as well as the concurring opinion of Judge Skelton.

QUESTION: So you said not only should the statute be construed to award benefits when the living-with occurred any time, but you also argued that the statute should be construed to permit proof of support in any case?

MR. MERRIGAN: Yes, Your Honor.

QUESTION: Because the Court of Claims apparently

rejected that position in Gentry, but you represented it in your case, anyway?

MR. MERRIGAN: We did. We relied totally on the Gentry decision and, in fact, I think what happened in our case is the Court of Claims looking at five straight Federal decisions on the subject didn't reach the construction of the statute that we urged on it; it simply ruled on the constitutional issue.

Thank you, Your Honor.

QUESTION: Mr. Merrigan, you haven't addressed yourself orally, unless I missed it, to the question of sovereign immunity with respect to the back payments.

MR. MERRIGAN: Your Honor, clearly the statute itself provides for payments from the moment of death of the Federal employee. The act was passed for that purpose. The Congress intended the act for that purpose. There was no withholding of sovereign immunity on the liability of the Federal Government for such payments, and the only way that sovereign immunity comes into this is a claim that, like in Teston, where there was no statute at all, therefore there is the sovereign immunity claim of no ability of the Court of Claims to judge it.

What we're trying to say here is the provision was severable. There is an act of Congress. There is a direction of the Congress that they be paid back to the date of death.

Can you imagine construing this, the law, in such a fashion that we have nowhere to do to collect a true debt of the United States --

QUESTION: Well, that's what sovereign immunity means, you have nowhere to go if the only person who would otherwise be liable to you is the sovereign, and he asserts his immunity: That's exactly what sovereign immunity means.

MR. MERRIGAN: And that usually arises in a case where there is no statute passed by the Congress authorizing the payment of the debt of the United States, and here there is a clearcut debt of the United States running back to the very day that the employee died.

QUESTION: Otherwise the Government could come in and say, of course you're within the class that was intended to be benefitted by this statute, and we owe you the money, but you just can't sue for it.

MR. MERRIGAN: I think that's generally correct. And by the way --

QUESTION: That would be the position?

MR. MERRIGAN: That would be it. And by the way, with that, Your Honor, we would then be scooped into a class of, I don't know how many employees, some of whom have completely different positions than we have, on all of the facts.

In other words, here we have a showing of support,

we have a showing of lived with and so forth and so on, a class would be so general that we may fall with the class, and even under the new statute we may somehow fall with the class. And so I think that the Gentry decision is a sound decision, I think it treated the question of sovereign immunity, it treated the question of the Court's jurisdiction correctly, and we urge the Court to affirm us, and I think what we're really here about is an appeal from Gentry, which the Government never took, the Government never took any appeals from any of the other decisions in the past up to this one, and I think that we're now trying to carry on our shoulders all of the claims that go the whole way back to Gentry.

QUESTION: This lawsuit wasn't brought as a class action?

MR. MERRIGAN: No, Your Honor, it was not.

QUESTION: Always an individual action?

MR. MERRIGAN: Always an individual action.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Counsel. The case is submitted.

(Whereupon, at 10:58 o'clock a.m., the case in the above-entitled matter was submitted)

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