

In the

# Supreme Court of the United States

PATRICIA R. HARRIS, SECRETARY OF )  
HEALTH AND HUMAN SERVICES, )

Appellant, )

v. )

CHARLES EDWARD WILSON, ET AL., )

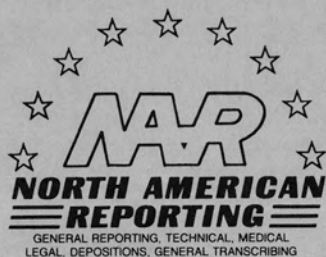
Appellee. )

No. 79-1380

Washington, D.C.  
December 2, 1980

Pages 1 through 38

# ORIGINAL



1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----:  
3 PATRICIA R. HARRIS, SECRETARY OF :  
4 HEALTH AND HUMAN SERVICES, :

5 Appellant, :

6 v. :

No. 79-1380

7 CHARLES EDWARD WILSON, ET AL., :

8 Appellee. :  
9 -----:

10 Washington, D.C.

11 Tuesday, December 2, 1980

12 The above-entitled matter came on for oral argument  
13 before the Supreme Court of the United States at  
14 11:09 o'clock a.m.

15 APPEARANCES:

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General, Department of Justice, Washington, D.C.  
20530; on behalf of the Appellant

17 JAMES D. WEILL, ESQ., Legal Assistance Foundation  
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Chicago, Illinois 60604; on behalf of the Appellee  
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COTTON CONTENT

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Harris against Wilson. Mr. Schulder, you may proceed when you are ready.

ORAL ARGUMENT OF ELLIOTT SCHULDER, ESQ.,

ON BEHALF OF THE APPELLANT

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

This case is before the Court on direct appeal from the United States District Court for the Northern District of Illinois. The question presented is whether Section 1611(e)(1) of the Social Security Act violates the equal protection component of the Fifth Amendment's due process clause by excluding from certain public assistance benefits under the Supplemental Security Income program otherwise eligible individuals who are residents of public institutions and whose care and treatment are not funded under the Medicaid program. In order to gain a proper understanding of this question, it is necessary to explore the interaction of Medicaid and SSI statutes that give rise to the equal protection issue here.

Under Medicaid, the federal government provides financial assistance to those states that choose to reimburse certain costs of medical treatment for needy persons. The Medicaid program generally covers in-patient and out-patient care for physical and mental illnesses, but it excludes

1 coverage for treatment of persons aged 21 through 64, in an  
2 institution for treatment of tuberculosis or mental diseases.  
3 Since Appellees are between 21 and 64 years of age and are  
4 patients in mental institutions, their treatment is not funded  
5 under Medicaid. The validity of the Medicaid mental insti-  
6 tution exclusion was upheld in this Court's summary affir-  
7 mance in Legion v. Richardson, and Appellees do not challenge  
8 their exclusion from Medicaid coverage in this litigation.

9 Under the SSI program, which was in effect on  
10 January 1st, 1974, the federal government provides monthly  
11 cash assistance to indigent, aged, blind and disabled persons.  
12 A person is considered disabled within the meaning of the  
13 statute if he is unable to engage in any substantial gainful  
14 activity by reason of any medically determinable physical or  
15 mental impairment. Currently a standard SSI benefit amounts  
16 to \$238 per month. In Section --

17 QUESTION: In total dollars, how much are we talking  
18 about, any idea?

19 MR. SCHULDER: In terms of the particular benefit at  
20 issue here, while we've stated --

21 QUESTION: Overall, overall to the government; how  
22 much annually?

23 MR. SCHULDER: We've stated the figure would be in  
24 the vicinity of 30 million dollars, although it's difficult  
25 to compute it with --

1 QUESTION: Annually.

2 MR. SCHULDER: -- precision.

3 QUESTION: Incidentally, Appellee Wilson is no  
4 longer in the case, is he?

5 MR. SCHULDER: That's correct. The only two Appellees  
6 -- the only two named Appellees who are still in the case are  
7 Appellee Simmons and Turney. But the case was certified by  
8 the District Court as a class action.

9 Section 1611(e)(1) of the statute at issue here  
10 provides that an otherwise eligible person who resides in a  
11 public institution is ineligible for full SSI benefits.

12 QUESTION: Mr. Schulder, could I just ask one ques-  
13 tion --

14 MR. SCHULDER: Surely.

15 QUESTION: -- following up on what Justice Blackmun  
16 said, in computing the 30 million dollars, do you just take  
17 the number of persons in mental institutions who, and multiply  
18 that by the \$25 figure, is that how you do it? It's an awful  
19 lot of people if you are up to 30 million dollars. Or is there  
20 any other cost, other than the \$25, in arriving --

21 MR. SCHULDER: No, that's the only cost that was  
22 considered here, but it was done on a, I believe, a nationwide  
23 basis. The class that was certified in this case is limited  
24 to one of the regions that's covered by the Social Security  
25 Administration.

1           QUESTION: Can you translate the 30 million to the  
2 number of persons? Do you know how many people are -- have an  
3 interest in the outcome of the case? Well, don't try to -- if  
4 you don't have it, then okay.

5           MR. SCHULDER: As I was saying, Section 1611(e)(1),  
6 the statute at issue here provides for an exclusion from SSI  
7 benefits generally, of all persons who are residents in public  
8 institutions. However, the statute provides that a small,  
9 \$25-a-month benefit for "comfort items" to those individuals  
10 who reside in a medical facility which is receiving a payment  
11 under the Medicaid program to pay for the costs of their care  
12 and treatment.

13           The purpose of this reduced monthly benefit, as  
14 expressed in the legislative history, is to allow the recip-  
15 ient to purchase small comfort items, such as magazines,  
16 stationery or clothing, not supplied by the institution. The  
17 statute, the statutory exclusion and exemption at issue here  
18 has the effect of denying SSI payments to all residents of  
19 public institutions whose treatment, for whatever reason, is  
20 not funded under Medicaid. Because of their exclusion from  
21 Medicaid, persons between 21 and 64 years of age who reside  
22 in public mental institutions are not eligible for the reduced  
23 SSI benefit.

24           Appellees are indigent individuals between 21 and 64  
25 years of age, who are disabled by reason of mental impairment.

1 They thus satisfy the general eligibility requirements for  
2 SSI. However, because Appellees are hospitalized in public  
3 mental institutions, under the operation of Section 1611(e)(1)  
4 they are ineligible for SSI benefits. They are ineligible  
5 for the full SSI benefit, because they are housed in a public  
6 institution. And they also do not receive the reduced bene-  
7 fit for comfort items because their treatment in a mental  
8 institution is not funded under the Medicaid program.

9 Appellees brought this lawsuit for declaratory  
10 relief on April -- challenging the constitutionality of  
11 Section 1611(e)(1) on equal protection grounds. District  
12 Court, as I mentioned earlier, certified the case as a class  
13 action and granted summary judgment for Appellees. The  
14 District Court first concluded that the statute invidiously  
15 discriminates against the mentally ill, it then determined  
16 that classifications based on mental illness are sufficiently  
17 similar to suspect classifications, such as race or natural  
18 origin to require a stricter standard of review than is nor-  
19 mally applicable in reviewing social welfare legislation.

20 QUESTION: This Court has never held that mental  
21 illness is a suspect classification, has it?

22 MR. SCHULDER: That's correct. Actually what the  
23 District Court held in this case was that mental illness was  
24 a quasi-suspect classification and thus entitled to an inter-  
25 mediate or heightened level of scrutiny. The only two federal

1 courts of which I am aware, that have specifically addressed  
2 the question, have held that mentally ill individuals -- or  
3 classifications, are not entitled to any kind of heightened  
4 or strict scrutiny. We have cited those in our brief.

5 The District Court ruled in this case that mental  
6 health classifications must serve important governmental in-  
7 terests and must be substantially related to achievement of  
8 those objectives.

9 QUESTION: Well that's pretty much the Boren test,  
10 I guess, isn't it?

11 MR. SCHULDER: That's correct. The Court held that  
12 the statute in this case failed to pass muster under this  
13 heightened standard. In addition, the Court expressed the  
14 view that the statute appeared to be an accidental by-product  
15 of the legislature rather than a deliberate means of serving  
16 a legislative end.

17 The case here presents a problem of line-drawing  
18 in enactment of social welfare legislation. In enacting the  
19 statutory provision at issue here, Congress drew the line at  
20 providing SSI benefits to public institution residents whose  
21 treatment was partially funded by the federal government under  
22 the Medicaid program, while leaving it to the states and  
23 local governments to provide for the comfort needs of public  
24 institution residents whose care was wholly funded by state  
25 and local government sources. We submit that the statute is

1     rationally based on considerations of conserving economic  
2     resources and of respect for the responsibilities of state  
3     and local governments for caring for those who are within  
4     -- caring for the comfort needs of those within public insti-  
5     tutions that are wholly funded by those local governments.

6             The District Court, however, held that the classi-  
7     fication at issue here is based on mental health. We submit  
8     that the Court's conclusion that this statute discriminates  
9     on the basis of mental health, is incorrect, and in fact the  
10    Court's conclusion that the statute discriminates on the basis  
11    of mental health ignores the fact that individuals such as  
12    Appellees, who are disabled by reason of mental impairment are  
13    included within the SSI program in the first place, precisely  
14    because their mental condition is severe enough to warrant --  
15    to constitute a disability, and to warrant benefits under the  
16    SSI program.

17            Appellees arguments and the conclusions of the District  
18    Court, therefore, rest and fall on this tortology. Moreover,  
19    it is important in this case to focus on precisely what kind  
20    of --

21            QUESTION: I have some difficulty following that  
22    argument. Supposing that they said you are eligible for SSI,  
23    one ground would be mental illness, but then they said,  
24    however, mentally ill pepole get half the benefits everybody  
25    else gets. They would get in because they are mentally ill,

1 but then they only get a lesser benefit. Couldn't they then  
2 still claim the classification was based on mental illness?

3 MR. SCHULDER: But that's not the classification at  
4 issue here.

5 QUESTION: But I'm just, I'm just directing my  
6 question at your point that because they get initial eligi-  
7 bility by reason of mental illness, therefore nothing else  
8 done by reason of mental illness can be based on mental ill-  
9 ness.

10 MR. SCHULDER: That may be true, that merely because  
11 a class of people are included within the statute initially  
12 and then not given equal treatment with other beneficiaries,  
13 that would not necessarily mean that the statute did not  
14 discriminate against them. But one of the points that we are  
15 trying to make here is that the District Court's conclusion  
16 that the statute invidiously discriminates against them and  
17 the Court's ascribing some kind of antipathetic attitude on  
18 the part of Congress toward the mentally ill, simply is un-  
19 founded in the context of a statute that singles out people  
20 who are mentally impaired for special treatment and inclusion  
21 in the program in the first instance. And in fact, the statu-  
22 tory exclusion at issue here does not exclude the mentally  
23 ill across the board; in fact, there are large numbers of  
24 mentally ill individuals who do qualify for the reduced SSI  
25 benefit.

1 QUESTION: There are a large number of non-mentally  
2 ill people who do not.

3 MR. SCHULDER: That's correct.

4 QUESTION: Well, Mr. Schulder, if you admit people  
5 to schools you can't discriminate, can you? So if you let  
6 them in this program, how can you discriminate against  
7 them after you admit them, and say that we're not discrimi-  
8 nating, because we did admit them.

9 MR. SCHULDER: Well, we're not --

10 QUESTION: Aren't you saying we didn't discriminate  
11 as much?

12 MR. SCHULDER: No. Because the specific statutory  
13 exclusion that we're dealing with here does not single out any  
14 one group of individuals. It draws a bright line between those  
15 public institution residents who are receiving Medicaid fund-  
16 ing for their care and treatment and those who are not. It's  
17 not based in terms of mental illness or even residence in a  
18 mental institution. The line that was drawn here is based on  
19 a neutral factor of Medicaid eligibility versus non-Medicaid  
20 eligibility. We submit that that distinction only has to  
21 serve a rational basis and that the rational basis is present  
22 to uphold the statutory distinction here.

23 QUESTION: I thought you said that the reason that  
24 was not discriminatory was because they did recognize them in  
25 one instance?

1 MR. SCHULDER: Well, but as I explained in answering  
2 Mr. Justice Stevens' question, we're not saying that --

3 QUESTION: I don't see the difference between that  
4 and the school. You say okay, we're not discriminating, we'll  
5 let you in the school, but we will educate you in the basement.

6 MR. SCHULDER: Well what we're saying is, that the  
7 District Court's finding --

8 QUESTION: To put it more precisely we'll let you in the  
9 school, but you can't get the \$25 that everybody else gets.  
10 Would that be all right?

11 MR. SCHULDER: Well, what we're saying here is that  
12 this legislative scheme does not manifest or reflect any kind  
13 of antipathetic attitude on the part of Congress toward the  
14 mentally ill. It draws the line at which some mentally ill  
15 are excluded and some people who are not mentally ill are  
16 excluded. And these people are excluded for reasons wholly  
17 unrelated to their mental health status. And it includes  
18 people who happen to be mentally ill, and it includes other  
19 individuals.

20 Also in that regard --

21 QUESTION: Who are not mentally ill?

22 MR. SCHULDER: That's correct. But who may be  
23 disabled for other reasons and who reside in public institu-  
24 tions, and whose treatment is covered under Medicaid.

25 QUESTION: Mr. Schulder, let me go at it another

1 way. Suppose you are wrong on the type of classification this  
2 is, and that it is one based in, just in part on mental  
3 illness, that isn't the end of your case, as I understand it?

4 MR. SCHULDER: No, it certainly would not be.

5 QUESTION: Well I'm wondering whether you're bogging  
6 down on this first point. I'd like to hear more on the rest  
7 of it.

8 MR. SCHULDER: Okay. Well, we would argue that if  
9 the SSI exclusionary provision is read together with the Medi-  
10 caid eligibility provision that specifically applies to these  
11 Appellees, the only factors that are really at issue here are  
12 age, and presence in a public mental institution. And we  
13 submit that neither of these two factors require any kind of  
14 heightened scrutiny.

15 First of all, this Court held in Massachusetts  
16 Retirement Board v. Murgia and Vance v. Bradley, that age is  
17 not a factor that requires heightened scrutiny. As to pre-  
18 sence in public mental institutions, the fact that certain  
19 individuals may have to go to a public mental institution  
20 because of indigency does not require heightened scrutiny, as  
21 this Court pointed out in Harris v. McRae. Indigency is not  
22 a factor that calls for any kind of heightened judicial review.

23 Similarly, presence in a public mental institution is  
24 not an immutable condition determined by accent or birth.

25 Some of Appellees, as the record points out, were voluntarily

1 committed to public mental hospitals. In fact, Appellees  
2 brief points out on page 28, footnote 12, that the medium  
3 length of stay in a mental hospital is 41 days. On the basis  
4 of that bit of evidence, we submit that presence in a mental  
5 institution certainly is not an immutable characteristic.

6 And third, the political powerlessness of public  
7 mental institution residents is based, at least in part, on  
8 legitimate considerations that these people are simply unable  
9 to contribute equally to the political process. This is not  
10 a factor like sex or race, where disparate treatment is not a  
11 function of ability, but is simply a function of stereo-  
12 typed views and discriminatory treatment. It's more like the  
13 factors of intelligence or physical disability that were dis-  
14 cussed in the plurality opinion of Frontiero.

15 Because the statute does not discriminate against the  
16 suspect or quasi-suspect group, we submit that it need only  
17 have a rational basis to pass muster. As we've shown in our  
18 brief, the statute meets this test. Congress could limit  
19 benefits to those it was already helping under other programs,  
20 such as the Medicaid program here, and it could determine that  
21 the needs of these -- of others who are not covered under  
22 Medicaid should continue to be met by the states. Now,  
23 Appellees argue that the same reasons that support the Medi-  
24 caid exclusion that was upheld in Legion do not support the  
25 SSI exclusion here. But we do not argue that precisely the

1 same reasons support both exclusions; Medicaid and SSI are  
2 two separate programs. In enacting the statutory exclusion  
3 here, Congress was painting with a broad brush and was not  
4 limiting the exclusion to those within a particular Medicaid  
5 eligibility provision at issue in Legion. The line in this  
6 case is one between public institution residents whose treat-  
7 ment is funded by Medicaid, and those whose treatment is not  
8 funded by Medicaid. To say that Congress had to consider a  
9 separate --

10 QUESTION: Do I correctly understand that if  
11 Congress did fund the mental institution program with Medicaid,  
12 that the government would concede that they could not consti-  
13 tutionally deny the mental patients the \$25?

14 MR. SCHULDER: Well, under the operation of the  
15 statute --

16 QUESTION: I understand the statute would take care  
17 of it, but assume that they have adopted a plan -- with an  
18 amendment that provided federal funding for mental institutions  
19 and for these mental patients, but nevertheless, retained the  
20 exclusion of the \$25 for these people -- as I understand  
21 your argument, that would be unconstitutional and irrational.

22 MR. SCHULDER: I believe it probably would be and we  
23 would --

24 QUESTION: Yes. So you rest entirely on the fact  
25 that the funding is provided by the states exclusively without

1 any federal support?

2 MR. SCHULDER: That's correct.

3 QUESTION: And does that mean that there is a pre-  
4 sumption that the state is given the equivalent of \$25, or  
5 just the mere fact that because it's a different source of  
6 funding, we don't care whether they get the \$25?

7 MR. SCHULDER: I think the latter would be the  
8 proper consideration, although the amicus brief filed by the  
9 States of New York and Pennsylvania point out that -- at  
10 least, the State of New York does provide this type of benefit  
11 out of its own funds. I'm not sure whether other states  
12 similarly provide for this benefit.

13 In sum, our submission is --

14 QUESTION: Well, that's why New York is against you,  
15 here. They want to be relieved.

16 MR. SCHULDER: That's correct. That's correct.  
17 Our position in a nutshell is that at least where a statutory  
18 distinction is based on a neutral factor such as Medicaid  
19 eligibility, the classification should be judged on its own  
20 terms and not in terms of the specific impact on the various  
21 subgroups that happen to be affected by it.

22 Finally, we submit that contrary to the suggestion  
23 of the District Court, the statute here is not the product of  
24 Congressional inadvertence. In the same legislative package  
25 that contained the SSI provision at issue here, Congress also

1 provided for expanding Medicaid to include coverage of those  
2 under 21. Congress also considered, and rejected in confer-  
3 ence, a proposal to set up demonstrations projects to study  
4 the feasibility of expanding Medicaid coverage to those  
5 mental institution residents between the ages of 21 and 64.

6 The brief of the private psychiatric hospital asso-  
7 ciation supports us in our contention that Congress knew what  
8 it was doing and knew the impact of what it was doing when it  
9 enacted the statute at issue here.

10 QUESTION: Well if Congress inadvertently enacts a  
11 piece of legislation, does that make it unconstitutional?

12 MR. SCHULDER: Not necessarily, Justice Rehnquist.  
13 In fact, the next thing I was about to say was that if Appel-  
14 lees have any problem with the statute and believe that  
15 Congress did inadvertently exclude them, then their remedy is  
16 with Congress and not with the Courts. For the reasons that  
17 I have stated here and we have stated in our briefs, we  
18 respectfully submit that the judgment of the District Court  
19 should be reversed. I'd like to reserve any time remaining.

20 MR. CHIEF JUSTICE BURGER: Very well, Mr. Schulder.  
21 Mr. Weill.

22 ORAL ARGUMENT OF JAMES D. WEILL, ESQ.,  
23 ON BEHALF OF APPELLEES

24 MR. WEILL: Mr. Chief Justice, and may it please the  
25 Court:

1           The Supplemental Security Income program is a wholly  
2 federal program, providing public assistance benefits to  
3 indigent, aged, blind and disabled people. One important  
4 component of that program is this grant of \$25-a-month income  
5 maintenance for those people who reside in public or private  
6 medical institutions.

7           The government has tried to characterize the program  
8 as excluding residents of public institutions generally, and  
9 as involving no discrimination at all against the mentally ill.  
10 But this ignores the broad grant of eligibility to virtually  
11 all aged, blind and disabled residents of medical institutions  
12 whether public or private, and the contrasting special exclus-  
13 ionary rules for certain mental institution residents. The  
14 framework is created by the incorporation of the receipt of  
15 Medicaid as the trigger for SSI eligibility. But under the  
16 Medicaid statute, virtually all residents of medical institu-  
17 tions get Medicaid. That includes residents of hospitals,  
18 including specialty hospitals and residents of hospitals and  
19 wards treating psychiatric diseases. It includes skilled  
20 nursing homes and intermediate care facilities; Medicaid also  
21 includes people over 65 and under 22 in mental hospitals.

22           The group that is excluded from Medicaid is the  
23 group of persons 22 to 64 in mental hospitals.

24           QUESTION: Did I correctly understand Mr.  
25 Schulder to tell us that the Court has, through summary

1     affirmance upheld the constitutional validity of the Medicaid?

2             MR. WEILL: That's correct, in Legion v. Weinberger.

3             QUESTION: Okay.

4             MR. WEILL: And we are not taking issue with Medi-  
5     caid exclusion. In Legion, the Court looked to specific  
6     reasons that Congress had articulated in the Medicaid exclus-  
7     ion, that it felt were substantial reasons. And we're not  
8     challenging that in any sense. We're looking at the linkage  
9     here, to SSI.

10            QUESTION: Right. So -- but you're proceeding on  
11     the premise that the Medicaid exclusions are valid?

12            MR. WEILL: That's right. No dispute. But it is  
13     Appellees, who are 22 to 64, and in public mental hospitals,  
14     who are excluded from SSI because they are excluded from  
15     Medicaid.

16            The SSI program, let me first talk a little bit  
17     about the nature of the discrimination. The government has  
18     argued that this doesn't discriminate at all against the  
19     mentally ill. We agree the statute discriminates to some  
20     extent among mental patients as well as against mental patients,  
21     but that doesn't alter the nature of the case. This Court  
22     has frequently considered cases in which statutes discriminated  
23     both among and against women, illegitimate children, and aliens.  
24     But the Court in each case identified the discrimination -- the  
25     discriminated group, as aliens, women or illegitimate children.

1           The statute and the legislative history of the  
2 medical assistance provisions that have been incorporated  
3 into SSI, demonstrates mental health status of Appellees  
4 plays a key role in the discrimination. The original medical  
5 assistance provisions excluded persons who were diagnosed as  
6 having psychosis and being treated in a medical institution  
7 as a result thereof. Those provisions have been narrowed since  
8 the current provision, excludes the Appellees from Medicaid  
9 because they reside in an institution for mental diseases.  
10 And it is this exclusion that Section 1611(e)(1)(B) incorporates  
11 into the SSI statute. Thus, the Secretary's suggestion that  
12 mental health status of Appellees is irrelevant to the SSI  
13 exclusion is incorrect.

14           The \$25 benefit at issue here is in some senses  
15 small but its significance to the Appellees is great. For  
16 residents of a mental hospital, as for residents of any other  
17 medical institution, the \$25 dollar a month grant represents  
18 the ability to obtain the rudiments of a barely decent exis-  
19 tence. It's used to purchase personal clothing, eyeglasses,  
20 articles necessary for personal care, reading material, or  
21 to pay the costs of transportation for trips when they are  
22 permitted by the hospital, to visit relatives or friends, or  
23 to participate partially in the life of the society outside  
24 of the institution.

25           QUESTION: What's that got to do with --

1 QUESTION: So does that have anything to do with  
2 whether other people in the family unit could provide that  
3 assistance? Is there any showing that needs to be made of  
4 need?

5 MR. WEILL: Yes. By definition, the members of the  
6 class are indigent and eligible, except for the exclusion  
7 caused by Section 1611(e)(1).

8 QUESTION: Well what has the -- the benefit  
9 that goes with the receiving of the \$25 a month got to do  
10 with the constitutionality of the statute?

11 MR. WEILL: It demonstrates that the Appellees needs  
12 for the items are identical and Appellees are identically  
13 situated vis a vis the purpose of the statute, as the people  
14 who are receiving the benefits. That's all --

15 QUESTION: So in your view then, the record shows  
16 that people in public mental institutions do not receive  
17 similar items?

18 MR. WEILL: That's correct. The record shows that  
19 and the government doesn't dispute that.

20 QUESTION: No, I didn't say the same \$25, but I  
21 meant similar care provided by the institution.

22 MR. WEILL: It was Congress that made the determina-  
23 tion that medical institutions, by and large, do not provide  
24 these items. We are relying, we don't have affidavits from  
25 every medical institution in the country or in the region, but

1 we are relying on the Congressional determination that insti-  
2 tutions meet the food, shelter and medical needs of recipients;  
3 but by and large, do not meet the needs for these types of  
4 items.

5           The Secretary has not disputed that. Mr. Schulder  
6 suggested that the New York brief, amicus brief, indicates  
7 that New York does make a grant payment of this sort. I  
8 disagree with his reading of that brief. I think what he's  
9 referring to is a statement in the brief that New York  
10 allows people who have income from other sources to retain,  
11 including SSI, to retain the \$25 or comparable amount, for  
12 these possessions, or to buy these items. But the New York  
13 brief does not say that New York itself makes a grant for these  
14 items.

15           So Appellees have been denied this grant --

16           QUESTION: Well on that basis, why is New York  
17 on your side of the case?

18           MR. WEILL: New York is on our side of the case,  
19 representing the interests of the residents of its mental  
20 hospitals, as is Pennsylvania. They are here not, not necessar-  
21 ily out of the economic insterestsof New York of Pennsylvania,  
22 but on behalf of the residents of their mental hospitals.

23           QUESTION: Just some good charitable, generous  
24 approach?

25           MR. WEILL: Correct.

1 QUESTION: But not, you can't rule out the fact  
2 that if they got it from the federal government, their own  
3 treasuries wouldn't have to bear any of the cognate  
4 responsibilities?

5 MR. WEILL: Well, it's not clear to what extent their  
6 own treasuries are bearing any of the responsibility now.

7 QUESTION: But they must be bearing some, are they  
8 not?

9 MR. WEILL: Now, yes, they must be bearing some of  
10 it, Your Honor.

11 QUESTION: Something more than a token.

12 MR. WEILL: Well, it's -- it varies from institution  
13 to institution. I mean, with the affidavits and -- from the  
14 Illinois institutions that are in the record, describe the  
15 patients begging visitors and relatives who come to the insti-  
16 tution for money to buy some of these items. The institutions  
17 in Illinois that they reside in do provide institutional cloth-  
18 ing for them, not personal clothing. It varies from insti-  
19 tution to institution. But Congress, I keep returning to the  
20 point that Congress has made a determination here that people  
21 in medical institutions need this grant. Congress has not said  
22 why residents of mental hospitals aged 22 to 64 as residents  
23 of medical institutions, don't need this grant, that all other  
24 residents of medical institutions get, assuming that they are  
25 aged, blind, disabled and indigent. Okay. And this denial

1 has occurred not only without the slightest suggestion from  
2 Congress of a reason for it, but the Secretary has also not  
3 articulated any rational relationship to a legitimate govern-  
4 mental interest.

5 Unlike many of the public assistance cases on which  
6 the Secretary relies, in this case Congress did not differen-  
7 tiate between the covered group and the uncovered group on the  
8 basis of a judgment of differing economic need. And the  
9 government concedes that Appellees needs for SSI are the same as  
10 that of other residents of medical institutions.

11 QUESTION: But surely you don't deny that the  
12 Congressional statutory scheme as written has the effect that  
13 the only way your clients can get the money is to hold it  
14 unconstitutional?

15 MR. WEILL: No, we don't deny that. The statute  
16 has that effect, legislative history does not describe the  
17 statute as it passed, we believe. There is --

18 QUESTION: Well, but if you don't have legislative  
19 history, you have legislation which prevents it?

20 MR. WEILL: That's correct. We're not making a  
21 statutory argument; we are challenging the statutory exclusion.  
22 But Congress, all that the legislative history says, it's not  
23 directed solely to people in Medicaid institutions, but it's  
24 directed generally to residents of medical institutions. For  
25 residents of medical institutions, both the House and the

1 Committee reports say, "while most subsistence needs are  
2 met by the institution and therefore full SSI benefits are  
3 not needed, some payment is necessary for remaining subsis-  
4 tence needs not supplied by the institution." The government  
5 does dispute that the Appellees are identically situated with  
6 regard to this determination and this need.

7 QUESTION: Are you going to mention this new classi-  
8 fication that the District judge referred to, the quasi-suspect  
9 classification?

10 MR. WEILL: Yes, I intend to, Your Honor. If I may  
11 say one other thing first, about the government's rational  
12 basis, rationale. Because we do believe that it's not neces-  
13 sary to reach heightened scrutiny here, that the exclusion  
14 is so patently irrational that the Court can strike it down  
15 on irrational basis grounds without reaching heightened  
16 scrutiny. The Secretary's sole contention is that Congress  
17 will simply say, well maybe the states will take care of  
18 these personal needs for people who are not in institutions  
19 that aren't receiving Medicaid. But that argument is  
20 flawed in several respects. First, the argument is simply  
21 conclusory, it's merely descriptive of the statutory result,  
22 but has no content that's related to a function of the SSI  
23 program or the Medicaid program, or any other concrete concept  
24 of governmental interest. Second, it misapprehends the nature  
25 of the SSI program. Congress created SSI to take over existing

1 state income maintenance responsibilities, in part because  
2 of the inadequacies of the prior state income maintenance  
3 programs. SSI dramatically altered the previous governmental  
4 roles and responsibilities for providing public assistance to  
5 the aged, blind or disabled. When the federal government has  
6 created a federal program, like SSI, like food stamps, like  
7 Social Security, to meet a perceived need, irrational dis-  
8 crimination in that program between similarly situated people  
9 can't be justified.

10 And this Court has never suggested that it can be  
11 justified by a hypothesis that the need may be met by the  
12 state. That approach would simply subvert the Congressional  
13 determination, like the one here, that such needs were not  
14 being met, or were not being adequately met, or should be  
15 part of a federal income maintenance program. In the Social  
16 Security, illegitimacy and gender discrimination cases, the  
17 Court has never suggested that state AFDC programs, which  
18 would cover illegitimate children or women and children, jus-  
19 tify exclusion from Social Security. The same is true  
20 with the food stamp cases the Court has decided on constitu-  
21 tional grounds, *Moreno* and *Murry*. Traditional state assis-  
22 tance roles are no excuse for irrational exclusion in federal  
23 programs.

24 Third, the federal \$25 grant is a federal grant to  
25 meet a Congressionally determined element of need for people

1 in medical institutions generally. It's not simply a bonus  
2 for the happenstance of eligibility for Medicaid programs.  
3 As the Secretary agrees, the needs of Appellees exist, regard-  
4 less of whether Medicaid subsidizes the state's cost for  
5 institutional care. But the government's argument ignores  
6 the Congressional determination of purpose and the importance  
7 of the SSI benefit itself, and the importance of the federal  
8 role on income maintenance. Congress found this to be an  
9 unmet need. There is no indication that any state, including  
10 New York, provides such a grant to meet these needs; Medicaid  
11 is withheld in part because states are not meeting the needs  
12 of mental hospital residents, that's why Congress originally  
13 did not give the Appellees Medicaid and we do not dispute that.  
14 But to withhold the federal SSI personal needs grant, because  
15 Congress didn't want to subsidize the inadequate state medical  
16 care for Appellees, turns rationality on its head and merely  
17 penalizes the mental patients for the inadequacies of the  
18 states.

19 The Secretary's argument also assumes, incorrectly,  
20 that there is an absolute consistent link between Medicaid  
21 and SSI eligibility. And there is not. There are groups of  
22 residents of institutions, including medical institutions, that  
23 get SSI even though they don't get Medicaid. That includes  
24 residents of private mental hospitals aged 22 to 64, includes  
25 residents of educational and vocational schools, and residents

1 of public non-medical institutions with fewer than 16 resi-  
2 dents. All these groups get SSI benefits, and not Medicaid.  
3 The government --

4 QUESTION: Mr. Weill, I am puzzled by the private  
5 mental institution. How could someone be a resident of a  
6 private mental institution, and be able to afford a private  
7 mental institution and also be on SSI?

8 MR. WEILL: The person might have Medicare paying  
9 part of the bill, there are some people eligible for Medicare  
10 but not social security. Or there may be contributions from  
11 a church group or some other governmental contribution from  
12 the state. Under the SSI rules, in that situation, I believe  
13 that church and governmental contributions to the cost of  
14 care are not considered income to the person.

15 QUESTION: I see. Those would probably be fairly  
16 rare, though, I mean is there anything in the record to tell us--

17 MR. WEILL: There's nothing in the record that says.  
18 And I don't believe they would necessarily be rare.

19 QUESTION: Necessarily be what?

20 MR. WEILL: Rare.

21 QUESTION: Rare.

22 QUESTION: Well, when you are dealing with a federal  
23 program that simply doles out federal money on a -- basis of  
24 perceived need, do you think that your analysis can be  
25 carried over so that a Corps of Engineers dam approved in Utah

1 and a Corps of Engineers dam disapproved in Wyoming would  
2 leave Wyoming to have a right to claim in this Court that  
3 the Wyoming dam should have been funded rather than the Utah  
4 dam?

5 MR. WEILL: Well it's not a situation that normally  
6 arises, it would depend on the structure of the federal sta-  
7 tute.

8 QUESTION: Supposing they were virtually identical  
9 and Congress simply chose to spend its money on the one in  
10 Utah rather than the one in Wyoming?

11 MR. WEILL: In that situation there's no violation  
12 of equal protection.

13 QUESTION: Well why is there in yours?

14 MR. WEILL: If there were a statute that said any-  
15 body could work on a federal dam except -- they had to be  
16 employed or be a contractor for a federal dam, except women,  
17 or except blacks, or except persons who were in a mental insti-  
18 tution within the last ten years; that raises equal protection  
19 questions. There's an entitlement there and an exclusion from  
20 that entitlement. Not all federal programs, funding programs,  
21 create the types of entitlement that Social Security and  
22 SSI do. And in certain circumstances, some exclusions from  
23 those entitlements are subject to equal protection -- become  
24 equal protection violations.

25 QUESTION: What sort of entitlement is it that you

1 say Congress has created here, since, as I understood it,  
2 reading the statute as written, your class is clearly ex-  
3 cluded?

4 MR. WEILL: That's correct. But they are excluded  
5 on the basis of a factor that's irrelevant, not only to the  
6 primary purposes of the program, but to any governmental  
7 interests at all. And this Court has consistently said, in  
8 entitlement programs, that an exclusion has to have a rational  
9 basis rationally related to a legitimate governmental interest.

10 The government here has not come up with any legit-  
11 imate governmental interests, except the conclusory one that  
12 I just mentioned, that's inconsistent --

13 QUESTION: Well --

14 MR. WEILL: -- that's inconsistent with the program.

15 QUESTION: -- they don't want to pay out the  
16 money?

17 MR. WEILL: Well that's never been held by this  
18 Court. The mere desire not to make a group eligible --

19 QUESTION: Well what about the Dandridge case?

20 MR. WEILL: Pardon me. I believe there are two  
21 questions there. The fiscal considerations that are involved  
22 have never alone been held by this Court to constitute a  
23 rational basis. We discussed that in the motion to affirm. The  
24 government here has not pressed the fiscal ground; I would add  
25 that the 30 -- in answer to the first question, Mr. Schulder,

1 the 30 million dollar estimate is an estimate that the  
2 government made of what the cost would be if every mental  
3 patient in a public hospital aged 22 to 64 in the country got  
4 SSI. There are about 100,000 such persons, if each person got  
5 it each month that would be about 30 million dollars. The  
6 government conceded that that estimate did not discount for  
7 all the various other factors that would go into reducing that  
8 figure: some of those people aren't disabled, some of them  
9 have outside income and resources, et cetera, et cetera, et  
10 cetera.

11 QUESTION: What if it's only 20 million, or 10  
12 million; what's -- how -- what's that got to do with it?

13 MR. WEILL: Pardon?

14 QUESTION: What if it's only 10 million or 20  
15 million, not 30 million?

16 MR. WEILL: Well, I was just answering the previous  
17 question. The amount of the money, unless the amount is tre-  
18 mendous, as was a factor in Medicaid exclusion, where it  
19 came to billions of dollars a year, money alone has not been  
20 a basis for upholding an otherwise invidious, discriminatory  
21 classification. And as far as the rationale that Congress  
22 just didn't want to give it to this group, that's not a  
23 rationale that the Court has accepted. In Moreno, the Court  
24 said that a bare Congressional desire to harm is not a legit-  
25 imate governmental interest --

1 QUESTION: Not a desire to harm, that was a with-  
2 holding of food stamps, as I recall, from people whom it was  
3 felt, Congress felt, shouldn't have food stamps. This may  
4 just as well be a desire to draw the line somewhere as to how  
5 much we're going to fund into these programs.

6 MR. WEILL: Well, the things like line-drawing  
7 as I understand it, are elements that go into why this Court  
8 gives some deference to legislative judgments, because the  
9 legislature has to draw lines.

10 QUESTION: Well presumably, we give a great deal  
11 of deference.

12 MR. WEILL: A great deal of deference. But that  
13 does not make line-drawing itself a rational basis for an  
14 exclusion. There has to be something beyond just the fact  
15 that, oh well, Congress drew the line there. Well, in Dan-  
16 dridge, the Court said that classifications don't have to be  
17 imperfect. And several months later in Moreno, the Court said  
18 well, this classification like that in Dandridge, is not  
19 only imperfect, it has no rational relationship to a legit-  
20 imate governmental interest. Classifications are not valid  
21 because they are imperfect.

22 QUESTION: Well, do you --

23 QUESTION: On the question of economy, isn't it  
24 true that the record is not clear that there was any legis-  
25 lative interest in that.

1 MR. WEILL: In this case, yes.

2 QUESTION: Yes.

3 MR. WEILL: The legislative, both the House and the  
4 Committee reports are both -- provide not only no reason for  
5 the exclusion, they provide no basis for suggesting that  
6 Congress understood that the exclusion was occurring.

7 QUESTION: That's right.

8 MR. WEILL: While the Court, the Court could cer-  
9 tainly look beyond what Congress says, in identifying a  
10 rational basis for discrimination, if there is one, there are  
11 situations where legislative silence or confusion simply  
12 reinforced the conclusion that the discrimination is not a  
13 product of any rational Congressional scheme. That's -- the  
14 Court said that in Schlesinger and Johnson v. Robison,  
15 and the Illinois State Board of Elections Commissioner's case.  
16 Here, you just can't tell what Congress was doing, what it would  
17 have said to justify the denial of the grant, and contrary  
18 to the government's rather offhand argument, Appellees are in  
19 no political situation to seek relief from Congress. They  
20 can't vote, and it is evident from the SSI history and the  
21 Medicaid history, that Congress has frequently noted the  
22 inability of the mentally ill to obtain equal amount of dis-  
23 criminatory treatment from Congress because they can't vote.

24 QUESTION: Well if the government is right about the  
25 average stay in a private mental institution being 41 days,

## COTTON CONTENT

1 one would think that many people who have been in private  
2 mental institutions, are capable and eligible to vote if they  
3 wish to vote, in most elections.

4 MR. WEILL: Well, the median stay is 41 days, but  
5 voting disqualifications don't necessarily relate in most  
6 states, simply to being in an institution. Most states dis-  
7 qualify people who have been found incompetent or have been  
8 found insane or have been committed, until there is a restor-  
9 ation of rights.

10 QUESTION: Are you suggesting that all of these  
11 people who are denied benefits will never again be allowed to  
12 vote?

13 MR. WEILL: No, I'm not suggesting that.

14 QUESTION: Well, and if they were sufficiently  
15 offended by the Congressional classification, wouldn't they  
16 register their protest in the ballot box?

17 MR. WEILL: Well, some of them might eventually,  
18 although, by that point they have presumably moved on to other  
19 interests.

20 QUESTION: Do you have any information that any of  
21 them are organized?

22 MR. WEILL: Well --

23 QUESTION: Any insane people-- do you know of any  
24 organizations of insane people?

25 MR. WEILL: None of any significance, that I know of.

1 The lack of a vote for people in institutions and for the  
2 people who have been labelled mentally ill, generally, by  
3 the state, is in part why, if the Court finds the discrimina-  
4 tion survives the rational basis test, it is appropriate to  
5 apply heightened scrutiny. The criteria the Court has  
6 used to invoke heightened scrutiny establishes propriety to  
7 discrimination against the mentally ill.

8 QUESTION: But I understood you are not arguing that  
9 heightened scrutiny is required here. Or are you?

10 MR. WEILL: No, we are arguing that the Court can  
11 and should first invalidate the statute under the rational  
12 basis test. If the Court finds that the statute meets the  
13 rational basis test, then it is appropriate to strike down the  
14 statute under the heightened scrutiny standard, akin to that  
15 applied by the District Court. We are not asking for strict  
16 scrutiny, we're asking for a form of heightened scrutiny, some-  
17 what like that applied in Craig v. Boren.

18 QUESTION: Quasi-scrutiny?--

19 MR. WEILL: Well that's --

20 QUESTION: Quasi-heightened scrutiny?

21 MR. WEILL: The District Court used the phrase  
22 quasi-heightened scrutiny, in Wengler this Court used the  
23 phrase heightened scrutiny, and I'll stick with this Court's  
24 phrase of heightened scrutiny.

25 Importance of political powerlessness, not just not

1 having a vote, but being confined in institutions, being  
2 stigmatized, and having lack of political power escalate  
3 because of the relationship between these factors, has been  
4 recognized by this Court for many years. It was recognized  
5 as early as Yick Wo v. Hopkins, and this Court has since  
6 indicated in cases like Katzenbach v. Morgan, that non-  
7 discriminatory treatment in governmental services is normally  
8 secured by the franchise. When political powerlessness is  
9 exasperated by insularity, they have usually become, perhaps,  
10 the crucial indicia of heightened scrutiny.

11 QUESTION: Mr. Weill, do you contend that the number  
12 of people in the -- affected by the judgment has anything to  
13 do with this argument?

14 MR. WEILL: No, I don't.

15 QUESTION: The fact that there are only -- some frac-  
16 tion of 100,000 people involved, does that have anything to  
17 do with their political power?

18 MR. WEILL: No. Minorities exist in many forms in  
19 our society. On any political issue there is a minority  
20 which may be small, but if that minority can vote and partici-  
21 pate and it's not stigmatized, it can trade in the legislative  
22 marketplace. A minority that cannot vote and that is stigma-  
23 tized cannot do that, and they are so totally shut out, so they  
24 are not like the minority of 50,000 ophthalmologists in the Lee  
25 Optical -- this is a different type of minority of 50,000 people.

1 It's precisely like the aliens. Aliens cannot vote, the  
2 reasons that this Court has given heightened scrutiny to  
3 discriminations against aliens are precisely applicable here.  
4 Aliens can't vote, their situation is not immutable, since  
5 they become citizens. But the voting factor and historical  
6 discrimination and the stigma, have been the crucial factors  
7 that have led this Court to give heightened scrutiny to aliens.  
8 Thank you.

9 MR. CHIEF JUSTICE BURGER: Mr. Schulder.

10 ORAL REBUTTAL ARGUMENT OF ELLIOTT SCHULDER, ESQ.,  
11 ON BEHALF OF APPELLANT

12 MR. SCHULDER: I would just like to address myself  
13 briefly to Mr. Weill's argument that Section 1611(e)(1) is  
14 inconsistent with the objectives of the SSI program. I  
15 believe that the Ninth Circuit, in its opinion in Baur v.  
16 Mathews, at 578 F.2d at page 233, deals with this specific  
17 objection. In fact, the Ninth Circuit in that case refers to  
18 the legislative history as indicating that Congress considered  
19 efficient and an economical method of providing SSI assistance  
20 as one of the important factors that it was taking into con-  
21 sideration in structuring the SSI program.

22 And the Secretary has also interpreted this provision  
23 as reflecting Congressional intent to prevent the shift of  
24 public institutional programs which are traditionally the  
25 responsibility of state and local governments, to the federal

1 government. Thank you.

2 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The  
3 case is submitted.

4 (Whereupon, at 11:57 o'clock a.m. the case in the  
5 above matter was submitted.)  
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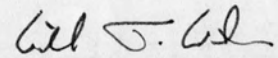
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