OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-874

TITLE MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES
Petitioner v. MILDRED M. EDWARDS, ETC.

PLACE Washington, D. C.

DATE November 30, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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MARGARET M. HECKLER, SECRETARY :

OF HEALTH AND HUMAN SERVICES, :

Petitioner, :

v. : No. 82-874

MILDRED M. EDWARDS, ETC. :

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Washington, D.C.

Wednesday, November 30, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

JOHN H. GARVEY, Esq., Washington, D.C.; on behalf of Petitioner.

NEAL S. DUDOVITZ, Esq., Los Angeles, Cal.; on behalf of Respondents.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Garvey, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN H. GARVEY, ESQ.,

ON BEHALF OF PETITIONERS

MR. DUNLAVEY: Thank you. Mr. Chief Justice and may it please the Court:

Section 1252 of the Judicial Code provides that any party may appeal to this Court from a decision by a court of the United States holding unconstitutional an act of Congress. The issue in this case is whether the Government must appeal to this Court in a case where it concedes that the statute is unconstitutional and the only issue is the question of what relief should be provided.

The statute in this case is Section 211(a)(5)(A) of the Social Security Act, which deals with self-employment income from a family business in community property states. What that section says is that if a family business is not run as a partnership then for purposes of old age, survivors and disability insurance all the income from the business shall be attributed to the earnings account of the husband, unless the wife is able to show that she exercised substantially all the management and control of the

business.

In 1980 the Attorney General determined that that presumption made in that section was unconstitutional and informed Congress that he would not defend on appeal a case called Becker against Califano, which had held that section unconstitutional.

Three weeks later Respondent filed this action on behalf of a class of affected wives in community property states. The Government acknowledged in the district court that the section was unconstitutional and did not defend it. So the district court shortly entered judgment on the uncontested issue of liability and held the section unconstitutional.

Thereafter and until now, the only issue in this case has been what relief should be provided for that deficiency in the statute. The Government proposed in the district court that, since the invalid provision was simply an exception to Section 211(a), the general rule applying in the 42 non-community property states, that what the district court should do was what was done throughout the rest of the country. That is to say, if the family business wasn't run as a partnership then all the income should be attributed to one spouse or the other without the use of any presumption, after a determination of which one was chiefly responsible for

running the business.

The district court disagreed and held, among other things, that in community property states the income should be divided between husband and wife according to the amounts of their labor in the business.

The Government appealed to the Court of Appeals, which dismissed in a one-sentence order saying it didn't have jurisdiction because of Section 1252, and the Government then petitioned this Court for a writ of certiorari.

Our position can be summed up briefly in two points: number one, only an appeal from the constitutional issue can bring a case to this Court; number two, the question of relief in this case is not part of the constitutional issue.

Let me begin with the first of those points. Only an appeal from the holding of unconstitutionality can bring the case to this Court under Section 1252. It's important to recognize at the outset that Section 1252 is a unique jurisdictional provision. In that section what Congress did was to pick out from the whole universe of cases that customary go from the district courts to the Court of Appeals a few unique cases which, because of their great importance, were thought to

warrant extraordinary treatment and immediate review in this Court.

The extraordinary treatment is, first of all, tat they're within the mandatory appellate jurisdiction of this Court; but in addition, they leapfrog over the Courts of Appeals. And unlike even cases coming to this Court under Section 1253, they haven't had the benefit of review even by three district judges by getting here.

The reason Congress did this, in the words of the sponsor of the bill which became Section 1252, the reason was this. The sponsor of the bill said: "It is ridiculous that the final determination as to the constitutionality of an act of Congress be held in abeyance for two or three years and nobody knows whether or not it is constitutional."

The House report said, in similar --

QUESTION: Mr. Garvey, do you propose to shift at some point in your argument from the statement of the sponsors to the language of the statute?

MR. GARVEY: Indeed I do. I intend to turn there briefly. Let me, if I may, just finish this thought and then I'll turn to the language of the section.

The House report on the bill said that its

purpose was to provide a prompt determination by the court of last resort of disputed questions of constitutionality of the acts of Congress. This is not such a case.

As I will demonstrate when I get to my second point, it does not even involve a constitutional issue. At most what it involves is something like a question of statutory intent. At worst, it involves nothing more than a simple question about whether the district judge properly exercised her equitable discretion in providing a remedy for a conceded unconstitutional provision in the statute.

Those are like the questions that the Courts of Appeals address every day. They are not the questions of extraordinary importance that Congress determined should come immediately to this Court.

Now let me turn to the language of the statute --

QUESTION: I suppose some issues, although not constitutional ones, can be as important in other ways.

MR. GARVEY: That is certainly so. There are many questions of statutory construction that are more important than some of the kinds of questions that can come to this Court under Section 1252. Nevertheless, Section 1252 does not turn on the importance of the

question, but on whether an act of Congress has been held unconstitutional.

Now, what the statute provides -- and we have reproduced it at page 2 of our brief. What the statute provides is, in the first paragraph it addresses what should be done with appeals from the holding of unconstitutionality. In the second paragraph it addresses what should be done with other issues.

The first paragraph says: "Any party may appeal to the Supreme Court from a judgment, decree or order by a court of the United States holding an Act of Congress unconstitutional in any civil action to which the United States is a party."

Now, there are two ways in which that, in which the language in that first paragraph, can be read. But I would suggest that only one of them makes sense in light of what Congress had in mind in providing this extraordinary review mechanism.

One way of understanding that language is that any party may appeal from any issue that is decided in a judgment or order along with the issue of the unconstitutionality of an Act of Congress. So one way of looking at the judgment or order is that it's a kind of grab bag and, provided the issue of unconstitutionality is in there, a party is entitled to

take any other issue up to this Court, even if the unconstitutional question is not brought to this Court. So for example, if in this Court in the same judgment in which the district court held the statute unconstitutional it had also denied attorney's fees to the plaintiff, this grab bag interpretation of the first section would entitle the plaintiff to bring up to this Court the question of her entitlement to attorney's fees, even though the constitutional question is not presented.

Or, to take another example, if in the same judgment the district court had decided a pendent question of state law and nobody was interested in appealing the holding of unconstitutionality, this grab bag way of reading the first paragraph would entitle the losing party on the question of state law to bring it directly to this Court.

QUESTION: By calling it a grab bag way of reading the paragraph, are you suggesting it's not a preferred or not a reasonable way of looking at the paragraph?

MR. GARVEY: That's exactly what I'm suggesting.

QUESTION: Well, certainly it doesn't seem implausible to me, given the language you just read,

that you say any party may appeal to the Supreme Court from a particular kind of final judgment. What kind of final judgment? A final judgment holding any Act of Congress unconstitutional. And if the final judgment meets that definition, it may contain a number of other provisions, and if you want to appeal any of them you have to go to the Supreme Court.

MR. GARVEY: As I said, the language and the syntax of that paragraph will support that reading. I suggest that that reading doesn't make a lot of sense in light of what Congress had in mind in adopting that section, and that there is another reading which can be given to it, which is that the first paragraph is entitled to authorize only appeals from the holding of unconstitutionality, that that is the issue which brings the whole case to this Court and that's an essential prerequisite for getting the case up here under the first paragraph.

QUESTION: Mr. Garvey, did the United States take a protective appeal here?

MR. GARVEY: No, we did not.

QUESTION: Was that a conscious decision?

MR. GARVEY: I don't know whether it was a conscious decision or not.

That interpretation of the first paragraph of

Section 1252 I think is, the interpretation we propose, is supported by the language of the second paragraph, because what the second paragraph says is that once this notice of appeal, which I think is this proper Section 1252 notice of appeal, is filed, the second paragraph tells you what to do with the other issues in the case.

It says if any of those issues have been taken to other courts -- that is to say, to the Court of Appealss -- prior to the filing of the proper Section 1252 notice of appeal to this Court, they shall be treated as taken directly to this Court -- that is to say, they will be transferred from the Court of Appeals to this Court -- when the holding of unconstitutionity is brought here, so that the whole case can be decided together.

It also says in the first paragraph that the party who has received a notice of appeal under this section shall take any subsequent appeal or cross-appeal to the Supreme Court. Now, the reason for that direction is, in the example that I gave earlier, if the winning party is sitting around drafting her notice of appeal on the question of attorney's fees to the Court of Appeals, where it would go but for an appeal to this Court on the question of unconstitutionality, the first sentence says that she ought instead to file the notice

of appeal to this Court because the appeal on the constitutional question has brought the case here.

QUESTION: Suppose, Mr. Garvey, that you have the whole range. You have a decision on constitutionality, which would clearly in your view bring the case directly here, but that there were also some remedial factors and some attorney's fees. Is there any statute that would prevent this Court, after it had decided the constitutional question, to remand the case for a determination, for an examination by the Court of Appeals of the other two questions that were not constitutional? Or would this Court be required to decide all the issues?

I don't believe this Court would be required to decide all the issues. I think the reason why the second paragraph directs the other issues to be brought to this Court is that in the ordinary case the party bringing them up won't yet have had a chance to have them reviewed and Congress didn't want those issues being decided simultaneously with the decision on the constitutional question in this Court so that inconsistent results might be reached.

But the procedure you suggest wouldn't result in possible inconsistencies in the determinations.

QUESTION: But one way or another, the parties

would be entitled to review of the district court in some way?

MR. GARVEY: Yes, they would. The second paragraph, by leapfrogging over the Court of Appeals, deprives those parties appealing on other issues of their usual right to have at least one appeal in the Court of Appeals.

Well, that is our first point, that only an appeal from the holding of unconstitutionality can bring the case, although it brings the whole case, to this Court under Section 1252.

Our second point is that the question of relief in this case is not a part of the holding of unconstitutionality. Respondent has maintained that the issue of relief here is an intrinsic aspect of the holding of unconstitutionality. But that is not so, as I think a couple of examples ought to make clear.

Suppose that what the district court had done in this case after holding the statute unconstitutional was to adopt the approach the Government suggested. Suppose the district court had concluded that, because this exception to the general rule in Section 211(a) was invalid, that it ought to apply the basic rule in Section 211(a) that applies in non-community property states.

If Respondent, plaintiff in the district court, had appealed that issue of relief to this Court, Respondent would not be able to contest the holding of unconstitutionality, having prevailed on it in the district court. And the Government, having conceded the unconstitutionality of Section 211(a)(5)(A), would have no interest in contesting it in this Court, and yet the appeal would be brought directly here.

Or to take an even more extreme example, suppose the district court had gone a step further and actually -- suppose this were an individual action. Suppose the district court had gone a step further and actually recomputed the Respondent's earnings account. Suppose that on the basis of that recomputation the district court had concluded that Respondent was entitled to collect $200 in old age benefits under the Social Security Act, and suppose that Respondent believed she was entitled to collect $205 a month.

If relief is in fact an intrinsic part of the holding of unconstitutionality, Respondent would be entitled to bring to this Court her disagreement with the district court about the additional $5 a month, notwithstanding that again she couldn't contest the holding of unconstitutionality, having prevailed on that issue in the district court.

Or, to take just one more example, suppose the district court had done what it did in this case and said that the income was to be divided between husband and wife, but that the district court had declined to recompute earnings accounts back to 1950 because, the court might say, some wives are going to be better off under those earnings accounts, under the earnings accounts of their husbands, than they will be under the new standard, and we don't want to disturb their reliance interests; and some husbands are going to be deprived of benefits if we recompute. So we'll just make this prospective. Once again, when the case got to this Court there would be no question about the unconstitutionality of Section 211(a)(5)(A).

Now, what those examples show, I think, are two things. What they show first of all is that there is involved in this case at this point no constitutional question whatever. The choice among the three types of relief that I suggested in those examples is not determined by the Constitution. All three of them are constitutionally permissible.

What's more, the type of relief that the district court chose, the one of those three that I suggested or another one, the one that it chose, the type of relief that the district court chose might in

fact be, for all we know, precisely the one that Congress would prefer it to apply, given the unconstitutionality of Section 211(a)(5)(A), which everybody concedes. That means that the district court's decision on the question of relief, unlike its decision on the question of unconstitutionality, may very well be quite consistent with the wishes of Congress.

QUESTION: But I take it it was not consistent with the Government's arguments there as to what the intent of Congress was.

MR. GARVEY: Indeed not. But whether or not it is inconsistent with the wishes of Congress is something that at this point we don't know, whereas its holding on Section 211(a)(5)(A) we do know is inconsistent with what Congress wanted, because wrote that into the statute and the district court said that statute is invalid.

So the question of relief may very well be consistent with what Congress wanted to do, and in that case I would suggest that there isn't the need for immediate review in this Court that exists in the case where the statute is actually held unconstitutional and that issue is still being litigated.

Now, I said that those examples showed two

things and one of them was that the case didn't really involve any question of unconstitutionality; in fact, it really involves a question of what Congress would want to do, or maybe what it involves is a question about equitable discretion. For example, in last example that I gave the district court took account of the reliance interests of people who were already collecting benefits under the invalid provision and said that maybe the most equitable approach is to protect their interests by making the judgment prospective.

Those kinds of decisions about what Congress had in mind, about the equitable -- about the reliance interests of people who are already collecting benefits, are the kinds of questions that the Court of Appeals decide every day in cases of statutory construction, in cases where -- in other cases involving issues about the proper remedy.

What's more, the impact of the decision on the question of relief is quite unlike the impact of the holding of unconstitutionality. The impact might only be a difference of five dollars a month, as was shown in the second example that I gave. I think --

QUESTION: Mr. Garvey, can I ask you this question? You use hypothetical examples, which is understandable because this problem doesn't exactly

arise every day. How often has this particular problem -- has it ever arisen before where the Attorney General has conceded the unconstitutionality of a statute?

MR. GARVEY: Yes. I think this is precisely the question that arose in Montana Contractors against Kreps, a case in which this Court dismissed for lack of jurisdiction. The issue in Montana Contractors was whether the plaintiff was entitled to collect damages after the district court held the minority business enterprise provision of the Public Works Employment Act unconstitutional. And I presume because the Government did not docket a separate appeal on the question of unconstitutionality, this Court dismissed plaintiff's appeal on the question of whether he was entitled to damages because of the enforcement of that provision.

QUESTION: You say you presume. Certainly our summary action doesn't explain it, does it?

MR. GARVEY: No, your summary action does not explain it, although it does note that the dismissal is for lack of jurisdiction.

I would also suggest, Justice Stevens, that it may be, with the less frequent use of three-judge courts nowadays, that the question may be one of more significance in future cases than it has been in the past. We suggested in our reply brief that the question

might come up in the wake of this Court's decision in INS against Chada about questions of severability, which we say are really no different from the question of relief involved in this case.

So it is one which I think has not only arisen in the past, but may reoccur with some frequency.

Let me make just one last point. The question in this case is not whether this Court should review the question of relief or not. The question in this case is whether this Court should immediately review the district court's decision on the issue of relief, because we presume that if an appeal were taken to the Court of Appeals and the impact of the relief really were severe and it really was fairly clear that the relief chosen was not the one that Congress would have preferred, that certiorari is always available from the Court of Appeals' decision on the question of relief under Section 1254(1).

So the question is not whether this Court should review it; it's whether it should review it immediately, rather than after having the benefit of the Court of Appeals' determination.

If there are no further questions, I'd like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Dudovitz.

ORAL ARGUMENT OF NEAL S. DUDOVITZ, ESQ.,

ON BEHALF OF RESPONDENTS

MR. DUDOVITZ: Thank you, Mr. Chief Justice, and may it please the Court:

The issue before you today involves both determining the parameters of the appeals to this Court as well as appeals to the Court of Appeals under Section 1291.

As the Government has acknowledged, the federal district court in this case did hold a federal statute, Section 211(a)(5)(A) of the Social Security Act, unconstitutional. It also went forward and awarded constitutionally adequate relief to the class members whose rights were violated.

The Government filed a notice of appeal from the district court order holding the statute unconstitutional. But they filed that notice of appeal to the Ninth Circuit and not to this Court. There was, as, Justice Blackmun, you noted by your question, no protective appeal filed in this Court.

Section 1291, which sets forth the jurisdictional parameters for the Court of Appeals, says that the Court of Appeals may not have jurisdiction if it's possible for there to be an appeal to this Court.

The operative word in the statute is the word "may". If you may appeal to this Court, then the Court of Appeals loses its jurisdiction. And as this Court has emphasized recently in its Donovan case, what that means is is that there is only one place for you to go when you're appealing from an order holding an Act of Congress unconstitutional.

The issue here then turns on whether or not this case presents a situation where the place for the Government to go if they had an appeal was this Court. We believe that the requirements of 1252 are pretty clear right on its face. They talk about, as most of the commentaries have pointed out, four basic requirements, three of which -- that it be from a proper court, that it be a civil action, the Government be a party -- are really not controversial and certainly are not in issue in this case, and the fourth requirement, that the order being appealed from must be from a holding that a statute is unconstitutional.

Well, there's no doubt that the order of the district court from which the Government appealed was in fact such an order. And it is important to recognize in this case that their notice of appeal purports to be a notice of appeal from that entire order. It simply says, we're appealing from that final judgment where the

court, the district court, held the statute unconstitutional.

We contend that, on the basis of that kind of notice, which fits squarely within 1252 and particularly so in a situation as here where the issue the Government wants to contest is really the relief that the court fashioned consistent with the Constitution to remedy the violation.

QUESTION: Well, Mr. Dudovitz, I'm curious to know how much of your position depends on the form of the Government's notice of appeal. Supposing everything were the same here except the Government's notice of appeal said, the Government appeals from all of that order the district court entered except that portion holding such and such unconstitutional. Do you think that should have gone to the Court of Appeals?

MR. DUDOVITZ: No, I don't think that should have gone to the Court of Appeals. I think the fact that the Government did that sort of highlights why this case is appropriate, but in and of itself it is not determinative. And that is because what it highlights essentially is there was a choice.

And as I pointed out, under 1291 when there's a possibility that seems to point us toward 1252. In fact, the Government would concede that. The Government

would concede that they in fact could have appealed the constitutional issue to this Court even though they didn't contest it in the district court, similar to what happened in the Clark case, where they didn't contest it in the Court of Claims and then appealed it to this Court. So that's something that the Government says can happen.

QUESTION: Suppose a concession of unconstitutionality was made and the Court of Appeals rejected it. Would there then be a decision under 1252 on the constitutionality?

MR. DUDOVITZ: Yes, there would, because --

QUESTION: And then what should be done?

MR. DUDOVITZ: 1252 is not limited to applicability in the district court. It also applies to the Court of Appeals.

QUESTION: Oh, I didn't make myself clear. I mean when it came to the Court of Appeals, the district court not having passed on it but having accepted the concession, the Court of Appeals said, no, we don't accept concessions on constitutional issues and we're going to decide it. Then could they decide it?

MR. DUDOVITZ: I guess your question presumes that it was proper for that case to get in the Court of Appeals in the first place. If it was, as I was trying

to say, if it was and then the Court of Appeals holds the statute unconstitutional, then you're going to be under 1252 and the appeal from the Court of Appeals could come directly to this Court because, as I was saying, 1252 is not limited to the district court.

QUESTION: As an appeal and not as a cert.

MR. DUDOVITZ: Not as a cert, that's correct.

With regard to the relationship of the relief to the constitutional question, I would point out that the Government itself agrees, as they've noted on page 3 of their reply brief, that the district court must address the questions of relief as a consequence of holding that statute unconstitutional. That is something the court had to do.

That was part of its job once it found that statute unconstitutional. And it seems to me that that puts that issue as a predicate; that the predicate to that issue therefore is the holding of unconstitutionality, which therefore binds the Government to do something. And that's the kind of problem that the court -- excuse me -- that Congress wanted to bring to this Court. When the Government was going to be bound, when something was going to happen to the Government as a result of holding the statute unconstitutional, Congress wanted this Court to quickly

and promptly resolve that problem, to make sure that the disruption to the Government was minimum.

Now, the Government's line here that they've attempted to draw we contend just plainly doesn't fit within the statute on its face. They are trying tc draw, in a sense here, lines which do not exist. There is no phrase or statement in Section 1252 that suggests that the issues to be appealed must be the question of constitutionality.

QUESTION: Certainly there are intimations in the second paragraph, aren't there?

MR. DUDOVITZ: There are, but it's very different, Your Honor, from the kinds of language that exist in the other direct appeal statutes, that talk more about the kinds of issues, such as 1257 and 1254. And it's also very different from the earlier predecessor of 1252, which was repealed in 1925.

And in that earlier language, which the Government cites in its cert petition at page 11, the statute said that in any case that involves constitutional construction or application of the Constitution or in which the Constitution or the laws of the U.S. are brought into question, that that's when you bring a case up. Now, the Congress didn't go back and bring that language back.

QUESTION: But now take the second sentence of the second paragraph on page 2 of the brief: "All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court."

Now, that hypothesizes that appeals to the Court of Appeals by some party would have been proper in the case of a judgment which held an Act of Congress unconstitutional, don't you think?

MR. DUDOVITZ: Well, I contend and we have argued that what that could very well be referring to is in fact other kinds of appeals, such as interlocutory appeals, which may have been appropriate in the Court of Appeals prior to the holding of the Act being unconstitutional.

The real import of the entire second paragraph is to make sure that when this Court gets a case where an Act has been held unconstitutional, it gets all aspects of the case so that it has the power to determine what should be done in this situation to make a final and quick decision in order, again, to avoid disruption to the Government.

QUESTION: That's certainly part of what the statute is trying to do. But another part, as your opponent has suggested, is to select out a very few

cases that Congress felt deserved the immediate attention of this Court, and certainly the focus of Congress was on the declaration of unconstitutionality.

MR. DUDOVITZ: Well, I agree it's very few cases, and I can partly, I think, try to answer Justice Stevens' question about how many cases. There is a statute, which of course the Government has cited, which requires the Attorney General to notify Congress when they're not going to appeal from a holding of unconstitutionality.

It's my understanding that in the years '81, '82 and '83, subsequent to this case, there have been two times where the Attorney General has so notified the Government. That's other than the one time before in this case.

We're not -- this is one of those unique cases. There aren't very many times when this happens. In fact, the Government itself points out the great difficulty it always has in conceding the unconstitutionality, that they rarely do that. So this is a unique case. I don't think it's a common case in any way..

Let me add, Justice Rehnquist, to one other major reason I believe that the kind of line that the Government wants to draw here in terms of

constitutionality doesn't make sense, and that is because it's really premised on the theory that in interpreting the statute this Court ought to be trying to minimize its mandatory docket.

Now, whether or not we all think that that's something that ought to be done, the fact is that this Court has held very explicitly that 1252 is not to be so interpreted. In fact, the purpose of 1252, as this Court has held before, is to expand the mandatory docket and not restrict it. And therefore, the Court should not view the language here with the idea of supporting the minimizing of the mandatory docket, but rather with the idea of what Congress desired.

QUESTION: I don't think our cases support you. If I understand your contention, you're saying that once Congress has decided to expand the mandatory docket by passing a statute such as 1252, that statute ought to be generously construed.

Now, I think that the whole history of the three-judge court situation and appeals from three-judge courts indicates that this Court recognizes when Congress wants to increase our mandatory docket, but it doesn't construe those statutes generously or beneficently, or whatever you want to use, the term.

MR. DUDOVITZ: I think this Court has

explicitly said, going back to the McLucas case and in the Grace Brethren Church case, that 1252 is not to be construed in the same fashion as 1253, the three-judge court. It is separate --

QUESTION: No, but what it said in McLucas was that it shouldn't be construed in the same way that the three-judge court appeal statute was, where we held that in order to have the appeal the three-judge court had to have jurisdiction. We said that wasn't required here. But I don't think that really is the same thing as saying we'll treat as broadly as possible the substantive definitions of what can be appealed.

MR. DUDOVITZ: Well, I guess, Justice Rehnquist, as I read those cases the Court has really said that the basis for the 1253 cases was in fact carrying out the principle of limiting the mandatory docket of this Court, and as a result that 1253 was going to be interpreted, if interpretation was necessary, in a restrictive way.

On the other hand, the cases -- and they go back before these three-judge court cases. The Reid case, where the word "party" was interpreted; that the Court specifically said, we're not going to take a restrictive view of the word "party", we're going to take a more broader view of the word "party".

Another -- let me add a final point on what I think are some problems with the Government's line drawing, and that is I think it's very difficult to draw that line and then make it consistent with the footnote in the Regan case, where it says that an appeal by a party who succeeded in the lower court on an issue which the lower court found to be constitutional fits within the first paragraph.

That is not an appeal on the issue for which the court held unconstitutional at all, and in fact, as the Government has pointed out in its reply brief in Regan, the real reason for that appeal was relief, because in order for the plaintiffs to get the relief they wanted they needed to try to succeed on a different issue. They were really appealing relief.

And the Court didn't say that that issue comes up under the second paragraph as a further appeal once the Government made its appeal. Instead, it said it comes up under the first paragraph. It comes up under that more broad language. And I think that that's consistent with what we're arguing here.

QUESTION: Mr. Dudovitz, you have referred to the Grace Brethren Church case as supporting your view and it seems to me it does no such thing. Jurisdiction under 1252 in that case was premised on the district

court's implicit but necessary holding that the federal statute was unconstitutional, and the Government challenged that holding. That's the point which you omitted.

MR. DUDOVITZ: Well, I understand that the Government challenged the constitutional holding. But it seems to me -- well, first of all, I don't believe there is any case that the Court has actually handled that is exactly the same as this case. Probably we wouldn't all be here if that were true.

But what Grace Brethren does, I believe, is it follows a line of cases from this Court which indicates the broader interpretation of what it means to hold an Act of Congress unconstitutional. We have cases like Fleming, where --

QUESTION: But Grace Brethren was wrestling with the problem of whether it was an implicit holding of unconstitutionality.

MR. DUDOVITZ: Right.

QUESTION: That's all. It didn't deal with this question at all.

MR. DUDOVITZ: What it does, I think, is it follows from first the holding that you don't really have to hold an Act of Congress unconstitutional; it can be the Act applied, which is a much earlier line of

cases from the Fleming case.

And then -- and I do think that it's taken at least somewhat of a step further to say, not only do you not have to hold the Act itself unconstitutional, but in fact if you held a state statute unconstitutional but it effectively tied in the federal statute and affected the operation of the statute program, the Federal Government -- I think the language of Grace Brethren talks about the Federal Government being effectively bound by that decision of the lower court -- then you're also under 1252.

QUESTION: It found, of course, that implicitly the federal statute was held unconstitutional and the Government challenged that. So it is not this case.

MR. DUDOVITZ: I wouldn't disagree that it was not this case. All I'm trying to suggest is that its view of how to interpret 1252 is consistent, I believe, with our view of how you interpret 1252.

QUESTION: Mr. Dudovitz, while you're pausing let me just be sure I'm right about one assumption. Taking your opponent's hypothetical appeal on attorney's fees, where you wanted to appeal because the court didn't allow them, denied an allowance entirely, you would agree that should come here under your reading of

the statute?

MR. DUDOVITZ: I would not. I think what comes here under my reading of the statute is relief that is necessary to remedy the constitutional wrong. The attorney fees relief doesn't come from that. It really comes from a separate statutory basis. That is, if the statute wasn't there, if we didn't have the equal access to justice statute --

QUESTION: Well, assume it's a single judgment. The court says, it's hereby ordered that the statute is declared unconstitutional, that's paragraph one. Paragraph two is, there will be an award of attorney's fees of $1,000.

You appeal from that judgment and you say, the only relief I want is an increase. You are not contending that that appeal would be to this Court?

MR. DUDOVITZ: Let me try to clarify that. I think my view is that as the statute is set out that definitely does fit within it, and I think that's how this Court has to interpret the statute, that that's correct that --

QUESTION: I'm not sure whether you're saying there would be jurisdiction here or not.

MR. DUDOVITZ: On its face I think that there would be jurisdiction. What I'm saying is that if this

Court feels -- and I would point out also that we're far different from that --

QUESTION: I understand.

MR. DUDOVITZ: -- situation in this case. But if this Court feels that it has to in a sense draw some lines -- I mean, I think the statute is fairly clear on its face, but if you have to draw some lines, the relief aspects I think that fit within the constitutional question are constitutionally required relief. And attorney fees is not constitutionally required relief.

QUESTION: So you're in effect arguing, you're challenging your opponent's second point rather than his first point. In other words, he argues: one, it has to be an appeal from the constitutional holding; and secondly, he argues this case does not involve a constitutional issue.

You're response to that is: No, this case does involve a constitutional issue and that's why it's appealable.

MR. DUDOVITZ: That's right.

QUESTION: You're not arguing that it would be appealable even if it did not present a constitutional question?

MR. DUDOVITZ: Probably partly arguing both. I think that --

QUESTION: You're not, then, really relying on your sort of plain language -- you're not resting your whole --

MR. DUDOVITZ: I would not rest solely on the plain language. I think even if you don't do the plain language we're still there, because effectively this is a constitutional ruling.

QUESTION: Right.

MR. DUDOVITZ: But under the plain language there's no doubt. I mean, it seems to me that, as the Government would concede, if the plain language were correctly undoubtedly this case should have been here under 1252.

QUESTION: Whether it's a constitutional ruling or not that's being appealed?

MR. DUDOVITZ: Well, as long as the district court held the statute unconstitutional, that's correct.

QUESTION: Yes, but you're much less confident on that argument, as I understand you. You aren't taking a four-square position that the attorney fee issue by itself would be appealable.

MR. DUDOVITZ: I'm saying that I think you can set that issue aside if you want to, because of the fact that the relief doesn't flow directly as a remedy for

the constitutional violation.

Let me finally turn to one other point which the Government has requested here to this Court which I want to address briefly, and that is they have asked that, even if this Court determines that we are correct, that the Court ought to vacate the district court's order and remand to allow the district court to enter a new judgment, from which a new notice of appeal could be filed, and therefore they could then appeal to this Court and have the relief issues brought here.

We think that that is a particularly inappropriate action for this Court to take should the Court decide in our favor. I think the question of whether you do that or not is really an equitable kind of decision and you must look at what the effects of that are and what actions of the Government ought to be protected here.

First, the effects of it could be very disastrous to the class members in this case, who are old and disabled women who, as the district court noted, are largely living on the social security benefits, some of which they receive as a result of this, the district court's ruling. The district court's relief has been fully put into place by now. In fact, it was required to be so by August 1983.

The Government, while it sought a stay in the district court, did not pursue the stay. They did not argue that having the relief implemented while this was going on was going to be necessarily particularly harmful to them.

So it seems to me that their failure to do that, the effect that this has on the class members, and finally the fact that the Government didn't take any action which you ought to really protect, which Justice Blackmun pointed out by his question, they didn't file a protective notice -- and it seems to me after the Donovan case, which you remember came down three or four months before the final judgment in this case, that at worst from the Government's position there were some questions to be asked as to where an appeal ought to go.

The Government didn't do anything in this situation to try to suggest that they were -- to protect themselves. They could have filed two notices of appeal, something that happens all the time. They could have tried to say something in their notice of appeal. They could have done something to indicate their awareness of what they say is a difficult problem.

Given those circumstances and the effect on the Plaintiffs, and finally noting that if what's left

here in this case is just the relief ordered by the district court that also is relief that can be remedied somewhere else. Congress can remedy that if the Government thinks that the relief that's left by the district court is particularly inappropriate. In fact, Congress has acted on many occasions in these social security sex discrimination cases to set forth new rules and new standards.

So that to leave in place relief for a statute we all agree is unconstitutional and then to have another forum available to remedy that relief it seems to me is not very onerous. In fact, it's less onerous, I think, than what happened in the Donovan case, where what was left in effect was the ruling a statute was unconstitutional when the Government thought the statute was constitutional. And so it seems to me that we are not any different than that.

Just one other point before I close, and that is the Government made the comment that the Montana Contractors case was in effect on point here. And I agree first with the comment of Justice White that that summary affirmant should have little effect as a precedent even if it were. But I don't think it really is on point.

My understanding of reading what happened in

that case is the Government did in fact first appeal, file a notice of appeal to this Court on the constitutional question. As a result, the plaintiffs had no choice under 1252 but to file their second appeal to this Court. I think we all agree that once an appeal is here under 1252 there is no choice.

The Government then decided not to perfect its appeal. The Government never filed a jurisdictional statement. It dropped its appeal and then moved to dismiss the other party's appeal. They sort of got stuck in this Court, and therefore the Court -- and then the Court held lack of -- no jurisdiction.

It seems to me, given the extraordinary circumstances of that situation, that that's really not a case that ought to stand as precedent for this situation, which is far different.

So I would again urge this Court to remember the uniqueness of this kind of situation. It doesn't happen very often. It happens very rarely and it does present, I think, a situation where Congress wanted this Court to be the determining factor of what was going to happen to this kind of federal program.

Thank you.

QUESTION: Anything further, Mr. Garvey?

REBUTTAL ARGUMENT OF

JOHN H. GARVEY, ESQ.,

ON BEHALF OF PETITIONER

MR. GARVEY: I just have three brief points, if I may.

If I understand correctly what Respondent's counsel has said, essentially, unless they're able to win on this unlikely point regarding the first paragraph, what this case all boils down to is whether the relief in this case is constitutionally mandated. That, as the examples that I gave showed and as all the cases cited in our reply brief at page 3 to 5 indicate, is simply not the case.

The second point I want to make is a rather technical point in response to a concern by Justice Rehnquist. You pointed out that under the second paragraph of 1252 Congress at least contemplated that some kinds of appeals would be filed to the Court of Appeals prior to the filing of what I have been calling the proper Section 1252 notice of appeal.

Respondent in her reply brief indicated that those prior appeals were probably appeals taken under Section 1292(b) of the Judicial Code. In fact, Section 1292(b) was not enacted until 1958, so it's unlikely that they had 1292(b) appeals in mind.

There were -- there was a narrow class of

interlocutory appeals that could be taken before that time, although they weren't even the kinds of appeals that Rule 54(b) of the Federal Rules of Civil Procedure contemplate, because that rule didn't exist in 1937 either. There was a narrow class that Congress probably had in mind as well, simply a question of who beat in filing the notice of appeal.

And the third point I want to make is that, if we should lose the proper disposition of this case should not be like the disposition of the Richland County case. In the Richland County case, in the Government's brief in this Court we conceded that we had gone to the wrong court in taking our appeal to the Court of Appeals and, as this Court said, the direction in which we should have gone was clear under this Court's precedents.

In this case, by contrast, I think we had very good reason for believing in Montana Contractors against Kreps that the proper place for us to go was to the Court of Appeals and not to this Court. And so if we should be wrong about where we should have gone, at least the proper disposition would be to remand to the district court for entry of a fresh decree from which we may take a proper appeal to this Court.

QUESTION: May I ask you one final question?

It hasn't been argued, but I'm just suggesting a rationale for requiring jurisdiction to be accepted by this Court of Congress might have been that it did not want the Attorney General to be able to concede the unconstitutionality of statutes without this Court in effect approving the concession, and that therefore they wanted the mandatory jurisdiction here, because it's certainly conceivable that the Attorney General might unwisely make a concession of that kind. And that perhaps underlies their requirement that you tell the Congress whenever you do this.

MR. GARVEY: That's conceivable, although I, having read the legislative history, have found no indication of that. And what's more, the Attorney General's choice to intervene or not in these cases is discretionary, so that he may let go by a holding of unconstitutionality without even getting involved. I think in light of that what you suggest is not probable.

QUESTION: Well, I suppose you would be taking the same position even more strongly if you had contested the constitutionality -- had attempted to sustain the constitutionality of the statute in the district court and you lost, and then, rather than appeal that declaration, you appealed only the remedy.

MR. GARVEY: We would still be taking the same position.

QUESTION: You'd go to the Court of Appeals?

MR. GARVEY: That's correct.

QUESTION: And if you were right then, you should be right when you concede?

MR. GARVEY: A fortiori, we should be right when we concede.

If there are no further questions, we would rest.

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

We'll resume at 1:00 o'clock.

(Whereupon, at 11:55 a.m., the argument in the above-entitled matter was concluded.)

* * *

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-874-MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner

v. MILDRED M. EDWARDS, ETC.

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY _____

(REPORTER)