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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

**CAPTION:** EDWARD McNAMARA, Appellant V. COUNTY OF  
SAN DIEGO DEPARTMENT OF ADOPTIONS  
**CASE NO:** 87-5840  
**PLACE:** WASHINGTON, D.C.  
**DATE:** November 28, 1988  
**PAGES:** 1 thru 49

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -x  
3 EDWARD McNAMARA, :  
4 Appellant :

5 v. : No. 87-5840  
6 COUNTY OF SAN DIEGO :

7 DEPARTMENT OF ADOPTIONS :  
8 - - - - -x

9 Washington, D.C.

10 Monday, November 28, 1988

11 JAMES E. The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 11:50 o'clock a.m.

14 APPEARANCES:

15 JAMES E. SUTHERLAND, ESQ., Long Beach, California; on  
16 behalf of the Appellant.

17 LLOYD HARMON, JR., ESQ., County Counsel of San Diego,  
18 San Diego, California; on behalf of the Appellee.

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P-R-O-C-E-E-D-I-N-G-S

(11:50 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-5840, Edward McNamara v. the County of San Diego Department of Adoptions.

Mr. Sutherland, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES E. SUTHERLAND

ON BEHALF OF THE APPELLANT

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

This case is a case involving the complete and irrevocable termination of an unwed father's parental rights to associate with his natural child as contrasted to a custody or even a visitation dispute which would be the province of the state domestic relations courts and would have to be handled there if Mr. McNamara prevails.

This appeal presents equal protection claims by the father who was deprived of that most precious of fundamental rights, the right to be a parent and to raise and care for his biological child, and results in the loss of any chance of a lifelong father-daughter relationship.

QUESTION: What were your claims below?

MR. SUTHERLAND: The claim --



1           QUESTION: Was it a due process claim?

2           MR. SUTHERLAND: The claim in the trial court  
3 was that he was entitled to the parental preference  
4 under the California statutes, relying on Stanley v.  
5 Illinois, both establishing the fundamental right, and  
6 both due process and equal protection claims.

7           QUESTION: So you did press equal protection  
8 claims below?

9           MR. SUTHERLAND: They were pressed there by  
10 raising that particular argument in the trial court and  
11 on appeal. The Fourteenth Amendment was not cited. The  
12 California Supreme Court, however, when it took over the  
13 case, did address all Fourteenth Amendment issues, equal  
14 protection.

15          QUESTION: Including equal protection?

16          MR. SUTHERLAND: Equal protection and due  
17 process. It is in the opinion in the jurisdictional  
18 statement.

19          QUESTION: Right, all right, thank you.

20          QUESTION: But you -- did you raise or did you  
21 not raise equal protection in the Court of Appeals and  
22 the Supreme Court?

23          MR. SUTHERLAND: Well, we submit that we  
24 raised the issue but not as directly or precisely as it  
25 might well have been.

1 QUESTION: Did you ever use the words?

2 MR. SUTHERLAND: Yes, in the brief, in  
3 Appellant's opening brief and in discussing the Stanley  
4 v. Illinois case, the Appellant, the father, did mention  
5 both due process --

6 QUESTION: In what, before what court?

7 MR. SUTHERLAND: That would be before the  
8 Court of Appeal. The brief was -- the way the procedure  
9 works, the California Supreme Court acted on the same  
10 briefs. They just took the case over and went there..  
11 As I recall, the words were used also in the trial  
12 briefs in the Superior Court.

13 We rely primarily here on the jurisdiction  
14 claim on the passed upon, under the pressed or passed  
15 upon test.

16 QUESTION: Excuse me, the words were used in  
17 describing Stanley? Is that --

18 MR. SUTHERLAND: Yes, Your Honor.

19 QUESTION: But not applying them to your own  
20 factual situation, saying we claim that in this case  
21 there has been a denial of equal protection. You just  
22 described Stanley as having spoken about equal  
23 protection.

24 MR. SUTHERLAND: As establishing the  
25 fundamental right that he was trying to rely upon to

1 parent, yes. That's --

2 QUESTION: But you rely on the fact that it  
3 was actually -- the equal protection claim was actually  
4 adjudicated in the California Supreme Court.

5 MR. SUTHERLAND: That's correct, Your Honor,  
6 and I believe both --

7 QUESTION: And that therefore you are entitled  
8 to bring it here, even if it wasn't raised prior to that  
9 time.

10 MR. SUTHERLAND: That's correct. That's the  
11 way we submit the pressed or passed upon test express in  
12 Clark v. Jeter and other cases should be interpreted,  
13 and certainly the California Supreme Court, when it  
14 interpreted the statute, parental rights termination  
15 statute under which this case had been handled, examined  
16 all the cases, Stanley and Caban, Lehr v. Robertson and  
17 Quilloin and said that the California statute, as  
18 interpreted, granting a parental preference was  
19 constitutional under those cases, particularly because  
20 this Court had not interpreted a similar statute and  
21 said otherwise, had not ruled such a statute  
22 unconstitutional.

23 QUESTION: Well, now, you are not raising a  
24 substantive due process claim here before us, I take it.

25 MR. SUTHERLAND: That's correct, Your Honor.

1 QUESTION: And if we can't find equal  
2 protection here, you lose.

3 MR. SUTHERLAND: Yes, though we do --

4 QUESTION: You agree to that.

5 MR. SUTHERLAND: We do contend that the  
6 substantial rights affected are to be considered in  
7 determining the equal rights standards and the  
8 classification, San Antonio School District, Griswald v.  
9 Connecticut and other cases like that, so that the  
10 substantive right involved is a factor.

11 Substantive due process, we would submit,  
12 would be more clearly presented if, for instance, the  
13 statute were rewritten so that both mothers and all  
14 fathers could lose parental rights based upon the best  
15 interests of the child test, then we would invoke the  
16 reservations in Santosky v. Kramer and Caban and go to  
17 the substantial due process.

18 But as the statutes are now framed and  
19 applied, it is these unwed fathers in Mr. McNamara's  
20 situation who are denied the similar rights of mothers  
21 and other fathers classified as presumed fathers. So  
22 this --

23 QUESTION: Could you tell me where the  
24 California Supreme Court discusses this issue of equal  
25 protection? I must say I --



1 MR. SUTHERLAND: Yes, Your Honor.

2 QUESTION: It's in your jurisdictional  
3 statement somewhere?

4 MR. SUTHERLAND: It starts at 45A --

5 QUESTION: That's the first time?

6 MR. SUTHERLAND: First time, the only time  
7 that they have written an opinion in the California  
8 Supreme Court. The second appeal was to the Court of  
9 Appeals.

10 QUESTION: Where -- I'm looking for the word  
11 "equal protection." I just don't really find it very  
12 quickly.

13 Do you want to tell me the first time you see  
14 the word "equal protection?" Just say bingo or  
15 something.

16 MR. SUTHERLAND: Well, I guess I haven't  
17 underlined or outlined that particular part of it.

18 QUESTION: Well, they also don't seem to be  
19 talking about equal protection. It's not just that they  
20 are not using the magic word; I don't -- I must say,  
21 it's a very subtle discussion of the issue to me.

22 MR. SUTHERLAND: They talk in Footnote 8 on  
23 page 45A of the Caban case and the undifferentiated  
24 distinctions which were not permissible.

25 QUESTION: The second paragraph of that

1 footnote does mention equal protection, right down  
2 towards the bottom of 45A.

3 MR. SUTHERLAND: Thank you.

4 QUESTION: That's a quote --

5 QUESTION: That's described, that's a quote  
6 from Caban.

7 QUESTION: -- from another case.

8 QUESTION: Just all a description of another  
9 case. I don't see in the text of the opinion any  
10 discussion of, you know, the difference between the  
11 mother and the father. That's what we're talking about  
12 here, aren't we, treating the mother differently from  
13 the father, and I fail to see any discussion of it in  
14 the California opinion, and you acknowledge you never  
15 raised it.

16 MR. SUTHERLAND: Well, may I proceed without  
17 taking the Court's time to --

18 QUESTION: We are going to recess in about  
19 three minutes for lunch.

20 Why don't you proceed with the rest of your  
21 argument, and perhaps you'll have something to say about  
22 that point when we resume at 1:00 o'clock.

23 MR. SUTHERLAND: All right.

24 So the situation presented is that Mr.  
25 McNamara was deprived permanently of all right to have

1 contact with his daughter, even though he was found in  
2 the California courts to have done everything that he  
3 could, everything that was necessary to assert and  
4 protect his rights, and even though he was found to be a  
5 good and loving father.

6 The facts of the situation are that he had a  
7 relationship with the mother in the fall of 1980. When  
8 they split up he was not aware of the pregnancy, nor was  
9 she. He did not learn of it until about two weeks after  
10 the child was born, when the mother asked his permission  
11 or his consent to the adoption.

12 QUESTION: When was the child born?

13 MR. SUTHERLAND: July 18, 1981.

14 QUESTION: So, what, he hadn't seen the mother  
15 from November of 1980 till July of 1981?

16 MR. SUTHERLAND: That's correct, hadn't seen  
17 her, nor had he had any contact from her.

18 QUESTION: Would you be making the same  
19 argument if it had been a so-called one night stand?

20 MR. SUTHERLAND: Well, I think we might get to  
21 that if we -- if he performed all the other requirements  
22 to come under the definitions of this Court of  
23 manifesting significant parental interest, and that he  
24 would be entitled to the opportunity.

25 It's a little close to see whether it is one

1 night or five nights, you know, where would you draw the  
2 line as to duration --

3 QUESTION: That would certainly go  
4 substantially beyond any of this Court's cases, wouldn't  
5 it, where there has been an established relationship.

6 MR. SUTHERLAND: It would go beyond all the  
7 cases. There have been no opportunities -- this is the  
8 first case where the courts have considered a newborn.  
9 In all the other cases the father either had an  
10 opportunity to establish a relationship or to show  
11 disinterest in establishing a relationship with the  
12 child. So the critical question here is what can he do  
13 or what does he have to do as to a newborn, and when is  
14 he entitled to that right?

15 California again found that he did what was  
16 available.

17 CHIEF JUSTICE REHNQUIST: We will resume there  
18 at 1:00 o'clock, Mr. Sutherland.

19 (Whereupon, at 12:00 o'clock noon, the Court  
20 recessed, to reconvene at 1:00 o'clock p.m., this same  
21 day.



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AEIERNQON\_SESSION

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We will resume the argument in No. 87-5840, McNamara v. County of San Diego Department of Adoptions.

Mr. Sutherland?

ORAL ARGUMENT OF JAMES E. SUTHERLAND

ON BEHALF OF THE APPELLANT -- Resumed

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

To return to the California Supreme Court's consideration of the constitutional equal protection issues for the jurisdiction point, I can only refer to the statements in the jurisdictional statement, the opinion recited there, point out again that the California Supreme Court did discuss Caban and the equal protection provisions and the requirements of that case.

The Court did not cite chapter --

QUESTION: Did you find anything other than that footnote?

MR. SUTHERLAND: Not other -- in that opinion, not other than that footnote citing the words and the case and the general discussion.

I would point out, however, that when the second appeal came, the Court of Appeal invited

1 additional argument on the significance of the  
2 involvement of state action, and the county responded  
3 that all constitutional issues concerning that and the  
4 need for a finding of unfitness to terminate the  
5 parental rights had been squarely presented to the  
6 California Supreme Court; the California Court of Appeal  
7 agreed that the constitutional issues, state action and  
8 others had been foreclosed. That's in the opinion of  
9 that court, and we are in the situation where the county  
10 has also conceded here at page 10 of the brief for  
11 Appellee that those issues were raised and considered.

12 So we would submit that, though it's not  
13 artfully stated with chapter and verse, that it was a  
14 necessary part of the judgment, and it was obvious that  
15 that's what they were intending to do is uphold it  
16 against all those claims.

17 QUESTION: I don't understand why it was a  
18 necessary part of the -- it certainly wasn't a necessary  
19 part of the judgment if you never raised the point. I  
20 mean, at most you can argue they happened to address the  
21 point, but it wasn't necessary for them to address it if  
22 you had never raised it.

23 MR. SUTHERLAND: It wasn't necessary to meet  
24 the points raised. It is perhaps necessarily included  
25 in their broad statement that the statute as interpreted

1 passes muster under the Fourteenth Amendment and this  
2 Court's cases applying it to unwed fathers' illegitimate  
3 children.

4 I would point out as to the various issues  
5 before the Court that Mr. McNamara was easily identified  
6 and established as the father of the child. He was  
7 named on the birth certificate, he was found, he claimed  
8 paternity, he was stipulated to be the father, and he  
9 was adjudged the father. So many of the issues that  
10 might come up in other cases are not presented here. We  
11 are addressed only with the situation where the father  
12 was known and identified, the mother has relinquished  
13 for adoption, the father then came forward, asked to be  
14 the full parent, offered to take and requested full  
15 parental responsibility and was denied any opportunity  
16 to form a relationship with the child and was denied any  
17 protected liberty interest by the California courts.

18 QUESTION: Mr. Sutherland, your complaint is  
19 that your client is denied equal protection both with  
20 respect to other fathers and with respect to the unwed  
21 mother?

22 MR. SUTHERLAND: That's correct, Your Honor,  
23 that no mother would lose her parental rights under the  
24 California scheme without a finding either of unfitness,  
25 neglect or abandonment of the child. The classification

1 of presumed fathers is treated the same. The presumed  
2 father is one who has married the mother, who has  
3 attempted to marry the mother by going through a  
4 ceremony which might be void or voidable, or whom the  
5 mother has let take the child into his home, and he  
6 receives it into his family and holds it out as his own.

7 We contend that as against both mothers and  
8 the presumed fathers under the statute, that Mr.  
9 McNamara has a protected interest under this Court's  
10 cases and is entitled to equal protection with both of  
11 them.

12 QUESTION: And you say there's no reasonable  
13 basis for treating an unwed father differently than an  
14 unwed mother in this situation?

15 MR. SUTHERLAND: In this situation, yes, where  
16 she is --

17 QUESTION: My question was you say there's no  
18 reasonable basis for treating an unwed father  
19 differently than an unwed mother.

20 MR. SUTHERLAND: Under these circumstances,  
21 yes. We do not contend that all unwed fathers should be  
22 treated like all unwed mothers. Our contention is that  
23 once they cross the threshold, once they act like a  
24 father and manifest a significant parental interest,  
25 then they are entitled to the same protection.



1                   QUESTION: Well, Mr. Sutherland, how much  
2 contact did Mr. McNamara have with the child since its  
3 birth?

4                   MR. SUTHERLAND: Well, the short answer is all  
5 that he was allowed. He had two visits, one when the  
6 child was approximately a month old, and then a couple  
7 of months --

8                   QUESTION: And how long was that visit, how  
9 long?

10                  MR. SUTHERLAND: Thirty to 45 minutes,  
11 approximately. That was the --

12                  QUESTION: And the second one?

13                  MR. SUTHERLAND: About the same time. It was  
14 in November of 1981. They went to trial. The child was  
15 born in July, and it went to trial the first time in  
16 December.

17                  QUESTION: And from then on was he deprived of  
18 the chance of doing so?

19                  MR. SUTHERLAND: Yes.

20                  QUESTION: By whom, the state?

21                  MR. SUTHERLAND: By the state.

22                  QUESTION: By the county?

23                  MR. SUTHERLAND: The county --

24                  QUESTION: By placing the child with an  
25 adoption --

1 MR. SUTHERLAND: Well, first by placing it  
2 with a foster parent, and then placing it with  
3 prospective adoptive parents. That was done a week  
4 after he asked for custody.

5 QUESTION: Was he denied any visitation rights  
6 during that period?

7 MR. SUTHERLAND: Yes. And he has consistently  
8 tried. We are litigating hard all the way up here.

9 QUESTION: May a -- can a mother be deprived,  
10 have her parental rights taken away by -- just on a  
11 best-interests-of-the-child basis?

12 MR. SUTHERLAND: No, not in California, not  
13 anywhere in any state, to my knowledge.

14 QUESTION: Do you think it requires some  
15 finding of unfitness?

16 MR. SUTHERLAND: Yes. There's two California  
17 statutes.

18 QUESTION: How about, how about  
19 constitutionally? Would it violate the Constitution to  
20 terminate parental rights just on the basis of the best  
21 interests of the child without any finding of unfitness?

22 MR. SUTHERLAND: We would certainly contend  
23 so. We would think that we would be walking into an  
24 amorphous area of conflicting psychiatric, psychological  
25 testimony, conflicting opinions, and even sort of

1 wandering off into 1984 and Brave New World where we are  
2 deciding parental rights, and this basic, fundamental  
3 relationship based on what expert might have as  
4 conflicting opinions.

5 QUESTION: Do you think it would be any more  
6 amorphous than the area you're asking us to walk into on  
7 kind of a case-by-case determination as to when an unwed  
8 father can have his rights cut off?

9 MR. SUTHERLAND: No, Your Honor -- well, yes.  
10 I think it -- I'll answer the question. I think that  
11 this Court has gone forward in *Lehr v. Robertson*,  
12 synthesizing the prior cases, to establish pretty  
13 definite guidelines which are subject to proof and  
14 subject to court interpretation as to when you acquire  
15 this protected liberty interest. When you act like a  
16 father, to use the language of the case, is fairly  
17 obvious. It's certainly a lot more obvious than  
18 conflicting psychiatric opinion, trends in child custody  
19 determination which have evolved and changed  
20 consistently, and where there's a tremendous amount of  
21 conflicting opinion and testimony in custody cases.

22 QUESTION: Mr. Sutherland, most states that  
23 I'm aware of, all that I'm aware of, have laws against  
24 polygamy. I guess, I guess that they wouldn't make a  
25 whole lot of difference if you wanted to have a lot of

1 children by different women, you just would not marry  
2 the women and become the biological father of children  
3 by a number of different women, and you are telling us  
4 you would have some legal rights to be declared the  
5 father of all of those children.

6 MR. SUTHERLAND: Rights and responsibilities.

7 QUESTION: Mm-hmm.

8 MR. SUTHERLAND: Yes.

9 QUESTION: So those polygamy laws are really  
10 sort of dead letters, really.

11 MR. SUTHERLAND: Our position would be that if  
12 that is a concern of the state, then the state first  
13 ought to address it in legislation.

14 QUESTION: They have. They have antipolygamy  
15 laws. I think what that means to say is you can be the  
16 father of as many children as you beget in a legally  
17 constituted marriage.

18 MR. SUTHERLAND: Well --

19 QUESTION: I think that's the purpose of those  
20 laws. I think that means you cannot beget as many  
21 children as you like by as many women as you like and be  
22 their father.

23 MR. SUTHERLAND: Well, it means precisely, I  
24 thought, Your Honor, that you couldn't marry them and be  
25 wise to them, but paternity litigation is rife with men



1 who have been married, had children by another woman who  
2 was not their wife, and they are still stuck with  
3 support, they still could be good parents. If Mr.  
4 McNamara had been married at this time, he still would  
5 have been a good parent, as the court found him to be.  
6 He could have provided a good and loving home.

7 If the state feels that that is some  
8 particular fact situation that should prevent a father  
9 in that situation from establishing a parent-child  
10 relationship with a child born out of wedlock, then the  
11 state should address that first, and it could, just as  
12 it could address in a statute various other situations,  
13 incest or rape or various other matters of policy.

14 QUESTION: Well, the state has done that here  
15 by effectively providing a mechanism for cutting off a  
16 biological father's right.

17 MR. SUTHERLAND: They haven't precluded them  
18 or made some finding that this is a policy. They just  
19 say all the fathers --

20 QUESTION: Well, they've adopted it as a  
21 policy that the state will consider the best interests  
22 of the child over the alleged rights of the biological  
23 father, isn't that right?

24 MR. SUTHERLAND: But that -- yes, but that  
25 applies to all the unwed fathers who are not presumed

1 fathers. They are not cutting off all unwed fathers  
2 because presumed fathers would get the different  
3 protection and the same standard as the mother.

4 QUESTION: Do you think the state has some  
5 interest here in promptly placing illegitimately born  
6 newborns in stable family homes?

7 MR. SUTHERLAND: I think the state has an  
8 interest. That interest would have been satisfied here  
9 by giving custody to Mr. McNamara, and the interests of  
10 the state to --

11 QUESTION: Well, by the time that hearing came  
12 up, is it possible that the bonding had already taken  
13 place of the baby with the adoptive parent?

14 MR. SUTHERLAND: Well, not sufficiently.  
15 Certainly the California Supreme Court said no. The  
16 trial court said yes to that question, and the  
17 California Supreme Court said there was no basis in the  
18 record for terminating his parental rights and interest  
19 for not -- no reason to not give him custody under that.

20 Bonding becomes one of the amorphous problems  
21 when you walk in to a best-interests-of-the-child test  
22 in that sort of litigation, and you have all sorts of  
23 competing ideas and theories. You have, used to have a  
24 tender years presumption. You used to have a belief  
25 that all children should be in two-parent homes. Now

1 one parent, single parents are allowed to adopt children.

2 QUESTION: Why isn't that for the state to  
3 decide, though, if there are all these ideas floating  
4 around, why isn't it reasonable for the state to choose  
5 one or the other as California has done here?

6 MR. SUTHERLAND: But they haven't chosen  
7 within the best interests standard. They have just said  
8 if you are not a presumed father, then we wander off,  
9 and we're going to decide in some trial what's best for  
10 the child, whether it should be placement with you or  
11 placement with somebody else that --

12 QUESTION: Well, but that's certainly a  
13 determination of state policy.

14 MR. SUTHERLAND: But it's a determination of  
15 state policy which deprives fathers who have achieved  
16 protected liberty interest from the equal protection  
17 with other people covered by state laws.

18 QUESTION: Well, but that really begs the  
19 question. None of our cases hold that a father in your  
20 client's position has achieved a protected liberty  
21 interest.

22 MR. SUTHERLAND: None hold otherwise, but if  
23 we must look to the particular holdings of this Court  
24 and the factual situations addressed in order to achieve  
25 that interest, it would be impossible for the father of

1 a newborn child to have a relationship over a period of  
2 years to either demonstrate interest or disinterest.  
3 And so the state policy, we submit, denies equal  
4 protection.

5 QUESTION: You have no trouble with just  
6 taking equal protection and saying I have been denied  
7 equal protection, so that means due process of law, you  
8 have no trouble with that at all, do you?

9 MR. SUTHERLAND: I would have no trouble with  
10 it.

11 QUESTION: By saying that a denial of equal  
12 protection is a denial of due process.

13 Do you see any difference between -- do you  
14 see any difference between the two?

15 MR. SUTHERLAND: Not really as to substantive  
16 due process and procedural due process --

17 QUESTION: That's your position, right?

18 MR. SUTHERLAND: Yes.

19 QUESTION: Is that your position?

20 MR. SUTHERLAND: Yes, that would be --

21 QUESTION: Do you prove equal protection --  
22 you claim due process, you prove equal protection,  
23 therefore you win.

24 MR. SUTHERLAND: Well, I'm claiming equal  
25 protection --

1 QUESTION: Sir?

2 MR. SUTHERLAND: I'm claiming equal protection  
3 and ending up arguing that substantive due process  
4 denial and the denial of equal protection in a situation  
5 are the same.

6 I would like to reserve the rest of the time  
7 for argument if I might.

8 QUESTION: Very well, Mr. Sutherland.

9 Mr. Harmon, we will hear now from you

10 ORAL ARGUMENT OF LLOYD HARMON, JR.

11 ON BEHALF OF APPELLEE

12 MR. HARMON: Mr. Chief Justice, may it please  
13 the Court:

14 First I would like to address the issue what  
15 does the 1984 decision of the California Supreme Court  
16 actually hold with regard to these federal  
17 constitutional issues, and I think in all candor we have  
18 to say that the decision and the discussion in that case  
19 is not as precise as we would have liked it to be.

20 However, we do believe that it certainly hit  
21 the substantive due process issue head on and that it  
22 did conclude that the California statutory scheme did  
23 not violate federal --

24 QUESTION: Well, Mr. Harmon, the substantive  
25 due process issue is not what the petitioner raises



1 here.

2 MR. HARMON: Yes, that also baffles us a  
3 little bit because if you look at his opening brief, the  
4 argument is, of course, that Edward has a protected  
5 liberty interest. He cites all the cases that are  
6 traditionally discussed in substantive due process  
7 cases, and on page 21 of that brief he says termination  
8 of parental rights interferes with a "fundamental  
9 liberty interest."

10 So as you will note from the brief that we  
11 filed, we talk about substantive due process and we talk  
12 about equal protection, but from our vantage point  
13 there's no question in our mind that the California  
14 Supreme Court dealt with the substantive due process  
15 issue.

16 With respect to the equal protection issue,  
17 again, Footnote 8 is the only place that you really find  
18 any discussion of equal protection, and as has been  
19 pointed out, that's in a quotation.

20 QUESTION: And the purpose of the quotation is  
21 to set the stage for the last paragraph of the footnote,  
22 which simply concludes: Because we have ruled that the  
23 New York statute is unconstitutional under the equal  
24 protection clause, we similarly express no view as to  
25 whether a state is constitutionally barred -- it's not a

1 substantive discussion of equal protection at all.

2 The point of it, if you go back to the text to  
3 see what the footnote is for, is to establish, is to  
4 establish that Caban, like Stanley, involved biological  
5 fathers who had established strong ties and held them  
6 out as their own. That's the only purpose it's cited  
7 for.

8 MR. HARMON: Well, it certainly does not have  
9 any discussion of the equal protection issue. There's  
10 -- we don't dispute that.

11 In looking at the decision as phrased by the  
12 California Supreme Court, we were of the view that in  
13 citing Caban, which is solely an equal protection case  
14 out of this Court, that the Court was considering that  
15 case and therefore, under the more general rule that  
16 raised and decided that the California Supreme Court in  
17 1984 had attempted to decide both federal constitutional  
18 issues.

19 However, as the Court knows, we have also  
20 raised the jurisdictional issue of finality, that this  
21 Court lacks jurisdiction because in 1984 the Appellant  
22 should have proceeded to seek review in this Court at  
23 that time since all federal constitutional issues had  
24 been raised.

25 With respect to --

1 QUESTION: Well, that's almost the converse of  
2 finality, to say that you must come immediately to this  
3 Court if you possibly could.

4 Have we ever held that?

5 MR. HARMON: No, not exactly in those words,  
6 Mr. Chief Justice, but the point of the finality rule,  
7 which is to protect federalism and also to have  
8 efficiency within the court system, would be served in  
9 this type of case where the federal constitutional  
10 issues have been decided by the highest court of the  
11 State of California so that on any remand of state  
12 issues only, the lower courts are going to be judged by  
13 what the California Supreme Court has said is the  
14 appropriate federal constitutional application.

15 QUESTION: But there was a remand, wasn't  
16 there?

17 MR. HARMON: There was a remand --

18 QUESTION: Well, there was a remand, so it  
19 really isn't -- the case wasn't over yet. So you have  
20 to find some excuse for saying it was final. And after  
21 all, the father could have prevailed on remand and won  
22 his case.

23 MR. HARMON: Well, right, but --

24 QUESTION: And there would have been no  
25 judgment at all to review.

1 MR. HARMON: That's --  
2 QUESTION: Isn't that right?  
3 MR. HARMON: That's possibly true. There's no  
4 question that could have happened.  
5 QUESTION: Well, they remanded to determine  
6 a --  
7 MR. HARMON: State law issue.  
8 QUESTION: Yes. Well, he could have prevailed  
9 in the whole case on that very issue.  
10 MR. HARMON: But the --  
11 QUESTION: And the federal issue would have no  
12 longer been in the case.  
13 MR. HARMON: But the federal issue was  
14 certainly a basic underpinning of what the trial court  
15 was going to have to do in that case with respect to the  
16 construction of the statute, and I think another aspect  
17 of this case that may differ from other types of cases  
18 where folks are asking a construction of the finality  
19 rule, this Court has recognized that in child custody  
20 cases time is of the essence, that it impacts a child's  
21 development to delay, and I think one could say this  
22 case is a classic example. It has been in the court  
23 system now seven and one half years, or almost seven and  
24 one half years. If it would have had to come to this  
25 Court four years ago, there would have been four years

1 less anxiety on the part of the adoptive parents,  
2 anxiety on the part of the adopted child, Katie.

3 So in this kind of case there may be some  
4 benefit to having a finality rule in custody, child  
5 custody cases.

6 With respect to the --

7 QUESTION: Excuse me.

8 MR. HARMON: Yes.

9 QUESTION: Your argument still does, even if  
10 you limit it to that narrow category of cases, it does  
11 hinge upon what the Chief Justice suggested, that is,  
12 that if we might have taken it, you must apply to us.  
13 If we make an exception from our normal finality rules  
14 ever, you have to take a shot at getting us to hear it,  
15 right?

16 MR. HARMON: That's correct.

17 QUESTION: So in all custody cases, even  
18 though you might win on remand, you have to go through  
19 the expense of filing cert petitions here.

20 MR. HARMON: Only if the highest court in the  
21 state has ruled on a federal constitutional issue  
22 properly raised.

23 QUESTION: Sure, sure.

24 MR. HARMON: With respect to the substantive  
25 issue, as we characterize it, the central substantive



1 issue is whether the Constitution requires a state to  
2 give the same consensual rights to the father, to the  
3 unwed father as it gives to the unwed mother of a  
4 newborn child.

5 In this case we have Katie Moses who was born  
6 July 18, 1981. Three days later she was placed with the  
7 county adoptions agency at the request of her mother.  
8 Approximately three weeks after her birth, her mother  
9 signed a formal relinquishment of the child to the  
10 county adoptions agency for adoption. And approximately  
11 five weeks after her birth, she was placed in the  
12 adoptive family. She has resided with that adoptive  
13 family since that time. There has been no interruption  
14 in that placement.

15 The requirement for the consent of only the  
16 mother of an unwed newborn is designed to implement the  
17 state policy which is the speedy placement of children,  
18 to put them into a stable setting so they can nurture  
19 and nourish.

20 The reason that the limiting the consent to  
21 the mother is reflected in both the enormity of the  
22 problem. In 1986 in California one-quarter of all  
23 births were to unwed mothers. And as this Court  
24 recognized in the Lehr case, that mothers -- excuse me,  
25 unwed fathers are typically not as identifiable and not

1 as necessarily not as interested in fatherhood. So --

2 QUESTION: Well, apparently California has  
3 chosen to require at least notice and an opportunity to  
4 be heard if the father is known, is that correct?

5 MR. HARMON: That is right once the child is  
6 going to be placed in adoption. This proceeding arises  
7 as a part of the adoption process, and that's how the  
8 notice is required.

9 As this Court knows, as a result of Stanley,  
10 there's a lot of gnashing as to what procedures should  
11 the states implement in order to meet those procedural  
12 due process requirements. The California law is  
13 basically the Uniform Parentage Act. So at a point in  
14 time, yes, the father is given notice. It gives the  
15 father an opportunity to come in and claim custody, and  
16 he's entitled to a hearing on the best interests  
17 standard, or he can simply ignore it, and a default is  
18 entered.

19 QUESTION: And what are the constitutional  
20 purposes served by requiring that hearing?

21 I take it you concede that that hearing is  
22 constitutionally required?

23 MR. HARMON: That hearing is required through  
24 -- is implementing Stanley v. Illinois.

25 QUESTION: All right.

1                   And what values are served by that?

2                   MR. HARMON: The value is it does give the  
3                   unwed father an opportunity to come in and seek  
4                   custody. First the unwed father establishes the  
5                   parentage, and then under the statute, as it existed at  
6                   the time of this proceeding, the father, if he claims  
7                   custodial rights, has a hearing on that issue.

8                   And in the first trial the trial court used  
9                   the best interests of the child standard, and based on  
10                  that standard, denied his request, awarded the custody  
11                  to the Moses family. That went up on the appeal. The  
12                  California Supreme Court concluded that it was a  
13                  detriment/best interests test that should have been  
14                  applied. It came back to the trial court in 1985.  
15                  There was a hearing. Based on the evidence provided at  
16                  that hearing, the court concluded it would be  
17                  detrimental to the child to be returned to her father or  
18                  placed with her father, and it was in the best interests  
19                  that she remain with the Moses.

20                  So that's the statutory scheme with respect to  
21                  the 7017 proceeding that is here.

22                  Now, California, though, does make it possible  
23                  for the unwed father to grasp the opportunity for  
24                  fatherhood, and that is found in Civil Code Section  
25                  7006(c). It allows a father to file a filiation

1 proceeding where the father can establish the  
2 parent-child relationship, where the court can award  
3 custody, can award visitation, can order the father to  
4 pay support, and at the same time, when this action was  
5 filed in 1982, when the TROF action was filed in 1982,  
6 the mere filing of the 7006(c) action would have stayed  
7 the termination proceeding.

8 QUESTION: Well, I think it's hard for you to  
9 argue that the father didn't do everything he could do,  
10 and the state courts seem to have so held. I think we  
11 are better off addressing the question rather than going  
12 off on some theory that he didn't do all that he could  
13 do here.

14 MR. HARMON: Well, Justice O'Connor, from our  
15 view, the father did not do all he could have done, and  
16 in fact, he did not do anything. Just to recite the  
17 facts, he learned about the birth on August 1, 1982. He  
18 first met with the social worker on August 5. He did  
19 not want custody at that time. He met with her again on  
20 August 10; he did not want custody at that time. He met  
21 with her on August 17, and that was the first time that  
22 he raised the issue of custody. He then did not meet  
23 with the social worker until November 11 where he saw  
24 the child the second time.

25 So during that whole period, there was still

1 no contact from the father with respect to his child.

2 So I think there is a question, did he do  
3 everything he could have done in order to have  
4 established or perfected his rights.

5 QUESTION: Well, am I mistaken, or did the  
6 courts below find that he had done what he could do?

7 MR. HARMON: The trial court certainly did not  
8 find that he could have done all that he could have done.

9 QUESTION: May I ask you, if he had initiated  
10 the kind of proceeding you describe in, say, August 17  
11 when he decided he did want custody, if he had initiated  
12 that proceeding and he had been able to prove that he  
13 was a fit parent, would he have prevailed under  
14 California law?

15 MR. HARMON: If he had, if he had established  
16 that it was in, would have been in the best interests to  
17 have the child placed with him --

18 QUESTION: No, would he -- he would have had  
19 to prove it was in the best interests of the child to be  
20 with him at that time?

21 MR. HARMON: Yes.

22 QUESTION: Would the issue have been any  
23 different in that proceeding than in this proceeding?

24 MR. HARMON: The issue would not have been any  
25 different. However, it would have been an affirmative



1 action on his part in order to perfect his rights, and  
2 that I think is a significant factor in the opportunity  
3 that the California statute --

4 QUESTION: Well, why is it significant if --  
5 why is that significant at all? If the test is simply  
6 best interests of the child, why couldn't the court at  
7 that time have said we think the child is better off  
8 with the adoptive parents?

9 MR. HARMON: Well, for one thing, a timely  
10 filing of that kind of action could have prevented some  
11 of the bonding issues that have arisen in this case.

12 QUESTION: Well, how? He wouldn't have gotten  
13 custody right away, would he?

14 MR. HARMON: He could have asked for interim  
15 custody. He could have --

16 QUESTION: Would the Judge have given it to --  
17 under your view, would it have been up to the judge to  
18 give it to him?

19 MR. HARMON: Under our view --

20 QUESTION: When the county agency is saying we  
21 think the child is better off with the adopting parents,  
22 and that's where the mother wants the child?

23 MR. HARMON: The county agency's perspective  
24 is that the child is better off wherever it is in the  
25 best interests of the child to be.

1 QUESTION: And the position of the county was  
2 the child was better off with the adoptive parents.

3 MR. HARMON: Well, yes, but by the time we  
4 were making that judgment in court, the child had been  
5 with the parents for some four months.

6 QUESTION: Wouldn't they have taken the same  
7 position on August 17 or 18th?

8 MR. HARMON: Well, in all candor I can't say.  
9 My feeling is, my sense of it is the issue would have  
10 been what is best for the child? Does this man have a  
11 serious interest in raising this child? Has he come  
12 forth with a plan that warrants serious consideration?  
13 If so, that might well have been in the best interests  
14 of the child at a particular time. But we will never  
15 know because that avenue was not pursued.

16 So what has happened is this case has been in  
17 litigation for some seven years now, and we have a child  
18 that has been in this placement for seven years now, and  
19 from the country's perspective, there's a lot of  
20 inaction on his part to have created this problem.

21 QUESTION: Well, there's one inaction: he  
22 didn't file that lawsuit right away.

23 MR. HARMON: Certainly.

24 QUESTION: Well, I suppose he didn't marry the  
25 woman.

1 MR. HARMON: That would have been an  
2 alternative, certainly.

3 QUESTION: Yes, which is what the state would  
4 have preferred.

5 I was looking through the statutes here.  
6 Wouldn't he have occupied a different status if he, not  
7 only if he had married her, but if he had offered or  
8 sought to marry her?

9 MR. HARMON: His different -- excuse me.

10 QUESTION: I can't find it in the appendix  
11 here, but I --

12 MR. HARMON: His different status could have  
13 arisen from filing the filiation proceeding, Having  
14 obtained some custodial interest in the child through  
15 visitation or otherwise, he would have become a presumed  
16 father. That would have put him into a class of father  
17 where his consent would have been necessary in order for  
18 the adoption to take place.

19 QUESTION: Do you become a presumed father by  
20 marrying after the birth of the child?

21 MR. HARMON: You can become one, yes.

22 QUESTION: Any limit on that?

23 MR. HARMON: No, no limit.

24 QUESTION: Clear this up for me.

25 He became a -- he would have become a presumed

1 father by filing the filiation proceeding, by offering  
2 to marry the mother, or by doing both?

3 MR. HARMON: He would, by -- he would become a  
4 presumed father by having married the --

5 QUESTION: No, say he offered.

6 MR. HARMON: Not, no, no, he would not have  
7 become a presumed father by offering to marry.

8 QUESTION: So if she says no, then --

9 MR. HARMON: Or merely filing the filiation.

10 The presumed father status is akin to what we  
11 used to call legitimation, and one of the concepts in  
12 that is you can bring your illegitimate child into your  
13 home, hold that child out as your own, and that  
14 legitimated the child. That was the law in California  
15 before the Uniform Parentage Act.

16 QUESTION: Well, but he -- that option wasn't  
17 open to him here.

18 MR. HARMON: No, it was not open to him.

19 QUESTION: And marrying her wasn't open to him  
20 because she didn't want to marry him.

21 MR. HARMON: That's right.

22 QUESTION: So, but did -- would institution of  
23 the filiation proceeding have made him a presumed father?

24 MR. HARMON: Only if he would have gotten the  
25 custody,, but it would have --

1 QUESTION: I mean, no, just that. -

2 MR. HARMON: No, just, no.

3 QUESTION: So that there really was no way he  
4 could become a presumed father on these facts.

5 MR. HARMON: On these facts, no, no.

6 QUESTION: Okay.

7 MR. HARMON: The argument that we've made is  
8 that the policies of California established by the  
9 gender distinction that's made in 7017(d) are consistent  
10 with the test of this Court dealing with gender  
11 distinctions. Justice Powell's opinion in the Caban  
12 case recognized that "in those cases where the father  
13 never has come forward to participate in the rearing of  
14 his child, nothing in the equal protection clause  
15 precludes the state from withholding from him the  
16 privilege of vetoing the adoption of that child."

17 QUESTION: Well, in Caban, though, the role of  
18 the father was a good deal more passive than it was  
19 here, wasn't it? I mean --

20 MR. HARMON: In Caban, the father had actually  
21 had custody of the child. That dealt with an older  
22 child where there had been two sets of married folks  
23 competing.

24 QUESTION: It was in Lehr that the father's  
25 role had been very [Inaudible].



1           MR. HARMON: Right. This case is similar, we  
2 think, to Lehr and Parham because in Lehr this Court  
3 said it was not a denial of equal protection or due  
4 process where the father had failed to send in the  
5 postcard that would have put him on the putative fathers  
6 registry so that he would have received notice and an  
7 opportunity to appear at the adoption of his child. And  
8 this was held, notwithstanding the fact that the father  
9 was also pursuing a separate court action to attempt to  
10 claim custody of the child.

11           In Parham, that's where the Court held that it  
12 was not a denial of equal protection to preclude the  
13 unwed father of an illegitimate child from maintaining a  
14 wrongful death action if the father had not taken the  
15 necessary steps under Georgia law to legitimate the  
16 child.

17           And what we're -- what we're suggesting here  
18 is that like Parham and like Lehr, Mr. McNamara did have  
19 an opportunity through the use of 7006(c) to put himself  
20 in the type of position where he could have been a  
21 presumed father.

22           QUESTION: I thought your answers to Justice  
23 Stevens' question indicated that this particular  
24 appellant could not have, other than marrying the mother.

25           MR. HARMON: No, no, what I was saying to

1 Justice Stevens was that merely filing the action itself  
2 would not have put him in the presumed father status.

3 QUESTION: Well, how could this fellow have  
4 put himself, brought himself within the presumed father  
5 status?

6 MR. HARMON: By getting custody, some type of  
7 custody of the child.

8 QUESTION: But how was he to do that?

9 MR. HARMON: The filiation proceeding would  
10 have been an available resource to him, Mr. Chief  
11 Justice. He just did not --

12 QUESTION: So what would a filiation  
13 proceeding have given him?

14 MR. HARMON: The right to obtain custody of  
15 the child or visitation with the child.

16 QUESTION: But wouldn't they have applied  
17 exactly the same standard as they did here, the best  
18 interests of the child? I don't see how that would have  
19 altered his position at all.

20 MR. HARMON: Well, no, they might have -- the  
21 point is they might have applied the same tests, they  
22 would have applied the best interests, but when you're  
23 dealing with the child custody timing is all important,  
24 and I think that's what the decisions of this Court have  
25 recognized, that it is that substantial relationship

1 between parent and child that warrants the protection  
2 and if a father is going to sleep on his rights, such as  
3 not send the postcard in, take those steps that are  
4 possibly available to fasten some relationship between  
5 him and the child, at least as a matter of  
6 constitutional law that father is not going to be denied  
7 equal protection.

8 QUESTION: But your position goes further than  
9 that.

10 Suppose in this case we stipulate that the  
11 father did everything that he could have done, isn't  
12 your position exactly the same, that the natural father  
13 is in a different category than presumed fathers?

14 MR. HARMON: Certainly.

15 QUESTION: All right. Then why don't you  
16 argue the case on that -- that's what the case is about,  
17 isn't it?

18 MR. HARMON: That is what the case is about,  
19 that's true.

20 And in that respect, looking at the test used  
21 by this Court in Craig v. Boren, where the  
22 classification serves an important governmental  
23 objective, which in this case would be speedy and stable  
24 placements of newborn children, we believe the  
25 classification is substantially related to that point.

1           And if I might just quote from Justice Stevens  
2   in the Caban case, the reasons for the substantial  
3   relationship, only the mother carries the child. It is  
4   she who has the constitutional right to decide whether  
5   to bear it or not. These differences continue at birth  
6   and immediately thereafter. During that period, the  
7   mother and child are together, the mother's identity is  
8   known with certainty. The father, on the other hand,  
9   may or may not be present. These natural differences  
10   between unmarried fathers and mothers make it probable  
11   that the mother and not the father or both parents will  
12   have custody of the newborn infant.

13           And that's the way it was in this case.  
14   Justice Stevens continued, but as a matter of equal  
15   protection analysis, it is perfectly obvious that at the  
16   time and immediately after a child is born out of  
17   wedlock, differences between men and women justify some  
18   differential treatment of the mother and father in the  
19   adoption process. Most particularly, these differences  
20   justify a rule that gives the mother of the newborn  
21   infant the exclusive right to consent to its adoption.

22           In *Lehr*, this Court made the -- states the  
23   same rule, equal protection does not prevent a state  
24   from according the two parents different legal rights if  
25   a parent has never established a custodial, personal or

1 financial relationship with a child.

2 The fundamental point we're making is that  
3 biology in and of itself does not create any substantial  
4 relationship or create a protected relationship. There  
5 must be something substantial between the father and the  
6 child. Absent that, the classification is reasonable.

7 And it is on this point that I think the  
8 Appellant misconceives the role of this Court. This  
9 Court is not to sit as an intermediate state appellate  
10 court to review the sufficiency of the evidence  
11 supporting the determination of the trial court as to  
12 who should have custody of the child. The issue before  
13 this Court is whether or not the unwed father  
14 classification meets constitutional principles. We  
15 submit that it does.

16 I'd like to make a point with respect to what  
17 is the remedy that the Appellant seeks in this case,  
18 because quite frankly, he has never made it clear. On  
19 page 3 of his reply brief, he says that it is the  
20 termination of rights of the father proceeding is set  
21 aside, no adoption will be permissible without his  
22 consent, and he will be able to seek custody,  
23 visitation, pay support and be a full participant in  
24 Katie's life.

25 On the other hand, on page 4 he states it is



1 not likely that Edward will get custody, and why is  
2 that? In all candor, I think it's for the same reasons  
3 that he did not get custody in the trial court: the  
4 best interests of the child are such that custody should  
5 remain with the Moses.

6           So if we are down to the point where  
7 visitation is the only remedy that he is seeking, that  
8 again is subject to the requirements of Section 4600 of  
9 the Civil Code, which is the detriment/best interests of  
10 the child standard. So even that type of action by the  
11 father is subject to the same statutory standard that  
12 this termination proceeding was subject to.

13           With respect to the substantive due process  
14 argument, again, McNamara ignores the fact that he did  
15 have an opportunity to establish a relationship with his  
16 child under state law. We again refer to 7006(c) of the  
17 Civil Code.

18           QUESTION: May I ask you on that point, Mr.  
19 Harmon, did you argue that in your brief, 7006(c)?

20           MR. HARMON: Yes, that is in the brief.

21           But in any event, this is not an intrusion  
22 into an existing family unit. Mr. McNamara and his  
23 daughter were never a family. They never had any  
24 relationship. As counsel indicated, the most they saw  
25 of each other may have been an hour and one half some

1 seven years ago.

2 So we would submit that under the tests that  
3 this Court has applied in Stanley, Caban, that before a  
4 personal liberty interest occurs, there must be a  
5 substantial relationship between the father and the  
6 child. Absent that, there is no protected liberty  
7 interest.

8 Thank you.

9 QUESTION: Thank you, Mr. Harmon.

10 Mr. Sutherland, you have six minutes remaining.

11 REBUTTAL ARGUMENT OF JAMES E. SUTHERLAND

12 ON BEHALF OF APPELLANT

13 MR. SUTHERLAND: Thank you, Your Honor. May  
14 it please the Court:

15 The paradox in the situation under California  
16 law is that to get a hearing, Mr. McNamara had to come  
17 under Section 7017, seek to establish his paternity by  
18 filing a 7006 petition, which he did. That argument was  
19 never raised below, and California found that procedures  
20 had been followed. So he had to come in, seek to take  
21 full custody, become a parent, act like a father, take  
22 full responsibility, and yet, he's cut out by that  
23 statutory scheme and treated as one who had no interest  
24 in his child at all. That would be another sort of  
25 natural father.

1           What we are asking the Court to do is  
2 determine that Mr. McNamara's parental rights should not  
3 be terminated except on the same grounds as the mother  
4 or the presumed father, unfitness, neglect or  
5 abandonment.

6           That will result in a new trial to see if  
7 those grounds may be established. On the basis of this  
8 record, they cannot be because he is a good and loving  
9 father and always has been.

10          That will leave custody open. Custody will be  
11 decided by the California courts according to the best  
12 interests of the child. Mr. McNamara would have the  
13 right to seek custody, perhaps not now but perhaps  
14 sometime in the future, he would have the right to try  
15 for visitation, he would have the right to establish a  
16 lifelong relationship, all subject to the trial facts  
17 and the supervision of the California courts.

18          The main points raised to justify the  
19 disparate treatment are supposed effects upon adoptions  
20 and upon unwed mothers in certain circumstances. We  
21 submit that that is speculative, there is no proof  
22 offered that there would be those adverse consequences.  
23 It doesn't seem to bother Texas, Illinois or Wisconsin  
24 which require the same grounds. It doesn't bother the  
25 commissioners on uniform laws and the Uniform Parentage

1 Act, Section 4 when they become a presumed father merely  
2 by filing an affidavit of paternity, which is not  
3 contested.

4 San Diego County, according to the newspapers,  
5 its current administration under these circumstances  
6 would give custody to the father subject to change, but  
7 it does indicate that all these adverse consequences  
8 don't come about. It doesn't bother California.

9 The delay, the possible placement with the  
10 father all arise now because the statutory scheme  
11 requires notice and a hearing so that the father might  
12 get custody. It didn't bother the California Supreme  
13 Court which found no policy reason, no factual reason  
14 nor any legal reason to deny parental rights, terminate  
15 parental rights at the first trial.

16 If merely placing the child with prospective  
17 adoptive parents or foster parents is going to become  
18 determinative of these issues, then agencies may act  
19 with impunity because the courts will take time, there  
20 is certainly some delay even pendente lite litigation.  
21 This trial as done in about three or four months, which  
22 is pretty fast, but there's still delay that they  
23 complain of. So that --

24 QUESTION: You mean the trial itself lasted  
25 three --

1 MR. SUTHERLAND: No, no, was within three or  
2 four months.

3 QUESTION: Oh.

4 MR. SUTHERLAND: I'm sorry, Your Honor.

5 It was started, a petition was put up in  
6 August and the trial went in December.

7 So that there simply is, we submit, no basis  
8 for the differential. No important state interest is  
9 served, certainly no compelling state interest is  
10 served. Again, state interest is to find a good home,  
11 and Mr. McNamara offered one. He offered one well  
12 within the time the state thought he should do so.

13 If there are no further questions, I would  
14 submit, Your Honor.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
16 Sutherland.

17 The case is submitted.

18 (Whereupon, at 1:49 o'clock p.m., the case in  
19 the above-entitled matter was submitted.)  
20  
21  
22  
23  
24  
25



CERTIFICATION

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

No. 87-5840 - EDWARD McNAMARA, Appellant V. COUNTY OF SAN DIEGO  
DEPARTMENT OF ADOPTIONS

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

BY Judy Freilicher

(REPORTER)

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