

# The Burger Court Opinion Writing Database

## *Weinberger v. Wiesenfeld*

420 U.S. 636 (1975)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

March 13, 1975

Re: No. 73-1892 - Weinberger v. Wiesenfeld

Dear Lewis:

Please show me as joining your concurring  
opinion.

Regards,

WBS

Mr. Justice Powell

Copies to the Conference

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U.S. DEPT. OF COMMERCE

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Brennan  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Burger  
Mr. Justice Rehnquist

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 73-1892

Caspar W. Weinberger, Sec-  
retary of Health, Edu-  
cation, and Welfare,  
Appellant,  
v.  
Stephen Charles Wiesenfeld,  
Etc.

On Appeal from the United  
States District Court for  
the District of New  
Jersey.

[March —, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the  
Court.

Social Security Act benefits based on the earnings  
of a deceased husband and father covered by the Act are  
payable, with some limitations, both to the widow and to  
the couple's minor children in her care. 42 U. S. C.  
§ 402 (g).<sup>1</sup> Such benefits are payable on the basis of the

<sup>1</sup> Section 402 (g) is headed "Mother's insurance benefit." It pro-  
vides in pertinent part:

"(g)(1) The widow and every surviving divorced mother (as  
defined in section 416 (d) of this title) of an individual who died  
a fully or currently insured individual, if such widow or surviving  
divorced mother—

"(A) is not married,

"(B) is not entitled to a widow's insurance benefit,

"(C) is not entitled to old-age insurance benefits, or is entitled  
to old-age insurance benefits each of which is less than three-fourths  
of the primary insurance amount of such individual,

"(D) has filed application for mother's insurance benefits, or was  
entitled to wife's insurance benefits on the basis of the wages and

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✓ *Suspensive changes throughout*  
— *See Pages 6, 12, 15-16*

✓ To: The Chief Justice  
Mr. Justice Brandeis  
Mr. Justice Clark  
Mr. Justice Warren  
✓ Mr. Justice Black  
Mr. Justice Brennan  
Mr. Justice Powell  
Mr. Justice Roberts

From: Brennan, J.

Circulated: \_\_\_\_\_

Recirculated: 3-11-75

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 73-1892

Caspar W. Weinberger, Secretary of Health, Education, and Welfare,  
Appellant,  
v.  
Stephen Charles Wiesenfeld,  
Etc.

On Appeal from the United States District Court for the District of New Jersey.

[March —, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Social Security Act benefits based on the earnings of a deceased husband and father covered by the Act are payable, with some limitations, both to the widow and to the couple's minor children in her care. 42 U. S. C. § 402 (g).<sup>1</sup> Such benefits are payable on the basis of the

<sup>1</sup> Section 402 (g) is headed "Mother's insurance benefit." It provides in pertinent part:

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"(C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

March 5, 1975

No. 73-1892 - Weinberger v. Wiesenfeld

Dear Bill,

I am glad to join your opinion for the  
Court in this case.

Sincerely yours,

PS  
/

Mr. Justice Brennan

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SSERJONUO EU ADVADU IN

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 6, 1975

Re: No. 73-1892 - Weinberger v. Wiesenfeld

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Brennan

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OF THE MANUSCRIPT DIVISION

OF THE SUPREME COURT OF THE UNITED STATES

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 6, 1975

Re: No. 73-1892 -- Caspar W. Weinberger v.  
Stephen Charles Wiesenfeld

Dear Bill:

Please join me.

Sincerely,

*J.M.*

T. M.

Mr. Justice Brennan

cc: The Conference

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THE MANUSCRIPT DIVISION

U.S. SUPREME COURT

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 10, 1975

Re: No. 73-1892 - Weinberger v. Wiesenfeld

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Brennan  
cc: The Conference

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THE MANUSCRIPT DIVISION

U.S. SUPREME COURT



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 13, 1975

No. 73-1892 Weinberger v. Wiesenfeld

Dear Bill:

I am circulating herewith a brief concurring opinion.

Although I am in general accord with your opinion, and join it, I personally would identify the impermissible discrimination somewhat more narrowly. I attach relatively little significance to the assumption that the surviving father may wish to remain at home to care for the child. In my view, this is immaterial.

Sincerely,

*Lewis*

Mr. Justice Brennan

lfp/ss

cc: The Conference

148-11

(last-148)

To: The Chief Justice  
 Mr. Justice Douglas  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Harlow

From: Powell, J.

Circulated: **MAR 13 1975**

1st DRAFT

Recirculated: \_\_\_\_\_

# SUPREME COURT OF THE UNITED STATES

No. 73-1892

Caspar W. Weinberger, Sec-  
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 Appellant,  
 v.  
 Stephen Charles Wiesenfeld,  
 Etc.

On Appeal from the United  
 States District Court for  
 the District of New  
 Jersey.

[March —, 1975]

MR. JUSTICE POWELL, concurring.

I concur in the judgment and generally in the opinion of the Court. But I would identify the impermissible discrimination effected by § 402 (g) somewhat more narrowly than the Court does. Social Security is designed, certainly in this context, for the protection of the *family*. Although it lacks the contractual attributes of insurance or an annuity, *Flemming v. Nestor*, 363 U. S. 603 (1950), it is a contributory system and millions of wage earners depend on it to provide basic protection for their families in the event of death or disability.

Many women are the principal wage earners for their families, and they participate in the Social Security System on exactly the same basis as men. When the mother is a principal wage earner, the family may suffer as great an economic deprivation upon her death as would occur upon the death of a father wage earner. It is immaterial whether the surviving parent elects to assume primary child care responsibility rather than work, or whether other arrangements are made for child care. The statutory scheme provides benefits both to a surviving mother

@ Wm. Douglas  
 6-17-75

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell

From: Rehnquist, J.

Circulated: 3/2/75

Recirculated:

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 73-1892

Caspar W. Weinberger, Secretary of Health, Education, and Welfare,  
Appellant,  
v.  
Stephen Charles Wiesenfeld,  
Etc.

On Appeal from the United States District Court for the District of New Jersey.

[March —, 1975]

MR. JUSTICE REHNQUIST, concurring in the result.

Part III B of the Court's opinion contains a thorough examination of the legislative history and statutory context which define the role and purpose of § 402 (g). I believe the Court's examination convincingly demonstrates that only purpose of § 402 (g) is to make it possible for children of deceased contributing workers to have the personal care and attention of a surviving parent, should that parent desire to remain in the home with the child. Moreover, the Court's opinion establishes that the Government's proffered legislative purpose is so totally at odds with the context and history of § 402 (g) that it cannot serve as a basis for judging whether the statutory distinction between men and women rationally serves a valid legislative objective.

This being the case, I see no necessity for reaching the issue of whether the statute's purported discrimination against female workers violates the Fifth Amendment as applied in *Frontiero v. Richardson*, 411 U. S. 677 (1973). I would simply conclude, as does the Court in its Part III B, that the restriction of § 402 (g) benefits to surviving mothers does not rationally serve any valid legis-

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