In the

Supreme Court of the United States

UNIVERSITIES RESEARCH ASSOCIATION, INC.,	)	
PETITIONER,	)	
V.	)	No. 78-1945
STANLEY E. COUTU ET AL.,	)	
RESPONDENTS.	)	

Washington, D.C.
November 10, 1980

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ORIGINAL

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UNIVERSITIES RESEARCH ASSOCIATION, INC.,

Petitioner,

v. No. 78-1945

STANLEY E. COUTU ET AL.,

Respondents.

Washington, D. C.

Monday, November 10, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 o'clock a.m.

APPEARANCES:

ROBERT E. MANN, ESQ., Seyfarth, Shaw, Fairweather & Geraldson, 55 East Monroe Street, Chicago, Illinois 60603; on behalf of the Petitioner.

MRS. HARRIET S. SHAPIRO, ESQ., Assistant to the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the United States as amicus curiae.

ROBERT JAY NYE, ESQ., Nye and Nye, 420 North Euclid Avenue, Oak Park, Illinois 60302; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments in Universities Research Association v. Coutu.

Mr. Mann, I think you may proceed when you are ready.

ORAL ARGUMENT OF ROBERT E. MANN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MANN: Good morning, Mr. Chief Justice, and may it please the Court:

The issue before the Court in this case is whether under the Davis-Bacon Act a federal court would have jurisdiction to revise a public contract upon suit by a private party against a private contractor without regard to the actions or inactions of the agency party to the contract.

The case arises at the Fermi National Accelerator Lab near Batavia, Illinois, which is a high energy physics research establishment housing the world's largest proton accelerator. The petitioner is an association of universities which has entered into a contract with the Federal Government, originally through the Atomic Energy Commission, and more recently with the Department of Energy, to manage the Fermi National Accelerator Laboratory.

All funds for the construction and management of the Laboratory are supplied by the Federal Government through provisions in the contract. The petitioner's role is that of manager, to supervise construction, to supervise the operation,

and to supervise the maintenance of the facility.

To carry out its responsibilities, the petitioner association is authorized by the Government to hire individuals to work in various categories, such as physicist, engineer, technician, clerical person, et cetera, and all funds for the compensation of those persons are provided by the Federal Government in accordance with the contract. There are rate schedules attached to the contract which have been agreed to by the Government as appropriate for payment of the individuals employed by the petitioner.

The claimant in this case maintains that notwithstanding his employment as an electronics technician, that is, one assigned to monitor computers, operate accelerators, and assist in research functions, he should have been paid at area electrician construction rates pursuant to the Davis-Bacon Act. The contract specifically provides that the parties did not contemplate performance of construction work by persons employed by the Association, and therefore there are no Davis-Bacon Act stipulations in the contract. The Federal District Court issued two rulings. The first ruling held that in the absence of an express Davis-Bacon Act provision in the contract there could be no right of recovery. The case was left open for purposes of allowing the plaintiff to show if he could that the Government had made separate determinations regarding his work as being construction in nature. After the taking of

a number of depositions, other discovery, Freedom of Information Act requests, the plaintiff was forced to conclude that he could show no prior agency determination that his work was in fact covered by the Davis-Bacon Act.

Consequently, the Federal District Court granted a motion for summary judgment upon that result. The Court of Appeals reversed. The Court of Appeals, in effect, held that regardless of the express inclusion of Davis-Bacon Act provisions in this contract, they were included as a matter of law and that the Federal District Court would have authority in effect to substitute its judgment for that of the agency regarding the construction nature of the plaintiff's work, to set an appropriate wage scale, and to set up an appropriate classification.

In doing so it extrapolated from its 1977 McDaniel case in which it held that there was an implied right of action to enforce express contract terms setting forth Davis-Bacon Act requirements.

We would ask the Court to focus on the fact that this is not a proceeding arising under the Administrative Procedure Act challenging agency action. It is not a proceeding arising under a contract action based upon express contract commitments. Our petitioner here has never entered into a contract agreeing to pay Davis-Bacon Act rates. It is not an action to enforce a self-enforcing statute, such as an equal opportunity clause,

which is directed to the beneficiary party without regard to Government actions.

This is an action which attempts to maintain a private cause of action to secure a judicial determination as to coverage of the Davis-Bacon Act, application of particular wages and classifications. The effect is to substitute the federal courts for the agencies' contracting officers regarding these matters of coverage, classification, and rates.

Not only that, the action is brought against a not-for-profit entity which does not stand to gain or lose, depending on what rates are paid to the employees. And it is brought after the contract has already been performed. It is not being brought in anticipation of the contract, as some recent cases have been brought, but after the contract was performed the Federal District Court was asked to revise the contract to include specific Davis-Bacon Act provisions and to hold the defendant not-for-profit contractor liable without regard to the agency action that it had contracted with.

As the Court undoubtedly knows, the Davis-Bacon Act emerged along with other pieces of legislation in the same legislative era of the '30s, including the Fair Labor Standards Act, the Walsh-Healey Act, and of course the Davis-Bacon Act and other provisions requiring the payment of wages at certain levels in order to rectify conditions that had resulted from the Depression.

There are significant differences, however, between the Davis Bacon-Act and the Walsh-Healey Act, on the one hand, and the Fair Labor Standards Act on the other. The same Congress that enacted these statutes provided that the Davis-Bacon Act and Walsh-Healey Act policies would be enforced through the vehicle of contract, and not only through the vehicle of contract but through the vehicle of administrative predetermination of what the obligations would be.

Conversely, in the Fair Labor Standards Act the universal minimum wage and hours of work standard was set and the parties affected by that were expressly given the right to file suit to enforce their rights independently of the Government to secure their wages.

Congress was concerned about the social goal that it had, that is, to make sure that local wage and labor markets were not disrupted, but also was concerned about maintaining efficiency in government contracting. And so it struck a balance. It struck a balance in the Davis-Bacon Act, and the fulcrum of that balance is the concept of predetermination, so that before the contract is gone into and executed, all parties know what their obligations are and no one can be heard to complain if the obligations prove too onerous.

What we have here is an attempt by the Court of Appeals and the respondents to upset that fulcrum, to establish a principle whereby the federal courts after the contract has

been executed, notwithstanding the predetermination concept, are in a position to go back and determine that something should have been paid at a different rate than it was. The concept of predetermination, which is embedded in the Davis-Bacon Act, was a topic of the legislative amendments to that Act in 1935. Prior to 1935 there was no provision for predetermination.

In 1935, after a four-year history of some confusion in applying the law, Congress expressly amended it to provide for predetermination, so that the contract would carry the obligations and not some implied obligations based upon a post-analysis of the work.

QUESTION: Mr. Mann, could I just be sure I understand your position. Assume here there had been a predetermination that some part of the construction work on the laboratory would be covered by Davis-Bacon. And the laboratory did not pay those -- and it was performed by their own people. And supposing an employee didn't know about that till the contract was performed and then he had gotten less than the Davis-Bacon Act provided, would he have in your view of the law, have a private cause of action against your client for the difference between what he was paid and what he actually should have been paid?

MR. MANN: We have taken the position on that question, Mr. Justice Stevens, that there is under the Act no

private right of action at all, even to recover under express provisions. There may be a right of action in a state court, under a state common law theory of third-party beneficiary, but not in federal court, because there's no real federal question there; it's a contract question involved there. So we've taken the position that even if there were an express contract that there would not be a private right to go to court.

QUESTION: Did you take that position in the 7th Circuit?

MR. MANN: The position of the 7th Circuit -- that question was not asked in the 7th Circuit, and that issue was not actually before us.

QUESTION: But you didn't raise that in the 7th Circuit?

MR. MANN: That's correct.

QUESTION: Or in the trial court?

MR. MANN: In the trial court the question of the private right of action per se was raised in the context of the jurisdiction of the court to revise the contract. That is, we didn't really address the issue whether in general there is a private right to enforce a specific clause, but whether there is a private right to obtain the court determination of the fundamental issues of coverage, of classification of rate, that was the issue presented to the trial court, and the trial court held that it did not have jurisdiction under the

Davis-Bacon Act to in effect substitute its judgment for the contracting officer's judgment, at least without having had some effort by the contracting officer to be involved, some appeal to him, some --

QUESTION: Well, I understand the distinction between predetermination and postdetermination, but it seems to me that's quite a different question than the question whether there is a private cause of action. And it seemed to me in your brief the issue was rather clear, that you basically were arguing about whether they decided in advance of performance of the contract there was any Davis-Bacon Act work and you said, no, and that's the end of the case. That doesn't require us to think at all about private cause of action, as I see it.

MR. MANN: Well, I believe the private cause of action comes in, Your Honor, in connection with the question of whether or not there is a private cause of action in the context of this case, to in effect secure a coverage determination by the federal court as opposed to the contracting agency.

QUESTION: But would you say the contracting agency could, after the contract was performed, come in and say, we'd like to make a new, a postcontract coverage determination?

MR. MANN: I believe that the evolved law under the Davis-Bacon Act would hold that if the agency wishes to come

in and amend the contract, the agency may find itself liable for increased cost, as an amendment for the convenience of the Government, for example. I believe there have been Comptroller General decisions and perhaps some Court of Claims decisions which say that the Government does not have as a matter of right the right to come in and amend its determination, and yet still hold the contractor unequivocally liable as though the amendment had occurred at the outset.

But I believe that the concept of predetermination is flexible enough to permit the agency itself, upon its own motion or upon the appeal of some party to --

QUESTION: Well, if they assume the responsibility for paying the difference, I suppose anybody could do that.

MR. MANN: That's correct. And --

QUESTION: But assuming they're saying, no. We paid you the contract amount and we just now realized we should have made a Davis-Bacon Act determination. We failed to do it. They can't do that either, can they, in your view of the law?

MR. MANN: Our view of the law is that they cannot.

QUESTION: In other words, it seems to me that if I understand your position correctly, it's the same whether the Government were the plaintiff or the employee was the plaintiff?

MR. MANN: That's correct, Your Honor.

QUESTION: So the private cause of action issue, it

seems to me, is a red herring in this case.

MR. MANN: Well, except that the private cause of action raises a question as to who is going to control the terms of the contract. I think it's one thing if one of the contracting parties, that is, the Government, moves to amend the contract for its advantage in one way or another.

But these are after all public contracts and there's public policy as well as economics involved, and for a third party to come in and say, irrespective of what the agency thinks about how the law should be applied, I believe this was Davis-Bacon work and I want an amendment; we believe that that raises --

QUESTION: Well, if he's just saying, I want an amendment. But if his theory is, it clearly says it's Davis-Bacon Act work, I provided it and the contract provided for it, you're saying, well, he could sue in the state court.

MR. MANN: I would assume that.

QUESTION: So the public policy in the private cause of action issue is just a question of where he sues.

MR. MANN: If there's an express term in the contract, that's correct. I don't believe there is a --

QUESTION: And that was in the McDaniel case by hypothesis, wasn't it?

MR. MANN: By hypothesis; that's correct. The 7th Circuit in both McDaniel I and McDaniel II indicated in the

course of their opinion that they assumed that there were express provisions.

QUESTION: In this case there never would have been a lawsuit had not a private individual claiming a private cause of action under the Davis-Bacon Act brought it, would there?

MR. MANN: So far as we know, that's right, Mr. Justice Rehnquist. The only lawsuit that has been brought is by the private individual.

QUESTION: So, if there is no -- so, in other words, the question addressed in part II of your brief is the threshold question, is it not?

MR. MANN: The private cause of action right?

QUESTION: Right. If the answer to that is, no, there's no private cause of action at least in the federal courts. Then that's the end of this case, without getting into matter addressed in Part I of your brief.

MR. MANN: Yes, Your Honor. Our position is that whether or not there's a private right of action to enforce express terms, clearly there is no federal jurisdiction to create the terms that are being enforced.

QUESTION: If there's no private right of action in federal district court, that's the end of that case.

MR. MANN: That's the end of the court case. Yes, sir. Thank you, Mr. Chief Justice. At this time I'm ceding my time to Ms. Shapiro to express the views of the

United States.

MR. CHIEF JUSTICE BURGER: Mrs. Shapiro.

ORAL ARGUMENT OF MRS. HARRIET S. SHAPIRO, ESQ.,
ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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

This is a suit against a federal contractor based solely on the Davis-Bacon Act. It's not a suit to review agency action under the Administrative Procedure Act. An Administrative Procedure Act suit would raise different issues between different parties and require the consideration of different fundamental legislative policies.

I want to emphasize that neither my brief nor my remarks today deal with the issues or the policies that would have to be considered in an Administrative Procedure Act suit. We've taken no position on those issues and I'm not authorized to speak for the government concerning them.

The question here is only whether the contractor employee has a right to relief against the contractor in an implied private cause of action under the Davis-Bacon Act itself.

We have discussed in our brief the reason why we believe that under the Cort v. Ash test there is no such implied cause of action. And we have emphasized there the indications of legislative intent as the recent decisions of

this Court require.

This morning, however, I would like to focus on the third Cort v. Ash factor, and discuss briefly why we believe that the implication of a private cause of action is not necessary to the accomplishment of the legislative purpose. That purpose was to assure the payment of prevailing wages by government construction contractors without disrupting the federal procurement process. The express remedies provided are the result of the congressional balancing of these potentially competing federal interests. The remedies are designed to protect the laborer's wages without interfering unduly with efficient procurement.

That congressional balancing was originally made in the 1930s when government procurement contracts were far simpler than the one before the Court in this case. Today the Act still covers the traditional brick-and-mortar contracts. It also covers contracts for construction that is necessary for the highly technical federal programs at the Department of Energy as well as at NASA and the Defense Department.

These two types of contracts are in many ways quite different in terms both of the need of the laborers for the additional protections that a private cause of action would afford, and of the potential of such a cause of action for disrupting procurement. These differences simply highlight the importance of maintaining the balance Congress struck in an

earlier day.

Mr. Mann has described briefly how the Fermilab is run under the prime contract at issue here. That operation is typical of many large, long-term federal contracts for work at the frontiers of science and technology. I want to add to his description only the statement -- at the Fermilab the Davis-Bacon decisions are made by a committee composed of agency experts and if the decisions that the private work projects are submitted to the committee, the committee makes a recommendation as to whether the project involves Davis-Bacon work or not. If the committee recommends to the manager and the contracting officer that Davis-Bacon work is involved, that work is subcontracted out to a contractor who works under the Davis-Bacon Act, with the Davis-Bacon clauses in his contract, using building trades union employees.

The operation of this system is monitored. The agency has extensive reviews to make sure that the contracts for construction work include the Davis-Bacon clauses. It also conducts enforcement investigations at the site to make sure that the work is performed as required by the contract and consistently with the contract.

QUESTION: Mrs. Shapiro, in a case such as you're describing where there is a clear determination that the Davis-Bacon Act is to be performed and to be paid for at the regular rates, assume there was a slip-up and for some reason an

employee did not get paid the amount required by the statute and by the predetermination and all the rest of it, and for some reason the Government missed it in its review and paid out the contract. Would the employee in your view have a cause of action against his employer for the difference between what he was paid and what he should have been paid?

MRS. SHAPIRO: In your hypothetical the provisions are in the contract?

QUESTION: Yes.

MRS. SHAPIRO: Yes.

QUESTION: He would only be -- in the federal court he'd have such a cause of action?

MRS. SHAPIRO: Probably not in the federal court. It would be --

QUESTION: Why not in a federal -- ?

MRS. SHAPIRO: -- he would have an action on his contract.

QUESTION: Right.

MRS. SHAPIRO: It wouldn't be on the Davis-Bacon Act. It would be -- well, the contract would --

QUESTION: He didn't have a contract with the employer, but he had a contract for a lesser amount with the employer.

MRS. SHAPIRO: He's a third-party beneficiary of the contract that was written.

QUESTION: And in your view he'd have the remedy but would be confined to the state court?

MRS. SHAPIRO: That's correct? He also has --

QUESTION: So you ask us basically to overrule --

QUESTION: Unless there's diversity jurisdiction or something like that.

MRS. SHAPIRO: Yes.

QUESTION: Yes, and there's no federal remedy for violation --

MRS. SHAPIRO: Well, but -- in that he certainly has an express remedy under the Davis-Bacon Act too.

QUESTION: Well, if he has a remedy -- does he have a remedy?

MRS. SHAPIRO: Like the Miller Act bond. I mean, it's the --

QUESTION: No, no. I'm assuming a case where there was a slipup and they paid out, and the bond was discharged.

MRS. SHAPIRO: Yes, yes, that's right.

QUESTION: And sometime later he then could sue his employer but you'd say, just as a matter of third-party beneficiary of a contract, but he has no federally protected rights.

MRS. SHAPIRO: That's right. And --

QUESTION: That's the Government's position?

MRS. SHAPIRO: -- as Mr. Justice Stewart pointed out, that's basically one -- that's what we thought was

involved in the McDaniel case.

QUESTION: You don't think he was still within the Cort v. Ash test of a person who was specifically intended to be the specific beneficiary of the statute in that case?

MRS. SHAPIRO: Well, but --

QUESTION: If the likelihood of a slip-up is so remote that he wouldn't --

MRS. SHAPIRO: In your case there has been no violation of the Davis-Bacon Act, because --

QUESTION: Well, he wasn't paid as the --

MRS. SHAPIRO: Well, what the Davis-Bacon Act requires is that the provisions be put in the contract.

QUESTION: The Act does not require that the contract be performed in accordance with the law?

MRS. SHAPIRO: It gives certain remedies that are available but the contract -- I mean --

QUESTION: Well, then he shouldn't even have a remedy under state law, if I understand you correctly, because the law, as you said, has been complied with. The Government just slipped up.

MRS. SHAPIRO: No, I mean, where he has under -- whatever remedy he has under state law is not on the Davis-Bacon Act, it's on the contract provisions which require payment of the wages that he didn't get.

Mr. Mann has emphasized the difficulties that

implication of a private cause of action would cause for Government procurement from the contractor's point of view. There are also problems from the point of view of the agency that is using these highly specialized, expert contractors to achieve important federal goals.

The interface between construction, alteration, and repair work covered by Davis-Bacon and installation, experimental, or maintenance work that is not covered will often be very hard to identify under prime contracts like the one here.

Moreover, the various work projects must be closely coordinated and labor disputes avoided. For all these reasons, it is important that decisions concerning Davis-Bacon coverage be made by people who are very familiar with the technical program involved, and that those decisions be made promptly, with finality, and consistently, for all work within the scope of the contract.

The possibility of a court acting as an independent decisionmaker in a private cause of action threatens the effective operation of this system. The more independent decisionmakers there are in terms of number of district courts, courts of appeals, the harder --

QUESTION: Mrs. Shapiro, can I just refresh my recollection? The Government took a contrary position when it filed its memorandum in connection with the sur-petition in McDaniel, did they not, on the private cause of action issue?

MRS. SHAPIRO: No.

QUESTION: I'm sorry.

MRS. SHAPIRO: I don't believe --

QUESTION: You took the position in that case that the 7th Circuit was wrong?

MRS. SHAPIRO: Yes, we did. Our position in McDaniel was basically, first, the 7th Circuit's opinion was somewhat cloudy, and to us it read as though what they were saying was that they believed that there was an express Davis-Bacon clause in the contract. And for the reasons that we just discussed under that theory, we believe that the 7th Circuit didn't have jurisdiction because there wasn't 1331 or 1337 jurisdiction, but that there would be a contract action in the state court.

QUESTION: Right.

MRS. SHAPIRO: And so that, on that theory -- and we didn't think that -- as a matter of fact, the decision --

QUESTION: Your view then was there was never any federal implied cause of action under any circumstances?

MRS. SHAPIRO: But, the petitioner in McDaniel had not raised that particular question. We did discuss in McDaniel the reasons why we thought that if the Court had been reaching the question that the 7th Circuit clearly reached here it was incorrect because of the application of the Cort v. Ash factors. But we recommended no certiorari because we just

didn't think that case was a clear enough case; this one is.

My final point is that at least in the particular situation that we have here, there are significant nonjudicial methods for the laborer to assure, to be sure that the agency is not acting in an arbitrary manner. These controls are non-judicial but the fact is that the construction trades are highly unionized, since all Davis-Bacon work is required to be performed by subcontract, those unions have a real interest in policing the agencies' implementation of the Act, so that their employers get as much of the total work at the projects as possible. And they have ample means of assuring that the agency will consider their view seriously. These basically are, negotiation locally in Washington with the procuring agency, and through consultation with the Department of Labor.

In short, particularly in the context of contracts like this one, the Davis-Bacon Act is effectively enforced through negotiations between union and agency. Implication of a private cause of action in this context is not necessary to achieve the Act's purposes.

Unless there are further questions, I reserve the remainder of the time for petitioner.

MR. CHIEF JUSTICE BURGER: Mr. Nye.

ORAL ARGUMENT OF ROBERT JAY NYE, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Just on that last point about sufficient nonjudicial controls to be sure that the Davis-Bacon Act will be implemented and applied by reason of negotiations between unions and agencies, I wish to advise the Court if the Court does not already know that I represent an individual and a class of individuals. I do not represent a union. I am here representing wage earners who have been requested by their employer, the petitioner in this case, to do certain work which manifestly is under a Davis-Bacon Act contract. It says, "for construction, alteration, repair" and everything else that the Davis-Bacon Act requires. These people did perform that work, we are not at the stage yet in this case where it can be said to this Court that they did not -- this case arose on a summary judgment, just on a legal issue.

They performed that work and they were not paid the prevailing wages required by the Davis-Bacon Act and established by the Secretary of Labor's predeterminations of wages. Now, on that predetermination point --

QUESTION: Why'd you sue in federal court rather that state court?

MR. NYE: Because, Your Honor, we have a federal right of action. Number one, because, number one, the statute gives it to us. Section 3(b) of the statute says -- and this Court in its Binghamton decision refers to that as being an employee right of action against his contractor. That statute

reads: "The right of action and/or of intervention against the contractor and his sureties conferred by law upon pertinent persons furnishing labor or materials."

QUESTION: That refers to the Miller Act, doesn't it?

MR. NYE: Well, if it does, Your Honor, and if it is to be so construed, it was not so construed in the Binghamton case, but of course that case did not involve the question.

If it is to be construed as being only an action on a surety payment bond -- it doesn't talk about the Miller Act bond, but on a surety payment bond, then we have the anomaly in this case of the contractor failing to furnish the surety payment bond that Congress requires with respect to construction contracts, and therefore the employes again are placed in a position of not being able to sue.

QUESTION: That may be, but it would not seem to me to necessarily follow that because the employer hasn't provided a bond which Congress has required him to file, that gives an employee a private right of action in a federal court.

MR. NYE: If the Court please, the question, as the 7th Circuit has said in the McDaniel cases, is not the existence of a private right of action. Congress intended a private right of action.

QUESTION: We granted certiorari here to review the judgment of the 7th Circuit.

MR. NYE: Yes, Your Honor. I appreciate that, and I

understand that. And I am submitting to the Court that Congress has created in favor of employees a private right of action. They intended one where they cannot --

QUESTION: Did they say in so many words that an employee shall have a private right of action against an employer for failure to comply with the Davis-Bacon Act?

MR. NYE: In my interpretation of that language --

QUESTION: Well, I mean -- certainly; you're a lawyer, I was a lawyer and like to think of myself as still being one. One could point to a section that says, either an employee shall have a cause of an action in United States District Court in the jurisdiction where he performs the labor. You have to admit it doesn't say that.

MR. NYE: I say -- I must take two positions, Your Honor. I say it does --

QUESTION: Where?

MR. NYE: -- grant the employee that right of action. And the mere fact that it may be on a payment surety bond, the surety bond, after all, is simply security to assure payment of an obligation. When the Congress talks about the right of action given to an employee in Section 3(b) of this Act, they have given a right of action to that employee. They have assured to him a private remedy in the event that none of the other remedies are available. And in this case, none of the other remedies are available. The Government did not --

QUESTION: Give me the exact language of Section 3(b) as you rely on it.

MR. NYE: I am quoting it. I have that language itself -- the employee shall have "the right of action and/or of intervention against the contractors and their sureties conferred by law upon persons furnishing labor or materials."

Now, that is the statute and that with reference --

QUESTION: Yes, but that refers to -- that refers back to the right of action conferred by law upon persons furnishing labor or material. It's derivative.

MR. NYE: Well, that may be the decision of this Court. It has been the decision of the 7th Circuit, that may also be the decision of this court. But to the extent that it does refer back to some payment bond that is required and that payment bond does not exist, I am saying, because Congress intended a right of action, this Court must recognize that there is by implication, at least, some remedy when this statutory remedy is rendered ineffective and unavailable to the employees, certainly through no fault of the employees whatsoever.

QUESTION: But would you say the same thing if a contractor went into bankruptcy, the Miller Act funds were exhausted, and even given the wage priority, your clients simply couldn't recover?

MR. NYE: If they can't recover, they can't recover,

Your Honor, if there are no funds. If the employer is bankrupt and there are no funds available from an estate, from a bankrupt estate with which to to pay the employees, they cannot recover. But that's whether or not the remedy is worthwhile, whether or not there will actually be recovery on a remedy. That's not the existence of the remedy itself.

QUESTION: What do you have to say about the 1964 amendments on this issue of whether a cause of action should be implied?

MR. NYE: The 1964 amendments to my recollection, Your Honor, had nothing to do with the existence or nonexistence of the right of action.

QUESTION: Wasn't there an effort at that time to amend the statute to provide expressly for --

MR. NYE: Representative Goodell in his attempt to place an amendment in the Act, which did not pass, sought to open up the entire area of judicial review concerning all aspects of the Act, at least according to his proposed bill, his proposed amendments. However, other statements by legislators, for example, Representative Fogarty and others, and Representative Goodell himself, recognized that the basic purpose of that proposed amendment by that Representative, was to render the Secretary of Labor's predeterminations of prevailing wages, what the prevailing wages in a community are, subject to judicial review. And because the Congress has always determined

that that question should not be open to judicial review as well as for other nongermane reasons, Congress did not adopt that view.

Congress did not, therefore, open up the question of predeterminations of wage rates, what they are in a community, to judicial review. But the question of predetermination of anything else has never been an issue in the Act. That has never been placed in the hands of any government agency, one way or another. Counsel attempts to use the word predetermination in a very broad way, and the Davis-Bacon Act is a very simple statute.

It says that the Secretary of Labor shall make predeterminations of wage rates, and he does, and they are published in the Federal Register for each county and metropolitan area around the country, and that's all that he is supposed to predetermine. Now, what the petitioner seeks to say, that there should be and must be, in order for the Davis-Bacon Act to work, there must be a predetermination by a government agency that a contract is a construction contract.

Well, the Solicitor of Labor in his testimony in 1962, among others, has said that when Congress enacted the Davis-Bacon Act in 1931 and amended it substantially in 1935, Congress did not use the words "construction, alteration, or repair, including painting and decorating," to mean something special, or something that is placed in the hands of some

technicians at some government agency, or something difficult of interpretation. The Solicitor of Labor at that time and all of the authorities who have referred to it have talked about the fact that Congress meant the ordinary meaning of those words, and courts can make those determinations.

We have cited the recent Cortelyou of one of our circuits in which the Court held specifically, very recently, that the work that was before it clearly was pursuant to a contract calling for "construction, alteration, or repair, including painting or decorating."

Now, I have asserted in my brief that the right of action question was never briefed, argued, or whatever, before the lower courts. This summary judgment matter arose when the petitioner filed a motion for summary judgment, and discovery at that time, by the way, was stayed to permit the court to rule on that legal question.

That summary judgment motion was supported by an affidavit of petitioner's counsel saying, "No Davis-Bacon Act stipulations have been included within or are incorporated within the government contract here in question." I am paraphrasing a bit there.

But that's the issue, that's the issue that was raised before the trial court, that is the -- this contract does not contain Davis-Bacon Act stipulations, that was the issue raised before the trial court and that was the issue

argued and dealt with in the 7th Circuit. There was no right of action issue at that time. And the 7th Circuit said, and I respectfully submit, correctly -- and indeed it must be so held -- that a statute that is a mandatory statute, a statute that says that certain things shall occur is incorporated by operation of law if it is not within a contract in itself, or if it is there by reference if it is referred to by the parties.

And I submit to this Court also, that the Davis-Bacon Act is expressly within our contract, notwithstanding the summary judgment granted by the trial court, because among other things this is -- the fact that Davis-Bacon was referred to in correspondence between the AEC at that time and our petitioner. The requirement on the petitioner is that such construction work which is called for by this contract would be subcontracted to subcontractors with the petitioner having the obligation to make sure that Davis-Bacon stipulations were included in all those subcontracts.

And there was the further agreement between them by memorandum which we were able to discover -- by the way, through Freedom of Information Act procedures, not through the discovery that we were able to get by that time, -- there was the further memorandum of understanding that if the petitioner does any of this work with its own employees -- that's our case -- its own employees, then the contract will be modified.

The general contract, this prime contract, will be modified to require that the petitioner pay its own employees the prevailing wages required by the Davis-Bacon Act.

How can anybody say that the Davis-Bacon Act is not express in that contract? And even if it isn't, even if we were to say that the Davis-Bacon Act is not referred to in that contract and that they are not bound by express contract, they are certainly bound by the principle that mandatory statutes which affect government contracts are in those contracts by operation of law.

QUESTION: But that isn't the same question as saying where they have a right to sue on those contracts.

MR. NYE: That's a separate question. Yes, Your Honor. And that was never raised below, and I raise that here.

QUESTION: Do you disagree with your opponent's reply brief at pages 14 and 15, as to his account of how he claims to have raised it in the 7th Circuit treatment of McDaniel I, McDaniel II? Do you say -- you have not had a chance to reply to that. Is he simply being factually inaccurate?

MR. NYE: Well, if I may examine that?

QUESTION: Well, no, don't --

MR. NYE: He did not raise it, it was not dealt with in that. You can look at his briefs, in his briefs in that court. His brief in that court does not talk about the right

of action; indeed, does not go into that question at all. He was placing all of his reliance on the question of contract interpretation. And that was all that was argued before the court of Appeals, except for the exhaustion of administrative remedies points.

But on this contract question, as to whether or not my clients, these wage earners, should have exhausted whatever administrative remedies there might be before going to the federal courts. And at that time the 7th Circuit mentioned the petitioner has not suggested any such administrative remedy, and the Court of Appeals could not find one.

QUESTION: That was available then?

MR. NYE: Or is available today, Your Honor.

QUESTION: I know. But there was one, wasn't there, prior to the contract issuance?

MR. NYE: No, your Honor. The Government in their briefs, in this case, in their amicus brief, has mentioned that there is no administrative remedy available to a wage earner under these circumstances.

QUESTION: After -- I know, after the contract issued.

MR. NYE: That's right.

QUESTION: Well, how about before?

MR. NYE: He was not a wage earner for this petitioner before, Your Honor. He didn't know that he was going to be

working for these people. There was no way. There was no way, absolutely, for this wage earner or his class members, not having been employed, not knowing whether they would ever be employed, not knowing that the Government was going to contract with Universities Research Associates, that there was any issue to be raised. They didn't -- they have no interest in it.

Their interest developed when they became employed and when it was determined by them -- and of course this is postcontracting -- that they were not being paid the proper minimum wages. And as to that, the Government agrees, there is no administrative remedy. Indeed, in the 1962 hearings before Congress concerning the administration of the Davis-Bacon Act -- it is very interesting to read these; I've cited them in my brief.

The representatives of the Comptroller General's office has said, there are, there is no agreement among the agencies as to who has what kinds of enforcement powers. And the Comptroller General also says, the Secretary of Labor believes he does, we believe we do. And then the Secretary of Labor's representative said the same thing, there is no agreement; we believe we do, and they believe they do.

QUESTION: Well, Mr. Nye, considering the fact that federal courts are courts of limited jurisdiction, on what jurisdictional section of the Title 28 do you rely for being in court here?

MR. NYE: Section 1337, Your Honor, a civil action, a civil case arising under any statute, any federal statute affecting interstate commerce. And that is one of the powers exercised by Congress in enacting the Davis-Bacon Act. That is the jurisdictional prerequisite, the right of action is referred to by Congress. To the extent that this Court elects to determine the question of the existence of a right of action, I should point out that I'm not asking this Court nor have I ever asked that this Court or any court in this case consider that there is an alternative private remedy to an employee which he can voluntarily use and disregard any other private remedy that Congress may have given him, such as that one under Section 3(b), talking about the right of action against the contractor and his sureties, which Congress has given to him.

I have not said that a wage earner has the right to disregard express remedies. I have said, if an alternative is required, if that statute, if that section is interpreted as meaning only action under some payment bond, then there must be -- since Congress intended -- a right of these individuals to recover their unpaid wages, for these individuals to have a right of action directly against the contractor, but only if the original statutory remedies are unavailable, and ineffective in the ways that they are in this case.

Now, I should be very frank with this Court to point

out that there is nothing in the record thus far to demonstrate that the remedies are unavailable or ineffective in this case. That was shown in the McDaniel case because that was in issue, and we presented affidavits below in the trial court demonstrating that the employer -- that was University of Chicago operating Argonne National Lab -- had not furnished the necessary surety payment bond and that the Comptroller General had not withheld certain payments in order to pay employees, as well as a couple of other miscellaneous items like blacklisting, which of course would not be done in this kind of an instance, and one other minor administrative item.

There we made our record. Here we never had a record, had an opportunity to make the record concerning the unavailability or ineffectiveness of this right of action, if it is so interpreted, if it is so limited to action only on a surety bond. Here we have to -- if the Court is going to rule on this question of the existence of a right of action, this Court must in order to be fair presume that the situation is as it was in McDaniel, and which we have no reason to doubt in this case that the situation was the same, that our Petitioner has not submitted Miller Act bonds or any other kind of surety payment bond that the employee can proceed upon, and that the Comptroller General has not withheld sums to assure payment to these laborers.

Certainly this Court, unless it makes that

presumption cannot rule appropriately on my opponent's suggestion that there is no right of action existing under circumstances such as these. I am not -- and I make this clear again -- I am not asserting that there's an alternate implied right of action for use by employees under any and all circumstances as an alternative to going through the surety payment bond procedure if the statute is interpreted in that way. I am saying that if those remedies are rendered ineffective and unavailable and particularly if they're rendered ineffective and unavailable because of action or inaction by the contractor and maybe cooperation by the Government, that the employee does have this right of action. Congress intended it, and the courts should make sure that --

QUESTION: So, any time the agency issues a contract and has made a determination that there is no coverage, that it isn't covered, I suppose you would -- the contract would issue and there wouldn't be a surety bond, and in any of those circumstances if you allege that the agency mistakenly decided that there was no coverage, you would have -- you should be able to have the court redetermine coverage.

MR. NYE: Well, I know that Your Honor wants direct answers so I'm going to give you one: yes, Your Honor.

QUESTION: Yes. Well, that's this case, isn't it?

MR. NYE: That's true. And may -- no, it is not, Your Honor.

QUESTION: Oh.

MR. NYE: There is no coverage determination saying that the Davis-Bacon Act does not apply in this case.

QUESTION: I know, but they didn't -- but they didn't provide for it.

MR. NYE: If the Court please, they referred to it, they spoke about it, they did everything except put a long list of stipulations in the contract. Now, if the Court please, the Government and my opponent have not referred to any Government agency determination that this is not a Davis-Bacon Act contract.

QUESTION: Well, that "long list of stipulations," as you call it, is required by the Davis-Bacon Act, is it not?

MR. NYE: The Davis-Bacon Act requires that there be certain stipulations; that's --

QUESTION: And therefore its absence indicates that the parties determined that the Davis-Bacon Act is inapplicable.

MR. NYE: Well -- or the parties -- well, I know the reason why they did not include that: because they intended that all Davis-Bacon work under this Davis-Bacon contract was to be subcontracted, and that the subcontracts would include those stipulations.

But here we are asserting -- and we are at the stage where this must be accepted by the Court. We are asserting on

behalf of these laborers that they did certain amounts of the Davis-Bacon Act work.

QUESTION: I see.

QUESTION: Mr. Nye, in this connection, earlier, I understood you to say that the contract has a provision that says if this eventuality comes to pass then they shall be paid at Davis-Bacon rates.

MR. NYE: That's what I contend, even --

QUESTION: Do you rely on paragraph 33, is that the paragraph you rely on for that, or is it a different paragraph?

MR. NYE: No, it's a letter, a memorandum of understanding in our joint appendix. I think it's one of the later pages. Two letters; excuse me: one at the time of the original signing of the contract in 1968, and again in a memorandum of understanding that I was able to discover when Modification 14 was made by the parties.

Modification 14 was the big modification of this contract, so at both times the Government and the petitioner agreed between themselves that in the event that the contractor does any of this work with its own work force -- and these employees whom I represent are in its own work force -- that the contract will be modified. And I say it is modified thereby to include the Davis-Bacon Act stipulations concerning these employees.

QUESTION: But don't you run into the same problem

Justice Stewart just identified, though, the very fact that it was not subsequently modified tends to indicate that the two parties agreed that no Davis-Bacon Act work had been performed?

MR. NYE: Well, if the Court please, even this Davis-Bacon committee -- it's an informal committee; it's not as formal as counsel would let us believe, and I was present at the depositions where it was described. This informal Davis-Bacon Act committee of three people in the local ABC office was presented with requests for Davis-Bacon Act determinations -- they're referred to in my brief also -- approximately 135 during the period of years, for various kinds of work. And 126 of those requests were returned by this Davis-Bacon Act committee saying, this is Davis-Bacon Act work.

Now, I submit that certain of the Davis-Bacon Act work done under this contract, and maybe a lot of it that was done pursuant to those determinations -- determinations, now, if we need determinations -- by the government agency here involved, certain of that work was done by my people. And if so, they are entitled to be paid. Congress intended it, and nobody, not their decision -- not to call this a Davis-Bacon Act contract -- not their decision, not --

QUESTION: But Mr. Nye, just sticking with that for just a second, is it not true that if that happened the way you describe, the Government had a duty not to pay the contract

price until they were satisfied that the employees had been paid the appropriate wages, isn't that true?

MR. NYE: Well, there's question as to how that's effectuated, if the Court please. I don't know how that's done. The Davis-Bacon Act itself does not say how that shall be done. All we know is that the Comptroller General is supposed to withhold certain sums of money. We don't know who asks the Comptroller General to do it or how the Comptroller General decides that.

QUESTION: Well, is it not true as a sort of a general propostion that the Government has a duty not to pay out in full on the contract until it's satisfied that there's been no violation of the Davis-Bacon Act?

MR. NYE: I think that there is such a duty. I think there is. I'm not proceeding on that duty. I'm not suing the Government in this case. I'm proceeding against my client's employer because the obligation of the Davis-Bacon Act is upon the employer to pay, and it's been referred to again and again by Congress and by the courts as being -- and by this Court -- as being a statute that requires the payment to laborers and mechanics concerning government contracts involving construction, alteration and repair, including painting and decorating, of wages which the Secretary of Labor has determined are the prevailing wages in a particular area for that type of work.

By the way, the Government in its brief has also said that if we look at the payment schedules -- some of which the Petitioner has included in the Joint Appendix. If we look at payment schedules, the Government has said it is clear that certain of the amounts received by my clients -- actually received -- were less than what the prevailing wages would have required that they be paid.

So we have -- there is no question that these people have not been paid what they are owed. There is no question that Congress commanded that the prevailing wage principle be effectuated.

And by the way, I think it's important to note the Comptroller General has just done a survey and there are 77 statutes concerning federally assisted contract situations, 77 statutes in which the Davis-Bacon Act is referred to and in these 77 statutes it is required that Davis-Bacon obligations be performed, that payment of wages be made in accordance with the prevailing wage principle of the Davis-Bacon Act and the Davis-Bacon Act is cited in each of those statutes.

I don't know what effect if any this Court's decision will have on the 41 state "little Davis-Bacon acts" which exist throughout the country. I'm not representing that it will have or not have any effect, but it shows the pervading effect and acceptance of the prevailing wage principle, not only by Congress in the Davis-Bacon Act, not only by Congress

in the 77 other statutes that refer to federally assisted programs and construction, but also throughout the rest of these United States. Thank you.

QUESTION: I take it that the heart of the Government's submission is that the agency determination of coverage is just unreviewable?

MR. NYE: If the Court please, I suggest that the agency has no function in deciding or not deciding with any binding effect that a contract is covered or not.

QUESTION: I know that, but don't you understand the Government to assert what I say?

MR. NYE: Yes, Your Honor.

QUESTION: And that if the agency makes a determination before contracting and that is subject to appeal, I suppose, to the Department of Labor, but the Department of Labor's decision may or may not bind the agency. But in any event the Government's submission is that those determinations are not subject to judicial review.

MR. NYE: I assume that that's what they are saying, and to that extent --

QUESTION: I thought, rather, that the specific question exposed by my brother White was one that the Government took no position on?

QUESTION: But wouldn't it be very odd to say it's subject to a judicial review but that this case must be

dismissed, because where there is no agency determination at all --

MR. NYE: It is --

QUESTION: Or where there wasn't -- at least, where there's no administrative remedy now?

MR. NYE: There is no -- absolutely, there is no administrative remedy. If there were one we wouldn't be going through the Courts. We would be proceeding with a much easier administrative remedy, but we have none, if the Court please.

It is our view and request that this Court affirm the decision of the Court of Appeals.

MR. CHIEF JUSTICE BURGER: Do you have anything further?

MR. MANN: Just one, comment, Jr. Chief Justice.

ORAL ARGUMENT OF ROBERT E. MANN, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. MANN: I'd like to reemphasize that it is our position that in order to hold the contractor liable, there must be an affirmative predetermination of coverage, and the coverage must be not only the wage rates but the existence of the coverage of the Act as well, because the agency making that determination is the other contracting party. And that concept is embodied in the comment that Mr. Nye referred to with respect to the contract, which is shown on pages 62 and 63 of the Appendix, where it indicates that if the Atomic Energy

Commission determines that work is covered by Davis-Bacon, then the contract will be amended.

QUESTION: May I just ask one other question in response to something Mr. Nye had said? If those letters that are referred to in the Appendix -- and very honestly, I don't have them in mind -- if they do unambiguously state that, if employees of the contractor do perform any Davis-Bacon work, then they shall be paid at Davis-Bacon rates, if they so provide, then do you have a duty to pay at the rate he claims?

MR. MANN: If they provided that, yes, sir. What the provisions of the letter agreement say is that if the Atomic Energy Commission determines both the need for our employees to do the work and that the work is covered, then the contract will be amended.

QUESTION: In effect, that's saying, if they do that, then instead of subcontracting the work, they could do it with their own employees if we agree that this is covered work?

MR. MANN: Right. In advance. If we agree -- it's in advance. Thank you very much, Mr. Chief Justice.

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

(Whereupon, at 12 o'clock noon, the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 78-1945

UNIVERSITIES RESEARCH ASSOCIATION, INC.

v.

STANLEY E. COUTU ET AL.

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

BY: William J. Wilson