In the

Supreme Court of the United States

JOHN F. LEHMAN, SECRETARY OF THE NAVY,	)	
PETITIONER,	)	No. 80-242
V.	)	
ALICE NAKSHIAN	)	

Washington, D.C.
March 31, 1981

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JOHN F. LEHMAN, SECRETARY OF THE NAVY, Petitioner,	:	No. 80-242
v.	:	
ALICE NAKSHIAN	:	

Washington, D. C.

Tuesday, March 31, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 o'clock a.m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the Petitioner.

MRS. PATRICIA J. BARRY, ESQ., 1066 National Press Building, Washington, D.C. 20045; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Lehman v. Nakshian. Mr. Kneedler, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is before the Court on writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The question presented is whether Congress has granted a statutory right to trial by jury in suits against the Federal Government under Section 15(c) of the Age Discrimination in Employment Act. That Act prohibits discrimination on the basis of age in employment by private employers as well as by the Federal Government and state and local governments. The first 14 sections of the Act contain the substantive and remedial provisions generally applicable to private employers and to state and local governments. Section 7 of the Act deems age discrimination by these employers to be violations of the Fair Labor Standards Act and provides for enforcement in accordance with powers, remedies, and procedures contained in the Fair Labor Standards Act. Section 7(c) then authorizes a person aggrieved by age discrimination by private employers and state and local governments

to bring civil action in any court of competent jurisdiction for appropriate equitable or legal relief. Section 7(c) expressly provides for trial by jury in suits under that section.

The United States is expressly excluded from the definition of the term "employer" as that term is used in the first 14 sections of the Age Discrimination act. Instead, age discrimination in federal employment is separately addressed in Section 15. For example, Subsection (a) of Section 15 states a distinct substantive prohibition providing that all personnel actions in the Federal Government are to be made free of discrimination on the basis of age. Subsection (b) then empowers the Civil Service Commission, now the Equal Employment Opportunity Commission after the reorganization plan, to enforce this prohibition through appropriate remedies including reinstatement or hiring with or without back pay. Section 15(c) then authorizes a person aggrieved by employment discrimination in the federal sector to bring a civil action in any federal district court of competent jurisdiction for appropriate legal or equitable relief. Section 15(c), unlike Section 7(c) applicable to the other employers, does not contain an express grant of the jury trial right.

Respondent brought this action under the Age Dis-Crimination Act in 1978, alleging discrimination by the

Secretary of Navy and certain subordinate officials. According to the complaint, respondent's permanent position was abolished in 1975 and she worked for the next three years in another position on a continuing but temporary basis. She alleged that officials of the Department had denied her reassignment and promotional opportunities on the basis of age during that three-year period.

To remedy that alleged discrimination she sought in this case a retroactive promotion as well as an award of back pay measured by the difference between what she actually earned and what she would have earned in the Department of the Navy in the absence of the alleged discrimination.

Respondent demanded a jury trial on her age discrimination claim. The Government moved to strike that demand for a jury trial. The district court denied the Government's motion to strike concluding that Congress intended to permit jury trials against the Federal Government under Section 15. The district court did however certify the jury trial issue for interlocutory appeal under 28 USC 1292(b). The court of appeals granted the petition for interlocutory review.

The court of appeals observed that the Seventh Amendment guarantee of trial by jury does not apply in this case because that guarantee does not apply in suits against the Federal Government. The Court of Appeals also acknowledged that there is no explicit statutory grant of the jury trial

right in Section 15. Nevertheless, the Court of Appeals concluded that a right to jury trial could be inferred in Section 15. It relied on two factors. First, it concluded that the jury trial right could be inferred from the fact that Congress had provided for these suits against the Federal Government to be brought in federal district court rather than in the Court of Claims.

Second, the court found this inference from the federal jurisdictional grant in the federal district courts to be strengthened by the fact that Section 15 authorizes the court to award legal or equitable relief.

QUESTION: Mr. Kneedler, how did the Court of Appeals distinguish the Federal Tort Claims Act?

MR. KNEEDLER: As I recall, the Court of Appeals did not expressly address the question of the Federal Tort Claims Act.

QUESTION: Yet the Federal Tort Claims Act provides for suits against the Government but does not allow jury trials.

MR. KNEEDLER: That's correct.

QUESTION: But it's express in the Tort Claims Act, is it not?

MR. KNEEDLER: Well, yes, what -- this is now codified in 28 United States Code 2402, that suits against the Federal Government under 1346 are to be tried without a jury with one exception, that's in tax refund suits. But the

origin of that prohibition is in the Tucker Act of 1887 and in the original Tucker Act one house of Congress had provided that jury trials, had permanently authorized jury trials in those claims that were brought in district courts at that time and as well in the circuit courts, and that one house had expressly granted it, the other house had expressly prohibited it. So that it's not surprising that in resolving the disagreement between the two houses that Congress expressly resolved it and barred jury trials in suits under the Tucker Act. In fact, we believe that's strongly indicative of Congress's intent in these matters. When its attention was actually focused on the question, it resolved the question against the availability of jury trial.

QUESTION: But is this a suit at common law in the traditional terms? Was there a suit at common law against the United States?

MR. KNEEDLER: No, there was not. No, in that sense, no. It was not. This Court held a hundred years ago in the McElrath decision that the Seventh Amendment has no application in suits against the sovereign because suits against the sovereign were unknown at common law or at the very least, if they could be analogized to common law, it could not have been asserted that the jury trial right that was preserved in the Seventh Amendment contemplated a jury trial right against the Federal Government. So it is not a suit at

common law.

Just to complete my answer to Mr. Justice Rehnquist's question, in the legislative history of the Tort Claims Act Congress simply picked up the bar to jury trials that was contained in the Tucker Act and decided to incorporate it in the Tort Claims Act, and in fact in consideration of the Tort Claims Bill in 1940 in the House there was a proposal to amend the bill to allow jury trials and that was defeated, again by reference to the Tucker Act.

So the provisions barring jury trials in our view reflect that when Congress focuses on the question it decides it does not want jury trials. We think that the court of appeals plainly erred in finding the jury trial right in Section 15 of the Age Discrimination Act. As I pointed out, these suits are not suits covered by the Seventh Amendment. Respondent concedes as much and the Court of Appeals so held. Accordingly, there can be no right to jury trial unless Congress has affirmatively recognized that right. Respondent concedes this as well, and in fact this conclusion is compelled by Rule 38(a) of the Rules of Civil Procedure. Under rule 38(a) where the Seventh Amendment does not apply there is no right to trial by jury in any civil action brought in federal district court except as given by a statute of the United States. There is nothing in the text, the legislative history, or the background of Section 15 of the Age Discrimination

Act to suggest that Congress intended to grant a right to trial by jury in suits against the Federal Government. To the contrary, all the indicia of congressional intent point in the opposite direction.

QUESTION: Well, I gather the Government's position anyway is that it has to be explicit, isn't it?

MR. KNEEDLER: Yes.

QUESTION: You can't find it by implication?

MR. KNEEDLER: That's right. Our position is that it does have to be explicit and --

QUESTION: It could be implicit even among private parties, as in Parklane Hosiery.

MR. KNEEDLER: Well, that's correct. A right to -- of course, in a suit between private parties where the Seventh Amendment applies. Right; right.

QUESTION: But the reason, it has to be explicit when it's an action against the United States Government.

MR. KNEEDLER: That's right. That's right.

QUESTION: That's the only time in your argument that it has to be explicit.

MR. KNEEDLER: That's correct; yes. We're not addressing the question of suits against private parties, nor where the Seventh Amendment applies, or, for instance, the application of principles of collateral estoppel. Well, in looking at the --

QUESTION: May I ask you one question that's brought

to mind that, what would you say about a suit against an officer of the United States, the Attorney General or someone, in his official capacity, seeking damages of a Bivens character, something like that?

MR. KNEEDLER: Well, if it's a Bivens-type action, then that is a suit, that would be a suit while arising out of his official duties, it's a suit in his personal capacity. When an officer is personally liable under no situation is it our understanding that the Seventh Amendment itself would guarantee a right to trial by jury.

QUESTION: Is there -- maybe I'm just totally off base. Is there a possibility of an action against someone in his official capacity -- then it would be like a suit against the United States?

MR. KNEEDLER: That's correct it would be deemed a suit against the United States, which would invoke all normal rules as if the United States were the injured party.

QUESTION: And the doctrine coming from Ex Parte Young was only in equity, it wasn't a suit for damages?

MR. KNEEDLER: That's correct. In looking at the congressional intent under Section 15 we must of course start with the language of the Act itself. As I mentioned before, Section 15(c) contains no reference to jury trials. Section 7(c) on the other hand, which applies to civil actions brought against all other employers covered by the Act, expressly

provides for jury trials. Therefore, Congress has demonstrated in the very statute that's under consideration here that it knows how to provide for a right to a jury trial when it wants to do so, and yet declined to grant that right in suits against the Federal Government.

Under settled principles of statutory construction, then, we submit, the conclusion to be drawn is that there is no such right under Section 15(c).

QUESTION: You could turn that argument around, could you not, and say that in the Federal Tort Claims Act it knew how to bar the right to jury trials and when it has not done so there is a right to jury trial?

MR. KNEEDLER: Mr. Justice Rehnquist, under Rule 38 certainly now the question we believe has to be whether Congress affirmatively granted it, granted the right, because Rule 38 provides for trial by jury guaranteed by the Seventh Amendment, whereas given by an act of Congress the mere absence of a prohibition does not in our view constitute the grant of a right to trial by jury, particularly when considered against the background of Congress's general practice of not granting a right to trial by jury in, for instance, the complete range of cases subject to the Tucker Act, which includes all monetary claims under the Constitution under any statute, under any contract, and all claims for liquidated or unliquidated damages sounding in tort. That is a broad

jurisdictional grant.

QUESTION: Was Rule 38 or its predecessor, did it say the same thing at the time of the enactment of the Federal Tort Claims Act?

MR. KNEEDLER: Well, the Federal Tort Claims Act was enacted in 1946.

QUESTION: In '46 or '47, I think.

MR. KNEEDLER: And the Rules of Civil Procedure were adopted, I believe, in 1937 or 1938. But, as I say, the committee reports on the Tort Claims Act do not really discuss the question. For instance, in my quick looking at them, there was no reference to the fact that if we don't prohibit it, it's granted.

QUESTION: Well, under your argument, Congress didn't need to provide, explicitly provide what it did provide?

MR. KNEEDLER: That's correct. It simply picked up the preexisting provision in the Tucker Act because the last phrase that I quoted was from the Tucker Act, referred to suits for liquidated or unliquidated damages not sounding in tort, and Congress in the Tort Claims Act was effectively filling a gap in the Tucker Act and so it was natural that it would also invoke the jury trial prohibition, but I don't think any inference can be drawn that it thought it had to prohibit --

QUESTION: Mr. Kneedler, as I recall it, Lorillard

emphasized legal relief in 7(c), didn't it, as a basis for the conclusion that jury trial was intended there. The words "legal relief" also appear in 15(c), don't they?

MR. KNEEDLER: Yes, they do, Mr. Justice Brennan. But in Lorillard the Supreme Court, this Court, enphasized the use of the word "legal" by reference to its accepted connotation under the Seventh Amendment. The Court stated that in suits for legal relief, when legal issues are to be decided, the Seventh Amendment ordinarily requires a right to trial by jury. The Court then concluded that Congress must have been aware of this interpretation and intended that when it used the word "legal" to receive into the Age Act the jury trial right that ordinarily attaches because of the Seventh Amendment.

That analysis, we submit, has no application here, because the Seventh Amendment doesn't apply to suits against the Federal Government, and therefore by using the word "legal" Congress could not be expected to have attached any significance to it for jury trial purposes. In fact, again, against the background of the Tort Claims Act and the Tucker Act, even in suits that are concededly of a type that would entitle a private party to a jury trial, Congress has established a different rule for suits against the Federal Government and it's consistent with this practice for Congress not to have affirmatively provided a jury trial right in suits

against the Federal Government under the Age Act.

QUESTION: And I notice we have an amicus brief from a number of Senators and Congressmen, or all they all Congressmen?

MR. KNEEDLER: I believe they're all Congressmen; yes.

QUESTION: All Congressmen. They seem to think that they meant by legal relief to suggest that there should be a jury trial. It doesn't say whether they voted on this bill or not. I don't find that.

MR. KNEEDLER: I didn't trace whether each of them did. I think it's a familiar principle, though, that the views of individual members post-enactment, as to the meaning of a particular --

QUESTION: Even when there were that many?

QUESTION: This is one step removed, you suggest, from the usual post-events legislative history?

MR. KNEEDLER: Yes, I would submit that it is.

QUESTION: How many years removed would this be?

MR. KNEEDLER: Oh, this -- the Act was extended to the Federal Goverment in 1974 so this would be six years, seven years.

QUESTION: Quite a few of these, I think, were there. Claude Pepper, for example.

MR. KNEEDLER: Yes. Congressman Pepper certainly

was in office --

QUESTION: Rule 38, by its terms, certainly -- at least the copy I have, is maybe outdated -- doesn't expressly bar a jury trial in a claim against the United States.

MR. KNEEDLER: No, but it does say, in the basic provisions dealing with jury trials, that there should be a right to jury trial as guaranteed by the Seventh Amendment or as given by a statute of the United States. Absent -- if a party does not fall into one of those two categories, then -- or if a case does not, then it would seem a party to that case does not have a right to demand a jury trial.

QUESTION: Well, but then doesn't the Seventh Amendment come into play?

MR. KNEEDLER: In a suit against the Federal Government? I mean, in a suit against a private party it certainly would and you wouldn't even have to get to the question of whether an Act of Congress had granted the right to trial by jury if the suit is one that falls under the Seventh Amendment guarantee.

QUESTION: You say, then, that 38 simply doesn't apply to the Federal Government?

MR. KNEEDLER: Oh, it does apply, but what it requires is that you find, not that the Seventh Amendment does not apply to the Federal Government, so that part of the jury trial right that's preserved in Rule 38(a) does not apply to

the Federal Government. But if Congress affirmatively grants a right to trial by jury in a suit against the Federal Government, then that comes in under the second provision in Rule 38(a) that there's a right to trial by jury as given by a statute of the United States. So, in that sense, Rule 38 certainly does apply. It just requires you to look outside of Rule 38 to some statutes to find an affirmative grant of jury trial.

QUESTION: Well, how about Curtis v. Loether and the other, the District of Columbia case and the 7th Circuit case where the right to trial by jury wasn't given by statute, but this Court found it was given by the Seventh Amendment?

MR. KNEEDLER: That's correct; yes. But those cases would have no application here because the Seventh Amendment does not apply to suits against the United States. We're only speaking of suits against the United States, in which it has been settled by this Court that there's no right given by the Seventh Amendment to trial by jury.

QUESTION: But isn't your reading of Rule 38 just a way of saying, the question is whether a right to trial by jury is or is not given by a statute? That's the issue.

MR. KNEEDLER: That's right. That's right.

QUESTION: So that Rule 38 doesn't add or subtract from anything as I see it.

MR. KNEEDLER: Well, I think that's basically

correct. The only reason I mention it is because the case that seems to be principally relied upon for the proposition that providing for suits to be brought in federal district court implies a right to trial by jury against the United States was a case by the name of United States v. Pfitsch, which is, for instance, the only authority cited in the Moore treatise for that proposition.

But Pfitsch arise prior to the adoption of Rule 38 and its analysis was not really that the Lever Act, which was the statute involved in that case, itself contained a grant of the jury trial right. It seemed to be more that there was something in the nature of district court jurisdiction that provided a right to trial by jury, and we think it's clear, whatever the rule would have been before the adoption of Rule 38(a), that there is no general inherent right to trial by jury in civil actions in federal district court, that Rule 38(a) establishes a mechanism for determining when there is such a right, and, namely, whether the Seventh Amendment applies, or you have to look to the statute for a grant of the jury trial right. And so, to that extent I think that whatever the application of Pfitsch may have been at a prior time, Rule 38(a) requires that you look to a statute.

Aside from the face of the statute itself, which as I mentioned distinguishes on its face suits against the Federal Government, I think it's also significant that

there's not one mention in the legislative history of a reference to trial by jury in suits against the Federal Government. This is -- we think this silence is particularly telling against the general practice of Congress not providing for jury trials in those case. Indeed, the most recent situation of which we are aware in which Congress has actually granted a right to trial by jury is in tax refund suits against the Federal Government brought in federal district court. Congress affirmatively granted a right to trial by jury in such suits in 1954.

But the House, at that time, for example, viewed this as a harmful precedent if Congress was going to provide for jury trial in suits against the Federal Government generally, and the House's resistance was sufficiently strong that it held up the reporting out of the conference committee of a bill authorizing jury trials for almost a year. The House finally acceded to the provision in the Senate bill because of special situations involved in tax refund suits. We think that this demonstrates that when Congress focuses on the question, at the very least it generates controversy within the Congress, and surely if Congress had intended to depart from its normal practice in the Age Discrimination Act we would expect some debate on it, instead we have silence.

QUESTION: That kind of argument is pretty well foreclosed by what we said in the last term in the PPG opinion,

isn't it? You can't require Congress to have a controversy or discussion.

MR. KNEEDLER: No, I'm not suggesting that that's a hard and fast rule, but in terms of looking at the indicia of legislative intent, if we look beyond the face of the statute, which we submit isn't even necessary here.

QUESTION: Let's consider the face of the statute. That's what PPG said. The argument was that if Congress had intended to make the drastic change that it did make, on the face of the statute, it would have talked about it. And we said, that's nonsense. You can't pursue the theory of the dog that didn't bark.

MR. KNEEDLER: Well, I'm not suggesting that it's dispositive. I do think, though, that the background against which Congress legislates in this area is at least of some relevance. And I also think that the manner in which Congress created a separate Section 15 also reinforces that conclusion. When the Age Discrimination Act was extended to federal employees in 1974, there was initially a proposal to bring federal employees in under the provisions of the first 14 sections of the Act, which incorporate the Fair Labor Standards Act procedures. As we point out in our brief, the primary basis of this Court's holding in Lorillard, finding as a matter of statutory construction a right to trial by jury under Section 7, was the incorporation of the Fair Labor

Standards Act procedures. But when Congress finally enacted the 1974 amendments, it did not bring the Federal Government under the Fair Labor Standards Act procedures. As we explain in our brief, Congress instead enacted a separate Section 15 which was not patterned after the Fair Labor Standards Act, doesn't incorporate those enforcement procedures. It's instead patterned after Title VII, after Section 717 of the Civil Rights Act which prohibits other types of discrimination in federal employment, and that selection of the Title VII model for federal employees rather than the Fair Labor Standards Act model, is doubly pertinent on the jury trial question. In other words, not only did Congress reject the Fair Labor Standards Act model, upon which this Court had relied in Lorillard, subsequently relied; it adopted the Title VII model and the right to trial by jury has not been recognized in suits brought under Title VII, even against private employers.

So that the only inference that can be drawn from the way in which Congress structured Section 15 is that it did not intend for there to be a right to trial by jury. And this inference drawn from the manner in which Section 15 was formulated in 1974 was only strengthened in 1978, we submit, when Congress amended the statute in a number of respects.

First, as I have pointed out, it was in 1978 that Congress amended Section 7 to provide for the jury trial right

in suits under that section and didn't under Section 15. Beyond that, Congress enacted a new subsection (f) in Section 15 dealing with federal employment, which provides that personnel actions in the federal sector are not to be subject to or affected by any other provision of the Act except one provision in Section 12 dealing with the upper age limit for federal employees. And the conference report states that this new subsection (f) makes clear that Section 15 is independent of any other provision of the Act.

Subsection (f) and the jury trial provision in private sector cases were both considered by the conference committee. They were both enacted by the Congress and we submit that given this reminder, very vivid reminder in the new Subsection (f), that Section 15 is entirely separate and does not incorporate the types of procedures and remedies that are available in suits against private employers under Section 7. Given that reminder that it's separate, the fact that Congress enacted a jury trial right under Section 7 and not under Section 15, we again think is very telling because it could not have overlooked, given the separate nature of these provisions, it could not have overlooked the need to amend Section 15 if it had chosen to do so.

QUESTION: Doesn't Pfitsch turn almost entirely on the court in which the case is authorized to be brought? Doesn't Justice Brandeis's opinion there say, since Congress

authorized suit to be brought in the district court, and in district court you get a jury trial?

MR. KNEEDLER: Well, there are several things about Pfitsch. One, Congress had focused on the question of jurisdiction. It had considered a provision to have these cases brought under the Tucker Act and rejected it. And the Court could conceive of no rational ground for doing this except to provide for jury trial rights so the rationale of Pfitsch is the Congress focused on the question, but beyond that, as I mentioned, Pfitsch also seems to depend on the notion that there is something inherent in district court jurisdiction, not on the fact that the statute granted a right, but there was a right that somehow attached because the case was brought in federal court.

QUESTION: Well, it said so in so many words, didn't it?

MR. KNEEDLER: Well, but it says, it said that the trial would be according to the ordinary procedures of suits of law in federal district court. Now, since Pfitsch was decided under Rule 38(a), one of the ordinary procedures is that there is not a right to trial by jury unless the Seventh Amendment applies or the jury trial right is granted by a statute of Congress.

QUESTION: What's your authority for that?

MR. KNEEDLER: Well, I think one explanation for

this is that at the time Pfitsch was decided there was the former 28 United States Code 770 which provided a statutory right for trial by jury in suits at law in the federal district courts. This was repealed in 1948, so it's conceivable that in Pfitsch the Court was relying on that statutory ground. But that, as I say, that general statutory provision was repealed in 1948. It was essentially unnecessary because the Seventh Amendment, in large effect it then implemented the Seventh Amendment. It was contained in the original Judiciary Act of 1789. But Rule 38 made it largely unnecessary because Rule 38 expressly itself protects the jury trial right.

QUESTION: Well, if this statute specifically said there would be no jury trial in suits against the Government which are consented to, I don't suppose Pfitsch would require a jury trial?

MR. KNEEDLER: No, that's correct.

QUESTION: And you're simply saying that you read the statute that way?

MR. KNEEDLER: That's correct. I would like to reserve the balance of my time if I could, please.

MR. CHIEF JUSTICE BURGER: Very well. Mrs. Barry.

ORAL ARGUMENT OF MRS. PATRICIA J. BARRY, ESQ.,

ON BEHALF OF THE RESPONDENT

MS. BARRY: Mr. Chief Justice; may it please the Court:

Parties are entitled to a jury trial in suits against the Federal Government under the ADEA, the Age Discrimination in Employment Act. Respondent has no quarrel with Petitioner when he states that the Government must consent in order to be sued.

QUESTION: Was this the kind of an action that existed at the time the Seventh Amendment was adopted?

MS. BARRY: No, Your Honor, but I believe in the Pernell case this Court indicated that often the common law theory of a right to a jury trial as it existed in 1789 or in 1791 is often extended if it can be analogized. That is, if the remedy that you have --

QUESTION: Did that case involve a situation with sovereign immunity being waived?

MS. BARRY: No, Your Honor, I believe it was a landlord-tenant case coming out of here out of the District of Columbia.

QUESTION: Don't you think that makes some difference?

MS. BARRY: Your Honor, I don't believe so, for the following reasons. I believe that the petitioner confuses the doctrine of sovereign immunity with an unproved and an unauthorized doctrine of sovereign immunity from jury trials. Now, if the petitioner is correct that in order for a jury trial to be obtained when the Government is sued and the statute is silent, then the instructional guidance set out by

this Court in Pfitsch, Law, Wickwire, and the accord in Galloway makes no sense, because in all of those instances the analysis set out by the Supreme Court was that where you had a case that was considered an action at law and there was exclusive jurisdiction in the district court, at least with respect to Law and Pfitsch, the conclusion was that Congress intended a right to jury trial.

Now, this is precisely what the circuit court of appeals found when it went to the language of Section 15. As petitioner has indicated to you, there was heavy reliance by the Court of Appeals of the District of Columbia on the fact that Section 15(c) talks about exclusive jurisdiction in the federal district courts.

The second reliance is the fact that Section 15(c) is identical in its language to section 7(c) and this Court relied upon the language, legal relief. Mr. Justice Marshall writing for the majority in Lorillard found that the Congress is imputed with having knowledge of the well developed common law meaning of the term, legal relief. And therefore concluded that Congress knows what it's doing when it uses certain terms and therefore on that basis as well as other bases this Court concluded a right to jury trial under 7(c).

QUESTION: Ms. Barry, I suppose there was no Lever Act, as involved in the Pfitsch case, at common law in 1791?

MS. BARRY: I don't think so, Your Honor. I think

that dealt with compensation, when the Government was setting up requisitions for -- I think it occurred during World War I.

QUESTION: Right.

MS. BARRY: And I don't think that kind of writ could be obtained in the common law courts of the King, back in 1789 and 1791. Now, again referring to the language of Section 15, to quote this Court in Pfitsch, "All difficulties of construction vanish if we are willing to give to the words of Section 15, 'deliberately adopted,' their natural meaning."

I have already addressed myself to the language of the fact that legal relief is contained in Section 15(c). And again I want to add that it states identically the same statement that is found in Section 7(c), that is a person aggrieved by age discrimination in the federal sector of employment is entitled to bring a civil action in a federal district court for such legal and equitable relief as will effectuate the purposes of this chapter, this chapter being the ADEA.

Now, petitioner claims that Section 15 is really different, that it was really modeled after Title VII. Well, as, again in Lorillard, as Justice Marshall noted, Section 4 of the ADEA which contains the prohibitions against age discrimination were lifted, or derived, in haec verba, from the prohibitions found in 42 USC 2000(e)-2(a)(1). But this Court said, aside from the fact that there is Title VII

overlay and that there is language found from Title VII, you've got to go to the remedies and procedures. And in here, in Section 15, as well as Section 15(c), there is a dramatic departure from what is found in Title VII, just as there is a dramatic departure from what is found in Title VII in the Section 7 or the other portion of the ADEA.

And what is that? There is an opportunity to bypass the administrative remedy set out in Section 15(b) for the federal employee and there is significantly the right to seek legal relief. That term "legal relief" is conspicuously absent in Title VII. The only mention you have in Title VII of any description of relief is the equitable relief.

Now, the petitioner at page 38 of his brief says that we should not ascribe or we should not impute to Congress the common law meaning of legal relief when it is found in Section 15(c) because Congress and the Seventh Amendment have always treated the issue of jury trial differently in the context of actions at law against the Government.

Well, the Seventh Amendment has no applicability here because once sovereign immunity is waived that drops out of the picture, and then the ordinary principles of statutory construction obtain. And you go to the statute --

QUESTION: At least that's what the court of appeals majority said.

MS. BARRY: Yes, sir, and as I understand that this Court has held in Pfitsch, Law, Wickwire, and Galloway. Also, in the 3rd Circuit the Collins case, which I found to be a rather interesting case. The 3rd Circuit found that the impact of the Seventh Amendment was no longer present once the Government of the Virgin Islands had waived immunity and allowed itself to be sued in a tort action. Then it said it was free of the impact of the Seventh Amendment. Then the ordinary principles of statutory construction then became applicable.

And, furthermore, in the 3rd Circuit, in that Collins case, that court of appeals concluded that there were two critical determinants present, which were the two same determinants found by the Court of Appeals here in the District of Columbia and here in Miss Nakshian's case, concluding that there was the right to a jury trial.

Now, with respect to how Congress has treated the issue of jury trials differently, I'm uncertain what is meant by that language except that there have been instances, as the petitioner has submitted in his argument, where Congress has expressly denied a right to jury trial. One of them is the Federal Tort Claims Act. Another is actions, all actions tried under the Tucker Act, and there is another one which is actions to quiet title found at 28 USC 2409(a).

Now, on the other hand, Congress has deemed fit to expressly grant jury trials. Those are found in the tax

refund suit and in the National War Risk Insurance Act and World War Veterans Act cases, and National Life Insurance Act cases. But in those instances Congress was already responding to a situation in which the case law had already established a right to jury trial.

Now, with respect to the reliance of the Court of Appeals on the fact that there was exclusive jurisdicion in the district courts, again Pfitsch states that the nature of the jurisdiction of the district court is of importance not only because of the questions directly involved but because the answer given to it will determine incidentally whether plaintiffs who proceed under Section 10 are entitled to a jury trial. And then it went on to hold that exclusive jurisdiction in the district court establishes as an incident a right to a jury trial, and that has subsequently been followed by other courts of appeals including the Collins case, Whitney v. United States, Hacker v. United States.

Now, the petitioner for the first time, before the Supreme Court argued that the language found in Section 15(f) means that the other rights, remedies, and procedures set out on the other section of the Act do not apply to actions brought by persons aggrieved by federal age discrimination.

Your Honors, if we follow the logic of what the petitioner is saying, we will in effect have a situation where courts will be completely left without guidance as to what

the rights, remedies, and procedures are with respect to federal ADEA cases. And why do I say that? According to the petitioner's arguments made in his brief as well as in his reply brief, courts would not be allowed to turn to other sections of the ADEA and to pertinent portions of the FLSA for guidance. For example, Section 4 contains prohibitions against age discrimination. However, if Section 15(f) is interpreted the way the petitioner would have you interpret it, the Court can't go over this to find out what would establish a prima facie case of age discrimination. Furthermore, we can't get -- according to the petitioner's argument -- we cannot get liquidated damages. Federal employees or those aggrieved by the federal sector of employment could not get attorneys' fees and costs.

Now, petitioner has conceded that federal employees are entitled to liquidated damages under the FLSA, as reaffirmed in 29 USC 404(f). However, they're saying by the logic of 15(f), you don't get liquidated damages under the ADEA.

Furthermore, even if we can assume that Section 15(f) means that the other provisions of the ADEA do not apply to the federal sector, you still have, or one is confronted with, the situation that you still have the phrase, legal relief, found in Section 15(c). You still have Section 15(c) identical to the language of 7(c), on which this Court primarily

based its conclusion that public employers and private sector employers are entitled to a jury trial right. Now, we contend that the reason that Congress didn't bother to amend 15(c) in 1978 -- well, it was probably an oversight, because the main purpose of the '78 amendments was not being focused on the right of a jury trial. That was, as you all know, was incidentally raised October 19, 1977, when HR 5383 came over from Congress over to the Senate for deliberation, and at that time Senator Kennedy made this relatively small jury trial amendment to Section 7. It is codified at Section 7(c)(2).

The reason, I contend, that Congress did not bother to amend Section 15(c) at the same time is not because they were deliberately going to deny a right of jury trial to parties bringing actions involving the Federal Government, simply because it would have been mere surplusage. Congress didn't bother defining the prohibitions of age discrimination in Section 15; didn't bother defining the statute of limitations -- that's found in 29 USC 255; didn't bother instructing the Court as to the specificity of legal and equitable relief found in Section 7(b); didn't bother telling the Government you have to post notices --

QUESTION: Well, Ms. Barry, you can see our difficulty with the case is that it would have been so easily resolved by Congress if it had said there will be a right to

jury trial or there won't be a right to jury trial. And here we're left with a kind of fuzzy legislative history and implications and that sort of thing.

MS. BARRY: Which is exactly why I think we're before this Court today is that the problem, I believe, that came up in October of '77 was, first of all, the focus of the '78 amendments was on the mandatory retirement age and then eliminating the upper age ceiling for federal employees. They wanted to expand the rights of federal employees and in fact did so to a greater degree than they did for people covered under the other sections of the Act.

For example, all you have to do is be 40 and you're protected under the ADEA if you're a federal employee or a person aggrieved by the federal sector of employment. However, you do have restrictions, qualifications set out in other portions of the ADEA that we contend Section 15(f) means you don't apply it to federal employees. For example, having to retire at 70 or if you're a professor, maybe teaching at NIH, you're not going to have, I think it's Section 12(c) or 12(d) applied to you. I think that was the focus.

Furthermore, the only cases coming up at that time -- you have to keep in mind, I think, Your Honor, that in 1967 the Age Act had been around for a number of years. People had ripened, the courts were getting a handle on how to treat the private sector employment. Whereas, the public

employers, we attorneys in the public, you know, were just getting into it. That provision, the ADEA was not amended until '74, so by '77 federal employees weren't even thinking of --

QUESTION: My point was that Congress in '46 in the Federal Tort Claims Act when it had not been around at all, so to speak, found itself perfectly able to say, there shall be no right of jury trial. And it could have gone one way or the other in this Act.

MS. BARRY: Your Honor, I think I can distinguish that situation, because the Federal Tort Claims Act at 1346(b) is simply that one section found under a general statute that did not allow jury trials in the first place. I think it can be distinguished here because there is the standard principle of statutory construction that says acts are construed in pari materia whenever that can be done. And in the same fashion, I think that Congress automatically assumes that all of the other sections of the Act, 1 through 14, 16 and 17, would automatically be applied to Section 15 unless you end up with absurd results --

QUESTION: But there's also a standard principle that the Government waives its sovereign immunity only to the extent that it is stated by Congress.

MS. BARRY: That is correct, Your Honor, but I don't think that is the same thing as what the petitioner is saying that there is a doctrine of sovereign

immunity against jury trials unless there is an express grant, at least, as I understand the case law precedent in this area where courts have been called upon to construe the mode of trial procedure where the statute is silent and the Government is being sued, and the ordinary principles of statutory construction obtain.

I want to add, also, Your Honor, that while we have approached both in our briefs that, and certainly because the Court of Appeals relies on the language found in Section 15, I've seen nothing in the legislative history that indicates that Congress did not intend that the express grant found at 7(c)(2) would not apply to Section 15(f). In fact, the 1974 amendments stated that the purpose of extending the rights of -- or rather, extending the ADEA protection to federal employees was being done in the same fashion as what was being accomplished for the private sector employees. Again, in 1978, the jury trial amendment was an incident to a much more overpowering interest on the part of Congress, and that was the mandatory retirement age, eliminating the upper age ceiling for federal employees and also trying to straighten out the 4(f)(2) defense set up by employers under the -- you know, with all the involuntary retirements that were occurring under the pension benefits set out in Section 4(f)(2) of the Act.

With respect to the legislative history, in March 15, 1974, HR 93-9113, it stated that the committee expects

that expanded coverage under the Age Discrimination in Employment law will remove discriminatory barriers against employment of older workers in government jobs at the federal and local government levels, as it has and continues to do in private employment.

Now, this is important because in '74 the law was amended to include all public employers. However, public employers were included by simply amending the definitions, I believe, found in 630. Section 15 came in to give jurisdiction to the Civil Service Commission, not because there was an absolute analysis of Section 15 to Section 717, but only because the Civil Service Commission had historically had jurisdiction over all kinds of matters regarding federal employees. It clearly at that time had Title VII jurisdiction and then, simultaneously in 1974, was given jurisdiction of FLSA claims.

Now, the Reorganization Act, I contend, to a certain extent has mooted that distinction, because the Civil Service Commission no longer has jurisdiction of the Title VII complaints nor of ADEA complaints. That, along with the relinquishment of the DOL jurisdiction over ADEA claims, has been sent over to the EEOC. One of the purposes of the reorganization plan of President Carter was that he was very concerned with the fact that there was not uniformity of result being obtained because of the different agencies' controlling or

trying to administer the antidiscrimination statutes for various employers. And he said, the reason we want to send it over to EEOC is because EEOC has a long history and expertise in administering and resolving complaints of discrimination. If we use the reasoning of petitioner of Section 15(f), then we will obtain wholly incongruous results in that that desire of President Carter will not be met by the reorganization plan. For the reasons that I've just stated, we will not be able to get liquidated damages, we will not be able to get attorneys' fees and costs, we will not be able to do -- we will not have to do an opt-in class action, we have a different way of going under, we will go under Rule 23 --

MR. CHIEF JUSTICE BURGER: We'll resume there at 1 o'clock, Mrs. Barry.

MS. BARRY: Thank you.

(Recess)

MR. CHIEF JUSTICE BURGER: You may continue, Mrs. Barry.

MS. BARRY: Thank you, Your Honor.

Your Honors, I believe one of the Justices asked Mr. Kneedler whether or not all of the Congresspeople whose names appear as amici on the brief had voted on the '78 amendments. It was brought to my attention that except for Mr. Lantos, Mr. Wyden, and Mr. Frank, and possibly Mr. Jeffords, aside from those three or possibly four, all of

the members who appear as amici on the brief --

QUESTION: What difference does it make?

MS. BARRY: Oh, only in response to that question, Your Honor. I'm sorry.

QUESTION: You don't suggest it makes any difference whether they express that view as members of Congress, later members of Congress, or future members of Congress, do you?

MS. BARRY: Well, Your Honor, I thought that in response to the Justice's question that perhaps the intent, those who wrote up the '78 amendments, who were close to the law and writing up the conference reports surrounding HR --

QUESTION: In order to do that, the best way would be to take a poll of the Congress, wouldn't it?

MS. BARRY: Yes, sir; yes, indeed, the best kind of legislative history is that that is contemporaneous with the law. With respect tc the petitioner's argument presented in his brief regarding "deep pocket," I don't believe that that theory is applicable to to the instant case for the following reasons. In fact, an age case is the kind of case that is a well set up kind of case for juries in that juries are limited to amounts owing, which generally take the form of back pay, and liquidated damages becomes the measure of that pecuniary loss. The trend of the case law at this time, at least with respect to the 3rd, the 4th, and the 5th Circuits, is that there is no right to compensatory or punitive damages. And in

fact, at page 14 of the conference report, it states that the ADEA as amended by this Act does not provide remedies of a punitive nature, and that the liquidated damages become a substitute to compensate for compensatory damages that are too obscure to define in any other way. I might add that this Court unhesitatingly applied the right of a jury trial in 1978 to state employers, or to other public employers, unhesitatingly where the theory of the "deep pocket" would have as much applicability as it would in the instant case.

Now, on this --

QUESTION: Don't those cases involve the surrender of sovereign immunity by the states?

MS. BARRY: Your Honor, in that one --

QUESTION: Or was it imposed on them from the outside?

MS. BARRY: I believe it was imposed upon them from the outside in 1974 when Congress amended 630 to include the definition of state employers under the purview of the Act.

With respect to the argument that Rule 38(a) -- with respect to whether or not there was the statutory grant of the right to a jury trial, I believe that what the petitioner is arguing is that in order for 38(a) to apply in the instant case there has to be an express grant of jury trial. Again, I believe that that is based, as I understand the petitioner's

brief, on a presumption that there is no right to a jury trial and that again is confused with the doctrine of sovereign immunity, which again, I'd like to emphasize, drops out of the picture once the Government has consented to be sued. And then, as the court of appeals held, and as the 3rd Circuit held in the Collins case, as it was held in the Monolith case, the statutory principles, or rather the principles of statutory construction become applicable and the doctrine of sovereign immunity is no longer of any concern.

And again, I'd like to emphasize that I believe that that was the instruction set out by this Court in Law, Pfitsch, Wickwire, and Galloway.

In conclusion, Your Honors, I'd like to state that based upon the language of the Act, as the court of appeals found by analyzing Section 15, there is an implied right of jury trial. And certainly, as has been indicated in prior cases dealing with the Federal Torts Claims Act, dealing with actions to quiet title to real estate in which the Government is a party, Congress knows how to deny a jury trial, and expressly chose not to take such a deliberate act in the case of the ADEA.

QUESTION: Well, as Justice Rehnquist suggested this morning, they know what words to use the other way too, don't they?

MS. BARRY: In making an express grant of jury trial?

QUESTION: Yes, in saying what they mean, one way or the other.

MS. BARRY: Yes, sir, which they did in Section 7(c)(2), probably operating under the --

QUESTION: Congress has done it both ways in different settings, have they not?

MS. BARRY: That's correct, Your Honor. They have allowed an express grant of jury trial as the petitioner conceded for tax refund suits. But again, Your Honor, as I recall the history of that particular statute, it was already a matter of case law under revised statutory --

QUESTION: Because the collector was the defendant rather than the United States.

MS. BARRY: I note the petitioner raised that but I think it's a very artificial one. For example, in the legislative history surrounding, there was a Senate report that came out and the Senators who signed off said that it was an artificial, fictional kind of thing that really no longer had an applicability because the Commissioner never paid the bill. Everybody knew that the Federal Government really paid it and the U.S. attorney defended it --

QUESTION: Wasn't that the reason assigned, at any rate, even though it was concededly artificial or antiquated?

MR. BARRY: Well, Your Honor, I believe with -- in passing in dicta, that I believe that this Court found in

Wickwire that it really came from a fair implication from the statutory language, that is, it was an action at law. And in fact it was noted that the petitioner in that case -- oh, I'm sorry, the respondent, which was the Government, indicated that, you know, the Seventh Amendment applied, and this Court chastised the Government for making such an argument and, said, no, it came from the implication of the statutory language and that it was an action at law.

Thus, I would say, Your Honors, that the conclusion of the district court is well grounded in precedent, when it held that there is an implied right to a jury trial by the fact that Congress vested exclusive jurisdiction in the district courts and by the fact that it used the identical language found in Section 7(c) when it developed Section 15(c) and used the term "legal relief."

Now, as Theodore Roosevelt said, he asked the question, who is the Government? The Government is all of us in this room. It is you and it is I, and to paraphrase the words of Justice Sneed concurring in Franquez v. United States, he states, "I am unwilling to assume that jury trials will not adequately protect the interests of the United States, for it is after all only placing the interest of ourselves in the hands of ourselves."

QUESTION: What did Louis XIV say about government?

MS. BARRY: Being the Sun King, I'm sure he

identified the state with himself.

QUESTION: L'état, c'est moi.

MS. BARRY: I respectfully request that the decision of the Circuit Court of Appeals be affirmed. Thank you for your kind attention, Your Honors.

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

MR. KNEEDLER: Thank you, Mr. Chief Justice.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. KNEEDLER: Just one quick point. I'd just like to emphasize that in 1978 when Congress affirmatively granted the right to trial by jury in suits under Section 7(c), and did not do so under Section 15(c), it also enacted the new subsection (f) which says, "Any personnel action of a federal department shall not be subject to or affected by any provision of this Act," at Section 12, dealing with the upper age limitation.

Given this reminder, and codified expression of congressional intent in the statute, that Section 15 is distinct from Section 7, we submit that Congress could not have been under the impression that the same rule would be applied.

QUESTION: Well, now, Mrs. Barry says that this argument, the logic of this argument would mean that none of the other provisions of the Act are applicable at all.

MR. KNEEDLER: Well, Mr. Justice Stewart --

QUESTION: Liquidated damages or statute of limitations or --

MR. KNEEDLER: Well, of course, there is a standard statute of limitations provisions for suits against the Government under 28 United States Code 2401, for suits against the Government generally.

Insofar as she was suggesting that the other provisions of the Act wouldn't apply --

QUESTION: Right.

MR. KNEEDLER: -- Section 15 --

QUESTION: She said the logic of your argument would lead to that conclusion.

MR. KNEEDLER: Oh, that's true, but we're not suggesting that the new subsection accomplished anything that wasn't in the statute before. All it did was reiterate what was implicit in the structure of the statute, because subsection (f) contained separate substantive provisions. There's no need to refer back to the other provisions that contain separate remedial and enforcement provisions, and separate -- authorizes the Civil Service Commission with a separate authority to fashion bona fide occupational qualifications.

QUESTION: So you're content, and you say that the logical conclusion of your argument is the correct conclusion.

MR. KNEEDLER: Is the correct conclusion, that

Congress deliberately chose to do that; yes.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, counsel. The case is submitted.

(Whereupon, at 1:10 o'clock p.m., 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. 80-590

JOHN F. LEHMAN, SECRETARY OF THE NAVY

V.

ALICE NAKSHIAN

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

BY: Bill G. Olson