ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-242

TITLE ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, Petitioner
v.
SIERRA CLUB, ET AL.

PLACE Washington, D. C.

DATE April 25, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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PROTECTION AGENCY :
Petitioner : No. 82-242
v. :
SIERRA CLUB, ET AL. :

- -x

Washington, D.C.
Monday, April 25, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:.

KATHRYN A. OBERLY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.;
on behalf of Petitioner

HAROLD R. TYLER, JR., ESQ., New York, New York;
on behalf of Respondent

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in the Administrator of the Environmental Protection Agency against the Sierra Club.

Ms. Oberly, you may proceed whenever you are ready.

ORAL ARGUMENT OF KATHRYN A. OBERLY, ESQ.

ON BEHALF OF PETITIONER

MS. OBERLY: Mr. Chief Justice, and may it please the court.

This is a Clean Air Act case in which the District of Columbia Circuit has ordered the government to pay respondents $90,000 in attorney's fees even though they were completely unsuccessful on the merits of their lawsuit. The government challenges this fee award because we don't believe that Congress has authorized attorney's fees for totally unsuccessful parties.

The case began in 1979 when respondents filed petitions for review in the Court of Appeals challenging EPA's new Source Performance Standards for coal-fired generating plants. EDF, the Environmental Defense Fund didn't challenge the substance of the regulations at all.

Instead, it argued that EPA had had meetings with people outside of the agency after the close of the

public comment period and that those meetings had resulted in a less stringent standard being adopted than would have otherwise been the case. The Sierra Club challenged EPA's statutory authority to adopt the type of performance standard that it did and it also claimed that the rule was unsupported by evidence in the record.

The Court of Appeals rejected each and every one of respondent's arguments and upheld the EPA standards in every respect. The court did write an extremely lengthy and comprehensive opinion on the merits, but nowhere in that opinion did the court suggest that its decision to uphold the regulations was a close one or that EPA had in any way acted improperly during the rulemaking.

After the decision on the merits, respondents sought attorney's fees under Section 307(f) of the Clean Air Act. That section provides that in any judicial proceeding to review EPA regulations a court may award reasonable attorney fees whenever it determines that a fee award would be "appropriate". The dispute in this case is about what Congress meant by the use of the word appropriate.

QUESTION: Was it your burden here today, Ms. Oberly, to persuade the court that this was an abuse of discretion on the part of the --

MS. OBERLY: We're happy to take that burden on, Your Honor, because we believe it was an abuse of discretion. When one looks at Congress's purposes in enacting this statute, it becomes clear that Congress did not intend or contemplate that attorney's fees would be awarded to losing parties, who neither prevailed in the technical sense of obtaining a final judgment in court, nor prevailed in the nontechnical sense of getting the agency to change its conduct, change the regulations or in any way alter its administration of the act.

QUESTION: What do you think Congress meant by the language when appropriate that fees should be awarded -- when appropriate?

MS. OBERLY: We think the legislative history shows that Congress meant two things. There were two classes of plaintiff -- of litigants that Congress was concerned about.

The first class was prevailing defendants, which would include the government, who were subjected to frivolous or harassing litigation and the second class would be plaintiffs who either won in court in the traditional sense of obtaining a judgment or who achieved the result they set -- or something close to the result they set out to achieve without obtaining a

formal judgment. That could be done, for example, by a settlement or by EPA agreeing to change its regulations, by something short of a final judgment on the merits.

But there is no indication, Your Honor, in the legislative history that Congress understood that, or thought that it was authorizing fees to parties whose only contribution to the Clean Air Act was to have a court validate precisely what the agency had done.

The Court of Appeals standard in this case is that attorney's fees are appropriate whenever a party substantially contributes to the goals of the Clean Air Act and on its face, we don't have a real quarrel with that standard. Our problem is with the standard as applied to this and other cases like it where the plaintiffs, or the petitioners, have failed to accomplish anything concrete for the purposes of the Clean Air Act.

The court found that the way respondents had contributed to the goals of the clean air act was by labeling judicial review itself as an express and an overriding goal of the statute and then it found that respondents had contributed to that goal here by making exemplary presentations on novel, important and complex issues.

Our problem with that ruling is that Congress

has never said in the statute, which does set out the goals of the statute, that judicial review is an overriding goal, an express goal or any goal at all of the Clean Air Act.

It's quite clear from the purposes of the statute that the primary goal of the statute and the relevant one to this case is to improve and maintain the quality of the nation's air and when EPA fails to do that by not following Congress' instructions, then judicial review does help to further that goal. But when EPA has already done what Congress told it to do, judicial review for its own sake is not a statutory goal and it's certainly not one that Congress had indicated it wanted to subsidize with attorney's fee awards.

QUESTION: Ms. Oberly, are you satisfied with a standard that says if the suit furthered the goals of the statute, it is appropriate?

MS. OBERLY: Yes, Your Honor, we are. Our problem is that we think it's impossible to further the goals of the statute when a party --

QUESTION: If you don't prevail?

MS. OBERLY: -- when a party wins nothing on the merits and in no way alters or improves or changes EPA's administration of the statute. Because to do that one would have to find -- to agree with the Court of

Appeals one would have to find the judicial review just for the sake of validating what the agency already correctly did is a goal of the statute. And that is not anywhere set out in the statute or the legislative history as a goal that Congress was --

QUESTION: Well do you think, did I understand you to say that you think the court below applied the correct -- that the court below set forth the correct standard, but simply applied it improperly?

MS. OBERLY: We think the Court of Appeals standard is perfectly plausible, given the guidance that Congress provided in the legislative history. The party who contributes to the goals of the Clean Air Act may, in fact, be entitled -- there may be other factors in a particular case that would make an award inappropriate but, in general, a party who contributes to the goals of the Clean Air Act would be entitled to fees.

Our problem here is that these respondents have done absolutely nothing to contribute --

QUESTION: Can a party who loses the case ever further the goals of the statute, in your view?

MS. OBERLY: No, Your Honor, not if they not only lose on the merits in the technical sense of failing to obtain a judgment, but also lose in the broader sense of failing to alter EPA's conduct or alter

the regulations or the statute, I might add, applies not only to the government as defendant, but to private corporations as defendant and if they are unable, through their lawsuit, as a catalyst, to get a private defendant to change his behavior or its behavior, a corporation's behavior, even short of a judgment, then we would say that fees could not be appropriate.

QUESTION: The respondents cited, I think, something like 20 other statutes, federal statutes, for attorney's fees that do not require that the party have prevailed.

Is there any other statute in which the language appropriate has been used and has been interpreted, as it was in this case?

MS. OBERLY: The statutes that respondents cited, and I believe there are about 14 of them, are all where appropriate statutes. In other words, their language is all -- the statutes they're citing have identical language to the statute that the court is construing today. But in none of those statutes is there, just like the Clean Air Act, there's no legislative history to indicate the Congress thought it was authorizing fee awards to parties who failed to prevail in court or out of court, and so they've not, in our opinion, added anything to the statute that you have

before the court. They've added Congress using the same language in other statutes, but again, no additional evidence that Congress contemplated the idea of paying fees to totally unsuccessful parties.

And I want to make it clear that when I say totally unsuccessful I mean not just unsuccessful in court, but unsuccessful out of court. They failed to obtain a settlement out of court, they failed to change the defendant's conduct in any way, not just that they failed to obtain a technical judgment in their favor.

It's particularly striking --

QUESTION: Could it be said that they speeded up --

MS. OBERLY: Pardon.

QUESTION: Could it be said that this action speeded up?

MS. OBERLY: I don't think so, Your Honor. The Sierra Club in the mid, early to mid-70's asked EPA to consider this kind of rulemaking and EPA had Sierra Club's petition for rulemaking under consideration when --

QUESTION: It took them more than ten years to get around to it?

MS. OBERLY: No, it did not take then ten years, Your Honor.

QUESTION: Well, you said '70. I thought that's what you said.

MS. OBERLY: I said in the mid, excuse me, early to mid-70's was when they first approached EPA but without a formal request. They then went to the Court of Appeals for the District of Columbia Circuit, asked that EPA be ordered to initiate this rulemaking. The Court of Appeals told the Sierra Club, file a formal petition with EPA and EPA will consider it.

While that petition was under consideration, and it had not been under consideration for very long at this point, Congress passed the 1977 Clean Air Act Amendments. Those amendments ordered EPA to do precisely the rulemaking that Sierra Club had asked for.

And so it was Congress -- and it gave a statutory deadline, and EPA later found itself under a court order deadline to meet the timetable that Congress had set.

QUESTION: Had it not been for this statute, would you be here?

MS. OBERLY: I'm sorry, I don't understand.

QUESTION: Well, you seem to say the statute forced EPA to do this.

MS. OBERLY: The statute directed EPA --

QUESTION: So my question is if the statute

had not been passed, would you have said that the lawsuit did it?

MS. OBERLY: No, Your Honor, because if the statute had not been passed, it probably would have been fully within EPA's discretion to decline to initiate a rulemaking proceeding. The passage of the statute makes it impossible to tell now whether or not EPA would have undertaken a rulemaking in response.

QUESTION: Well didn't the action remind EPA that they should do it?

MS. OBERLY: It wasn't clear until the statute was passed, Your Honor, that EPA should do it. Prior to that time it was a matter of discretion with EPA and because of the intervening passage of the statute there really is no way of telling now, in hindsight, whether EPA would acted favorably on Sierra Club's petition or not. And the one thing that is clear is that Congress ordered EPA to undertake this rulemaking and EPA did it in response to the statute.

QUESTION: Of course, one could be facetious and say that they ought to be paid just to plow through the voluminous opinions of the law.

[Laughter]

MS. OBERLY: Maybe the Court of Appeals judges ought to get higher salaries to plow through the

opinion, but respondents took this task upon themselves voluntarily and it would seem to me that the government has as good a claim to having contributed to the public interest and to the purposes of the statute as do respondents.

QUESTION: Ms. Oberly, may I ask you a sort of a hypothetical question? As I understand it, it was kind of a three-cornered case. The utilities were attacking from one direction and the Sierra Club from the other direction.

Supposing there were an argument that was raised by the utilities in its attack on the regulations which was rejected for reasons set forth in the Sierra Club brief, but not set forth in the government brief, so that they would have accomplished nothing but they might have helped defeat the utilties. Would it be appropriate to give them the fees in that event?

MS. OBERLY: I don't think so, Your Honor. It would be somewhat like a rule that this Court might promulgate where parties filing amicus briefs would get paid simply because the Court found the amicus brief more helpful than the party's brief.

QUESTION: Well, if Congress passed a statute saying we can give fees where appropriate, that would be different. See, we don't have such a statute.

MS. OBERLY: You would have to look to the guidance of your statute, if you had one. And when you look to the guidance of the Clean Air Act, you don't find that Congress thought that the Justice Department needed assistance from self-volunteering public interest groups to help in defending EPA regulations.

They may, in fact, provide such assistance in such cases, but it's not something that can go into expecting the government to pay the bill when we're already paying our own lawyers to defend these regulations. And in this case, EPA filed a 200 page brief on the merits and EPA felt, the Justice Department felt that it could defend its own interests.

We did not ask for help from the Sierra Club or the Environmental Defense Fund. The fact that they wanted to offer it is their decision, but there's no indication that Congress thought that the government needed help from public interest groups in defending its own interests. That's simply mentioned nowhere in the statute or the legislative history.

An important point that I'd like to stress is that Congress has expressly considered legislation that would authorize fees for parties who don't prevail at all. An early version of the Equal Access to Justice Act expressly had such a provision in it.

The Justice Department objected to that proposal as being radical and unacceptable and Congress immediately dropped it from the Act so that the Act as passed now requires a plaintiff to prevail. The fact is that Congress has never passed a statute that says the winning party is to pay the other side's attorney's fees, even though it has had the opportunity to consider legislation that would do that.

On the other hand, in several statutes cited in our brief, Congress has authorized the payment of attorney's fees just to allow citizens to participate in agency rulemaking proceedings, even when their views are not adopted. So, there's no question that Congress knows how to draft the kind of language that the Court of Appeals read into the statute in this case. But the obvious fact is that that language just isn't here.

Respondents claim that if the government's position were correct, there would have been no need for Congress to change from the prevailing party standard that it's used in other statutes and switch to an appropriate standard. But what they've overlooked is that in 1970, which is the year that this type of standard was first passed, the courts were interpreting prevailing to mean that a party had to have a technical final, favorable judgment in his favor in order to be

eligible for fees.

It wasn't until at least 1976 or 1977 that the courts started liberalizing the interpretation of prevailing party so that in 1970, for example, when the origin of this statute first came into being, a party who prevailed by way of settlement would not necessarily have been treated as a prevailing party for purposes of an attorney's fee award.

And it was, therefore, necessary in 1970 for Congress to adopt a different standard than the prevailing party standard in order to bring in to that group of plaintiffs elibible for fee awards plaintiffs who accomplish their result without getting a favorable final judgment.

That situation, that state of the law is, as regards the meaning of prevailing party, continued up through 1976, 1977, in fact it wasn't until 1980 that this court held that a party who obtained relief by way of settlement could be deemed a prevailing party for purposes of attorney's fee awards.

So, in our view, at the time this statute was first passed it was, in fact, necessary for Congress to adopt a different standard, the appropriate standard. But that doesn't go as far as respondents would take it or as far as the Court of Appeals would take it to show

that Congress actually intended or even thought about the notion of paying fees to parties who accomplish no tangible benefit.

I would also remind the court that, given the country's long tradition against fee shifting, and given the fact that we're aware of no other situation in which a winning party has been ordered to pay a losing party's fees, it's simply not plausible to assume that Congress would have passed this type of legislation without mentioning it, without debating it.

QUESTON: Ms. Oberly, isn't it a little bit of an overstatement to say winning party never pays the losing party's fees? What about all our criminal litigation?

MS. OBERLY: Under the Criminal Justice Act. You're right, Your Honor, but that's not directly against the opponent. Here, this is the victorious party, EPA, paying the other side's fees and what's more important, or equally important, is that the statute is not limited to the government as defendant.

Section 304 of the Act, the citizen suit provision, would have private parties being a defendant as often as the government and I find it implausible to think that Congress would have assessed attorney's fees against a winning corporate defendant without saying

that it actually meant for the winning corporate defendant to pick up the other side's legal fees. There's nothing in the legislative history to show that Congress contemplated that.

As far as the government is concerned, the situation here is really quite similar to what the court had before it in Lehman v. Nakshian where the court took a look at what Congress's strong and unbroken prior practice had been with respect to jury trials and concluded that express and unequivocal language was needed before the court would presume a change was intended --

QUESTION: But that wasn't an abuse of discretion case, was it?

MS. OBERLY: It was a statutory construction case and basically --

QUESTION: And it wasn't -- and this you admit is an abuse of discretion case? You admit that?

MS. OBERLY: And it's a statutory construction case, Your Honor, in terms of interpreting what appropriate means. It's first a statutory construction case and then, did the Court of Appeals abuse the discretion once the statute is properly interpreted.

I think it's really undisputed in this case by respondents that they didn't win any of their claims on

the merits and so what we're left with is whether they still somehow helped to accomplish a goal of the Clean Air Act. And again, we think judicial review is not a goal the Congress set in and of itself.

So all respondents can claim they did was get the Court of Appeals to render a decision validating what EPA had already done. Their lawsuit did nothing to change, improve, alter EPA's administration or implementation of the Clean Air Act.

They claim to have achieved certain public benefits, but as we have shown in our reply brief, those benefits are completely lacking in substance and there are just two of them that I'd like to mention here.

First, EDF claims that it forced the government to disclose important documents that had never before been revealed. That claim is simply false. What EPA, excuse me, what EDF wanted was to depose high-ranking EPA officials from the administrator on down. That request was denied by the Court of Appeals as inappropriate and unnecessary and instead, what EDF got was affadavits describing what they aleady knew, the fact that meetings had taken place.

So as far as we're concerned, this case isn't even as strong a claim for fees as Hanrahan v. Hampton, in which the court held that a victory on procedural

issues that doesn't relate to the merits is insufficient for an attorney's fee award. Here, EDF didn't even get the procedural victory that it wanted and it certainly didn't get any relief on the merits.

EDF also claims that the court's merits opinion changed the -- caused the government to alter the way it handles ex parte communications in rulemakings. Again, that's not true. The court found that EPA's procedures were just fine the way they were before this lawsuit was brought and EDF has not shown that those procedures have been altered in any way since the decision.

As a final point, I'd like to make it clear that we're not downplaying the importance of allowing citizen plaintiffs full access to the courts. But our position does not mean that that access will be cut off.

If the court holds that a plaintiff has to accomplish something concrete before it can expect to have the government pick up the bill, it will still be sufficient incentive, economic incentive, for plaintiffs with meritorious cases to bring suit. That's all Congress ever indicated it was authorizing and we believe that anything going beyond that, such as the Court of Appeals decision in this case, is an abuse of discretion and inconsistent with the statute that

Congress has written.

I'll save the remainder of my time.

CHIEF JUSTICE BURGER: Mr. Tyler.

ORAL ARGUMENT OF HAROLD R. TYLER, JR., ESQ.

ON BEHALF OF RESPONDENT

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

Harold Tyler for the respondents, Sierra Club and Environmental Defense Fund.

Basically, our difficulties and disagreements with the United States in this case come down to a difference in reading in the statutory language and quite a substantial difference in our appraisal of the legislative history. Indeed, it seems to me that the government is taking a rather successively naive version of what actually happened in the legislative history.

To begin with, as you know, in 1970 this language did come into the Clean Air Act and some other statutes of an environmental nature. In the year 1970 Section 304 was the area and the type of suit for which Congress did pass this statute saying that fees could be awarded when appropriate.

Unfortunately, the government tends to ignore what happened thereafter leading up to the 1977 amendments which, in very simple terms, we urge, made it

very clear that Congress specifically was trying to address what had happened in the intervening years in terms of appropriate judicial review, particularly of rulemaking.

Congress was certainly aware that Section 304 did not specifically authorize petitions to review regulations or rulemaking. In fact, prior to 1977 at least two courts, the Fifth Circuit and the D.C. Circuit, had held that the law was unclear and that even though Judge Levin Campbell, speaking for the First Circuit, had allowed with his panel a petition for review under Section 307, Congress thought that they should address that problem. And so they did by passing in 1977 very specific legislation underscoring a congressional tenet, we say, to encourage citizens and groups with expertise in the environmental field to seek review of EPA rulemaking.

Now, the government tosses this off as being a situation where they didn't ask for the Sierra Club to come in. They didn't ask for the Environmental Defense Fund to come in, and all of this would have been resolved very much easily, more easily, much more timely, had there not been this petition for review, which you know about, was filed in this important case.

Well, the fact is, we urge that what happened

is that Congress illustrated very clearly that, contrary to what the government argues, they want 307 cases to keep EPA honest, to put it in simplistic, blunt terms. But more importantly and more fairly, perhaps, they wish to encourage outsiders, particularly outsiders like these two organizations, who have competence to handle these complex cases.

QUESTION:. Well, Mr. Tyler, that would be something of a new departure. I would think Congress would have said so in so many words if they had intended that.

MR. TYLER: I think, Justice Rehnquist, that of course Congress didn't have, the legislative history doesn't have somebody saying look, this year, 1977, we want the phrase when appropriate, which we're going to continue for 307 cases, to mean that even losers get fees. They didn't say that. That's true. But here's what they did say.

The House and the Senate were aware that the First Circuit had reasoned that in a case, which as the government fairly points out, there the environmental groups were not total losers, in the old fashioned tort contract --

QUESTIONS: They won on some issues?

MR. TYLER: Yes. But the rationale of Judge

Campbell seems to us to be very clear and seems, more importantly than to us, to the Congress to have indicated, as Judge Campbell pointed out, that there should be an encouragement for citizen suits in this complex field where people just don't have the money or the competence or the expertise to, you know, just sort of come in and do it easily.

This is a case where not any doubt, I think, what Congress intended to do was not to reward counsel in the sense of giving restitution to counsel or their clients, such as the Sierra Club or EDF, but to encourage them to come in and speak their piece in judicial review proceedings.

QUESTION: Well that's a perfectly understandable motive if Congress, indeed, did entertain it. But my question still remains, why didn't they spell it out to some extent, rather than simply using the word appropriate?

MR. TYLER: Well, there is language in the legislative history, concededly, if I were standing here today and had a chance to rewrite what was said, I'd have it a lot clearer, I agree. But there's a number of strands of evidence, if you will, Justice Rehnquist, indicating the Congress understood quite clearly that this isn't a simplistic situation, like the government

argues. The results didn't clean our air in a measurable sense, ergo, nobody gets counsel fees. I don't really think the government means to argue that ultimately.

The point is, the legislative history shows that it would be in the public interest, as Congress saw it, to permit judicial review of rulemaking on a timely basis, a 60-day statute of limitations, and they encourage private individuals and institutions with lawyers to come in and do this and to even get paid when they lost. And the Court of Appeals, in this case, saw that point, as did the First Circuit. Congress saw the point.

You see, the government keeps trying to tie us in to the legislative history of 304 in 1970. There's a good reason for that. They don't want to see anything develop to indicate and anticipate and take care of what happened in the year 1977.

They want to treat this as if it's an old fashioned, simple litigation, or even a fairly modern, simple litigation, like an abatement case. Of course this isn't an abatement case.

They also suggest that private parties could be defendants. Section 307 suits, I'm sure Ms. Oberly misspoke. She knows that you cannot be a defendant if

you're a private party in a 307 petition for review unless you are brought in as an intervenor. So that, conceding that the history is not clear, as either the government would like or the respondents would like, we argue the balance tips in favor of what the Court of Appeals did in this case.

Now, the government also likes to downplay this case and say, well you know, there really weren't that much happened. It began, all in '79, it was routine. It's a little more than that. Back in 1973, groups out in the west began to be concerned about emissions of sulphur dioxide, particularly in the western coal-fired utility plants.

It is true, as the government says, that in 1975 was really the formal kickoff, but there's been a long and tortuous history, not only under the banner or case name of the case that we're here before you this morning, but in a case before Judge Skelly Wright in 1975, as I recall, brought by some of the Indian tribes, raising this issue.

We're talking in this case about an issue that engendered a simply enormous, complex record. It's also a little bit disingenuous, it seems to me, to argue that these people who came in here for the Sierra Club, particularly in terms of the merits issues and then

later EDF, in terms of the administrative law issues which were settled in this case, to say that nobody won anything.

Obviously there was the win in the sense that the public, in the broad sense, had somebody coming in to petition for review where you had a brand new Section 111 of the 1977 Act dealing with standards for emissions of sulphur dioxide.

And one of the great issues that was resolved here, and it wasn't an easy issue, and the Court, contrary to the government's position, said it wasn't an easy issue, and that was the variable standards, west as opposed to east, for emissions of coal-fired utility smokestacks.

QUESTION: Mr. Tyler, is there any reason to think that the same result wouldn't have been reached simply if the government had defended its own position without the help of the environmental groups.

MR. TYLER: Your Honor, as an ex-bureaucrat I'd like to admit that there is some grounds for thinking that the government possibly reaches the same result without citizen intervention.

QUESTION: Occasionally.

MR. TYLER: The point is that Congress has said, though, there should be citizen intervention. We

really don't know. It is true, as Ms. Oberly says, that the court sided with EPA. We have to concede that. But here we have a 12,000 page record, briefs, papers, 7,000, so on. As you know from the Court of Appeals opinion, they had a very lengthy one. This wasn't as easy as the government suggests.

Now who can do a better job about complex issues than this than organizations such as these respondents?

QUESTION: The only thing is, they took their chances and lost.

MR. TYLER: Ah. We argue, Mr. Justice White, that Congress contemplated that.

QUESTION: I understand that.

MR. TYLER: This is not a statute designed to restore and look back and say we only reward winners. This is a statute which as a policy matter, Congress said, look, the best way to encourage judicial review is to say we'll even pay losers in approprite circumstances.

Incidently, there's an excellent law review which came out. I say it's excellent, concededly, because it supports our rationale, but I think it's better than that. It goes into this a bit. It's a note which appears at 96 Harvard Law Review, beginning at page 677. I don't think anybody had a chance by the

time the briefs were in to include it. But I point it out to the court because it deals with this issue, Justice White.

We say that this is a statute which you have to approach a little different than typical American fee shifting statutes.

QUESTION: I agree, you do have to. If you win, you must approach it considerably differently.

MR. TYLER: Well, different in the sense that it isn't the frequent thing. But this isn't the first time that a loser has ever been awarded fees in American federal court.

Take a very simple situation, old Chapter 10 reorganizations. Many people get fees in those proceedings and they don't win anything. Supposing you're representing an indenture holder, a bond.

QUESTION: I used to collect fees like that.

MR. TYLER: You don't win anything. You don't win, I dare say. At least, in the classic, technical sense.

QUESTION: But that's the -- where you have a fund out of which the fees are paid.

MR. TYLER: Ah. True. That is a distinction. We do not have, of course, the classic fund situation.

QUESTION: And a distinction that was critical in Alyeska.

MR. TYLER: Fine. But think again about how we award, true, by statute, fee out, if you will, the legislature fees to lawyers who represent defendants in criminal cases and, you know, in certain Circuits it's very hard to win a criminal case at all and the United States pays the lawyers.

QUESTION: Of course, there the purpose is to provide the criminal defendant with an attorney.

MR. TYLER: Right. And we argue that here the purpose is to provide the Congress -- the American people, but purports in the limited sense we are dealing with here, somebody to come in and speak for the environmental interests.

QUESTION: Well, but the Criminal Justice Act is express when it says our purpose is to provide a criminal defendant with an attorney in every case, win or lose.

MR. TYLER: Admittedly, it's clearer language. I have to concede that, but if you analyse the interplay between what happened in 1970, particularly in courts, then what happened in the Congress, in such evidence as we have -- obviously both Ms. Oberly and I both would agree we'd like, from our

respective points of view, to have clearer statements, but we say the only fair construction is that Congress wanted to encourage this type of litigation and recognized that the way to do it was to hold out that in certain cases, not all, even if you lost, you'd get paid.

Now let me add to that something which I think is important. The government may be arguing, among others, that it is poor policy to encourage suits by paying losers.

Now, of course, none of us, I assume, certainly in our briefs we don't have any studies to show whether this is true or not, but let me say that I think that Congress was aware in 1977, and indeed even back in '70, that you'll get frivolous lawsuits no matter what you do. And my answer to that is, look, if judges can't smell out frivolous lawsuits, I will be surprised.

So that the next step to go with, and I think the government may be trying to say this is, that if you have a statute permitting payment of losers, you may get more frivolous lawsuits. I don't believe that's true and I think human experience proves it's not true.

It's better to encourage, particularly citizens and groups who know something about environmental problems, to come in and petition for

review and get payment, in appropriate cases only, where they lose, than to discourage them totally so that they won't even bring petitions.

And finally, let me make another point here. The government says, with some plausible record basis for it, that the problem is that Congress didn't flesh out the words where or when appropriate and that, of course, is literally true. But our argument on that is understandable to you all, I'm sure, and it is simply that courts have long, whether federal, state or local on whatever issue, been able to exercise discretion with even less precision than this.

And a good example is the cases here in this Circuit, which, of course, is where you're going to get most of the cases. Following our case, there was on the same day, an eloquent dissent by Judge Wilkey in Alabama Power in which he said that when appropriate was very vague and it put the court in the political thicket and so on and so on.

Time passes and in a case which sometimes lawyers refer to as North Slope v. Andrus, or as in our briefs is called, Village of Kaktovik v. Watt, Judge Wilkey himself accurately summed up the holding of the panel in this case, applied those rules, if you will, or those criteria; came to the conclusion that in that case

the losers did not deserve to win, parsing out all of the criteria that would make sense to any judge or court that ever has fixed fees on any basis.

Therefore, we sum up and say to Your Honors that this is a case where Congress clearly intended to say under the appropriate circumstances, subject to the sound discretion of the fee fixing panel or court, there can be fees paid in these environmental cases, even where there has been a technical loss on petitions for judicial review.

Thank you, very much.

QUESTION: Mr. Tyler, if this had been a Section 304 suit and the defendant had been a small to medium size business, would you be making this same argument under 304?

MR. TYLER: Not entirely, because there --

QUESTION: Is the language different?

MR. TYLER: The language is not different, but I would answer you and admit that I would argue differently because I think there a court would apply its discretion differently.

QUESTION: Why should it in light of the language? Couldn't it argue, couldn't it be argued that the interpretation of the statute had been consistent with the goals of the act, which is your argument

basically?

MR. TYLER: Well, I can see the argument.

QUESTION: Do you think any judge would award fees to a lead loser in that sort of case against a small business?

MR. TYLER: I would, if I were exercising the discretion, concedely, not award fees if I were the panel. I admit that. But I would answer, though, that this could be done and, indeed, already has been done, even in a 307 environment. That really, to me, seems to be the point of Village of Kaktovik under the same language. But certainly, taking the case you quote, I would have to concede I'd come out differently, but I would urge that it matters not that the same language is used by Congress.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Ms. Oberly?

ORAL ARGUMENT OF KATHRYN A. OBERLY, ESQ.

ON BEHALF OF PETITIONER -- REBUTTAL

MS. OBERLY: A few points, Your Honor.

Mr. Tyler accuses the government of focusing on the 1970 Act and trying to ignore what happened between 1970 and 1977. But, in fact, the language of the two statutes is, word for word, identical, and the

Senate report in 1977 indicates that all Congress wanted to do in 1977 was conform the two sections so that they would mean the same thing.

So, we think it's clear that the 1970 legislative history is the relevant legislative history that the court has to examine.

There is one other final point. I'd like to say that we disagree strongly with respondents that Congress has evidenced an intent to encourage litigation. Congress has made it possible for citizen groups to litigate when they want to and has done so by providing that they'll be paid if they actually accomplish something, but we have read the legislative history in the statute from one end to the other and find no evidence that Congress was trying to increase litigation or to encourage litigation.

I'd also point out that civil rights plaintiffs who have to prevail in their statutes have not been discouraged from bringing cases by the requirement of prevailing. To say that Congress wants to encourage litigation is really to say something that has never been said on the floor of the Congress.

Thank you.

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

(Whereupon, at 10:44 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

#82-242 - ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, Petitione
SIERRA CLUB, ET AL.

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