OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-385

TITLE WILLIAM E. BROCK, SECRETARY OF LABOR, Petitioner V. PIERCE COUNTY

PLACE Washington, D. C.

DATE April 1, 1986

PAGES 1 thru 50

(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM E. BROCK, SECRETARY :
OF LABOR, :
Petitioner, :
V. : No. 85-385
PIERCE COUNTY :

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Washington, D.C.

Tuesday, April 1, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:46 o'clock a.m.

APPEARANCES:

ANDREW J. PINCUS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the petitioner.

JOSEPH F. QUINN, ESQ., Special Deputy Prosecutor for Pierce County, Tacoma, Washington; on behalf of the respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Brock against Pierce County.

Mr. Pincus, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ANDREW J. PINCUS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PINCUS: Thank you, Mr. Chief Justice, and may it please the Court, the federal government disburses billions of dollars to state and local governments pursuant to a variety of grant programs. A recipient of such a federal grant must agree to abide by statutory and regulatory requirements designed to ensure that the grant will further the goals of the federal program, and the relevant statute typically provides that a grant recipient must repay to the federal goverment any funds spent in violation of those statutory and regulatory requirements.

This authority to recoup unlawfully spent federal funds generally serves as the federal government's principal method of enforcing compliance with these grant requirements, and thereby ensuring that grant funds are used by recipients in a manner that furthers the public interest.

This case concerns the government's ability to

utilize this enforcement authority with respect to grants under the Comprehensive Employment and Training Act, generally known as CETA.

The specific question presented here is whether a procedural statute establishing a time limit for agency action should be interpreted to cut off the federal governments' authority to recover unlawfully disbursed grant funds and thereby immunize grant recipients from this obligation to repay such funds to the United States.

The CETA funds that are specifically the subject of this action were expended by respondent during the years 1974 to 1977. CETA was a federal program designed to increase employment opportunities for economically disadvantaged persons.

The Secretary of Labor disbursed funds to states and localities who operated employment programs, and the states and localities in turn agreed that their programs would comport with the requirements set forth in the federal statute and the regulations promulgated by the Secretary.

Department of Labor officials conducted two separate audits of respondent's expenditures of CETA grant funds. The audits uncovered some irregularities, and pursuant to the applicable regulations, the audit

reports were transmitted for further review to the grant officer who administered respondent's grants.

It is the receipt of these audit reports by the grant officer that provides the basis for respondent's invocation of the statutory provision that is in issue in this case. This provision, Section 106(b) of the CETA statute, states that the Secretary of Labor shall issue a final determination within 120 days of the receipt of a complaint alleging the unlawful use of CETA funds by a grant recipient.

Here, the grant officer did not issue a final determination with respect to the information uncovered in the audits until more than 28 months after his receipt of the reports. The grant officer found that certain of respondent's expenditures violated CETA requirements principally because respondent had used the federal funds to hire persons who were ineligible under the federal standards of the CETA program.

The grant officer therefore ordered respondent to repay to the United States an amount equal to the misspent grant funds. Respondent appealed the grant officer's determination to an administrative law judge pursuant to the scheme set forth in the statute and regulations. And in addition to challenging the grant officer's substantive determination about the propriety

of its expenditure of funds, respondent claims that the grant officer's repayment order was invalid because it was not issued within the 120-day time period set forth in Section 106(b).

Now, the Administrative Law Judge specifically addressed this claim, and found that respondent had suffered no prejudice because of the delay in issuing the repayment order. It therefore rejected respondent's claim that Section 106(b) rendered the repayment order invalid, and the Administrative Law Judge himself issued an order directing respondent to repay a total of $373,000, the amount of grant funds that he determined to have been expended in violation of the substantive rules of the CETA program.

QUESTION: Mr. Pincus, may I ask what the government's position would be if the ALJ had found prejudice?

MR. PINCUS: Well, Your Honor, in our reply brief we discuss that problem to some extent. Let me state as a preliminary matter that it seems quite unlikely that any prejudice could be found simply because of the way the process operates.

The grant recipient gets notice -- at the same time that the grant officer gets the audit report, the grant recipient gets notice that there are some

irregularities that are being questioned, and therefore at that initial date he is on notice that he should be preserving documents and preparing his case.

QUESTION: Say there was an earthquake or something, and they lost the document. Would you answer my question?

MR. PINCUS: Sure. No, I am sorry, I was going to come to that. If there is a showing of prejudice, and if there is no excuse for the Secretary's delay, we think that in an appropriate case, that some either the withdrawal of the repayment order or some other equitable adjustment of the remedy might be appropriate.

Of course, we think that the appropriate test probably is a test similar to the Barker against Wingo four-factor test that looks to the length of the delay, the reasons for the delay, whether or not the grant recipient in this case has invoked any right that he might have to a speedy determination, and if the balancing of those factors indicates that there is prejudice, then we think some adjustment would be appropriate.

QUESTION: Thank you.

MR. PINCUS: The Ninth Circuit reversed the Administrative Law Judge's determination, and held that

Section 106(b) prohibited the Secretary from recovering misspent CETA grant funds whenever a final determination is not issued within 120 days. The Court of Appeals rested its conclusion upon what it viewed as the plain meaning of the statute. It observed that Section 106(b) states that the secretary shall issue a final determination within 120 days, and concluded that the simple use of the term "shall" barred any subsequent issuance of a repayment order.

The Court of Appeals rejected the Secretary's argument that the legislative history of Section 106(b) showed that Congress did not intend to impose any limitation upon the Secretary's enforcement authority.

Now, we submit that each of the Court of Appeals' conclusions was demonstrably incorrect. Both the language used by Congress in drafting Section 106(b) and the relevant legislative history make clear beyond any doubt that this provision should not be interpreted to limit the Secretary's authority to recover unlawfully spent federal funds.

Indeed, three Courts of Appeals, including the Eighth Circuit and the decision that was issued last week have agreed with our position regarding the proper interpretation of Section 106(b).

The Ninth Circuit's basic error was its

failure to correctly identify the question of statutory interpretation that is presented here. The Court of Appeals found that the 120-day time limit was mandatory, and then assumed without making any further inquiry that the effect of the time limit was to restrict the Secretary's enforcement authority.

But even when a time limit relating to government action is mandatory, rather than simply directory, there remains a second inquiry. It is necessary to determine the proper remedy for the government's failure to comply with that time limitation.

In our view, Section 106(b) should be read to confer upon interested parties a right to an expeditious determination regarding the propriety of the grant officer's expenditures, a right which could be enforced by obtaining an order from an Administrative Law Judge, for example, directing the grant officer to issue his final determination expeditiously where the grant officer has failed to act within 120 days.

We think it is plain that Congress did not intend the remedy to be the cutting off of the government's right to recover unlawfully spent funds simply because the Secretary did not act within the relevant time period.

Now, Section 106(b), of course, is silent regarding the appropriate remedy in the event the Secretary fails to act in a timely manner. But this Court's decisions and a long line of decisions in the Courts of Appeals make clear that this silence itself is dispositive of the question of the appropriate remedy.

The Court frequently has observed that statutes should be interpreted to protect the public interest against the consequences of delay by public officials, and it has refused to construe statutory time limits to bar actions commenced by the United States, for example, unless there is a clear indication that Congress intended that result.

And the practical common sense of such a rule is quite obvious. Congress often attempts to spur agencies to quicker action by including in a statute requirement that regulations be issued in a certain number of days, or that another type of administrative determination be made within a specified period.

QUESTION: It was certainly unsuccessful here, wasn't it, in spurring the Labor Department to any quick action.

MR. PINCUS: Well, unfortunately, Your Honor, by 1978, when Section 106(b) was enacted, the Labor Department was already so far behind that it was -- they

had a long backlog to catch up with before they could even begin to process new actions in a timely manner.

Unfortunately, the burdens of a lot of complaints and a lot of audit results and the lack, perhaps, of sufficient staff just made it impossible for the Secretary to comply with this time limitation in many cases.

QUESTION: Mr. Pincus, can I ask, I know there are a lot of cases that say that unless the statute of limitations expressly applies to the government, we don't read that in.

Here, of course, it clearly does apply to the government, and your argument, rather, is that they didn't specify a remedy for failure to meet the time, and there is a general rule that then there is no remedy, I guess, or no significant remedy.

What is the case that most directly supports that argument that you rely on, the strongest authority you have for that proposition?

MR. PINCUS: A case in this Court, Your Honor?

QUESTION: Yes.

MR. PINCUS: Well, I think there is no case in this Court that -- decided by this Court that directly supports that proposition. I guess the cases that are

closest to this Court's decision in Wurts and the Wheland case and the St. Paul Railroad case, because in those cases it was clear that Congress had enacted a statute of limitations, and the question was what the scope of the limitations, what actions would be encompassed within the statute of limitations --

QUESTION: No, I put that group to one side, because here it is clear that the statute does apply to the government, and my question is, and the basic argument you make, as I understand it, is, yes, but they didn't tell us what the consequence of the failure to comply with the deadline was, and you say if they don't tell us the consequence you can ignore the statute, and I was just wondering if there was any -- really any authority for that argument.

MR. PINCUS: Well, Your Honor, we don't say that they can ignore the statute.

QUESTION: When you press it --

MR. PINCUS: There is a different remedy available for the government's failure to comply.

QUESTION: What is the remedy for the failure to comply here?

MR. PINCUS: The remedy would be an injunction from an Administrative Law Judge directing the government to act expeditiously.

QUESTION: Please sue us. Please start the proceedings to recover money from us.

MR. PINCUS: Well, Your Honor, the remedy may seem a little odd in this circumstance, because, as I will discuss later in my argument, the purpose of Section 106(b) was not to protect grant recipients at all, it was just to protect the people who filed complaints, and those people clearly would have incentives to get an order to direct expeditous action.

QUESTION: You don't think the grant recipients have any interest in knowing where they stand on these claims.

MR. PINCUS: Well, Your Honor, if they have such an interest, then they should invoke it. It is like the speedy trial. It is like the speedy trial clause questions. In a way, the invocation of a speedy trial right is a criminal defendant asking to be tried, but if the defendant wants to know where he stands, then he has to invoke the right, and this Court has said whether or not the defendant invokes his right is an important question in determining whether or not your rights have been violated, and the same -- we think the same kind of analysis applies here.

If the grant recipient is concerned about expeditious resolution, then the grant recipient has --

QUESTION: Of course, the speedy trial analysis that you talk about is one where there is no specific deadline. When there is a deadline, it is a little different. Then they don't have the balancing of four or five factors.

MR. PINCUS: We think the factors are relevant. In this Court's decision in 8850, it applied the Barker against Wingo tests to see how long delay permits, although there, too, there was not a specific deadline, but we think it is still appropriate in deciding what remedy is appropriate.

QUESTION: What about the Courts of Appeals? I take it you have support in the Courts of Appeals for your position.

MR. PINCUS: Yes, Your Honor, both with respect to this particular statute, three Courts of Appeals have ruled in our favor in respect to our general principle that statutory time limits on agency action do not cut off the government's authority in the absence of express consequences. That is a proposition that has been endorsed by a large number of Courts of Appeals.

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

MR. PINCUS: Thank you.

(Whereupon, at 12:00 o'clock noon, the Court was recessed, to reconvene at 12:58 o'clock p.m. of the same day.)

AFTERNOON SESSION

(12:58 P.M.)

CHIEF JUSTICE BURGER: Mr. Pincus, you may resume.

ORAL ARGUMENT OF ANDREW J. PINCUS, ESQ.,
ON BEHALF OF THE PETITIONER - REBUTTAL

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

As I discussed in my remarks before the lunch break and in my colloquy with Justice Stevens, we submit that the general principle underlying a number of this Court's decisions that the public interest should not be sacrificed due to the negligence of government officers itself supports our reading of Section 106(b).

However, the legislative history of the provision independently mandates the conclusion that Congress did not intend to limit the Secretary's enforcement authority by enacting a provision, and this conclusion is supported both by the specific legislative history of the provision and the general purposes of the 1970 CETA amendments that included Section 106(b).

With respect to Section 106(b) itself, the legislative history establishes that the provision was enacted to protect individuals who had filed complaints against grant recipients such as respondent. The 1973 CETA statute had authorized individuals employed in CETA

programs as well as other interested parties to file complaints with the Secretary of Labor alleging that a grant recipient had failed to comply with the applicable statutory or regulatory requirements.

For example, an employee might allege that a grant recipient was paying improperly low wages. Congress found in 1978 that the Labor Department was not processing these complaints within a reasonable time, and that it therefore enacted the 120-day time limit in Section 106(b) to remedy this particular problem.

Section 106(b) thus was designed to enable CETA program beneficiaries to enable more expeditious -- to enable -- to obtain, rather, a more expeditious resolution of their claims against grant recipients.

QUESTION: Mr. Pincus, does the legislative history that you are referring to give any indication of what Congress thought should be done at the end of 120 days?

MR. PINCUS: Well, there is both specific legislative history regarding this question, and we think the general purpose compels the conclusion that we are supporting. First of all, the author of the language that became Section 106(b), Congressman Obie stated specifically in the House of Representatives that the Secretary's failure to comply with the Act within

120 days did not remove the Secretary's jurisdiction to act in the matter. So, we think that definitively resolves the question whether or not Section 106(b) eliminates the Secretary's enforcement authority. It simply doesn't.

In addition, the contrary interpretation of Section 106(b) adopted by the Court of Appeals would turn the purpose of the provision on its head. Instead of protecting the rights of the complainants, Section 106(b) would extinguish their rights whenever the Secretary failed to act within 120 days, and neither the legislative history nor the purpose would justify such a perverse reading of the statute.

QUESTION: Mr. Pincus, Justice Rehnquist asked you if there was anything in the legislative history that indicated what was supposed to be done at the end of the 120 days. What is your answer to that question? What did they think the 120 days was supposed to require?

MR. PINCUS: Well, the provision required the Secretary to act within 120 days.

QUESTION: And if he doesn't act, what does the statute imply should be done?

MR. PINCUS: The statute is silent on the matter, and we think that Congressman Obie's comments

and the purpose of the statute itself requires the conclusion that it would make no sense for a claimant's rights to be cut off. We think that a more appropriate remedy would be an order from an Administrative Law Judge directing the Secretary to Act to issue the final determination that had not been issued within the 120-day period.

QUESTION: Does an Administrative Law Judge have the power to issue that sort of an order to the Secretary?

MR. PINCUS: Well, he would be issuing the order to the Secretary's designee, to the grant officer in this particular case. It is -- the Secretary has delegated to the grant officer the power to issue these final determinations, and we think that he could do that, and that in fact is what happened in the Milwaukee County case. The grant officer had failed to act on a complaint with 120 days. The complainant went to the Administrative Law Judge, and the Administrative Law Judge issued such an order, and the grant officer issued the final determination. We think that is a more appropriate administrative procedure, because it reconciles the interest in expedition with the interest in protecting complainant's rights and enforcing the requirements of the CETA statute.

QUESTION: Are you saying that the purpose of the statute is to protect the right of the complainant, in effect, the private party? Because if you are, you cited the case of French against Edwards to us at Page 12 of your brief and quoted one sentence out of the opinion, and then in the next sentence that talks about where the deadline is for the protection of the citizen, why, then the direction shall be mandatory. You didn't quote that language.

MR. PINCUS: Well, Your Honor, I think we are confusing two different private parties. There is a grant recipient who is, like respondent here, the party that gets the money from the federal government, and then there is a party that files a complaint alleging that such a grant recipient has misused federal funds.

So, we think that Section 106(b) plainly was enacted to protect the rights of complaints, not to protect the rights of grant recipients such as respondents, because Congress was responding to the problem that complaints had not been acted on within a timely fashion. It wasn't concerned about the question of whether or not grant recipients might be prejudiced by that delay. It was concerned about whether the complainants and employees of people like grant recipients were prejudiced because their claims weren't

being acted upon in a timely fashion.

QUESTION: Is there some sort of a qui tam or informer provision regarding these potential plaintiffs who are going to file complaints about the use of CETA funds?

MR. PINCUS: I am sorry, Justice Rehnquist. I am not familiar --

QUESTION: Something whereby they get a certain percentage of what is recovered.

MR. PINCUS: I am not familiar with such a provision, but in many cases the complaints would be to enforce their own rights. For example, in the situation where the employee of a grant recipient is being paid low wages, that employee might file a complaint with the Secretary because his own wages should be set at a higher level.

QUESTION: So he would benefit in that way.

MR. PINCUS: He would benefit because he would get an award of that compensation and a future adjustment to the salary.

So, I think it is crucial to an understanding --

QUESTION: I must confess, I find it hard to envision that kind of -- usually the federal government is trying to get money back from state municipal

governments. How would they get government money back if they had been underpaying somebody? I don't understand that example.

MR. PINCUS: Well, let me step back for a second, Justice Stevens. There are two possible types of administrative actions that can be prosecuted against grant recipients. In one case, an individual such as an employee of the grant recipient can file a complaint alleging that the grant recipient has done something wrong, and that that particular individual has been harmed in some way. That would be the example of the policeman who is being paid with CETA funds but was getting a wage that was impermissibly low under the federal statute standards.

QUESTION: And that kind of case would not give rise to a recovery of funds action by the federal government, I don't suppose.

MR. PINCUS: In that kind of a case, the recovery would go to the particular complainant who had been wronged. That is the kind of case that Section 106(b) is designed to deal with. There is a separate kind of case where after the grant recipient had spent its money, its expenditures are audited by the federal government or a private auditor and some irregularities may be found, and the question is whether the federal

government may recover those misspent federal funds.

That is the kind of a case that is at issue here, and we think it makes no sense to interpret Section 106(b) in this context any differently than in the other context. It shouldn't cut off the right to enforce CETA's provisions against the grant recipient.

QUESTION: But, Mr. Pincus, apparently the Secretary's own regulations say that an audit report triggers the 120-day period even though it isn't a complainant as you have described, so do we defer to the Secretary's interpretation then?

MR. PINCUS: Well, Your Honor, we don't think that the Court has to decide here, and we haven't presented the question whether Section 106(b) actually applies only to complaints or applies to both audits and complaints. We think assuming the question rather is what the effect of a violation of Section 106(b) is either situation.

And we think the effect is the same in both contexts. It doesn't cut off the complainant's rights to get a remedy, and it doesn't cut off the Secretary's right to recover misspent federal funds. It rather gives both the complainant in one case and the grant recipient in the other case the right to obtain more expeditious processing of the complaint or the audit

result.

And as I mentioned before, Congress itself expressly considered this question of what the appropriate remedy should be for a violation of Section 106(b), and specified that the provision did not limit the Secretary's enforcement authority.

QUESTION: When you say Congress, you don't mean the Congress itself did that. There is legislative history supporting the view that some Congressmen thought that was --

MR. PINCUS: The Congressman who was the author of this particular language stated that in a colloquy with the floor manager of the House bill, and that is legislative history that the Court has said in previous instances is entitled to considerable weight, and we think that is especially so here, because there isn't any contradictory legislative history as to what the proper remedy for a violation of Section 106(b) should be, and because that comment fits so closely with the purpose of the provision.

Again, it just -- it wouldn't make any sense that the remedy for the Secretary's failure to comply with a provision that is supposed to protect complainants would be to dismiss the complainant's claim. And that is essentially -- that is the

construction of Section 106A(b) that respondent contends for.

We don't think that Congress could possibly have intended that result.

Finally, just a word about the general purpose of the 1978 CETA amendments, which also supports our conclusion. Those amendments in general were designed to strengthen the Secretary's enforcement authority. The legislative history is replete with comments, both the committee reports and in the debate on the floor, that Congress wanted CETA requirements to be applied more strictly to grant recipients, and it would be inconsistent to interpret Section 106 in a manner that would handicap the Secretary's enforcement efforts and provide grant recipients with a windfall by protecting them from their obligation to pay what are clearly unlawfully spent federal funds.

For these reasons, we think that the Court of Appeals erred, and the judgment of the Court of Appeals should be reversed.

QUESTION: May I ask just one other question, because I still have a little trouble visualizing the claim of the complainant who wants some money of some kind, an underpaid police officer or something like that. Who would be his adversary in a proceeding?

MR. PINCUS: His adversary -- the way the program works is, the grants are given to an entity such as Pierce County --

QUESTION: Right, and they --

MR. PINCUS: -- and -- the policeman.

QUESTION: Right, and then who would the policeman be suing?

MR. PINCUS: He would be filing a complaint against Pierce County.

QUESTION: That really doesn't go to the question whether the Secretary completed the 120-day -- I mean, the Secretary can avoid compliance with the 120 days. I just -- the cases we are dealing with are cases where the United States government is going against the local governmental unit trying to recover funds that were misused. I don't understand why --

MR. PINCUS: Well, Your Honor, the 120-day sentence in Section 106(b) by its terms applies only to those kinds of --

QUESTION: Well, I understand, but it is just so counter -- how your regulations make it applicable to this case.

MR. PINCUS: Yes, but we think the effect of the provision should be considered by reference to what Congress's purpose, what Congress was thinking about

when it enacted the provision, and what Congress was thinking about were those kinds of complaints filed by the underpaid policeman, and since it couldn't have meant to cut off those complaints --

QUESTION: We don't have before us the question whether the failure of the Secretary to act promptly in response to an underpaid policeman's claim would bar his claim six or eight months. That is just -- nothing in the statute suggests that. The question is whether the Secretary's own failure to act bars the Secretary's claim.

MR. PINCUS: But, Your Honor, the basis for the claim that our enforcement action is barred is the same 120-day provision that applies only to complaints. So they can't be separated --

QUESTION: Yes, but I don't know how you could reasonably say that the Secretary's failure to act would bar a policeman's claim. That is what I -- whereas you could reasonably say that the Secretary's failure to act bars the Secretary's claim.

MR. PINCUS: Well, Your Honor, because if the Secretary's failure to act barred the Secretary's claim, that would be based on the 120-day rule that is set forth in Section 106(b).

QUESTION: Right.

MR. PINCUS: Since that very sentence applies the 120-day rule to complaints, it would of necessity bar any further action on a complaint. There is no way to distinguish the two situations.

QUESTION: Except -- well, all right. I understand your argument.

MR. PINCUS: I would like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Mr. Quinn.

ORAL ARGUMENT OF JOSEPH F. QUINN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. QUINN: Mr. Chief Justice, and may it please the Court, I would like to state a few facts before I delve into the issues. In this case, there was mention of irregularities in the Solicitor General's argument, so I think perhaps we need to say a little bit more about the allegations of irregularities.

It has been said in the last many years that the CETA program was rife with abuses and rife with fraud. And this case comes before you today after a petition for certiorari in which it was stated that there are $72 million in federal funds that would be barred according to the government if you were to rule in favor of Pierce County.

So, I think it is important to mention in that

context that in controversy here is $375,000 of federal grants given in two federal grants, one of which was a smaller one of about $110,000 disallowed, and the other one was $165,000. But in neither of those grants were there any issues of fraud or the kinds of abuses that we hear about so frequently in these cases.

These were irregularities more in the nature of technicalities or in the nature of eligibility violations or failures to maintain documents, and it is very important, I think, for us to realize that the specifics of this case show the reason for the rule. The seven jailers whose wages were disallowed, their wages that were paid over those three or four years where they continued to be employed by Pierce County were paid to them in spite of the fact that they were not unemployed for 15 days before they began to participate.

As it came out through the Administrative Law Judge process and all of the hearings, it was admitted by all parties that they had indeed been unemployed for 15 days, but the local officials had decided that they were eligible prematurely on about the seventh or eighth day.

So, we are not dealing with cases where people were clearly ineligible for this federal program.

QUESTION: Now, what is that distinction again, counsel? You say it was contended that they were ineligible because they had not been unemployed for 15 days?

MR. QUINN: Yes, Your Honor. In this particular program it is a public service employment Title 6 CETA grant, and under the applicable regulations one has to be unemployed for 15 days before they begin to participate, and the administrative law judge agreed with Pierce County that participate means to actually begin earning wages.

However, Pierce County was still liable because they had prematurely decided that these gentlemen were ineligible on approximately the seventh day of the 15-day period.

QUESTION: Well, now, you say they had prematurely decided that they were ineligible or elibigle?

MR. QUINN: No, eligible, Your Honor, because how could one know that the other participant would be indeed still unemployed at the end of the 15-day period if one made the determination on the seventh day.

QUESTION: So they took them into the program when they had been unemployed only seven days?

MR. QUINN: They applied, and were accepted

into the program on about the seventh day. It varied, actually. But --

QUESTION: You can say that they were prematurely taken in, but they were taken in at a time they weren't qualified under the rule.

MR. QUINN: Right, but they were, Your Honor, people that were specifically let go and then rehired by Pierce County with the understanding by us that they would indeed be unemployed for that statutory period. I just mention it because it is so --

QUESTION: Well, so they had been employed by Pierce County, and then they were let go for 15 days, and then rehired so they could come in under CETA?

MR. QUINN: Well, Your Honor, there was in fact a maintenance of effort claim earlier in the case, and it dropped by the wayside at the Administrative Law Judge level. That means -- maintenance of effort is the concept that federal grant money shall be used to supplement rather than supplant your local funds, and the Administrative Law Judge, based upon the evidence, made a finding that these people would in fact have been laid off by Pierce County because of the budget problems that we had at the time, January of 1975. He was satisifed under all the evidence that there was no maintenance of effort and there was no paper layoff,

that they were legitimate rehires, but what he said was, you are still liable, because there is a technical violation, and that is all I wanted to point out to the Court, was the nature of the alleged violations.

The second thing I wanted to point out about these grants factually is that one of the grants was what we call a conduit grant, where the money was merely passed through Pierce County in part, not in its entirety, but some of the participants were not even employees of Pierce County as public service employees. They were either private sector or other public sector employees, and all Pierce County did was do the intake processing, as we call it, the personnel work, and then referred them to the school district or the private industry that accepted them for unemployment.

So, and I think that becomes relevant later on, when you think about the equities of the case, that they were not even -- in other words, the money of their wages did not even go to Pierce County in some cases.

QUESTION: But the recovery by the federal government would be from Pierce County?

MR. QUINN: Solely from Pierce County at this point, Your Honor, because --

QUESTION: And I suppose Pierce County could try to recover in turn from the actual users of the

people hired?

MR. QUINN: That is my point, Your Honor, in even mentioning the conduit theory, is that no, we would indeed not now be able to recover, because the state statute of limitations would have run. The beginning of the period and the alleged violation in this case on the smaller audit was January of 1975. It is now 1986. And our state statute of limitations is six years. Our rights against those subgrantees have long since been foreclosed.

QUESTION: And did Pierce County make any effort in this case to compell the federal government to go ahead and issue its audit report by seeking such an order of mandamus type order from an administrative law judge?

MR. QUINN: No, Your Honor, we did not.

QUESTION: Why not?

MR. QUINN: And, first of all, I don't think there is any such mandamus remedy under law. First of all, if you --

QUESTION: Do you think -- do you disagree with the Solicitor General's office that Pierce County could have sought an order from an Administrative Law Judge?

MR. QUINN: Yes, Justice O'Connor, I do.

There is no such procedure in the regulations. Furthermore, I do not think an Administrative Law Judge has equitable jurisdiction to issue a mandamus or injunctive relief. That is a remedy that is peculiar to the courts, and it is within their inherent power. But the Administrative Law Judge agency wasn't even created until the 1979 amendments to the regulations, and to me they were given no power to do that, and maybe there is a precedent for it, but I say that the remedy was created out of whole cloth by the Department of Labor.

QUESTION: Well, equity was created out of whole cloth at the time they thought the common law courts were too harsh.

MR. QUINN: I agree with that, Your Honor, but I think that there is a far cry and a great distance between an Administrative Law Judge court or quasi-judicial body and a judicial body like this one, or the constitutional courts of this country.

So, actually, I think the purpose of 106(b) is not something that we differ on at all. The purpose of this statute was relatively clear from the legislative history. Congress intended to have the department take prompt and decisive steps to remedy a perceived problem in this country in the CETA program. The problem was at two levels. It was at the recipient level, or what we

sometimes refer to as the prime sponsor level, and it was acknowledged to be at the Department of Labor level, and when they passed 106(b) with respect to complaints, I believe that if you read the entire colloquy of the Obie amendment, the colloquy between Obie and Mr. Hawkins, Congressman Hawkins, that you will find that the insertion of the Obie amendment probably related more to the complaint process.

There is like a tripartite scheme in this. There is the grant officer. There is the Administrative Law Judge. And then there is the courts. And the complaint process, if you will, involves a participant, as counsel said, who might have any kind of complaint. It might involve discrimination. It could involve low wages.

But commonly it is a participant complaining about the way the prime sponsor or the recipient is running the program. But there is an administrative remedy that they must pursue first. The regulations provide for a 60-day period in which the prime sponsor has to have a hearing examiner hear that complaint of that grievant, if you will, and then rule on it.

And that is referred to in the colloquy between Congressman Obie and Congressman Hawkins, and then Mr. Hawkins asked Mr. Obie, what happens if the

determination is not made within the time allowed? It is not clear from that colloquy that he is talking about the grant officer's determination. It could just as easily have been the prime sponsor's determination that he was asking about in the complaint grievance process as opposed to the one on one process that we are dealing with in this case.

This case -- no mistake should be made about that. This case involves two parties, the federal government through the Department of Labor and Pierce County. It does not involve the complaint, grievance process that we have spoken of, and so many of the cases cited by the government, we feel, are inapposite. Many of those cases on down from the Supreme Court's early case of French versus Edwards and through the whole line of cases that they have cited, I think there is one common thread, and that is that the courts were trying to protect third parties who would be hurt if the governmental body for some reason did not act promptly.

That third party situation just isn't here. That is what we submit was happening in the colloquy between Mr. Obie and Mr. Hawkins. They were concerned that somehow a participant might make a complaint in the grievance process. The prime sponsor would not act promptly, and then the Department of Labor somehow could

not do anything about it. It had nothing to do with this situation.

QUESTION: The government's reply to that argument of yours, as I understand it, is that it would be strange for the law to be more greatly concerned with isolated individual complaints than with the public fisc.

MR. QUINN: I think, oddly enough, the courts probably are more concerned generally speaking with the individual whose rights the program was intended to create. In this case, it is only the public fisc that is affected. In other words, everyone in the country generally will be affected if the --

QUESTION: Do you regard that as kind of the bottom of the barrel so far as interests are concerned?

MR. QUINN: No, Your Honor. I view it as something that is and probably should be less of the court's concern because there are interests on both sides, whereas in the third party situation the innocent uninvolve party who can do nothing to protect his rights has them cut off.

In this situation we have two more equal parties, a very intelligent, well-advised Department of Labor on the one side, and Pierce County on the other side. I think the parties are equal --

QUESTION: Also intelligent and well-advised.

(General laughter.)

MR. QUINN: Thank you, Your Honor.

(General laughter.)

MR. QUINN: In any case, I wanted to make one point about the effect of delay, because I think that is where we should go. The purpose of this legislation was to encourage, really, to prod the Department of Labor to improve its performance. They wanted quite prompt and decisive action, and they did not get it. The Department of Labor essentially let Congress down, and since 1978, the backlog of audits has not been reduced, it has probably increased.

The amount of money that is involved in this case would not be so high if in fact they had acted promptly, as Congress intended, and decisively. So what I want the Court to understand is that I think that really our interpretation does further the basic purpose of the rule.

We would be the last ones to stand up here and say that this statute was enacted for the benefit of Pierce County or prime sponsors, because it just is not there in the legislative history, but what is there are two policies, expedition and making sure that the money, the CETA money, gets to the proper parties.

We submit that our rule, our contention what the rule should be is doing that, because there is sort of a teaching or educational process to this grant review process. Now, if you put yourself in the position of Pierce County, when we supposedly the 15-day rule back in January of 1975, if we had had an expeditious, decisive resolution of the issue, we could have let those people go. We could have changed the way we were doing things, and others, not only Pierce County, would have learned by that and saved his wages, that instead went on for years, others would have seen that, and there would have been a general deterrent effect or educational effect from that regulatory interpretation, and that cuts across all of these regulations.

CETA was just -- anyway, there were numerous regulations in the CETA program that were very ambiguous and that needed some clarification, hopefully by program people, like the grant officer. If not, then by Administrative Law Judges or the courts. That simply, that predictive effect, that goal of certainty, cannot happen if the government sits, so to speak, on the audits for months before they release them.

Now, it was mentioned, I believe, that the government is required to release the audit to the prime

sponsor at the same times it is filed, and that is true. That should put the person on notice, the prime sponsor.

However, I wanted to note, as I said in my brief, and I believe it is an undisputed fact, that in one of our cases, a smaller case, the audit was filed with the grant officer on these seven jailers in September of 1978, and for the first time Pierce County received that audit, that copy of that audit in August of 1980.

Now, I ask this Court, how could we know -- in general terms I suppose we could know, but how could we know what the irregularities were if we did not even have a copy of the audit for nearly two years after the thing was actually filed with the grant officer.

What we are asking the Court to do is to look at the statute and see what its plain purpose was.

QUESTION: Of course, what you have just said, does that really apply to the seven jailers?

MR. QUINN: Pardon me, Your Honor?

QUESTION: What you have just said, the question you have asked, how could we know, does that really apply to the seven jailer situation?

MR. QUINN: Well, with respect to the seven jailers, we surely knew that there was an audit going

on.

QUESTION: You also knew it was premature hiring, didn't you?

MR. QUINN: Well, Your Honor, I really don't see that as a violation, and I can see how a court could disagree with the Administrative Law Judge about that prematurity, because in practical terms -- in the real world it was very unlikely that those people were going to go out and get a job with another party when on the seventh day we all knew that they were coming back on the 15th day, and despite what some people might think about that as a maintenance of effort violation, that is simply not in the case. It has been held that it was not improper to rehire them per se. So I don't see that prematurity is that big of a problem.

What we would like to bring forward to the Court is maybe a medium approach, a balanced approach, and the Ninth Circuit did rule that the grant officer really lacked jurisdiction. He did not act within the 120 days. We concede that there would be some cases that that might seem harsh. Where there are tremendous numbers of alleged violations, where there are a lot of witnesses and a lot of documents to go through, it may be harsh.

Even though in fact there is a long give and

take period in the audit itself when a lot of those things are worked out, simplified, and the issues are crystallized, I could conceive of a case that would be impossible for the grant officer to resolve in 120 days. Actually, the plain language of the statute says that the Secretary of Labor shall resolve it, but we don't rest upon the plain language of the statute in this Court.

I think we would concede that it could be impossible for the Secretary to finally conclude through all of the Department of Labor and audit within 120 days. So what we rely upon instead is their own regulations. They did promulgate their own regulations, which say on their face that they purport to implement that statute, and they did that effectively on April 3rd, 1979.

That is why I cited the Chevron case of this Court. In the last couple of years the Court gave us a very important case, we feel, that tells us, gives us some guidance about how to deal with the statutory interpretation case when there are regulations that have been promulgated.

And what that case does, I think, here, is, it gives us a workable rule, a flexible rule that does indeed fulfill and balances the Congressional policies.

There are these two competing policies that we talk about of expedition and prevention of abuse.

And what the Secretary of Labor did was created this tripartite scheme that I spoke of, where the 120 days is only a time period for the grant officer to resolve the questions, and then from there on out there is a sort of an appeal process, and that really was an accommodation.

That was a little bit longer than Congress perhaps had envisioned, but under Chevron I think they are entitled to make that interpretation, and this Court should defer to that if the Court finds that it is a reasonable and permissible interpretation of the statute, and does not go beyond the statute, in other words, the ultra vires, and if it balances the competing policies, and we submit that it does.

We submit that in the garden variety cases like this one, if I may use the word, it is a fairly straightforward case, or the two audits are both fairly straightforward. It is not like many of the cases cited in the briefs of the amici, where there is $10 million in controversy and hundreds of exhibits.

So, it is something that could be resolved by the grant officer within 120 days and then the more difficult issues could be fleshed out at the

Administrative Law Judge hearing.

Really, the Court could easily find that the rule that we offered need not be applicable to complaint cases, but the complaint situation, the third party complaint situation simply is not presented here. The Court could rule on the basis of all of the arguments that there is no third party right being asserted, there is no third party right being cut off. The statute applies equally to both, but the Court could find that cases like the Fort Worth line of cases -- in response to a question, counsel acknowledged that there is no Supreme Court precedent really for this rule about requiring consequences.

This two-part rule of Fort Worth and the other cases states that a statute of limitations, for example, a federal one needs not only to state the definitive limitation, but it also needs to state the consequence of noncompliance. No Supreme Court case has ever explicitly so held, as you know, and we submit that it would be better not to adopt that rule, since it is a case of first impression, because in this case the problem simply isn't presented.

One final argument relates to the federal grant law that has been developing in the court over the last few years. We see federal grants as a specific

variety of a bilateral relationship, i.e., a contract. And we submit that the 120-day rule, treated like a statute of limitations, is very consistent with that developing law of this Court.

If you see the federal grant as a bilateral contract to any degree, maybe it is not a specific contract or a typical contract, but it is a type of contract, and if it is, you have the ability, the power to simply say, there can be equitable defenses, and that is really all we are saying.

If the statute of limitations argument from the Zipes case, that type of an example fits, then you can also reach that same result under a contractual analysis.

We submit to the Court that the 120-day rule of the statute and the regulations is workable and practical. Our version of the rule or the rule that we would proffer to the Court fully effectuates Congressional intent. It would promptly resolve audits. It would teach grant recipients that if they violate the rules they will have to amend their ways, and more importantly than that, perhaps, it would simply stop us from compounding the error by continuing to pay these people. If they are indeed ineligible, simply tell us. That is all we ask.

QUESTION: Mr. Quinn, may I just ask one question? You talk as though this was all in the future, but the years have gone by, and isn't it a fact that your program has pretty well exhausted itself when we are talking about probably -- almost all the claims for reimbursement, recovery by the government would be barred.

MR. QUINN: Not necessarily, Your Honor. CETA has been repealed in 1982 and replaced by the Job Training Partnership Act, but I don't offer such a strict rule that all of the claims would be barred. I only know that in the routine cases like this one, the government probably would be hard pressed to come up with any equitable exception to the statute of limitations, but that is not to say that in many other cases they couldn't.

I think they could raise an impossibility defense.

QUESTION: I am not entirely clear on what your equitable exception is. You are in effect saying that that you would say they are too late, 120 days went by, and then the government would have an opportunity to explain its delay? Is that what it would be, and if they had some reason why, it was a particularly difficult audit or something like that, that they could

then get a waiver?

MR. QUINN: Yes, Your Honor. I think the context in which it would arise and does arise in the Administrative Law Judge practice under CETA is that the grantee has to raise it as an affirmative defense, a statute of limitations-like defense. Then at that point it is incumbent upon the Department of Labor to come forward with evidence to get around the limitations defense, such as equitable tolling waiver or the like.

QUESTION: -- concealment or something like that.

MR. QUINN: Yes, Your Honor. If, for example, the prime sponsor caused delay during the 120-day provision and asked for more time, I think equitably they would be proceeding with unclean hands or they would be proceeding inequitably if they said, gotcha, we asked for 30 more days, you gave it to us, but you missed the 120-day deadline. It just wouldn't be fair.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Pincus? You have four minutes remaining.

ORAL ARGUMENT OF ANDREW J. PINCUS, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. PINCUS: Thank you. A few things, Your Honor.

First of all, about the availability of the injunctive remedy that we describe, the Administrative Procedure Act specifically provides that injunctive relief may be granted if administrative action is unreasonably withheld, and that would, we think, plainly apply where the administrative agency has failed to comply with the mandatory time limit, so there was no need for Congress to specifically write in an injunctive relief provision --

QUESTION: Isn't the APA addressed to District Courts?

MR. PINCUS: Yes, Your Honor, so that the grant recipient or the complainant could certainly go into District Court and get injunctive relief if this injunctive relief were not available from the ALJ, as we think it is available from the ALJ, but as a last resort it certainly would be available from a District Judge.

Second of all, with regard to the interpretation of Section 106(b), before 106(b) was passed in 1968 -- in 1978, rather, it is clear that there was no time limit applicable to the grant officer's action, and therefore grant recipients such as respondent would have no remedy at all.

So, the question here is whether Congress in 1978 intended to afford a new protection to grant

recipients who had misused federal funds. We think there is nothing in the legislative history that indicates that Congress passed this provision in order to allow these people to avoid their responsibility to repay those funds to the federal government.

Indeed, respondent's counsel just admitted that Section 106(b) was not enacted for the benefit of grantees such as Pierce County, so it seems incredible that the provision could be interepreted to provide them with this kind of remedy where the purpose of the statute was to strengthen the Secretary's enforcement authority where the ALJ specifically found that respondent had not been prejudiced, and where respondent never sought to expedite the proceedings in any manner.

Finally, I would like to address the question whether there can be some distinction in the remedy afforded under Section 106(b) in the complaint context and in the audit context. The statute itself does not distinguish between complaints and audits. It refers only to complaints. Therefore we think Congress could have intended only one remedy, and whatever that remedy is must apply equally to complaints as well as to audits.

Since it is virtually impossible that Congress intended to cut off complainants' rights, we think it is

inescapable to conclude that Congress did not intend to cut off the Secretary's rights, and that Section 106(b) should not interpret it to limit the Secretary's enforcement authority.

Unless there are any other questions.

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

(Whereupon, at 1:40 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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#85-385 - WILLIAM E. BROCK, SECRETARY OF LABOR, Petitioner V.

PIERCE COUNTY

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BY Paul A. Richardson

(REPORTER)