OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-54

TITLE LIBRARY OF CONGRESS, ET AL., Petitioners v. TOMMY SHAW

PLACE Washington, D. C.

DATE February 24, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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LIBRARY OF CONGRESS, ET AL., :

Petitioners :

v. : No. 85-54

TOMMY SHAW. :

- -x

Washington, D.C.

Monday, February 24, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:58 o'clock a.m.

APPEARANCES:

CHARLES A. ROTHFELD, ESQ., Assistant to the Solicitor General, Washington, D.C.; on behalf of Petitioners.

CHARLES STEPHEN RALSTON, ESQ., New York, N.Y.; on behalf of 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: Mr. Rothfeld, I think you may proceed when you're ready.

ORAL ARGUMENT OF

CHARLES A. ROTHFELD, ESQ.

ON BEHALF OF PETITIONERS

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

This case involves one narrow question, whether Congress has waived the sovereign immunity of the United States to permit the addition of pre-judgment interest to Title VII attorneys' fee awards against the Federal Government.

In 1979, Respondent prevailed in his Title VII action against his employer, the Library of Congress. The district court indicated at the time that it would award attorneys' fee to Respondent as the prevailing party, but it postponed entry of an order awarding those fees, deciding to await the decision of the Court of Appeals in a pending case, Copeland versus Marshall, which was expected to provide guidance on the calculation of a reasonable attorneys' fee.

The Court of Appeals handed down its decision in Copeland almost a year later, in September 1980. An additional year then passed before the district court,

in November of 1981, issued an order awarding fees to Respondent for work that his attorney had performed three years earlier, in 1978 and early 1979.

In the part of the order that is specifically at issue here, the Court then added 30 percent on top of the basic fee award, representing 10 percent for each year of delay to compensate Respondent's attorney for the time that had passed between the date that he completed his work and the time of the fee award.

A divided panel of the Court of Appeals affirmed this award of what it acknowledged to be pre-judgment interest on Respondent's attorneys' fee. In the Court of Appeals' view, the Title VII attorneys' fee provision specifically waives that aspect of the Government's sovereign immunity that traditionally has shielded the United States from liability for interest.

The question is this case is whether that judgment was correct. In our view, this issue is flatly resolved by the application of one of the oldest and most firmly settled principles covering the resolution of claims against the United States, what Judge Ginsburg in her dissenting opinion aptly called the no interest rule.

As it has consistently been applied, this no interest rule provides that, even when Congress has

explicitly waived the sovereign immunity of the United States and provided for the recovery of substantive claims against the Federal Government, interest cannot be awarded on top of those claims unless Congress in addition affirmatively considered the interest question and expressly indicated that interest should be available.

It has never been considered enough that the statutory language could be read to support an award of interest or that making interest available might be consistent with the statutory purpose.

QUESTION: Mr. Rothfeld, if there were private litigants involved in a case like this, so we didn't have the Federal Government issue, if some form of pre-judgment interest were sought as against a private defendant employer, would it be payable as part of attorneys' fee, or as a part of damages in general, or how?

What's the theory of the recovery against the private litigant, do you think?

MR. ROTHFELD: Pre-judgment interest on the attorneys' fee award would be characterized, I think, either as a component of that award -- pre-judgment interest I think is generally viewed as a part of the damages and is generally termed pre-judgment interest on

the damages.

QUESTION: So if it were a private defendant, in your view then it would be a part of attorneys' fee or costs in any event?

MR. ROTHFELD: Well, it would --

QUESTION: Is that right?

MR. ROTHFELD: It would be a part of the attorneys' fee. It would be interest -- it's somewhat complicated, because the Title VII attorneys' fee provision defines the attorneys' fee as a part of the costs, and interest is generally not -- pre-judgment interest is generally not awarded on costs.

But in our view, the pre-judgment interest would be awarded on the attorneys' fee, which would then be awarded as an element of the costs.

QUESTION: Is it conceded all around that in the case of a private defendant pre-judgment interest can be recovered on attorneys' fees?

MR. ROTHFELD: We acknowledge that a district court can exercise its discretion to award pre-judgment interest on attorneys' fee in private sector litigation.

QUESTION: As part of the attorneys' fee?

MR. ROTHFELD: As a part of the attorneys' fee, that's correct.

QUESTION: Not as a part of damages?

MR. ROTHFELD: That's correct, not as a part of the substantive back pay award, for example, that a plaintiff might be entitled to get.

So what we think is determinative here is this no interest rule which applies specifically to suits against the Federal Government, the sovereign immunity rule. And this rule has been applied with undiminished force for the better part of 200 years. Early in the ninteenth century, it already was the usual practice of executive agencies not to pay interest on claims against the United States unless expressly directed to do so by Congress.

And in the years since then, this Court has repeatedly applied the no interest rule to bar claims for interest against the United States in literally dozens of decisions. With the exception of narrow situations that are not applicable here, principally claims involving constitional takings, the Court has applied the no interest rule to virtually every imaginable setting, in cases involving pre- and post-judgment interest, cases involving liquidated claims and unliquidated claims, cases involving statutes and contracts.

It has even applied the no interest rule

without hesitation in cases in which the statutory language directed the United States to pay just compensation or full equitable relief, or other language that undoubtedly would make a private party liable for interest in the same circumstances.

Given all this, the rule is considerably more than a simple canon of construction. As a principle that has been applied consistently by this Court and by the lower Courts and by executive agencies for well over a century, the rule has taken on an institutional significance as something that tells Congress what it must do when it thinks it appropriate to make interest available against the Federal Government.

There is little doubt that Congress is aware of the rule and has legislated with the rule in mind. When it has wanted interest to be available against the United States, Congress has said so expressly, and it has set out the circumstances in which interest should be paid with great specificity, setting out the rates at which it should be paid, what a plaintiff must do to protect his right to collect, and generally the conditions under which interest will be awarded.

It is against this background of consistent interpretation and action by the Court and by Congress that Respondent's claim for attorneys' fee under Title

VII must be evaluated. The Court of Appeals itself acknowledged this background of law. It recognized that the no interest rule would be fully applicable here in the absence of a sufficiently clear waiver by Congress.

But the Court of Appeals believed it found such a waiver in the Title VII attorneys' fee provision. That's 41 U.S.C. 2000(e)(5)(K), which authorizes a Court to award an attorneys' fee to the prevailing party in Title VII litigation as a part of the costs, and then goes on to provide that the United States shall be liable for costs the same as a private person.

In the Court of Appeals' view, this language, the "same as a private person" proviso, must have manifested Congress' clear intent to waive every aspect of the Government's sovereign immunity, necessarily including the no interest rule.

But in our view there are several fundamental problems with this analysis. The first and most obvious involves what the Court believed the statutory language to mean, the "same as a private person" proviso. In fact, Congress placed that language in the statute not in an attempt to waive immunity in some complete way, but in 1964, at a time when the United States was not liable as a Title VII defendant at all.

That language was put in the statute to provide that the United States would be liable for attorneys' fees in the same circumstances that private plaintiffs would be liable -- excuse me -- in which the United States acted as a plaintiff.

As this Court, however, has held time and again in its no interest rule decisions, this sort of threshold undifferentiated waiver of sovereign immunity is simply not enough to make the United States liable for an award of interest.

QUESTION: Mr. Rothfeld, would you comment ot Attorney General Bell's memorandum that you opponent quotes toward the end of his brief? Does he take -- do you think he -- he wouldn't agree with your view, I take it?

MR. ROTHFELD: Well, I think he would, Justice Stevens, and I think actually in a sense that supports our position here. At the same time that that memorandum was issued, the United States took the position in litigation in that very year that it was issued and in the years following while Attorney General Bell was in office that Title VII plaintiffs should not be entitled to attorneys' fees on their back pay awards against the United States.

So I think it must have been manifest to the

Justice Department at the time that the no interest rule stood on a different footing, that it was ancillary to the basic Title VII litigation. And I think that has always been the view, that the no interest rule is something different from the substantive recovery that's authorized by statute.

QUESTION: And at that time, the Department took the position that no interest would be awarded on attorneys' fees awards?

MR. ROTHFELD: It's my understanding that no court had ever suggested that --

QUESTION: I mean, I was just curious to know what the position of the Government was when Attorney General -- when Griffin Bell was the attorney General. I had the impression from reading this that there'd probably been a change in the Government's position, but maybe I'm wrong.

MR. ROTHFELD: Well, to my knowledge the first suggestion that attorneys' fees would be available, interest would be available on attorneys' fees against the Government, did not occur until 1980 in this Copeland versus Marshall decision. So I think that there was no litigation about the matter prior to that time, at the time that the memorandum had been issued.

The only interest litigation, as I said,

involved probably the more important question of whether plaintiffs were entitled to their interest. And in that area, the United States consistently has taken the position, successfully I should add, that plaintiffs cannot obtain interest on their back pay awards.

So I think that that has been the consistent position, and emphasizes the distinction that we draw between interest and an underlying award.

QUESTION: May I also just clarify, because I'm a little hazy on it, what is your position with respect to post-judgment interest on an attorneys' fee award?

MR. ROTHFELD: So far as post-judgment interest is concerned, there must, again, be a separate statutory authorization. I think that Respondent acknowledges that and I think that that is not at issue here.

QUESTION: I know it's not at issue. Your position is that such interest is or is not --

MR. ROTHFELD: On Title VII awards, it is not available.

QUESTION: I'm talking about attorneys' fees awards.

MR. ROTHFELD: That's correct, in Title VII attorneys' fees awards.

QUESTION: It's not available.

Can I ask one other question that troubles me about this case that nobody mentions in the briefs. In Judge Oberdorfer's award he deducted I think $3100 because the client had already paid that amount to the attorney. Do you recall that?

He said that that should be deducted. That was plainly wrong, wasn't it? Why would that be deducted? Isn't the -- is the attorneys' fees -- is there to be no attorneys' fees award if the client has already paid the attorney?

MR. ROTHFELD: Well, I must acknowledge that that's not an area of the law that I am completely familiar with. I think that Judge Oberdorfer's rationale was that the purpose of the attorneys' fees provision is to assure that the Title VII plaintiff will be able to obtain representation and get into court.

QUESTION: And so that if he pays his own attorney, he's not entitled to recover the fee? It just sounds crazy to me.

MR. ROTHFELD: Well, again, that is an issue, Your Honor --

QUESTION: And perhaps I shouldn't, but I just thought that perhaps you would have thought about it and have some comment that would help me understand it.

MR. ROTHFELD: Well, again --

QUESTION: It seems to me the Government got a $3100 windfall at that point, let me just put it that way.

MR. ROTHFELD: I hope that does not reflect on the remainder of our case.

QUESTION: No, it doesn't.

QUESTION: Mr. Rothfeld, harking back a moment to post-judgment interest on attorneys' fees, does the -- did you say the Respondent in this case agrees that post-judgment interest isn't available against the Government?

MR. ROTHFELD: The Respondent does not explicitly address that question in his brief and I shouldn't speak for him. As I understand it, he attempts to distinguish this Court's no interest rule cases on the ground that they involve pre-judgment interest. And I think it may be implicit in that that he acknowledges that post-judgment interest is only available when there's a specific statutory authority for it.

The usual approach, the usual distinction between pre- and post-judgment interest is that pre-judgment interest is awarded as, as I suggested to Justice O'Connor, as an element of the damages, without

a specific statutory authorization, except when the United States is a party.

Post-judgment interest has always been treated as something which is awarded separately by statute, and there are a host of federal statutes that address the availability, none of which make the United States liable for post-judgment interest on Title VII attorneys' fees.

The United States was made liable as a Title VII defendant generally through the Equal Employment Opportunity Act of 1972, which essentially extended the existing provisions of Title VII to suits against the United States. It is that 1972 enactment, in combination with the basic attorneys' fees provision in Section 2000(e)(5)(K), that waives the Government's sovereign immunity and makes it liable for attorneys' fees awards at all to Title VII plaintiffs such as Respondent.

The fact that Section 2000(e)(5)(K) already contains the "same as a private person" proviso upon which the Court of Appeals primarily relied is a fortuity that really has no application here. And that language certainly was not intended to waive the Government's immunity in some sort of unusually complete way, as the Court of Appeals believed.

This leads to a second and more basic problem with the Court of Appeals' approach as viewed against the background of this no interest rule. Nothing in the Equal Employment Opportunity Act of 1972, for that matter nothing in the 1964 version of Title VII, even reading that version as the Court of Appeals did, meets the test of clarity that this Court has set out in its repeated decisions applying this no interest rule.

Title VII obviously does not mention interest on its face, let alone set out circumstances in which interest should be paid. Nothing in the legislative history of the attorneys' fees provision, either in 1964 or the 1972 provisions that applied the '64 version to the Federal Government, adverts to interest at all. And nothing in the broader and more general history or background of Title VII contains anything which is helpful to Respondent here, and that background sets out, as I think Attorney General Bell suggested in his memorandum, that Congress intended to remove sovereign immunity as a bar to federal employee plaintiffs bringing their claims of discrimination to court, and that background shows that Congress intended generally that the same types of relief be available to federal employee plaintiffs as to their private sector counterparts.

But again, as this Court has consistently held in cases interpreting the no interest rule, whatever other forms of relief Congress has authorized, the question whether interest will be available on that relief presents a separate inquiry to sovereign immunity that must be resolved by reference to the no interest rule.

It is for this reason, as I mentioned earlier, that the Court of Appeals have uniformly ruled that Title VII plaintiffs cannot obtain interest on their back pay awards against the Government. Had Congress give any attention to the question, it is impossible to believe that it would have chosen to provide more favorable treatment to Title VII plaintiffs' attorneys than to Title VII plaintiffs themselves.

Finally, there is one what might be termed institutional problem with the Court of Appeals' analysis. By ignoring the requirement of an express statement of Congressional intent, the Court has effectively substituted its judgment for that of Congress in deciding when sovereign immunity should be waived.

A look at the body of laws in which Congress has chosen to make interest available against the United States confirms that this is more than a theoretical

interest. When Congress has made interest available, it has set out very precisely the terms on which it should be paid.

The most recent of a long line of examples of this is probably last year's amendment to the Equal Access to Justice Act, a case that already contained at attorneys' fees provision strikingly similar to the one in Title VII. It makes the United States liable for fees to the same extent as a private person.

Congress nevertheless found it necessary to expressly provide for awards of post-judgment interest under awards under the Equal Access to Justice Act and, in response to suggestions from the Comptroller General, Congress quite precisely limited the circumstances under which those awards would be paid. It provided that they would only be available in cases in which the United States took an unsuccessful appeal, and even then only in cases -- interest would only run from the date of the fee award through the day before the date of the Court of Appeals mandate of affirmance.

The Congress put these limitations in the statute for a very specific reason. It wanted to assure that interest awards under the Equal Access to Justice Act would be in line with awards under similar statutes which contain generally similar limitations on when

interest is available against the United States.

Congress did that in an attempt to prevent attorneys benefiting under the Equal Access to Justice Act and from obtaining unequally favorable treatment.

The Court of Appeals decision, which finds a waiver of the no interest rule in a case where Congress failed to address the interest question and adopts an essentially ad hoc approach to the circumstances under which interest will be paid, throws into uncertainty an area that Congress obviously believed to be governed by very precise rules.

And the Court's decision essentially has that effect after the fact, by finding interest available under statutes Congress wrote when it knew the no interest rule to be in full force. In our view, that sort of decision simply cannot be reconciled with over a century of this Court's precedents.

Thank you.

CHIEF JUSTICE BURGER: Mr. Ralston.

ORAL ARGUMENT OF

CHARLES STEPHEN RALSTON, ESQ.,

ON BEHALF OF RESPONDENT

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

We agree that this case does present a single

issue. We would state it a little bit differently than the Government does, and that is it is whether a reasonable attorneys' fees award against a federal agency in a Title VII action may include compensation for delay in payment between the time services are rendered and the time of the award.

The Government sees the entire case as dependent upon whether the word "interest" can be found in the attorneys' fees statute or anyplace in Title VII, or perhaps in its legislative history. And not finding this word anywhere, Petitioners simply rely on a series of decisions based on early opinions of the Attorney General and codified not in 28 U.S.C. Section 2516, to the effect that, because of sovereign immunity, interest is not awardable against the Government in the absence of a statute.

The Government then equates any adjustment in fees to compensate for delay in payment with interest. Therefore, according to the Government, no such adjustment may be made in calculating either a reasonable attorneys' fees, what constitutes a reasonable fee under the statute, or in calculating back pay which is intended to make a discriminated against employee full or whole for the injury they have suffered.

We take the position and urge strongly that this case may not be decided by the simple and mechanical application of this alleged no interest rule, nor by a semantic dispute over what the word "interest" means.

Rather, we would urge, it requires an analysis of first the reasons for and historical basis of the "no interest rule," of the nature of an adjustment for delay in payment to a reasonable attorneys' fees or to a back pay award, and all of this in the context of the purposes of Title VII and Congress' intent in making Title VII applicable to the Federal Government in 1972.

Now, it must be emphasized that our position comes from the language of the statute and Congressional intent, matters that the Government has dealt with hardly at all in its brief or today, but which are determinative, that is, Congressional intent when it passed the 1972 Act.

And our position also flows from an investigation of a series of decisions on the issue of interest and accounting for delays in payment in making awards, particularly a series of decisions by Mr. Justice Holmes. These decisions have been cited and discussed and are in the Government's brief, and we call the Court's attention particularly to the Boston Sand

and Gravel versus United States decision, the decision in Standard Oil versus United States, and the decision it Waite versus United States.

These decisions and Justice Holmes' discussion of the issue I think makes clear that there is not some absolute rule that the word "interest" must appear in the statute, that the underlying purpose and intent of the statute must be looked to and can govern.

Further, what is clear -- and the Government doesn't dispute it seriously -- is that Congress' central purpose in 1972 when it enacted the Equal Opportunity Act and those provisions that applied Title VII to the Federal Government was to override any and all sovereign immunity barriers to federal employees getting precisely the same relief as all other employees could get, all other employees, whether employees of private employers or state and local governments.

And we've set out that legislative history in some detail in our brief, and it was discussed in some detail by this Court in Brown versus General Services Administration. Indeed, a succinct summary of the background of the statute can be found in the Government's brief in Brown, where there the Government pointed out that Congress was concerned with two aspects of sovereign immunity and the barriers it presented to

federal employees.

One was a lack of any judicial remedy whatsoever, the ability to get into court in the first place. But the second problem, in the words of the Government's brief, was that "some forms of relief were foreclosed."

And this concern came out of extensive discussions in the hearings in the 1971 Act. It is discussed at great length in the legislative reports, both the Senate, the House, and the conference committee reports. It's discussed on the floor.

Congress dealt with these two problems by, number one, providing the clear right to go into court for the first time; and by making the actions against the Federal Government once you got into court governed by precisely the same relief provisions and attorneys' fees provisions that governed actions against state, local government, and private employers.

They made it absolutely clear in the legislative history and the discussions therein that their purpose was to ensure that federal employees be treated with regard to employment discrimination claims precisely the same as everyone else.

QUESTION: Does the legislative history speak expressly anywhere to pre-judgment interest on

attorneys' fees?

MR. RALSTON: No, Your Honor. I have gone through this rather voluminous book, and I assume the Solicitor General's Office has, too, and the word "interest" as far as I know does not appear there. The legislative history does -- and we cite it in our brief -- mention attorneys' fees.

It mentions and clearly recognizes the fact that this type of litigation tends to be protracted and this creates burdens on the ability to obtain lawyers and to obtain -- and for employees to obtain relief in court. But there's no --

QUESTION: Mr. Ralston --

MR. RALSTON: -- discussion of interest.

QUESTION: Excuse me.

MR. RALSTON: I'm sorry, Your Honor.

QUESTION: I didn't mean to cut off your response.

MR. RALSTON: No, I've completed it.

QUESTION: Do you agree with the Solicitor General that Congress has usually used much more express language when it's provided for the payment of interest than it did in this case?

MR. RALSTON: Certainly where it's provided for post-judgment interest, and the EAJA, the Equal

Access to Justice Act, is an example where they put in post-judgment interest in the statute. However, that Act really is not much of a guide in this case, because that Act doesn't purport to provide for full reasonable attorneys' fees. It has a cap, a $75 cap.

So the whole question of how you calculate the fee to begin with just doesn't really come into an EAJA case. But Congress hasn't always made it so clear, and this Court has found that it's not always necessary to make it so clear.

In 1983, in a unanimous decision by this Court written by Justice Marshall, General Motors Corporation versus Devex, which we cite and quote in our brief, the Court discussed pre-judgment interest and its function in fashioning an award that was fully compensatory in a patent infringement case, and cited Waite versus United States as standing for the proposition, which it does, that exactly that type of relief is available against the Federal Government when it infringes a patent, even though there is no express provision in that statute for interest.

And the Court reached that conclusion by analyzing the purpose of that statute and what the function of what it calls pre-judgment interest was. And clearly, that purpose is substantially the same as

the purpose the Congress had when it enacted the '72 Act making the provisions of Title VII applicable to the Federal Government.

And that was, quite simply, to provide the federal courts and at the administrative level, because it also enlarged and clarified the powers of the Civil Service Commission, now the EEOC, and indeed the Library of Congress by name, which was sort of a special status in the Act -- at the administrative level, these agencies have the power to grant any relief necessary to fully recompense the employee for his or her loss, both financial and professional.

Indeed, at the same time Congress was making the statute apply to the Federal Government, it was expanding the remedial provisions of Title VII to make clear that federal courts have the power to make an employee who had suffered discrimination completely whole for the discrimination.

QUESTION: Do you think this statute allows the recovery of post-judgment interest --

MR. RALSTON: Your Honor, on --

QUESTION: -- against the Government, or a private litigant?

MR. RALSTON: With regard -- we take the position -- I suppose the best way to state it is, we

take the position that, because our position is it's intended to be a total waiver of all sovereign immunity with regard to employment discrimination claims, that if post-judgment interest is available against private parties it would be available against the Federal Government.

However, this case does not involve post-judgment interest.

QUESTION: Is it available against private parties?

MR. RALSTON: Under the general statute that provides for interest on a judgment, it would be. And indeed, we have obtained that in some instances.

QUESTION: So the short answer is you think it's recoverable against the Government, post-judgment interest?

MR. RALSTON: Yes, although again I must emphasize this case does not involve that. This is on our grounds set forth in our brief that this is a total waiver of sovereign immunity. The first argument really doesn't reach that issue. It would not result in the Government being liable for post-judgment interest. It deals with the nature of pre-judgment interest and particularly that aspect of pre-judgment interest that deals with compensating for the effects of inflation.

One problem with the Government's position is this simple equation of the word "interest" with what was done here by the district court and what is done by many, virtually every Court of Appeals that has dealt with the issue, at least in cases involving other defendants besides the Government.

And that is taking into account the effect of inflation when calculating either a reasonable attorneys' fees, as in this case, or a back pay award for the direct benefit of the employee. And very simply, unless that is taken into account a reasonable fee is not being awarded, in the sense that it is not fully compensatory for the attorney's work. In the same way, if inflation is not taken -- I'm sorry.

QUESTION: Do you agree that the enhancement factor here is the equivalent of the award of interest?

MR. RALSTON: Your Honor, the judge calls it interest, and again --

QUESTION: Well, I'm asking what your position is.

MR. RALSTON: Our position in this particular case, although the judge called it interest, it in fact did not fully compensate for the effect of inflation. The judge fell -- technically, the judge's award should be, by my calculations based on the formula we set in

our brief, should have been in the neighborhood of -- I'm sorry, $9400, so that --

QUESTION: In answering the question in this case, should we address the question of pre-judgment interest or should we address some other question?

MR. RALSTON: Well, Your Honor, I think the Court can address the issue of pre-judgment interest, but I think it's helpful in addressing that as to what that involves. And it's the two components that are important.

The Government doesn't really address the issue of what do you do about inflation in calculating the award, and pre-judgment interest really has two components: Number one is to account for the loss in value of money through inflation. The second one is for the loss of the use of money, which is more like interest in the ordinary sense. That's certainly more what post-judgment interest involves, the fact that someone owes you money now, they aren't paying it, so you're compensated for the fact that you're not allowed to use it.

What the courts have done in saying that attorneys' fees -- and most of the courts that do this do not talk about pre-judgment interest. They say when calculating a reasonable attorneys' fee you must take

into account the delay in payment, because otherwise the attorney is not being fully compensated in actual dollar values for the value of his or her work.

QUESTION: But in which of the two senses that you just spoke of do they use that term, "delay in payment"? Damages for delay in getting the money, for the loss of the use of the money, or damages because the money is worth less when you get it?

MR. RALSTON: In most instances, the courts don't analyze it particularly. They make that statement, but in most cases that I am aware of when the award is adjusted for the delay in payment it is essentially an adjustment to take care of the loss in value of money.

Certainly, when we present an attorneys' fees petition to a court one of the things that we factor in is the fact that the work was done five years ago, and if you pay -- and if the hourly rate five years ago was $80 an hour and you pay $80 an hour now, you in fact are paying really only $50 an hour in terms of the value of the money.

QUESTION: So that's something different in your view, then, than simply loss of the use of the money for that period of time?

MR. RALSTON: Yes, that's loss of value of the

money, and that is an essential component of the calculation that was made here. That's what the Court of Appeals in Copeland talked about. That's what the other Court of Appeals talked about.

Now, our first position is that if you don't at least do that -- and we set out in our brief at some length the formulas and figures and numbers to demonstrate -- if you don't at least do that, you in fact are not paying a reasonable attorneys' fee because you aren't paying the proper hourly rate. It's just as simple as that.

Now, whether if the no judgment interest rule then says, well, you can do that but you can't then impose a charge for loss of use of the money, we contend that that is a somewhat different issue. Now, we have laid out in our brief reasons why we think you can also get the value for the loss of the use of the money, but we say certainly that rule has nothing to do with whether you can at least get paid a reasonable fee in the sense that you're getting paid the full value in today's dollars.

QUESTION: If we were to agree with you on the point that a district court may properly allow for lessening value of the money --

MR. RALSTON: Yes.

QUESTION: -- but would agree with the Government on the proposition that there is no interest or damages for delay on attorneys' fees, we would have to reverse the Court of Appeals, would we not?

MR. RALSTON: The Court of -- yes, I think the Court of Appeals' decision, if that was the Court's decision, would allow both aspects of pre-judgment interest. And if the Court held that, as Your Honor has just stated, it would be -- the Court of Appeals' decision would be inconsistent with that holding.

Now, our position is the Court of Appeals was right completely. But we certainly would say or hold that if you don't calculate in inflation you haven't calculated a reasonable attorneys' fees in the first instance.

QUESTION: Well, I thought you said if the district judge had done that he would have given you more than interest.

MR. RALSTON: Yes, but the district court judge --

QUESTION: As the Respondent, are you entitled to try to present a theory here that would give you more than you got?

MR. RALSTON: No, we do not contend that if the Court reached that conclusion that we would now be

able to go down and get more money. But we do say that such a result would certainly support what the district court did, because in fact, whatever it was called, it did almost compensate us at least for the loss in value of money. It fell slightly short.

We might just point out that the Court of Appeals was also concerned with the district judge's calculation, and indeed its order requires the district judge to look again at the calculation, because it was concerned that the hourly rate it used already contained a component for loss of value of money, and that we shouldn't get double billing for this factor, which we agree with.

So no matter what happens -- if the Court adopts the Government's position, then that's the end of it. But if it adopts the partial position that at least loss in value should be calculated in, this case will go back down to the district court anyway to determine if that calculation was properly made and not double billed.

Let me just say, mention what the district court did, in response to Justice Stevens' inquiry. I don't believe the district judge deducted what the client had paid the attorney in terms of the overall award. What the district court said was, this is the

total award for all the services, your client has paid you $3100, so you have to pay the client back.

That was to ensure that the lawyer didn't get paid twice, once by the client and then once by the defendant.

Now, the district court also did, in part of his overall calculation, first deduct 20 percent, sort of a reverse Blum factor, I suppose it would best be described, for quality of representation, and then brought it back up by 30 percent. The calculation got somewhat confused, as the Court of Appeals pointed out.

So again, that will have to be straightened out by the district court if the case goes back to it.

QUESTION: Let me go back for a moment to your distinction between loss of use and loss of value. The district court computed the ten percent for each of three years entirely on loss of use, as I read it; is that not right? And he did not take --

MR. RALSTON: That's correct, Your Honor. The district court did say, if you had had this and put it in a bank you would have gotten ten percent. I was not involved at the district court level. I quite frankly do not know where the district court got that figure, because the fact of the matter is that at that time, the rate of inflation being such as it is, substantially

higher interest could have been gotten, which would have taken into account both factors.

For example, the prime rate goes up and down with inflation because it factors in both aspects, both the loss of value and loss of use.

As a matter of fact, what the district court -- the adjustment that the district court made here came very close but not quite to compensating just for loss of value, and it didn't in fact compensate at all for loss of use of the money.

Again, I think by giving an example, a couple of examples really of the Government's position is right that no adjustment whatsoever, no matter what it's intended to compensate for, can be made for delay in payment, Congressional purpose would be totally thwarted. That is, the Congressional purpose of ensuring that a federal employee when dealing with the specific area of employment discrimination would be entitled to the same relief, the same make-whole relief, the same attorney fee relief, as anyone else.

If one looks for example at this case, using this case for an example, under the Government's position an employe who worked for a state government, a local government, a private corporation would get at attorneys' fees award of some around $9,000, and that

would take into account again just the loss in value because of inflation. A federal employee's award would only be $6750.

If back pay were involved, again using the example of a state employee that worked for a state library that was denied a promotion in 1978 like Mr. Shaw was, and then was given an award in 1981, and the value of that back pay, or the back pay lost, in dollars was $5,000, that state employee would receive $7,000 in actual back pay.

And the Government itself takes that position when it pursues state governments in federal court under Title VII. I call the attention of the Court, if I may, to a case that is not cited in our briefs, Equal Employment Opportunity Commission versus Erie, County of Erie, at 751 F.2d 79, where the Government successfully argued and defeated the state's position that, since Title VII didn't say anything about interest, there could be no pre-judgment interest award in an award of back pay against it, either.

And indeed, one of the decisions of this Court, the old decisions of this Court, that the Government cites in its brief here, United States versus North Carolina, stands for the proposition that this no judgment -- I'm sorry -- no interest rule applies to all

scvereigns, including the state.

Well, the Second Circuit adopted the EEOC's position that when you look to the purposes of the statute and the function of back pay, which is to put the person in the same position that they would have been in they had never been discriminated against, you could not do that unless you accounted for the loss in value of money because if inflation. If fact, pre-judgment interest period in both aspects was awarded in that case.

Again, if we use that type of an example in this case and just talk about loss of value because of inflation, the state employee would receive, in the example I've given of having been denied $5,000 in back pay in 1978, would receive $7,000 in 1981. Mr. Shaw or any other employee of the Library of Congress or any other federal agency would only receive the $5,000.

And ipso facto, that federal employee is not receiving the same relief as any other federal employee. Just, you cannot say that $5,000 is the same as $7,000. And again, Congress' clear intent -- and it comes out of every aspect of the legislative history, the structure of the statute itself -- was to ensure that federal employees not be in a disfavored position in Title VII actions that they bring.

If the Court has no further questions, thank you very much.

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

REBUTTAL ARGUMENT OF

CHARLES A. ROTHFELD, ESQ.,

ON BEHALF OF PETITIONERS

MR. ROTHFELD: Just a few quick points, Your Honor.

First, in response to something that was raised by Justices O'Connor and Rehnquist on the difference between compensation for delay and compensation for use of the money, neither this Court's decision nor the decisions of any lower court have ever distinguished between those two. This no interest rule has always applied to every aspect of compensation for delay.

QUESTION: Does that mean -- may I just interrupt. Does that mean that, say there's a five year piece of litigation. At the end of the litigation the judge thinks that it would be fairer to, say, award fees on the basis of current going rates in the market for legal services, rather than those that applied five years ago.

That would be prohibited by the no interest

rule, would you say?

MR. ROTHFELD: That's correct, Your Honor. To the extent that that use of current rates would be designed to compensate for a change in the value of money in the meantime, that would obviously be compensating for delay, and the purpose of the no interest rule as articulated by this Court is to prevent that type of compensation being paid by the Government.

QUESTION: Do any of the no interest rule cases on which you rely actually discuss the problem of inflation, as opposed to the problem of loss of use of the money?

MR. ROTHFELD: A number of the Court of Appeals decision which address interest on back pay awards under Title VII do discuss that, and Saunders versus Claytor, a Ninth Circuit decision, and one from the District of Columbia Circuit, Blake versus Califano, and both conclude that, relying on this Court's no interest decisions, that there should be no difference between the two, that both are prevented by the no interest rule.

This Court's decisions to my knowledge have not explicitly drawn any distinction, but I think that conclusively establishes our point, because they have not inquired as to whether or not there is some element

which is compensable. The Court has simple said no compensation for delay, period.

I think this relates to the suggestion that compensation for delay or some type of pre-judgment interest is an element of a reasonable attorneys' fees.

QUESTION: I'm not sure that the change in the value of the money is necessarily covered by the notion compensation for delay. It's compensation for change in value instead of loss of use. Maybe it is, I don't know.

MR. ROTHFELD: Well, as the rule has been treated by the Court, again, it hasn't inquired as to whether or not there should be some difference in treatment. And certainly the value of the fee award will have been adjusted simply because of delay, and always articulated by the Court, it is that the United States cannot be held liable for a delay at all, and that gives rise to the application of the no interest rule.

And that clearly, whether you're compensating for a change in the value of the money or whatever other element of the award is premised on passage of time, that compensates for delay.

I think as illustration of this is this Court's decisions interpreting the term "just

compensation" as used in statutes and contracts. I think it's generally recognized that the term "just compensation" includes some type of component for delay in payment. The Court has held repeatedly that, where constitional takings are involved, payment of interest is constitionally compelled.

The Court has still held, in statutes or contracts that require payment of just compensation, unless interest is explicitly referred to, interest is not subsumed within the term "just compensation." And I think here the same thing is true: interest is not subsumed within the term "reasonable attorneys' fee." In each case it's a compensation for delay which is barred by the rule.

A second quick point in response to Justice O'Connor's question --

QUESTION: Equally quick?

MR. ROTHFELD: A quicker point in response to Justice O'Connor, about whether or not when the United States has made interest expressly available it has done so in very precise terms.

To our knowledge, it has been quite precise. The Waite case that Respondent refers to we discuss in our reply brief, and I should add to that only that the Court has repeatedly applied the no interest rule on

very strict terms in many decisions that postdate Waite, and that decision crearly did not signal a retreat from the rigid application of the --

QUESTION: Was the unierlying statute in Waite a statute that required the Government to compensate for the taking of a patent?

MR. ROTHFELD: It was not put in those terms, Your Honor. It simply required a payment of full and complete compensation for the infringement. But the United States did not contest liability for interest in Waite, and the Court really didn't discuss the no interest rule at all.

One final point, as to the purposes of Title VII. We acknowledge that Title VII was designed to erase sovereign immunity as a barrier to employees entering federal court. But again, the Court has emphasized that, whether or not interest can be added to other relief that is authorized is a separate ancillary question that must be resolved by the application of the no interest rule.

I think this is not a case where the purposes of Title VII will be entirely thwarted, although even if it were that would be something that should be addressed to Congress. Interest has never been awarded outside of the District of Columbia Circuit on Title VII attorneys'

fees. Even in the District of Columbia Circuit, it has not been awarded, certainly not before 1980 -- even in 1982, in a case called Parker versus Lewis, the Court of Appeals acknowledged that interest was not available on Title VII attorneys' fees.

And yet, plaintiffs in Title VII actions against the Government have been able to obtain representation. This is not a case where the statute simply cannot function without the award of interest.

QUESTION: May I just, one last question. What is your response to his reliance of the patent case, Devex against General Motors?

MR. ROTHFELD: Well, Devex involved a private patent action, where the no interest rule had no application at all, and obviously the Court didn't discuss any --

QUESTION: Well, but the Government was the infringer in that case, wasn't it?

MR. ROTHFELD: Not in the Devex case.

QUESTION: Devex was against General Motors. That's right, it was General Motors.

MR. ROTHFELD: The Court relied in that case on Waite simply for general propositions relating to the availability of pre-judgment interest. There was no discussion of --

QUESTION: What about the claims against the Government where the Government is an infringer of a patent? Is pre-judgment interest awarded in those cases, do you know?

MR. ROTHFELD: Generally, there's -- I know that the Court of Appeals have handled it -- I'm afraid I can't provide you with a citation now -- that, in post-Waite cases, that interest is not available against the Government.

Waite, interest obviously was awarded, although again the United States didn't contest the availability of interest, so the issue was conceded when it reached this Court.

My understanding is generally interest is not available against the United States on patent infringement claims.

If there are no further questions.

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

(Whereupon, at 11:46 a.m., oral argument in the above-entitled case was submitted.)

CERTIFICATION

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

#85-54 - LIBRARY OF CONGRESS, ET AL., Petitioners v.

TOMMY SHAW

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)