

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1630

TITLE LOWELL D. HEWITT, ET AL., Petitioners V.
AARON HELMS

PLACE Washington, D. C.

DATE March 4, 1987

PAGES 1 thru 54

AR
ALDERSON REPORTING

(202) 628-9300

20 F STREET N.W.

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X
3 LOWELL D. HEWITT, ET AL., :
4 Petitioners :
5 v. : No. 85-1630
6 AARON HELMS :
7 -----X

8 Washington, D.C.

9 Wednesday, March 4, 1987

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 11:51 a.m.

13 APPEARANCES:

14 THOMAS G. SAYLOR, JR., ESQ., First Deputy Attorney
15 General of Pennsylvania, Harrisburg, Pennsylvania; on
16 behalf of the Petitioners.

17 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; as amicus
19 curiae supporting Petitioners.

20 ROBERT HAROLD VESELY, Williamsport, Pennsylvania; on
21 behalf of the Respondents.

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
THOMAS G. SAYLOR., JR., ESQ.	
on behalf of Petitioners	3
LAWRENCE G. WALLACE, ESQ.	
as amicus curiae supporting Petitioners	16
ROBERT HAROLD VESELY, ESQ.	
on behalf of Respondents	26
THOMAS G. SAYLOR., JR., ESQ.	
on behalf of Petitioners - rebuttal	51

1 district court to determine the issue of petitioner's
2 claim of official immunity, and also to determine the
3 appropriateness and availability of the relief requested
4 by Helms. On remand Helms abandoned any claims other
5 than his request for damages.

6 The district court granted judgement for the
7 officials, finding them to be immune from liability for
8 damages, and the court of appeals affirmed. Helms then
9 petitioned for attorney's fees which the district court
10 denied, finding that Helms had not prevailed in this
11 litigation.

12 The court of appeals reversed and awarded
13 fees, concluding that its statement of the law on prison
14 informants in its first opinion was sufficient to
15 qualify Helms as a prevailing party under the Civil
16 Rights Attorney's Fees Awards Act.

17 In addition, the court of appeals directed the
18 district court to determine whether Helms' suit was a
19 catalyst for a state regulation addressing the use of
20 informant testimony which was passed, or promulgated
21 after judgment had been entered for the officials.

22 There are two major reasons, Your Honors, why
23 a plaintiff like Helms should not be entitled to
24 attorney's fees. First of all, to award attorney's fees
25 to a claimant who has obtained no personal benefit or no

1 actual relief as a result of his suit would violate both
2 the plain meaning of the statute, as well as the intent
3 of Congress.

4 QUESTION: Was there ever a judgment that the
5 use of secret testimony was illegal?

6 MR. SAYLOR: No, Your Honor. There was a
7 statement of the law by the Third Circuit Court of
8 Appeals on that point, saying that the use of the
9 informant testimony by the officials under the facts of
10 this case was violative of Mr. Helms' due process rights.

11 No judgment, Your Honor; there was a remand at
12 that time to the court of appeals to consider --

13 QUESTION: To the district court?

14 MR. SAYLOR: To the district court, I'm sorry,
15 to consider petitioner's claim of entitlement to
16 immunity based on the statement of the law articulated
17 by the Third Circuit. It's really the first prong of
18 the two-prong Harlow inquiry.

19 The court of appeals said what the law is and
20 left it to the district court to determine whether that
21 law was clearly established. Also, Your Honor, the
22 court of appeals on remand --

23 QUESTION: What if the district court -- what
24 did the district court hold on remand?

25 MR. SAYLOR: That the officials were immune.

1 That was the only issue before the district court on
2 remand.

3 QUESTION: Well, what it it had held that they
4 were not immune? Then all the district court would have
5 had to do was determine the damages?

6 MR. SAYLOR: Correct, Your Honor.

7 QUESTION: Because there would have been a
8 judgment already -- it would have been required by the
9 court of appeals' holding or opinion for the district
10 court to say that the use of the secret testimony was
11 violative of due process?

12 MR. SAYLOR: On remand, Your Honor, the court
13 of appeals instructed the district court to enter
14 summary judgment for Helms unless it found the officials
15 to be immune.

16 QUESTION: Right, right.

17 MR. SAYLOR: And it also --

18 QUESTION: So that, the district court had
19 nothing more to do with the law?

20 MR. SAYLOR: That's correct, except to
21 determine whether that law was clearly established at
22 the time of the --

23 QUESTION: Exactly, exactly. And if it had
24 found -- if they had found no immunity it would have
25 gone on to determine damages, wouldn't it?

1 MR. SAYLOR: Correct. It would have entered
2 summary judgment for Helms and determined damages.

3 QUESTION: You say that isn't equivalent to
4 his having obtained a declaratory judgment?

5 MR. SAYLOR: Not even close, Your Honor. The
6 court didn't enter judgment. It didn't direct the
7 district court to enter judgment. It told the district
8 court on remand to determine the appropriateness and the
9 availability of the requested relief.

10 It expressed no opinion.

11 QUESTION: But if no immunity -- you enter
12 summary judgment --

13 MR. SAYLOR: On the damage issue, not a
14 declaratory judgment.

15 QUESTION: As a predicate to -- before you
16 order damages you have to find that somebody has done
17 something wrong.

18 MR. SAYLOR: You have to determine the law
19 applicable to the facts.

20 QUESTION: And the court of appeals determined
21 it.

22 MR. SAYLOR: Right.

23 QUESTION: Okay.

24 MR. SAYLOR: Favorable decision on the law, a
25 far cry from declaratory judgment. Declaratory

1 judgment, Your Honor, you can enter, you can enforce,
2 you can execute on it, you can appeal from it.

3 QUESTION: On that point, General, will you
4 just refresh my recollection. The secret testimony,
5 informants' testimony had been used in the disciplinary
6 proceeding for what purpose?

7 MR. SAYLOR: To convict him of prison
8 misconduct, Your Honor, based on his involvement in a
9 prison riot.

10 QUESTION: So, his prison record included in
11 effect a finding of guilt of some kind of prison
12 misconduct?

13 MR. SAYLOR: Correct.

14 QUESTION: And wouldn't that clear his record,
15 though? Wouldn't the result of this proceeding have the
16 effect of at least washing that off of his record?

17 MR. SAYLOR: Your Honor, Helms had asked for
18 three forms of relief. He asked for money damages.

19 QUESTION: Right.

20 MR. SAYLOR: He asked for declaratory
21 judgment, and he asked for an injunction enjoining
22 prison officials from doing certain things, but also to
23 expunge his record.

24 QUESTION: Correct.

25 MR. SAYLOR: He never got an injunction. In

1 point of fact, on remand to the district court after the
2 Third Circuit had stated the law, Helms abandoned his
3 claim for expungement of his misconduct charge.

4 QUESTION: Well, he abandoned it, but isn't
5 the effect of what the court of appeals held -- I mean,
6 I can't imagine they still have on his record the fact
7 that he is guilty of a crime for which there is no
8 evidence, or do they?

9 MR. SAYLOR: I don't know.

10 QUESTION: I mean, even if they weren't
11 ordered to take it out, wouldn't one, if later on it
12 came up for review, say another charge or something,
13 let's see how many prior violations do you have.
14 Wouldn't as a result of this proceeding they would not
15 be able to count this violation, would they?

16 MR. SAYLOR: I think that is a fair statement,
17 Your Honor.

18 QUESTION: Isn't that of some benefit to him?

19 MR. SAYLOR: No, because he didn't get an
20 expungement. He didn't get the injunction.

21 QUESTION: Because it wasn't a formal order of
22 expungement, but as I understand you it was tantamount
23 to an expungement?

24 MR. SAYLOR: No, Your Honor. There wasn't
25 anything close to an expungement order. He never even

1 asked for one.

2 When he went back on remand to the district
3 court --

4 QUESTION: We are not communicating.

5 MR. SAYLOR: I don't -- a statement of the
6 law--

7 QUESTION: We are not communicating. I
8 thought you said a moment ago that he was found guilty
9 of a misconduct charge, and that the effect of the court
10 of appeals' opinion was, he could no longer be
11 considered to have been guilty of that charge.

12 MR. SAYLOR: I am sorry. If I said that, I
13 misstated myself. I don't know that the law articulated
14 by the Third Circuit, I don't know that it would follow
15 necessarily from the Third Circuit statement of the law
16 that this misconduct charge could never be used against
17 this man.

18 What I meant to tell --

19 QUESTION: That statement of law might be
20 wrong, might it not? You had no opportunity to appeal
21 it, whereas if a final judgment had been based upon it
22 you would have had an opportunity to appeal it?

23 MR. SAYLOR: That is correct. You appeal from
24 judgments, Your Honor. And to try to be fully
25 responsive to your question, I don't think there was any

1 collateral consequences, Your Honor, of this misconduct
2 charge.

3 I don't think the State could have used it in
4 any way against this man.

5 QUESTION: Is he incarcerated again?

6 MR. SAYLOR: I saw a reference to that in
7 respondent's brief, Your Honor. We did check in
8 anticipation of the argument and found out that in point
9 of fact he has been returned -- he is back in prison.

10 QUESTION: He is back in what?

11 MR. SAYLOR: He is back in prison, Your Honor.

12 CHIEF JUSTICE REHNQUIST: We will resume at
13 1:00 o'clock.

14 (Whereupon, at 12:00 o'clock noon, the Court
15 recessed, to reconvene at 1:00 o'clock p.m. this same
16 day.)

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5

2

3

5

6

7

10

15

16

19

25

1 Your Honors, if you accept Helms' position, it
2 is going to encourage of necessity litigation beyond the
3 point where the results have any effect on the relief
4 available to the parties. Appeals are going to be taken
5 from statements of the law merely because defendants
6 want to avoid liability for attorneys' fees. Or
7 conversely, I guess you could say because attorneys for
8 the plaintiff want to recover fees even though there is
9 no effect on the relief available to their clients.

10 QUESTION: Well, that won't really happen. I
11 think the result is quite different from that. They
12 won't be -- you're not able to appeal a statement that
13 has no operative effect.

14 It isn't that people will appeal it. It is
15 that they won't be able to appeal it and will get stuck
16 with the attorneys' fees.

17 MR. SAYLOR: Yes, Your Honor.

18 QUESTION: I think that's right. This
19 couldn't have been appealed, could it?

20 MR. SAYLOR: Well, we could have petitioned
21 for certiorari.

22 QUESTION: Well, we wouldn't have taken it.
23 It wasn't final.

24 MR. SAYLOR: In effect it couldn't have been
25 appealed.

1 QUESTION: Of course, we took one part of the
2 case on petition for certiorari when it was not final.

3 MR. SAYLOR: Yes, Your Honor, the
4 administrative custody issue. I think that the
5 arguments that I have made are particularly relevant,
6 Your Honors, in cases involving governmental immunity,
7 which is based on the sound idea that government
8 officials should be free to vigorously pursue their
9 duties without the fear of monetary awards, whether
10 those awards take the form of damages or of fees.

11 Again, at least in some instances if you award
12 a plaintiff like Helms attorney's fees, officials are
13 going to be litigating statements of law despite their
14 entitlement to immunity even where there is no effect on
15 the relief available to the parties.

16 In the absence of liability for damages and in
17 the absence of the entry of any other relief, a
18 government official's immunity is seriously weakened if
19 they are nonetheless held liable for attorney's fees.

20 As this Court has pointed out, as recently as
21 in the unanimous decision of Kentucky versus Graham a
22 liability on the merits and responsibility for fees go
23 hand in hand. Where defendant has not been prevailed
24 against, either because of legal immunity or on the
25 merits, Section 1938 does not authorize a fee award

1 against that defendant.

2 It would be unfair and unjust and a
3 dissservice to the very important principle of qualified
4 immunity to permit an award of attorney's fees against
5 state officials who are found not liable to the
6 plaintiff.

7 We urge this Court to reverse the court of
8 appeals.

9 QUESTION: May I ask one other question. This
10 was not a class action, was it?

11 MR. SAYLOR: No, Your Honor.

12 QUESTION: And when we reviewed the custody
13 issue, had he already been released from prison?

14 MR. SAYLOR: Oh, yes, Your Honor. He was
15 released shortly after he initiated this lawsuit.

16 QUESTION: I guess we -- did we review a moot
17 case then? If he was out of prison --

18 MR. SAYLOR: No, Your Honor, because his claim
19 for damages was still clearly alive.

20 QUESTION: But the administrative custody
21 issue, did that involve the claim for damages or was
22 that injuncive relief?

23 MR. SAYLOR: Yes, it did, Your Honor. He
24 claimed damages on two violations.

25 QUESTION: Right, okay.

1 QUESTION: Was the case less than final when
2 we took it the first time around?

3 MR. SAYLOR: Was it --

4 QUESTION: Was it less than final? The Chief
5 Justice said that we took it although it wasn't final.
6 Had there been no adjudication of the damages yet?

7 MR. SAYLOR: That's correct. The court of
8 appeals, Your Honor, had remanded the case to the
9 district court but in the meanwhile this court granted
10 certiorari to review the court of appeals' finding of
11 the law on the administrative custody issue.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
13 Saylor.

14 We ~~will~~ hear from you now, Mr. Wallace.

15 ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.

16 AS AMICUS CURIAE SUPPORTING PETITIONERS

17 MR. WALLACE: Thank you, Mr. Chief Justice,
18 and may it please the Court:

19 The civil rights attorney's fee provision and
20 other fee award statutes enacted by Congress provide for
21 the award of attorney's fees to prevailing parties as an
22 incident of litigation in which those parties succeed on
23 the merits of their claims. These statutes are not
24 intended to exalt attorneys' fees into a self-generating
25 force that will drive the merits litigation or transform

1 the nature of the merits litigation.

2 That is the basic theme of the brief that we
3 have filed, and we believe a fundamental principle
4 reflected in this Court's decisions under the attorneys'
5 fees statutes, and preservation of that principle
6 requires in our view insistence that the statutory term
7 "prevailing party" be given meaningful and manageable
8 content.

9 To be a prevailing party, the plaintiff must
10 receive some practical relief or benefit for himself on
11 the merits of his claim, whether by judgment, by
12 settlement, by consent decree or by voluntary action
13 taken by the defendant, and here the respondent did not
14 receive any such benefit or relief.

15 His damages claims were held barred by
16 immunity, and he failed to pursue any of his equitable
17 claims presumably because they were moot since he was no
18 longer in prison. Now, it is true that the court of
19 appeals said on his first appeal that his rights had
20 been violated but it did not rule on whether he was
21 entitled to any relief.

22 This Court's decisions make clear that a
23 litigant is not automatically entitled to equitable
24 relief, whether declaratory relief or injunctive relief,
25 merely because a court agrees with his contention on the

1 merits. A judgment in his favor may nonetheless be
2 precluded by mootness, by lack of standing, by case of
3 controversy limitations, by equitable considerations.

4 QUESTION: -- directed the entry of a
5 declaratory judgment in his favor --

6 MR. WALLACE: Well, then it would have ruled
7 that he was entitled to relief and I think we would have
8 a substantially different --

9 QUESTION: No, no, but no other -- is a
10 declaratory judgment by itself without any claim for
11 damages a basis for a fee?

12 MR. WALLACE: It could be a basis for a fee.
13 That would then bring in the criteria that this Court
14 talked about in Hensley against Eckerhart of whether he
15 prevailed on a substantial part of what he was seeking.

16 Of course, that would have been a quite
17 different ruling. What he got from the court of appeals
18 ultimately was no different than if the district court
19 in the first place had rejected his claim on grounds of
20 immunity and mootness and the court of appeals had
21 merely affirmed that but citing dictum about, you know,
22 if they weren't barred by mootness and immunity we think
23 he would indeed have a meritorious claim and his rights
24 were violated.

25 QUESTION: Mr. Wallace, I am right here.

1 Isn't it true that in some of our case we have
2 said that requests for declaratory judgments are subject
3 to the same limitations as requests for injunctions;
4 that is, that you don't just simply come in and say, I
5 wanted that declaration of the law, period.

6 MR. WALLACE: Exactly so, Mr. Chief Justice.
7 I have many of them in hand here. It's just what I had
8 in mind.

9 QUESTION: But before you get them all out
10 here, he got more than a declaration of law. Didn't he
11 get a declaration that the factual basis for the finding
12 of misconduct was unconstitutionally obtained?

13 MR. WALLACE: That is -- one could call it a
14 declaration. The court of appeals subsequently said it
15 was a declaration. But it was the functional equivalent
16 of saying the same thing in dictum, as I said if the
17 district court had in the first place rejected his
18 claims on grounds of immunity and mootness and then he
19 had appealed to the court of appeals and they affirmed
20 that judgment but said in the opinion that were it not
21 for that, it's true that he was barred, it's the
22 functional equivalent.

23 They never ruled that he --

24 QUESTION: I think that overstates it a
25 little. That overstates it a little. It's more than

1 that, surely.

2 It is at the time it is pronounced an
3 operative judicial act that has real force, unlike a
4 dictum, right?

5 MR. WALLACE: It remanded the case for a
6 determination of the --

7 QUESTION: And is it not true that it is also
8 a judicial statement that could have been made the
9 subject of a petition for certiorari to this Court if
10 you wanted to review it, if Pennsylvania wanted to.

11 MR. WALLACE: It could have.

12 QUESTION: And there would have been no
13 jurisdictional objection even though it would have been
14 non-final and as a matter of discretion we probably
15 would have denied it.

16 MR. WALLACE: It is equally true that a
17 petition for certiorari before a judgment could have
18 been filed before the court of appeals had ruled at
19 all. But it is hard to persuade the Court to grant
20 review in an interlocutory posture.

21 QUESTION: But they did in this very case, at
22 that very time --

23 MR. WALLACE: The Court did -- in this very
24 case with respect to an issue that it concluded
25 warranted review, but that is a rather exceptional

1 circumstance. It does happen.

2 QUESTION: Well, all we did was we granted
3 certiorari from a judgment of the court of appeals.

4 MR. WALLACE: That is correct.

5 QUESTION: And before it was final, but there
6 is no need for finality from the federal court.

7 MR. WALLACE: That is correct. That is
8 correct. There was a grant of certiorari.

9 QUESTION: If the same thing happened in a
10 court system, in a state court system and the same thing
11 happened at the intermediate state court level and then
12 it went down to the court of first instance, there would
13 have been no way unless the Supreme Court of the state
14 had -- and was as liberal as we are on interlocutory
15 appeals, there would have been no appeal of right of
16 that dictum, in any case.

17 You can certainly say that, but the person who
18 would be socked with the attorney's fee would have no
19 way of appealing the correctness of the statement that
20 is the basis for the fee.

21 MR. WALLACE: That is correct, Mr. Justice,
22 nor would there have been any right of review from this
23 Court in the hypothetical case I have posited where it
24 was purely dictum by the court of appeals which was
25 affirming the rejection of his claim but which I think

1 is the functional equivalent for purposes of whether he
2 was a prevailing party because he got no more and no
3 less than he would have gotten in that situation.

4 QUESTION: And they should have given a
5 declaratory judgment?

6 MR. WALLACE: Well, then he would have
7 prevailed to that extent, because the --

8 QUESTION: Wouldn't he be entitled to --

9 MR. WALLACE: The court would have ruled that
10 he was entitled to a declaratory judgment, then.

11 QUESTION: Would he then be entitled to
12 attorney's fees?

13 MR. WALLACE: He would at least be entitled if
14 he met the --

15 QUESTION: So, the magic words are, he should
16 have granted?

17 MR. WALLACE: The court of appeals --

18 QUESTION: The court said that he was entitled
19 to it. It didn't say declaratory judgment, but it said
20 he was entitled to relief.

21 MR. WALLACE: Well, they --

22 QUESTION: Are we quibbling on words?

23 MR. WALLACE: No, Mr. Justice, because by the
24 time the court of appeals ruled, he was not in jail and
25 there was a serious question about whether a declaratory

1 judgment should issue on the supposition that he might
2 commit another crime and go back to jail sometime in the
3 future.

4 Well, the court of appeals never tried it
5 out. They never ruled on that. They never said he was
6 entitled to relief. That's my point.

7 QUESTION: They said he was entitled -- they
8 didn't say injunctive relief or declaratory judgment.

9 MR. WALLACE: That's right.

10 QUESTION: But he was entitled to relief.

11 MR. WALLACE: Well, they didn't say he was
12 entitled to relief. They said his right had been
13 violated. That's different.

14 QUESTION: It surely is, in words.

15 MR. WALLACE: Well, they said his right had
16 been violated and he'll get damages unless there's
17 immunity. That's what they said.

18 QUESTION: I don't read it that way. You
19 could be right.

20 QUESTION: Mr. Wallace, you really have two
21 separate theories, as I understand it. One is that he's
22 out of jail and so therefore even expungement wouldn't
23 have done him any good.

24 Secondly, even if he were still in jail, this
25 is not quite as good as declaratory judgment. Is that

1 right? You have two separate arguments?

2 MR. WALLACE: Yes. I would say my second
3 point is understated by saying it's not quite as good.
4 I don't think he was entitled to a declaratory judgment
5 because his case was moot, in seeking equitable relief.

6 QUESTION: You don't think if he had asked for
7 it, that he could have had that order expunged, the
8 misconduct?

9 MR. WALLACE: Probably not because he was no
10 longer in jail and the only basis on which his case
11 would not be moot would be for the court to be willing
12 to assume he might commit another crime and go back to
13 jail.

14 QUESTION: Or he might be asked to fill out an
15 employment application on, "what were your misconduct
16 violations in jail." And he'd say none in one case, and
17 he'd say in the other case, "I beat up the guard," or
18 whatever it was.

19 That's not enough?

20 MR. WALLACE: I don't think so.

21 QUESTION: Mr. Wallace, what about the
22 opportunity for gamesmanship? That troubles me a little
23 bit here. You get a remand from a court of appeals and
24 you know that the only thing that's left to be litigated
25 on the remand is something you're going to lose on.

1 Let's assume that all that had been asked was
2 either an injunction or a declaratory judgment, so you
3 immediately amend the prison regulations so the thing is
4 moot by the time it gets to the district court. That's
5 a way of avoiding paying the attorney's fees, for
6 somebody who has basically beat you fair and square.

7 MR. WALLACE: Someone can be a prevailing
8 party if the defendant has taken voluntary action that
9 moots out his claim. We readily concede that and the
10 cases establish that.

11 But, the catalyst concept should not be
12 extended to a situation where it has no effect on his
13 litigation and he didn't prevail in any way, and it
14 doesn't extend the rule more generally that he prevailed
15 on.

16 QUESTION: But he was paroled and that is what
17 mooted his claim, wasn't it? He was paroled; isn't that
18 what largely mooted the claim?

19 MR. WALLACE: Yes.

20 QUESTION: And I take it that was -- they
21 didn't have to parole him?

22 MR. WALLACE: Well, but those standards have
23 nothing to do with whether he had a pending claim. That
24 is a determination made wholly independently of the
25 lawsuit.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
2 Wallace.

3 We will hear from you now. Mr. Vesely.

4 ORAL ARGUMENT OF ROBERT HAROLD VESELY
5 ON BEHALF OF THE RESPONDENT

6 MR. VESELY: Mr. Chief Justice, and may it
7 please the Court:

8 The case before you today is one dealing with
9 statutory construction, and in the process of statutory
10 construction there are several things to look at, among
11 which are the statute itself and the legislative history.

12 Obviously from the discussion that's gone on
13 this morning, we are well aware that there is nothing in
14 the statute itself that is going to answer the question
15 before this Court. However, we feel there is strong
16 language in the legislative history to indicate that the
17 Third Circuit's decision was correct, and I will attempt
18 to address that language today.

19 There are three basic focuses in the language
20 of the legislative history as to when we decide to shift
21 attorney's fees. Those three focuses are the
22 vindication of rights, constitutional or statutory; when
23 an individual functions as a private attorney general,
24 enforcing congressional policies; and third, when the
25 person has effectively secured compliance with the

1 federal or constitutional laws.

2 Where these policies have been furthered,
3 Congress has made the decision that we shift the burden
4 or the costs of establishing that violation from the
5 person who was subject to the violation to the
6 violator. That is the pure and simple language we
7 believe is involved in the legislative history.

8 As to the issue of the vindication of rights,
9 this language is repeated constantly throughout the
10 legislative history and it is repeated, not to be too
11 picayune about this but at least nine times within the
12 language of the legislative history.

13 Significantly, what is not contained in the
14 legislative history are concepts of personal benefit and
15 formal relief. One of the issues with regard to the
16 vindication of constitutional rights is the concept and
17 the expressed language of the fact that when an
18 individual succeeds on an important matter in the course
19 of litigation, that is a point at which Congress as
20 decided it is proper to shift the costs --

21 QUESTION: You are talking about expressed
22 language of legislative history?

23 MR. VESELY: Yes. I am talking about language
24 in the legislative history.

25 QUESTION: And not --

1 MR. VESELY: Words, "important matter" in the
2 course of litigation are the specific words that I am
3 referring to.

4 QUESTION: So, now we talk about expressed
5 language in the statute but about expressed language in
6 the legislative history?

7 MR. VESELY: Well, the reason we have to go
8 back to that, Your Honor, I believe is if we look at the
9 statutory language. Obviously the concept of
10 "prevailing party" is the concept that all the courts
11 have been struggling over, so the word "prevailing" does
12 not have a finite definition.

13 The only point at which there is reference to
14 that specific word "prevailing party" in that specific
15 context is they state, "A party can be perceived to have
16 prevailed when he succeeds on an important matter in the
17 course of litigation or he can prevail without obtaining
18 -- when he vindicates rights without formally obtaining
19 relief."

20 That is the section in which they use the word
21 "prevail" in the legislative history, and that is why I
22 have focused upon that area.

23 QUESTION: Well, that may well have been what
24 the Committee in question had in mind. Do you think
25 that it's clear that the entire House, much less the

1 other House, had that in mind just from the words
2 "prevailing party"?

3 Do you think the word is that ambiguous to --

4 MR. VESELY: Yes, I think the word is in fact
5 that ambiguous.

6 QUESTION: "Prevailing party in litigation"?

7 MR. VESELY: Yes.

8 QUESTION: I wouldn't have thought that.

9 May I ask you this, what happens to the
10 doctrine of immunity of federal officials such as was
11 involved here if you know you can get a judgment for at
12 least your attorney's fees so long as you get a court to
13 determine the issue of the merits before it determines
14 the issues of official immunity?

15 Doesn't it in effect invite lawsuits, which is
16 just exactly what the statute -- the doctrine of
17 immunity is designed to forestall?

18 MR. VESELY: Well, I don't think it invites
19 lawsuits because what in fact invites lawsuits is the
20 fact that someone's constitutional rights have been
21 violated. The reality of the situation will be that
22 where that has happened all you are going to require is
23 that the same actions to accomplish the exact same
24 result will be brought as class actions and so you don't
25 decrease the litigation.

1 All you do is in fact -- you have the exact
2 same litigation and the people are going to be subject
3 to the same number of suits. You just restructure the
4 way it's brought.

5 Maybe I am not -- are you asking me about the
6 damage concept?

7 QUESTION: Yes. I'm asking about the damage
8 concept.

9 MR. VESELY: The damage concept in that
10 regard, it's the concept of attorney's fees is a
11 shifting of cost and I answer you this way because the
12 issue of damages is divorced from the decision that
13 Congress made as to the shifting of cost.

14 In other words, they didn't decide because
15 someone was awarded damages that you shift the costs
16 over. Once you establish the violation of
17 constitutional right, that's why you shift costs.

18 QUESTION: But the doctrine of official
19 immunity, I think means that an officer when he performs
20 his duties shouldn't have to worry about having to pay a
21 lot of money out of his own pocket. But you are now
22 saying that he does have to worry a lot -- he at least
23 has to pay the attorney's fees on his side and the
24 attorney's fees on the other side, even if he has that
25 immunity, so long as the Court reaches the merits before

1 it reaches the immunity issue.

2 MR. VESELY: I think the simple answer to that
3 was the answer that was given by this Court in the
4 Pulliam versus Allen case. That may be a logical
5 concern, but that's a decision that Congress has made
6 and it's the Congress that these people should repair if
7 they don't agree with that concept, and not to this
8 Court.

9 QUESTION: The very fact that the conclusion
10 does prove troubling is some reason to look closely at
11 whether Congress really mandated it. And certainly it
12 didn't mandate it in the statutory language.

13 I'm not sure that I would be persuaded simply
14 by quotations from the legislative history in one House,
15 if the result seems that illogical.

16 MR. VESELY: Well, I don't believe it is in
17 fact that illogical, because what you have is, you have
18 an expressed desire by Congress that in these certain
19 situations where these policies have been furthered, we
20 are going to shift the costs.

21 Now, they then leave it to the states to
22 decide how they are going to deal with that thing, but
23 it's really in essence, it's a legislative determination
24 and I don't think a judicial determination. Congress
25 had the power to do it.

1 QUESTION: And the Congress exercised that
2 power by saying that a prevailing party should recover
3 attorneys' fees.

4 MR. VESELY: Yes.

5 QUESTION: But that's what Congress said.

6 MR. VESELY: Yes.

7 QUESTION: And you're asking us to draw what
8 may seem to some of us quite an illogical conclusion
9 from it, and you are saying that Congress directed us to
10 do it.

11 Well, Congress didn't direct us to draw that
12 in the language of the statute.

13 MR. VESELY: No, I agree that in fact, if you
14 read the statute, that very little guidance is going to
15 be given to the Court and that's why I have gone to the
16 legislative history as really the only other alternative
17 we have to, you know, receive guidance from Congress on
18 this issue.

19 QUESTION: Mr. Vesely, if the court below had
20 decided the question of immunity first and had found
21 that the officers had immunity for their actions, I
22 suppose you wouldn't be here claiming attorney's fees?

23 MR. VESELY: That is correct. If they had not
24 made a final determination on the merits as to the fact
25 that they violated his constitutional rights.

1 QUESTION: Well, why should the result be any
2 different if at the end of the line they determine there
3 is immunity, but in the meantime have something to say
4 about the merits? It's just kind of illogical.

5 MR. VESELY: I am not sure I understand Your
6 Honor's question.

7 QUESTION: Well, suppose at the end of the
8 line when the case is all over and done with, the court
9 decides the officers are immune.

10 MR. VESELY: Yes.

11 QUESTION: But in the process of doing that
12 makes comments in the course of the opinion about the
13 merits of the underlying violation. Do you think you
14 are entitled to recover them?

15 MR. VESELY: I think in situations where they
16 have -- you have to remember that the nature of how the
17 judgment was -- I think in situations where they have in
18 fact made a judgement on the merits as to the
19 constitutional violation, yes, I think in every one of
20 those circumstances attorneys' fees should be awarded
21 regardless of concepts of immunity.

22 QUESTION: What do you mean by a judgment? I
23 mean, if you said a judgment, you know, in the sense
24 that Mr. Wallace was using it I would understand what
25 you meant. But when you say a judgment on the merits,

1 it could be dictum.

2 MR. VESELY: Well, the dictum then wouldn't be
3 a judgment on the merits. I mean, in other words the
4 merits wouldn't have been presented to the case. It
5 wouldn't have been a case at law, a case of controversy,
6 I presume.

7 QUESTION: But all these are live cases of
8 controversy. You go to trial on these 1983 cases and
9 you say, "My constitutional rights have been violated."

10 MR. VESELY: Yes.

11 QUESTION: And the officer comes back and
12 says, "But I'm entitled a defense of good faith
13 immunity."

14 Now, the court has its option in whether to
15 talk first about the merits or first about immunity.
16 Maybe most courts go directly to immunity, but we've got
17 a situation where in the process of handling the
18 case the Court had something to say about the merits.

19 Now, why should that determine, at the end of
20 the line, whether attorney's fees are recovered or not?

21 QUESTION: Mr. Vesely, I think we have held
22 here that the immunity defense is no bar to an
23 injunction.

24 MR. VESELY: Yes.

25 QUESTION: And I suppose it isn't any bar to a

1 declaratory judgment.

2 MR. VESELY: I believe that both those were
3 involved in the Pulliam case.

4 QUESTION: And the court of appeals here said
5 that this complaint included a claim for a declaratory
6 judgment. Did it?

7 MR. VESELY: Yes. In fact, the initial thing
8 requested in the complaint for relief, and that was in
9 fact specifically requested from the Third Circuit on
10 appeal.

11 QUESTION: So even if there had been a holding
12 of immunity that wouldn't have entered the case?

13 MR. VESELY: No. That was perhaps my
14 inarticulate statement as to the nature of why
15 attorney's fees are being awarded. They aren't being
16 awarded for damages. They are being awarded because of
17 a declaration of constitutional rights.

18 QUESTION: But what do you think wasn't mooted
19 out by his release?

20 MR. VESELY: What wasn't mooted out?

21 QUESTION: Yes.

22 MR. VESELY: His damage claim was not mooted
23 out.

24 QUESTION: Was not mooted out by his release?

25 MR. VESELY: Yes, and this Court has

1 repeatedly held that you can receive a declaratory
2 judgment as a predicate to a damage claim.

3 QUESTION: You almost have to -- you almost
4 have to whether you call it a declaratory judgment or
5 not. You have to establish what the law is as a
6 predicate for a damage suit.

7 MR. VESELY: Yes, you do, but it is possible,
8 one of the ways that that could be avoided would be,
9 even if -- a 12-B motion, I would think, would be the
10 way around it, to basically say under the facts -- even
11 if we assume everything he said is true, he would have
12 qualified immunity.

13 QUESTION: Well, what if a plaintiff in a case
14 similar to this sues for damages and says, my rights
15 have been violated by these prison regulations or prison
16 practices and I want a judgment for damages. And the
17 state comes in and says, we think you are wrong on the
18 merits. We also think we are entitled to immunity.

19 And the district court says, yes, your rights
20 were violated but we think the defendants are entitled
21 to official immunity. Now, can the defendants appeal
22 from that judgment?

23 MR. VESELY: Yes, I believe they can.

24 QUESTION: Under what theory? I thought you
25 had to be a losing party to appeal from a judgment.

1 MR. VESELY: No, I don't believe that that's
2 -- for one, if we consider that to be a declaratory
3 judgment, the Declaratory Judgment Act specifically says
4 that declaratory judgments are reviewable.

5 However, if we do not specifically consider a
6 declaratory judgment, I believe this Court has held,
7 where you can show that a decision that has made -- even
8 where the ruling has been in your favor is appealable
9 for purposes of -- if it has adverse consequences
10 against you and in fact, then you still have a live case
11 or controversy.

12 QUESTION: So, then we are going to expand the
13 class of appealable orders from the district court by
14 virtue of the potential for attorneys' fees?

15 MR. VESELY: Well, I don't necessarily think
16 -- I am not saying we expand that. My argument is that
17 that already exists, and I would point out that the
18 counterpoint to that is, Aaron Helms certainly walked
19 into this case well aware of qualified immunities, and
20 he specifically sought declaratory relief because until
21 Aaron Helms walks in there and obtains declaratory
22 relief this policy isn't going to change.

23 You have to remember that the person who is
24 arguing in favor of this policy is the person who is
25 supposed to enforce the laws. But for Aaron Helms

1 coming in, nobody in that state is going to walk in
2 there and try and get this policy changed.

3 That's a very important concept, I think, and
4 that's why Congress has said in this situation, even
5 though it may at times seem harsh, we are going to shift
6 that cost.

7 QUESTION: You would also agree, wouldn't you,
8 that you are going to have more appealable orders under
9 your theory than under your opponent's theory, officials
10 are going to be able to appeal more often and will
11 probably be motivated to appeal more often?

12 MR. VESELY: Well, I -- the reality is, I
13 would have to say yes. However, I think there certainly
14 is an indication that their motivation as to appealing
15 these types of orders does not solely exist for fear of
16 attorneys' fees, because in fact the order that was
17 ultimately appealed to this Court and the one that they
18 chose not to appeal was in fact the final decision.

19 The one that they chose to appeal to this
20 Court was not in fact the final decision. All the Court
21 had done in that circumstance was remand it for a
22 determination, a factual determination, if his rights
23 had been violated. And they chose not to -- there was
24 nothing left to do once they made a decision on the
25 issue that we are here for today. The facts were

1 admitted and the court took note of that in its decision.

2 I would like to stress the concept, which I
3 have already done, of fee shifting because it is a
4 policy decision again that is made by Congress and
5 again, I think the problem comes when we try to equate
6 what has to happen here with formal relief and judgments.

7 There is nothing in the legislative history
8 that indicates that they contemplated formal relief and
9 judgments, and I think one of the most significant cases
10 in the legislative history is the case of Richards
11 versus Griffith Rubber.

12 That was a Title 7 case, and they use this
13 case to show for the vindication of rights concept
14 without formally obtaining relief, the individual
15 received a determination that the practices that the
16 employer was using violated her constitutional --
17 violated her statutory rights under Title 7.

18 She could not receive any relief because the
19 employer was only doing it solely to comply with the
20 state regulation. The state regulation subsequently
21 changed. Despite the fact that there was no relief,
22 despite the fact that the only thing that occurred in
23 that situation was a finding of a violation of the
24 statute, the court awarded attorney's fees.

25 One of the reasons I think this case is

1 significant is that it is a fairly obscure district
2 court case out of Oregon that they cited for this
3 proposition, so they must have picked it for a reason
4 and that's why we think that's an important case.

5 QUESTION: When this case was here before, he
6 had already been released from prison?

7 MR. VESELY: That's correct.

8 QUESTION: And his only interest at that time
9 in the case was the fact that there was a damages claim
10 pending?

11 MR. VESELY: Yes.

12 QUESTION: He could at that time get no
13 personal benefit out of the declaratory judgment phase
14 of the case?

15 MR. VESELY: Well --

16 QUESTION: I think we noted, didn't we, at
17 that time that the court of appeals had said that the
18 secret testimony violated his rights?

19 MR. VESELY: Yes.

20 QUESTION: And then we remanded?

21 MR. VESELY: Yes.

22 QUESTION: Because that issue was still in the
23 case and it might be a ground for damages?

24 MR. VESELY: Yes.

25 QUESTION: Well, but at that time, if his only

1 interest was in the damages, how could he have gotten
2 any benefit out of just the fact that the court of
3 appeals had made this declaration?

4 MR. VESELY: Well, the simple answer to that,
5 Your Honor, is I don't --

6 QUESTION: Do you have to get to the catalyst
7 argument?

8 MR. VESELY: I don't find the vindication of
9 my constitutional rights as not of personal benefit, and
10 I think you have to -- to go along with the opposition's
11 argument you have to make that determination that the
12 thing that Congress, in fact, created this statute --

13 QUESTION: Well, why isn't the answer to that,
14 that -- supposing there hadn't been a damages claim in
15 the case?

16 MR. VESELY: Suppose there had not been?

17 QUESTION: Yes.

18 MR. VESELY: Yes.

19 QUESTION: Wouldn't the case have been moot?

20 MR. VESELY: Yes, it probably would have, Your
21 Honor.

22 QUESTION: Well, whether or not the
23 vindication of your constitutional rights as a personal
24 injury, it would have been moot, the case would have
25 been over?

1 MR. VESELY: It was not in this case.

2 QUESTION: Well, only because the damages were
3 still alive, but aside from the damages, the declaratory
4 judgment phase was really a dead issue.

5 MR. VESELY: Well, it's dead to the extent
6 that it had already been decided.

7 QUESTION: He had been released.

8 MR. VESELY: He had been -- again, if you are
9 going to say that there is no benefit in that --

10 QUESTION: Well, suppose here the -- suppose
11 we just took the bull by the horns which sometimes we
12 do, and said, well, it may be true the court of appeals
13 said this or that but there's enough facts in the record
14 for us to declare that this defendant is immune.

15 Suppose we had said that. Do you suppose you
16 could have gotten attorney's fees?

17 MR. VESELY: I'm not --

18 QUESTION: Suppose at this Court we said that
19 the damages claim is dead now because we say the
20 defendant was immune.

21 MR. VESELY: And you say that in what context?

22 QUESTION: Right here in this court, when it
23 was first here, when Hewitt against Helms was first
24 here, we said the defendant is immune so the damages
25 claim is no longer alive.

1 Do you think you could have gotten attorney's
2 fees?

3 MR. VESELY: Yes, I think we should be
4 entitled to attorney's fees.

5 QUESTION: Because?

6 MR. VESELY: Because in fact, the final
7 judgment on the merits of that issue had been made by
8 the Third Circuit. That remains the law of the Circuit.

9 QUESTION: You are out of jail and absent a
10 damages claim it would have been moot.

11 MR. VESELY: Well, it would have been moot
12 except that it was entered prior to that -- prior to
13 your decision.

14 QUESTION: Mr. Vesely, I think there is some
15 inconsistency in your answer. On the one hand you say,
16 as I understand you correctly, that the vindication of
17 your client's constitutional rights is sufficient to
18 make him a prevailing party?

19 MR. VESELY: Yes.

20 QUESTION: But you acknowledge in questioning
21 by Justice White that the vindication of your client's
22 constitutional rights when he has no claim for damages
23 is not sufficient to prevent the case from becoming moot.

24 Now, how can something that's not strong
25 enough -- it doesn't take much to keep the case from

1 getting moot. How can that be enough to make you a
2 prevailing party if it isn't enough to keep the case
3 alive?

4 MR. VESELY: It a decision has been made -- my
5 answer is, if a decision on that issue was made prior to
6 it becoming moot --

7 QUESTION: Well, but the question is whether
8 there is not inconsistency between your concession that
9 the case had become moot or would be moot as long as
10 there was no viable claim for damage left.

11 You are saying that the interest in a
12 vindication of constitutional rights on behalf of your
13 client is not enough to save the case from becoming
14 moot? I don't know how you can say that and also say
15 it's enough to entitle you to fees.

16 MR. VESELY: If the seeking of a declaratory
17 judgment --

18 QUESTION: Well, but you said your request for
19 declaratory judgment would have been moot if you were
20 not also asking for damages. You seem to have conceded
21 that there's not enough left, that the interest in a
22 declaratory judgment vindicating your client's rights
23 was not of any benefit to your client after he was
24 discharged on parole.

25 I have some question about whether that is

1 right, but you seem to be willing to give it up.

2 MR. VESELY: I think I am misunderstanding
3 Your Honor. Let me -- if I phrase it back -- are you
4 assuming that I am saying that he could receive no
5 benefit?

6 QUESTION: Well, if you are saying the case is
7 moot, the reason it is moot is there is no adversary
8 interested in the result of the case any more. If he
9 has something of value he is seeking, namely a
10 vindication of his constitutional rights, and if that's
11 sufficient to justify the payment of fees, it is
12 puzzling to me why you would concede that it's not
13 sufficient to keep the case alive.

14 MR. VESELY: Well, I believe it is sufficient.

15 QUESTION: That's not the way you answered
16 Justice White.

17 MR. VESELY: Perhaps I misunderstood him. I
18 perhaps got bollixed up.

19 QUESTION: You said his interest in a
20 declaratory judgment would not prevent the case from
21 being moot. Now, you may be changing your mind, but you
22 can't -- it doesn't seem to me you can both concede that
23 and also say it's enough to make him a prevailing party.

24 MR. VESELY: The interest in --

25 QUESTION: The interest in vindicating his

1 constitutional rights.

2 MR. VESELY: I am saying --

3 QUESTION: Which is what would support a
4 declaratory judgment.

5 MR. VESELY: Yes, I would say that that would
6 be adequate for standing purposes.

7 QUESTION: The case is dismissed in the
8 district court and the plaintiff appeals his 1983 loss
9 to the court of appeals, and then while it's pending in
10 the court of appeals he is released from prison, and all
11 he ever asked for, let's assume, is a declaratory
12 judgment in the district court. That is all he ever
13 asked for.

14 He is then released while this case is pending
15 on appeal. Now, you have at least twice, earlier in
16 your argument, said the case would have become moot if
17 all it was was a declaratory judgment request.

18 Do you think it would not be moot now?

19 MR. VESELY: Well, I think that he could bring
20 a declaratory judgment action for violation of his
21 constitutional rights against the individual. I'm not
22 saying he could bring it against the state.

23 QUESTION: Well, you analogize it, then,
24 really to an action for damages rather than to an
25 injunctive action?

1 MR. VESELY: I'm not sure what you mean.

2 QUESTION: Well, I've always thought that a
3 declaratory judgment was kind of over on the same side
4 of the line with an action for an injunction on the
5 equity side, so to speak, and the damages action is on
6 the other side.

7 But you say that even though the thing is moot
8 and he is not getting damages he could still get a
9 declaratory judgment?

10 MR. VESELY: No, no, no. Obviously if it's
11 moot he can't get a declaratory judgment. That's gone.

12 QUESTION: But you say that he can appeal and
13 ask for a declaratory judgment under the circumstance
14 Justice White gave you?

15 MR. VESELY: In other words, he could appeal,
16 we found qualified immunity --

17 QUESTION: Yes.

18 MR. VESELY: Then you have had a lower court
19 decision finding qualified immunity?

20 QUESTION: Yes, the lower court says it
21 doesn't make any difference whether it's a violation of
22 the constitutional rights or not because I find as a
23 matter of law there is immunity.

24 MR. VESELY: Right.

25 QUESTION: Can the plaintiff appeal from that

1 and say, maybe there's immunity but I want a declaration
2 of my constitutional rights?

3 MR. VESELY: My answer is yes.

4 QUESTION: Even though all he seeks is
5 damages; even though all he sought in the lower court is
6 damages?

7 MR. VESELY: He sought -- I thought you said
8 he sought declaratory relief.

9 QUESTION: Okay. If he seeks both declaratory
10 relief and damages --

11 MR. VESELY: Yes.

12 QUESTION: And the lower court says -- well,
13 then the lower court would have to pass on the
14 declaratory judgment issue, so that that, perhaps is a
15 different question?

16 MR. VESELY: Right.

17 QUESTION: What if it passes on it and says,
18 you don't get your declaratory judgment and you appeal,
19 but then your client is released?

20 MR. VESELY: Then I appeal --

21 QUESTION: Doesn't it become moot?

22 MR. VESELY: I don't believe so, because we
23 have a violation there and we are seeking a declaration
24 of our rights.

25 QUESTION: What if your client brings an

1 action which he has no standing to bring but the court
2 in disposing of it says, we agree you've been done
3 wrong, what the police did here was a violation of the
4 Constitution; however you have no standing, suit
5 dismissed.

6 Now, would that be a vindication?

7 MR. VESELY: I really can't perceive that
8 situation but if it were a vindication of the
9 constitutional rights and a court throws it out for no
10 standing --

11 QUESTION: No, I can think of --

12 MR. VESELY: The court would have had no
13 jurisdiction to enter the order. The order would have
14 no force and effect.

15 QUESTION: Now, let's take the case where you
16 think the Army should not be engaging in certain
17 intelligence activities, or that the CIA should publish
18 its expenditures, okay. And the Court says, as we have
19 said, you have no standing to raise these issues.

20 But suppose the Court doesn't begin that way.
21 It begins by saying, you're right, there seems to be a
22 flat violation of the Constitution. Too bad, however,
23 you have no standing to raise it.

24 Now, you're going to go out of that courtroom
25 saying, you see, I've proven my point. Would you be

1 able to get attorney's fees, in a case in which you had
2 no standing?

3 MR. VESELY: In a case in which you had no
4 standing I don't believe you would because the court
5 would have had no jurisdiction to enter anything. In
6 other words, it is a mere statement and it is not going
7 to become necessarily the law of the circuit, for
8 instance as the holding in this case did.

9 The point that I would like to get back to is
10 that even in immunity situations, attorneys' fees are to
11 be awarded and it's not -- and you have to differentiate
12 damages from the concept of shifting the burden of
13 establishing the violation. And I think this Court
14 addressed that in Pulliam versus Allen and one of the
15 cases that this Court noted in Pulliam versus Allen is
16 the case of Pierson versus Ray.

17 That case specifically dealt not only with
18 absolute judicial immunity but it also dealt with the
19 lesser concept of qualified immunity and presumably if
20 it implies that attorneys' fees can be awarded for
21 declaratory relief in the case of absolute judicial
22 immunity, it also applies in the case of qualified
23 immunity and I would -- if you stand this case up
24 against every purpose as expressed in the legislative
25 history, the vindication of rights, the functioning as a

1 private attorney general and the bringing of the State's
2 action into compliance with the law, the facts of this
3 case indicate that every single one of those policies
4 was vindicated and furthered by this lawsuit.

5 Therefore, I think this is especially a case
6 within which Congress intended the shifting of
7 attorneys' fees and I would say that if the opposition
8 does not agree with the concept the place to go, as this
9 Court noted in Pulliam, is not to the Supreme Court of
10 the United States but to Congress.

11 Thank you very much.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
13 Vesely.

14 Mr. Saylor, you have six minutes remaining.

15 ORAL ARGUMENT OF THOMAS G. SAYLOR, JR., ESQ.

16 ON BEHALF OF THE PETITIONERS - REBUTTAL

17 MR. SAYLOR: Briefly, Your Honor, in drafting
18 the fee statute Congress struck a balance, and that is
19 clear from the legislative history, between encouraging
20 civil rights suits to vindicate rights, on the one hand,
21 and fairness to the defendants that have to pay
22 attorneys' fees on the other hand.

23 Congress didn't take the private attorney
24 general concept to its logical extreme and it didn't say
25 that all plaintiffs who bring non-frivolous claims are

1 entitled to fees, nor did it say the plaintiffs who
2 secure a favorable legal ruling are entitled to fees.
3 What Congress did say is that in order to receive fees
4 you need to prevail.

5 Helms didn't prevail. He got no damages. He
6 got no injunction and he got no declaratory judgment or
7 declaratory relief, and I think we need to be clear that
8 what he got from the Third Circuit Court of Appeals was
9 not relief.

10 The court said, "We therefore leave the issue
11 of official immunity to the district court on remand."
12 But it also said, "Further proceedings will also be
13 required to determine the appropriateness and the
14 availability of the requested relief."

15 In other words, they gave him no relief. They
16 didn't come close to giving him relief, and they made it
17 clear that if the man's going to get relief on his
18 claims which are damages, injunction and a declaratory
19 judgment that's going to be done by the district court.

20 You also need to understand, Your Honors, that
21 shortly after Helms filed his suit he was parole from
22 prison. That is the fact.

23 QUESTION: Suppose -- the new regulations were
24 the result of his lawsuit? Would you think then that
25 his release from prison -- say he was released from

1 prison the same day that they adopted the new
2 regulations so that he himself could never have gotten
3 any particular benefit out of the new regs.

4 Now, I take it that it's your position, is it,
5 that he's not entitled to attorneys' fees, even though
6 it's clear that there's a connection between his suit
7 and the new regs?

8 MR. SAYLOR: Under the facts of this case --
9 can I answer that in two parts, please, Your Honor?
10 Under the facts --

11 QUESTION: I know you don't want to accept
12 part of my --

13 MR. SAYLOR: I will answer your hypothetical
14 first.

15 QUESTION: All right.

16 MR. SAYLOR: Yes, if the State changes its
17 practices in response to a lawsuit so that the effect of
18 that change or cessation is to moot plaintiff's claim, I
19 think plaintiff is a prevailing party and entitled to
20 fees.

21 QUESTION: Well, I know, but you still haven't
22 answered my question. He is released from prison the
23 day the new regs go in so he can, himself, never get any
24 personal benefit.

25 I thought part of your theory was, at least

1 the government's, that unless he himself is going to get
2 a benefit from the result of his case he isn't entitled
3 to fees?

4 MR. SAYLOR: That's correct, because he
5 wouldn't have benefited nor would have any party who he
6 represented, Your Honor. The only benefit, if there is
7 arguable benefit, would be if non-parties with future
8 grievances -- and Congress didn't say, we're taking the
9 private attorney general concept that far.

10 QUESTION: So, even if he was the cause of the
11 new regulations he gets no attorney's fee if he is
12 released -- if he is released prior to the adoption of
13 the regs, or at the same time?

14 MR. SAYLOR: Correct, Your Honor.

15 QUESTION: Thank you.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
17 Saylor. The case is submitted.

18 (Whereupon, at 1:49 o'clock p.m., the case in
19 the above-entitled matter was submitted.)
20
21
22
23
24
25

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:

#85-1630 - LOWELL D. HEWITT, ET AL., Petitioners V. AARON HELMS

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

BY Paul A. Richardson

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

87 MAR 10 P2:40