REVISED

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-937

TITLE WEST VIRGINIA, Petitioner V. UNITED STATES

PLACE Washington, D. C.

DATE November 10, 1986

PAGES 1 - 40

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IN THE SUPREME COURT OF THE UNITED STATES

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WEST VIRGINIA, :

Petitioner, :

v. : No. 85-937

UNITED STATES :

- -x

Washington, D.C.

Monday, November 10, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 o'clock a.m.

APPEARANCES:

CHARLES G. BROWN, ESQ., Attorney General of West Virginia, Charleston, West Virginia; on behalf of the petitioner.

ALBERT G. LAUBER, JR., ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the respondent.

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CONTENTS

ORAL ARGUMENT OF	PAGE
CHARLES G. BROWN, ESQ.,	
on behalf of the petitioner	3
ALBERT G. LAUBER, JR., ESQ.,	
on behalf of the respondent	16
CHARLES G. BROWN, ESQ.,	
on behalf of the petitioner - rebuttal	30

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning in No. 85-937, West Virginia versus the United States.

You may proceed whenever you are ready, Mr. Brown.

ORAL ARGUMENT OF CHARLES G. BROWN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BROWN: Mr. Chief Justice, and may it please the Court, in 1972, amid torrential rains, a dam burst in southern West Virginia. The valley below was flooded. Over 100 people were killed. Thousands were left homeless, and millions of dollars of property damage ensued. There was an immediate federal-state cooperative effort to deal with the tragedy, a joint effort by both, each side spending millions of dollars of appropriated funds.

One of the efforts dealt with housing. The Federal Government supplied housing units. The state supplied the land. And the Army Corps of Engineers prepared the sites. They prepared the sites in a relationship under which the District Court found to be a contract between the Federal and state government.

Although finding a contract existed, the District Court held that prejudgment interest would not

be allowed against the United States. The Court of Appeals reversed, applying cases involving private litigants in suits against the United States.

QUESTION: You mean in favor of the United States, don't you, rather than against the United States?

MR. BROWN: Reversed -- the Fourth Circuit reversed in favor of the United States -- excuse me -- applying cases involving private litigants in suits against the Federal Government. Excuse me, Mr. Chief Justice.

We contend two points on oral argument today. One is that the Fourth Circuit erred by equating the state and private parties, and two, the prejudgment interest may not be awarded without Act of Congress or consent against a state.

Number One. States are not private litigants. The Fourth Circuit committed error when it put states into the shoes of private litigants on the prejudgment interest issue. The last time the Court dealt with the question it explicitly rejected exactly the same argument, Board of Commissioners of Jackson County, Kansas, versus United States, in which Justice Frankfurter, for the Court, said, "Nothing seems to us more appropriate than due regard for local institutions

and local interests."

The Fourth Circuit did not even cite Board of Commissioners of Jackson County, Kansas. The Congress subsequently has acted as well and acted in the same direction in the Debt Collection Act. The Congress excluded state and local governments from the statute, so Congress as well believes that states and private litigants are two different entities indeed when it comes to prejudgment interest.

The more recent cases since Board of Commissioners are along the same lines which this Court has dealt with. Congress is to decide the constitutional balance between Federal and state governments. In Garcia, the Court said that Congress would determine the reach, how far the relationship would go, how far Congress would reach into the power of states, and that is a Congressional decision.

In Bowen v. American Hospital Association the plurality said that Congress must speak with a clear voice if it wants to change the relationship between Federal and state governments, and in Pennhurst I you said that a state must know the terms and conditions of a grant, know what is expected of us before we get that grant.

Not surprisingly, the Court as well has said

that the Congress is the one to decide how the Federal Treasury is to be protected. The Fourth Circuit reached in to protect the Federal Treasury, but that is not their judgment to make. It is the Congress's decision, US v Standard Oil in the 1940s, so Congress has determined and this Court has determined, both have said that private litigants and states are two different entities, and the Fourth Circuit did not recognize that.

Argument Number Two. There is no statute and there is no consent applicable here so there is no prejudgment interest. The Debt Collection Act is a comprehensive statute dealing with all debts owed to the United States Government. Congress is no longer silent on the issue of treating states different from private litigants, so the need for interstitial law, for the Court to move in and make law, is reduced.

Senator Percy, and he said this in a letter after the statute was passed, but Senator Percy was the author of the Debt Collection Act. Senator Percy said that Congress will decide when the states and local governments will pay interest. He said this in a letter to the solicitor general.

QUESTION: General Brown, did you rely on the Debt Collection Act in the Court of Appeals?

MR. BROWN: No, we did not. We did not

below.

QUESTION: Do you think you can raise a new argument in this Court that you didn't raise there?

MR. BROWN: Justice Stevens, we don't think we are raising a new argument. We have continued to stress that there is no statute and no consent pending or applicable here to have prejudgment interest.

QUESTION: You were arguing there was no authorization. Here aren't you construing this statute as a prohibition? Or are you? Maybe I don't get the --

MR. BROWN: We argued heavily Board of Commissioners of Jackson County. We said that's what the Fourth Circuit should rely on. The Fourth Circuit didn't even cite the case. We feel now that the Debt Collection Act, although not governing because it was passed after the flooding occurred, is an act of Congress which demonstrates that Congress believes what you said in the 1930s, which is that states are to be treated very differently from private litigants when it comes to prejudgment interest.

QUESTION: Did you make this argument in your principal brief.

MR. BROWN: Yes, we did.

QUESTION: Where was that?

MR. BROWN: We made the argument that the

starting point has to be the Act of Congress and we focused in our principal brief not on the Debt Collection Act but on the Disaster Relief Act.

QUESTION: Did you say anything about the Debt Collection Act in your principal brief?

MR. BROWN: No, we did not.

QUESTION: So you come in with a reply brief that the other side hasn't had an opportunity -- has no opportunity to respond to. I frankly don't know what the practice is on this Court, but on the Court that I came from we don't entertain arguments first made in the reply brief. If this is such a basic point, it should certainly have been in the main brief.

MR. BROWN: Mr. Justice Scalia, we apologize. We do think that the argument is consistent with the points we raised in the initial brief, although we did add an analysis of that statute in the reply brief.

QUESTION: Just to clarify it, you are not urging us to hold that the Debt Collection Act applies to a previously entered into agreement, are you?

MR. BROWN: We think that the Debt Collection Act -- no, you don't need to do that. We think that the Debt Collection Act provides the same Congressional guidance that you did with Board of County Commissioners.

QUESTION: Well, it is certainly possible that Congress included the provision that it did in the Debt Collection Act about interest against states because it thought that otherwise the rule was to the contrary under Federal common law.

MR. BROWN: I think Congress has said that they are supporting the common law and they will decide when the states are to pay interest. That is what Senator Percy said in his letter and that is what we believe. Justice Scalia, in Footnote 3 at Page 23 of our brief in chief we did mention the Debt Collection Act when we analyzed the Pennsylvania v. U.S. and the Perales case, which were the two circuit decisions which said that there would be no prejudgment interest going against a state. We did mention it at that point.

Congress will decide when the states are to pay interest, and Congress has said so.

QUESTION: Excuse me. That footnote continues after analyzing the state decisions, "although this statute does not apply to the current dispute, because the contract was entered prior to the effective date of that Act. It does, however" -- I would take that as a concession that the Act is not applicable here, and so would the other side, so they do not brief the point. They do not discuss the point. It looks like a

concession. And then in comes the reply brief, and lo, they have been sandbagged.

If this point is as basic as you say, it should certainly have been relied upon in your principal brief. The footnote says the statute does not apply to the current dispute.

MR. BROWN: The solicitor, us having dealt with the case in a footnote, the solicitor deals with the case in the footnote on Page 9 of the solicitor's brief in opposition to cert, so they mention it at that point. But we do think that the Board of Commissioners of Jackson County, Kansas, is the case the Fourth Circuit should have looked at, and it was the case we presented to them as the deciding point, as a lodestar for deciding the case.

Congress will decide when interest is to be imposed, and they have done that in very clear terms, as we have said. In the Social Security Act, "interest at a rate of 6 percent per annum from date due until paid," that is quoting the language of the Social Security Act, where Congress specifically said when interest would be imposed. In the Medicaid statute they were even more lengthy in making clear that interest was to be imposed against a state government.

The quote is "plus interest on such amount

disallowed beginning on the date such amount was disallowed and ending on the date of such final determination at a rate based on the average of the bond equivalent or the weekly 90-day Treasury bill."

So, Congress has said when they feel that the interest is to be imposed. Now, the Disaster Relief Act simply uses the word "charges." It does not say that interest is to be imposed. Interest is not mentioned in the statute. Interest is not mentioned in the legislative history. Interest is not even mentioned in the Code of Federal Regulations.

The government doesn't -- the executive branch therefore hasn't even contemplated interest in this matter until this case is brought, and by the way, we think this is the only case that we can find under the Disaster Relief Act where the government is seeking prejudgment interest. The Disaster Relief Act indicates there is no duty of the state to pay. The duty was imposed because of the contractual relationship between the parties.

The purpose of the relevant section, of course, was to provide temporary housing for the victims. The Disaster Relief Act contemplates, in fact, five different ways for the states to pay these obligations or for others to pay the obligations,

states, local governments, private parties, the Federal Government itself, or any combination of those four.

The Disaster Relief Act even contemplates percent loans and money paid back. They mention that 6 percent loans can be made to businesses. That is in the same Act, the Disaster Relief Act. If Congress at one point talked about 6 percent loans, talked about percentage interest, they didn't talk about it here, so it is a different matter.

Just as there is no statute which calls for interest to be paid by the State of West Virginia in the Disaster Relief Act, there is no consent either. There is no language in the letters. The letters were the basis of the contract, according to the District Court, and under the record at 821 and 884, the Federal officials outlined what the letter should say. If there is no such language in those letters which contemplates interest, we would think the government at that point didn't contemplate interest, nor did the government contemplate interest, as the record shows, in the bills that they went out. There was no indication over the years that interest was going to be due to the state.

I think when we see the word "charges" in the statute it is hard to take that word and say, well, that must mean prejudgment interest, too. Many of us when we

get our bills, if we get a bill from a department store we expect the interest to be added each month. If we get charges, a bill from the doctor, interest is usually not added each month.

So, the word "charges" is a word that does not automatically mean interest, and we think Congress has to say it.

QUESTION: You mean just as a matter of general law, General Brown -- certainly if this were a quasi-contract or money had in received action between private individuals and the bill had been sent that didn't indicate interest, I wouldn't think under ordinary common law that would preclude a claim of interest.

MR. BROWN: No, it would not, but I was just talking about the word "charges" as not reaching into the word "interest" because Congress at other points such as in the Social Security Act and the Medicaid Act have indeed said that there should be interest.

Historically it has been that way. There has been reliance. People's expectations is that the sovereigns do not pay prejudgment interest. Both times this case has come to the Supreme Court in the Jackson County case we mentioned and a case earlier than that, the Supreme Court has held that prejudgment interest is

not to be made against the state from the Federal Government.

QUESTION: General Brown, would you tell me what your understanding of the holding of the Jackson County case is?

MR. BROWN: Yes. Yes, I would, Justice Stevens. The holding of the case was that Justice Frankfurter said that equitable determinations would govern, but the equitable matter, the equitable factor that he used that made the decision was due regard for local interest, and that was that factor.

QUESTION: Weren't there a number of other equitable factors in the case as well?

MR. BROWN: After he made that decision that there would be no interest for the state, he said, however, if we had to rule on general equity we would rule with Jackson County Commission as well, so as I read Justice Frankfurter's opinion he held for the state solely on that basis -- held for the County and the state would have at least as much basis a fortiori as the county would, but he held first solely on that equitable ground. Then he fell back to balancing more equities, he said, if we had to, but he started with, however, if we had to do it the other way.

QUESTION: Do you think there are any equities

supporting the state's position here?

MR. BROWN: Yes, yes, yes, I think there are. First, I think any balancing of the equities has to recognize in the balance that West Virginia is a state, and that is a fatal error.

The District Court in fact balanced the equities in favor of the State of West Virginia. Looking at the Disaster Relief Act, saying that the Federal taxpayers were the ones to bear much of the burden of national disasters, saying that the people in West Virginia had suffered enough by going through the flood and that the obligation of the state was not voluntary because it was amid chaos.

There were four factors the District Judge used in determining in balancing the equities that the state, just on a balance of equities, that the state should rule, should win.

I wanted to point out as well that the state did make a commitment of its own. It mobilized a lot of effort, and ultimately, although the advisory jury held there was no contract, the Court held there was a contract, so we feel there was litigation in good faith throughout the proceeding, but litigation based on the exchange of letters, which held that the state was liable.

If there aren't more questions, we feel that if there is to be prejudgment interest that decision must come from Congress or there must be consent. Neither exists today, and we ask that the Fourth Circuit decision be reversed.

CHIEF JUSTICE REHNQUIST: Thank you, General Brown.

Mr. Lauber.

ORAL ARGUMENT OF ALBERT G. LAUBER, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

MR. LAUBER: Mr. Chief Justice, may it please the Court, I would like to make three points about the Debt Collection Act to begin with. First of all, that statute does not apply to any debts incurred before October 25th, 1982.

QUESTION: By its terms?

MR. LAUBER: By its terms. It is 31 USC 3717(g)(2), by its terms. Now, that statute was passed by Congress to tighten up on Federal debt collection practices, and it did so by mandating that interest be charged on debts owed by any person, so it made more stringent interest requirements nationwide. It defined "person" to exclude states.

Both the Comptroller General, an officer of Congress, and the Justice Department in regulations

interpreting that statute have interpreted it simply to preserve, by excepting the states from the mandatory interest requirement, have simply preserved the common law entitlement, whatever it was, of the national government to get interest from the states, and those are set forth in regulations at 4 CFR 102.13.

QUESTION: You may have to litigate some time, I suppose.

MR. LAUBER: We are litigating that right now in several Courts of Appeals and have not --

QUESTION: Yes, I would think you would.

MR. LAUBER: -- and have not prevailed thus far, but even if we don't prevail on that argument, as the Third Circuit held, the effect of the Act would be to abrogate the common law rule under which the Third Circuit held we were entitled to interest, and because the common law rule applies here, that would lead us to win this case, we hope.

I would like to turn next to a brief summary of what we think the salient facts are here, and we think these are important because the outcome may turn on the relative equities between ourselves and West Virginia.

The District Court found and the Court of Appeals agreed that West Virginia had entered into an

express unilateral contract to pay the Corps of Engineers for their site preparation work. The Governor requested that the Corps undertake the site preparation activities, and that oral request was confirmed shortly thereafter in writing by the state's director of emergency planning, who wrote a series of letters to the Corps acknowledging that site preparation was the state's responsibility under the Federal statute and that the state "will be responsible for the costs incurred."

The Corps performed the work quickly and efficiently and the state gave us releases to that effect. The Corps replied that bills would be forthcoming. They were promptly tendered in the amount of about $4.2 million. The Governor acknowledged the debt, stating that he would take steps to "consummate reimbursement," although he expressed his doubt that he could accomplish reimbursement during the then current fiscal year.

In response to a series of dunning letters from the Corps the Governor asked for a meeting at which he again acknowledged the debt but asked that the Corps forbear from collection for a time to permit him to negotiate with the state's delegation in Congress with a view to getting possible relief from Capitol Hill.

When that failed settlement negotiations ensued, and when those proved fruitless we were forced to bring this action to prevent the statute of limitations from running against our debt collection activities.

In the lawsuit the state's defense was that the Governor was incompetent to contract with the Corps on behalf of the state. Their theory was that in the middle of this flood emergency the Governor would have had to go through the normal procurement process of competitive bidding before awarding a contract to the Corps of Engineers.

The court below rejected that defense, found there was a binding contract, and held the state was in breach of its contract. The only -- and this Court denied review of that question. The only question at this stage, therefore, is whether the Court of Appeals erred in holding that the state should be required to pay prejudgment interest as one element of the damages for its breach of contract.

The interest would run from the date the bills were tendered in 1972 until the date of the judgment of the District Court eleven years later. The aggregate interest is now about $6 million, well in excess of the original principal amount.

The petitioner appears to agree with us that this question must be answered by referring to Federal law. That is so because Federal law governs the interpretation of contracts to which the United States is party and also because the debt here was incurred ultimately under a Federal statute, namely, the Disaster Relief Act.

Petitioner also seems to agree that the Federal common law rule is that prejudgment interest is awarded as matter of course to the United States in action for breach of contract. The rationale of that common law rule is that where there is a breach of the contract to pay money the creditor is damaged by the delay in getting his money, and should be awarded interest to make him whole for his loss.

The only exception to this rule recognized by this Court is where it would be inequitable on the facts to award the Federal Government prejudgment interest, and the situation that typically has led the Court to find such inequity is where the Federal Government delayed unreasonably in asserting its claim. That happened, for example, in the old case of United States versus Sandborn in 135 US, where the Court denied interest to the Federal Government, where it delayed for ten years in seeking to recoup money erroneously paid by

the Treasury to a private party.

It happened again in the Board of County Commissioners case referred to earlier where the Court denied interest to the Federal Government where it delayed for eight years in seeking to recover taxes on behalf of an Indian wrongfully collected by a state, a county in Kansas on Indian property.

Therefore we believe that the Federal common law rule applicable both in cases against private parties and against states and their subdivisions is that interest is allowable unless it would be inequitable to allow it.

Petitioner here argues that this Federal common law rule should not be applied here, but that the Court instead should adopt state law as the Federal rule of decision, and by state law petitioner does not mean the generally applicable West Virginia law of contract damages which, like the Federal rule, would allow interest for a breach of contract.

Rather, by state law petitioner means the exception to the general West Virginia rule of damages under which -- which operates where the state itself is the defendant in the contract action, and under that exception a state is not liable, unlike other parties, for interest for a contract breach unless it has waived

sovereign immunity expressly.

So it is that sovereign immunity based exception to the general rule that petitioner wants to incorporate here. That contention brings us to the Clearfield Trust line of cases where this Court has set for the factors that are relevant in deciding whether to apply a Federal common law rule or rather to adopt state law as the Federal rule of decision.

The Clearfield trust doctrine as elaborated in later cases like Yazell and Kimball Foods essentially requires a balancing of the Federal interest against the state interests at stake. Now, the Federal interest will typically require resort to a Federal rule, as this Court said in Kimball Foods, where the incorporation of state law would "frustrate a specific objective of the Federal program," and we think that would be the case here.

Although the Disaster Relief Act imposed much of the responsibility for bearing the cost of disaster relief on the national government it does affect a clear division of labor and cost as between the national government and the states. One of these is that the states are required by the statute to prepare sites for temporary housing, and the statute requires that this site preparation be done by the state "without charge to

the United States."

We think that this statutory division of labor and cost would be frustrated by adoption of petitioner's state law rule here because the United States would then be required to bear a substantial portion of the site preparation cost through the loss of a time value of its money.

Quite plainly the present value of paying the Corps of Engineers $4.3 million when it is due as compared to the present value of paying it $4.3 million eleven years later is much larger, and we think that the difference between the present value of getting your money now and getting it 15 years down the road would operate as a direct subsidy to the state's site preparation undertakings in defiance of the statutory mandate that site preparation be done by the state without charge to the United States.

For these reasons we think that adoption of the state no interest rule here would frustrate a specific purpose of the Disaster Relief Act and would therefore be improper under Clearfield Trust.

QUESTION: Although Congress doesn't now think so, anyway.

MR. LAUBER: That depends on whether we are right in our construction of the Debt Collection Act.

QUESTION: For the future. I mean, should the same series of events arise in the future it is clear what would happen, isn't it, under the Debt Collection Act?

MR. LAUBER: We don't think it is clear yet.

QUESTION: Why?

MR. LAUBER: Because our interpretation of that '82 Act is that by excepting the states from the definition of "person" the statute merely excepted the state from mandatory interest pursuant to the statute and preserved the status quo ante under which states could be held liable under the common law where applicable.

So, in our view of the statute which the Comptroller General and the Department of Justice have concurred in, we would still be litigating this very issue under the new statute. We have lost that interpretation, I think, in two Courts of Appeals now, and it is pending in others at the present time.

The second element of the Clearfield Trust doctrine requires reference to the state interests that are implicated, and we think that this factor as well points to the result I have just reached. I think it is helpful here to consider the kinds of state interests that this Court has found persuasive in the past in

adopting state law as the Federal rule of decision.

In the Yazell case, for example, the Court held that Texas law respecting marital property governed in interpreting the terms of an SBA loan contract. The Court noted that the contract had been negotiated with specific reference to Texas law and that the state law at issue involved the "intensely local interest" of family property and the rights of married women, including their capacity to contract.

In Kimball Foods the Court held in another SBA loan case that state commercial law governed the priority of creditors' liens on secured property. The Court noted that the SBA loan there again had been negotiated by reference to state law, that the Federal Government was acting as a money lender in an ordinary commercial context. The state law at issue was a commercial code of general application on which businessmen relied daily in making their lending decisions, and the Court held that failure to adopt state law there would have disrupted commercial relationships in the state, for example, by impairing the integrity of the state's notice filing system.

Thirdly, in United States versus North Carolina, a case in 136 US, the Court adopted state law to decide the availability of post-maturity interest on

a defaulted state bond held by the United States. We think the reasoning of that case has been superseded by modern cases like Clearfield Trust. We think the result in that case was plainly correct under the modern Clearfield Trust doctrine.

There the Federal Government had invested in state bonds, and state law denied post-maturity interest to investors in those bonds generally, and the Court, I think, quite sensibly held back in 1890 that it would have been impossible to have the rights attaching to a bond vary depending on who happened to own the bond at the time of the lawsuit because the bonds were freely transferable. Therefore the Court correctly held, in our view, that the state law denying post-maturity interest should apply to all investors, whether they be private parties or the Federal Government.

I think that the interests referred to in the Court in these earlier cases stand in rather stark contrast to the interest the state is urging upon the Court here in support of its state law rule. Here the state is not trying to preserve the integrity of any state program like a bond program. It is not trying to protect family or property values. It is not trying to protect marital relationships. It is not trying to protect settled commercial expectations of its citizens,

nor is it even seeking to apply the general law of interest under the state's contract remedy statute because that would allow interest here.

What the state is trying to do is to avoid paying money because of a claim of sovereign immunity, but we think that a claim, a mere claim of sovereign immunity standing alone is entitled to no weight when the state is litigating against the United States. It is clear that sovereign immunity did not bar the Federal Government from bringing this lawsuit in which a state has been held liable for breach of contract, and there is no reason why sovereign immunity should be any more relevant in and of itself in determining the measure of damages for breach of contract. So, for these reasons we think --

QUESTION: Yet you have the Jackson County case, which of course suggests that the fact that the state is a litigant in the action is entitled to some consideration.

MR. LAUBER: Well, the opinion there referred to state -- to local institutions and what Justice Frankfurter went on to say was that under the more modern law of the Court, Indians had come to be regarded increasingly as like any other citizens. Although they were in a way the wards of the Federal Government,

Justice Frankfurter said that the law had evolved to try and treat them as much as possible like any other taxpayer.

So the Federal Government there was suing on behalf of an Indian, not in its own right, and I think the Court suggested that under those circumstances it would be important to defer to the state's treatment of taxpayers generally because Indians want to be treated like any other taxpayer as far as possible, and in any event he went on to base the holding of the case on the Federal rule under which interest is recoverable unless it would be inequitable, and he found it would be inequitable because the government had delayed for ten years -- eight years in bringing the action.

So, I think even the earlier discussion by Justice Frankfurter in that case does not work against our position here because he was talking about the state's interest in maintaining parity among its taxpayers, including Indians, and there is no equivalent state interest in this case.

QUESTION: Mr. Lauber, isn't it also true that there was no question about the state's interest as a litigant because the state wasn't a litigant in that case, it was just the county?

MR. LAUBER: It was just the county. That's

correct.

QUESTION: So their argument they rely on that case ought to apply to counties as well, I suppose.

MR. LAUBER: I think they would make the same argument for any political subdivision as well as for themselves. That's correct.

So we think that for these reasons the state interest here, because it is merely sovereign immunity without more, is not enough to justify the adoption of the state no interest rule. Therefore the rule that should be adopted is the Federal interest rule which, as I said before, is that interest is awarded unless it would be inequitable to do so.

QUESTION: Or in this case you would say you resort to state law but the exemption just isn't applicable.

MR. LAUBER: That would be another way of putting it. I think that's right.

QUESTION: Well, which one? Which do you think we should take, the Federal rule or the state rule without the exemption?

MR. LAUBER: We think the proper approach is to adopt the Federal rule, and the fact it is the same as the general state rule maybe makes an even stronger case for doing that.

As I noted before, the inequity that typically has caused this Court to deny interest to the United States under the Federal common law rule is where the U.S. has delayed in presenting its claim and the other party is innocent. Here, we did not delay and the state was not innocent. The Corps of Engineers undertook this work at the express request of the state. The work was well and promptly performed. We demanded payment promptly and repeatedly, and the state kept putting us off, using a variety of dilatory tactics, forced us to bring suit, and then interposed the strained defense that they were not liable for the debt they had acknowledged all along because the Governor was incompetent to contract on behalf of the state.

If any inequity was practiced here, we think it was practiced against us by the state, and to decline to award us interest would damage us considerably and would reward the state for its dilatory conduct. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lauber.

General Brown, do you have something more? You have 15 minutes remaining.

ORAL ARGUMENT OF CHARLES G. BROWN, ESQ.,
ON BEHALF OF THE PETITIONER - REBUTTAL

MR. BROWN: I have a few brief points, Your Honor.

First, I wanted to respond to the charge of the state being dilatory. The fact is that the advisory jury held that the state was correct that there was no contract.

The fact is that the first District Judge on the case held that there was no duty by the state to pay. He denied summary judgment, and he said there would have to be a trial on the facts. Those facts in turn the jury found to be such that the state prevailed. The District Judge found otherwise and ruled against the state, but the District Judge, partly based on these equities, determined that the state would not have to pay prejudgment interest.

QUESTION: But even during the period when the state was acknowledging the debt it wasn't paying it. It is true that later there was some reason to believe there wasn't any debt, in this state claim there was none, but even when the state acknowledged there was a debt it just wasn't coming up with the money.

How long did that last?

MR. BROWN: Justice Scalia, the government alleged that the state was acknowledging the debt through letters from the Governor and other officials.

The state never conceded that it was acknowledging the debt through those letters. I think the District Court found that the letters themselves constituted the debt, not the later acknowledgment, but that the later acknowledgment certainly factored against us in his findings, I am sure.

The point is, there were a lot of equities on both sides in this case from the start. The state was informed that it had a duty to pay for site preparation. The government continues to argue that. Judge Copenhaver in the District Court said the state has no duty to pay, and as I pointed out, there are a lot of ways that this could happen, including the Federal Government paying.

There was misinformation on both sides. The Corps of Engineers dealt with a person that had a budget of $50,000. He in turn mounted up $4 million of obligations, and the Corps never informed him or any of his superiors what the ongoing cost was despite their procedures generally to do so.

There was no mention in those letters that interest would be paid and the so-called dunning letters the government mentions, there was no mention there that the state would owe interest. Interest was something that the state found out about in 1978 from a 1972

flood, and it is something that we never were held liable to pay until a 1985 court decision which we would not be able to pay until 1987, and that gets us very much to the reason that there is no prejudgment interest against sovereigns without Act of Congress or consent.

It has been that way historically and interest has always been treated differently. Witness Library of Congress versus Shaw in the last term where you treated interest as something different. The budget process is different with states. We have a balanced budget. Forty-nine states are required to have one, all but Vermont. We have to plan. Every two years we have to start over with a new legislature. There has to be this planning, and the states simply cannot act with the celerity of an average man. A court decision in many close calls may be necessary and the state won't even know what interest would be owing in the area of prejudgment interest.

The state, by the way, never pays prejudgment interest under state law. I wanted to clear that up as well.

The other reason besides the budget process the historic --

QUESTION: General Brown, I understood Mr. Lauber to say that the state never pays it because there

is an exception for the state in West Virginia --

MR. BROWN: Yes.

QUESTION: -- but that prejudgment interest is normally awarded between private litigants in a contractual type --

MR. BROWN: That's correct, Mr. Chief Justice. Besides the budget process the other historical reason is, we are punishing innocent taxpayers. Congress protects itself through its use of sovereign immunity in prejudgment interest except when it grants exceptions. Congress also acts to protect state and local taxpayers as well.

It is no surprise that 27 states filed in a cert petition an amicus petition that cert be granted in this case because of the very broad impact, the impact that this case would have in hurting the targeted populations, the populations Congress has sought to help in foodstamps, in education, and so on, and so on. A Ninth Circuit decision, Riley v. Bell, is pending waiting on what the Court will do here.

So, we will be hurting innocent taxpayers and we will hurt the targeted populations if the Court chooses to uphold the Fourth Circuit decision.

Besides the -- I wanted to deal with one other point and that is the Disaster Relief Act.

QUESTION: May I just interrupt --

MR. BROWN: Yes.

QUESTION: -- on your notion about hurting innocent taxpayers. I suppose the cost of the use of the money has to be borne by --

MR. BROWN: Some taxpayers.

QUESTION: -- either the West Virginia taxpayers or by the taxpayers of the country as a whole. So it is just a question of which one has to bear this burden. Isn't that right?

MR. BROWN: That's right.

QUESTION: And the taxpayers from California and other states are innocent in the same sense.

MR. BROWN: That's right. I think that is why the District Judge, Justice Stevens, said that the Disaster Relief Act was an effort to spread out the loss of these disasters to national taxpayers to the extent possible.

QUESTION: And of course I gather on that point the Federal Government did pay a fair amount of money in connection with the disaster --

MR. BROWN: We both did.

QUESTION: -- that was not recoverable.

MR. BROWN: We both did. The Fourth Circuit --

QUESTION: How much did the Federal Government

pay?

MR. BROWN: I believe $30 million. The Fourth Circuit indicated the state had not appropriated any money. The state spent $2.2 million, proportionately a lot more, and the state committed really hundreds of people in terms of resourcing and so on. That amount is not calculatable any more.

QUESTION: Why isn't it fair to have the cost of the use of the money borne by the people who have been using the money, which is the taxpayers of West Virginia, who should have paid up the money many years ago, and have been using it in the interim? Why isn't it entirely fair to say they have been using the money, they have had the advantage of it? It is not as though we are taking any money away from them. We are --

MR. BROWN: We are asking them to appropriate in 1987 based on a 1972 disaster. We are --

QUESTION: That may well be, but they have had the use of that money during that whole interim period. Why should the Federal Government pay for that use?

MR. BROWN: I believe because historically it has always been that way, Justice Scalia, that the sovereign, it doesn't have prejudgment interest against it. When we have two sovereigns, of course, to get into the equitable --

QUESTION: That may be, but, I am just -- as a historical matter it may be, but there is no overwhelming fairness case. I mean, if there is any fairness case the person who has been using the money has been the State of West Virginia, and all the Federal Government is asking them is to reimburse them for the use of the Federal Government's money during this period.

MR. BROWN: If the states could act with the celerity of a private person, as Justice Holmes said once, that may be the same thing, but the states simply are not called on to do that, and the historical basis is, we have budgets and we have delays in putting all that together. That may be one of the reasons --

QUESTION: Maybe that is why you do a better job of balancing your budget than the Federal Government does.

(General laughter.)

MR. BROWN: We have a smaller budget to deal with, Justice Stevens.

QUESTION: Don't you have some trouble with Courts of Appeals cases? Don't you think some Courts of Appeals disagree with you?

MR. BROWN: In fact, we have the Second Circuit, Third Circuit, and Ninth Circuit. The Second

Circuit in Perales and the Third Circuit in Pennsylvania v. U.S. --

QUESTION: What Courts of Appeals agree with you?

MR. BROWN: Second and Third Circuit agree with us.

QUESTION: And how about the other side?

MR. BROWN: The only side that doesn't is the Ninth Circuit. It was a very perfunctory treatment of the issue. The issue was presented to this Court and the petition presented didn't even make that an issue, the issue of prejudgment interest. California did not even appeal on that issue. The Board of Commissioners was not cited. It was simply a short statement by the Court that interest would be due. It did not have the analysis that the Second and Third Circuit did, so we think the weight is more the other way with the Second and Third Circuit, although the Fourth and the Ninth, the case below in the Ninth Circuit had gone the other way.

QUESTION: Is the Pennsylvania case the Third Circuit case?

MR. BROWN: Yes, it is, Pennsylvania v. U.S. Perales is affirming a Southern District of New York case that --

QUESTION: What do you do with Clearfield?

MR. BROWN: Your Honor, on Clearfield?

QUESTION: Yes.

MR. BROWN: We think the Clearfield line and the Royal Indemnity Line are private parties. We think that the analysis should be between the relative weight of two groups of taxpayers, and we feel if we had to get into a state-Federal question the issue should go back to the equities, the balancing of the equities used in Board of Commissioners.

QUESTION: There are two groups of taxpayers in this case whether your taxes or my taxes pay the bill?

MR. BROWN: Somebody's taxes are going to pay for this, Justice Marshall.

QUESTION: Either yours or mine?

MR. BROWN: That's correct.

QUESTION: So that is two taxpayers groups.

MR. BROWN: Yes, it is.

QUESTION: So that is Clearfield.

MR. BROWN: Yes, it is. Yes, and in Board of Commissioners the Court determined the dispositive issue was the due regard for local interests, and we would hope the Court would likewise give that due regard to local interest unless the Congress has specifically said

otherwise. The Disaster Relief Act simply doesn't call on interest to be paid. The only word in there is "charges." If Congress wanted interest to be paid it could have used the Medicaid or Social Security language and that language simply wasn't present.

We ask the Court to adopt the common sense meaning of this, which is that there has never been any decision, any effort by Congress to ask the states to pay interest in the Disaster Relief Act.

CHIEF JUSTICE REHNQUIST: Thank you, General Brown.

The case is submitted.

(Whereupon, at 10:46 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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BY Paul A. Richardson

(REPORTER)