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IN THE SUPREME COURT OF THE UNITED STATES

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OTIS R. BOWEN, SECRETARY OF :
HEALTH AND HUMAN SERVICES, :
Petitioner, :

vs. : No. 86-1146

MARY ALICE GALBREATH :

-----X

Washington, D.C.

Wednesday, December 9, 1987

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 1:58 p.m.

APPEARANCES:

RICHARD J. LAZARUS, ESQ., Assistant to the
Solicitor General, Department of Justice,
Washington, D.C.; on behalf of the Petitioner.

ANTHONY W. BARTELS, ESQ., Jonesboro, Arkansas;
on behalf of the Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

RICHARD J. LAZARUS, ESQ.

on behalf of the Petitioner

3

ANTHONY W. BARTELS, ESQ.

on behalf of the Respondent

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RICHARD J. LAZARUS, ESQ.

on behalf of the Petitioner - Rebuttal

27

P R O C E E D I N G S

(1:58 p.m.)

1
2
3 CHIEF JUSTICE REHNQUIST: Mr. Lazarus, you may
4 proceed whenever you are ready.

5 ORAL ARGUMENT OF RICHARD J. LAZARUS, ESQ.

6 ON BEHALF OF PETITIONER

7 MR. LAZARUS: Thank you, Mr. Chief Justice, and may
8 it please the Court.

9 Thus case presents a straightforward question of
10 statutory construction, whether a court may order the Secretary
11 of Health and Human Services to withhold a portion of past due
12 benefits owed a financially needy claimant under Title XVI of
13 the Social Security Act and pay those benefits directly to the
14 claimant's attorney as an attorney's fee.

15 The Secretary of Health and Human Services has
16 concluded that the court is without such authority under
17 Title XVI. The language of Title XVI and its legislative
18 history, we believe, prove the reasonableness of that
19 construction. For this reason, we believe the decision of the
20 Eighth Circuit should be reversed.

21 The pertinent facts of the case can be very briefly
22 stated. In May 1982, Respondent Mary Alice Galbreath applied
23 for Supplemental Security Income disability benefits, or SSI,
24 under Title XVI of the Social Security Act. That program
25 provides supplemental security income to financially needy

1 persons who are aged, blind, and disabled.

2 The agency, HHS, denied her application, both
3 initially and following internal administrative appeal on the
4 ground that she was not disabled. Her financial need was
5 uncontested.

6 In August 1983, Ms. Galbreath, represented by her
7 counsel, brought this action in Federal District Court
8 challenging the agency's determination. In February 1985 the
9 District Court reversed the agency on the ground that
10 Ms. Galbreath was in fact disabled. The Court accordingly
11 remanded the case to the agency with instruction that it
12 calculate and pay to Ms. Galbreath the amount of past due
13 benefits owed to her.

14 On July 23rd, 1985, the agency accordingly sent her
15 a check for approximately \$8000.

16 One week later, her counsel filed with the District
17 Court a motion for an attorney's fee award out of her past due
18 benefits. The District Court granted the motion, relying on a
19 provision of Title II of the Social Security Act, Section 406,
20 and ordered the Court to pay Mr. Bartels, counsel, 25 percent
21 of his client's past due benefits, or approximately \$2000.

22 The Eighth Circuit affirmed the District Court's
23 order, but on a different ground. The Court of Appeals
24 concluded that courts possess inherent authority to order the
25 Secretary to withhold a portion of Ms. Galbreath's benefits

1 and pay those benefits to her counsel. It is from that
2 judgment that we sought this Court's review.

3 In our view, Congress deny courts the authority, in
4 Title XVI, to order the Secretary to revert to a claimant's
5 attorney a portion of the claimant's SSI benefits. Congress's
6 plain intent is evident from the statutory language and from
7 the legislative history. Indeed, the latter shows that
8 Congress specifically considered the possibility of granting
9 courts authority to order withholding and declined to do so.

10 Congress determined that withholding would be
11 contrary to the purpose of the SSI program, which is to provide
12 benefits to the financially needy.

13 QUESTION: Is your argument that Title IV --

14 MR. LAZARUS: Excuse me?

15 QUESTION: Is your argument that Title IV repeals
16 whatever pre-existing inherent authority would have existed
17 in courts?

18 MR. LAZARUS: The title -- well, it's Title II, it's
19 Title II and Title XVI.

20 QUESTION: XVI, I'm sorry, XVI, you would say,
21 repeals --

22 MR. LAZARUS: Once Congress entered the field and
23 there was legislation, then whatever inherent authority courts
24 had -- and even the Celebrezze decision, which is the one
25 decision to adopt that, in 1965, said it was in the absence of

1 a statute. And at this point we have a statute, we have
2 specific, we believe, Congressional intent not to allow
3 attorney's fee withholding. And it is that Congressional
4 intent we rely on.

5 QUESTION: Do you concede the authority of the
6 courts to do it in an ordinary case where there hasn't been
7 any prohibition by Congress?

8 MR. LAZARUS: Well, there are several prohibitions,
9 and there is also -- here we have the United States as a
10 party. I wouldn't concede it with respect to the United
11 States being party.

12 There is some common law precedent far back there in
13 England, starting with the decision by Lord Mansfield in 1779,
14 called Welsh v. Hull, which endorses the notion that courts do
15 have inherent authority to split a judgment and ensure the
16 attorney's fee. But it's always, even at common law, it's
17 always been in the absence of a statute, and the courts have
18 noted that. And they have never been in cases involving the
19 government.

20 And in here what we have is we have the government,
21 we have a statute, we have an anti-assignment prohibition in
22 the statute which we believe is explicit, and that's the first
23 thing we rely on in Title XVII, which Congress lifted with
24 respect to attorney's fee withholding in Title II.

25 We don't concede that Celebrezze decision was right

1 at the time.

2 The first point is that the language of Title XVI is
3 explicit. It bars the transfer or assignment of any
4 individual's right to payment of SSI benefits. The purpose
5 of the anti-assignment provision in Title XVI is to ensure
6 that the benefits go to those who Congress wanted them to go,
7 the needy claimant, to provide for their basic subsistence
8 needs. There is no exception made in Title XVI for attorney's
9 fees.

10 In contrast, in Title II of the Social Security Act,
11 which provides old age, survivor, and disability benefits to
12 insured individuals who need not be financially needy, there
13 is express authority in the statute authorizing withholding.

14 Section 406(a) of Title II authorizes the Secretary
15 to withhold a portion of a claimant's past due benefits as an
16 attorney's fee upon making a determination favorable to the
17 claimant in administrative proceedings. Section 406(b) of
18 Title XVI likewise authorizes a court to order attorney's fee
19 withholding upon making a determination favorable to the
20 claimant in judicial proceedings. They lift the ~~anti-~~
21 anti-assignment bar in Title II.

22 Although Congress incorporated much of Title II's
23 procedural provisions into Title XVI, it did not include
24 either of these provisions. Indeed, comparison of the
25 relevant provisions in Titles II and XVI, Sections 406 and

1 1383, reveals a remarkable fact. The language of Title XVI --
2 Congress enacted in 1972 -- duplicates the language of Title II
3 prior to 1965 and 1967, when Congress amended Title II to
4 provide an attorney's fee withholding. Congress, in effect,
5 reached back to the language that Congress enacted in 1939 for
6 Title II rather than simply adopt Title II's then current
7 language in 1972.

8 The language, we believe, of Title XVI by itself
9 suggests that the omission was careful and deliberate. The
10 legislative history confirms the deliberateness of Congress's
11 decision, and answers why Congress chose to omit withholding
12 from Title XVI. First, as we lay out in our brief, the
13 legislative history shows that Congress considered the
14 possibility of including withholding authority in Title XVI,
15 just as it had in Title II, and rejected the idea.

16 As first proposed in 1970, Title XVI would have
17 simply incorporated all of Section 406 of Title II, including
18 the withholding authority. Congress, however, subsequently
19 redrafted the bill and carefully omitted withholding
20 authority from Title XVI. The revision was not a product of
21 mere oversight. It was precise, it was surgical. The
22 withholding provisions were removed, while most of the rest of
23 Section 406 was carefully retained.

24 Congress, moreover,, explained why, the reasons in
25 the accompanying legislative reports. Congress stated its

1 view, speaking to the administrative proceedings, that
2 withholding would be contrary to the purpose of the program.
3 The purpose, again, unlike for Title II, is to provide
4 benefits to financially needy persons, Title II -- Title XVI
5 benefits, unlike Title II, being needed to meet basic
6 subsistence needs.

7 Congress decided that withholding those benefits
8 from those needy persons was not warranted, as it had been in
9 Title II. Not surprisingly, Respondent concedes that
10 Congress denied the courts the power to order withholding when
11 Congress first enacted Title XVI in 1972. Respondent, however,
12 contends that Congress somehow revisited the issue and decided
13 to allow withholding when it amended Title XVI in 1976. The
14 claim, we believe, does not withstand serious scrutiny.

15 The amendment upon which Respondent relies had
16 absolutely nothing to do with attorney's fee withholding. In
17 1972, Congress had decided that the Secretary's administrative
18 determinations under Title XVI would be subject to judicial
19 review, as they were under Title II, with one exception. The
20 determination of any fact by the Secretary would be final and
21 not subject to judicial review.

22 In 1976, Congress amended the law to omit that
23 exception. That was the extent of the revision. It was a
24 deletion of one prior difference between the two titles that
25 had absolutely nothing to do with attorney's fee withholding.

1 It concerned Section 405 of Title II, while the two attorney's
2 fee provisions of Title II are in Section 406.

3 If Congress had originally in 1972 made the
4 standards of judicial review exactly the same, no serious
5 claim could have been made in the face of the language and
6 legislative history of 1972 that Congress had by that action
7 intended to allow attorney's fee withholding. That Congress
8 instead only achieved that result by an amendment and a
9 deletion to Title XVI four years later wholly unrelated, for
10 reasons wholly unrelated, to attorney's fee withholding does
11 not add any credence to that theory.

12 QUESTION: Mr. Lazarus, absent any statute dealing
13 with it at all, do you suppose the judge would have inherent
14 authority to enter such an order?

15 MR. LAZARUS: Not with respect to against the United
16 States. We have several provisions which we think would bar
17 that. One there is, although we've not pressed the claim here,
18 there is a sovereign immunity aspect to it. There's also a
19 general anti-assignment provision for claims against the U.S.,
20 and then in this statute itself we have Section 1383(d), which
21 incorporates the anti-assignment bar in Section 407 of Title
22 II.

23 QUESTION: Is there any way within your view,
24 Mr. Lazarus, in which the Court could impose a ceiling on the
25 charge that the lawyer could make to the client?

1 MR. LAZARUS: The Secretary -- that issue is not
2 presented in the case, but it is the Secretary's view that the
3 Court could; that we do not interpret the statute as
4 interfering with that inherent authority. We believe it
5 presents a very different question. It doesn't run into the
6 anti-assignment provisions; it doesn't direct the Secretary to
7 do anything. The legislative history speaks to the issue of
8 withholding and not to the issue of the maximum fees.

9 And finally, to the extent that Congress spoke in
10 the statute at all to ceilings, it actually authorized the
11 Secretary to do just that for administrative proceedings,
12 and all the courts actually are in agreement on that question,
13 that the courts do have the inherent authority. And we
14 believe that presents a different issue not raised here.

15 In sum, the sole question in this case is whether
16 the Secretary's construction of Title XVI is reasonable.
17 Because it is supported by the language, by the structure of
18 the statute, and the legislative history, which show that
19 Congress considered and rejected attorney's fee withholding
20 in the context of Title XVI, we believe that it is. The
21 decision of the Court of Appeals, therefore, should be
22 reversed.

23 If there are no further questions, I'd like to
24 reserve my remaining time for rebuttal.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lazarus.

1 Mr. Bartels, we'll hear now from you.

2 Mr. Bartels, I guess it is.

3 ORAL ARGUMENT OF ANTHONY W. BARTELS, ESQ.

4 ON BEHALF OF RESPONDENT

5 MR. BARTELS: Thank you, Your Honor.

6 May it please the Chief Justice and Members of this
7 Court, we have in this country a wonderful social security
8 disability system. There is one brief flaw in it right now,
9 and that is how the poor people are going to come about paying
10 their attorneys. If these people can't pay attorneys, lawyers
11 aren't going to take their cases. They have the right to
12 present a social security claim, but if they don't have a
13 lawyer to help them appeal it, they can't get there.

14 Now, the whole issue is legal representation. And
15 I'd submit to you that most of these people out there who I
16 represent, they're the poor, the illiterate, the downtrodden.
17 They don't know what it is to even carry a credit card, a
18 Kerr-McGee gas credit card or American Express or anything.
19 They're poor. But they live from day to day, from mouth to
20 mouth. If these people can't get a lawyer to help them, they
21 don't live in one town long enough to get their social
22 security claim with the local social security office.

23 And I want to point out to you that it's the lawyers
24 who help them get their claims filed, even if the people --

25 QUESTION: The major implication is that they're

1 just not trustworthy.

2 MR. BARTELS: No, Your Honor, not trustworthy.

3 We're --

4 QUESTION: Well --

5 MR. BARTELS: They move a lot.

6 QUESTION: -- the government pays them the money,
7 and they just forget to pay their lawyer.

8 MR. BARTELS: Well,, Judge, I've had it happen to me
9 a few times.

10 QUESTION: Wel,, I know, but so your basic
11 contention is that you really can't rely on your client to
12 pay you when he gets the money?

13 MR. BARTELS: I would have to submit that, Your
14 Honor.

15 QUESTION: Yes.

16 MR. BARTELS: I've had it happen to me where people
17 have gotten their money, died, they didn't -- they're res
18 pendent, so there's no estate to file a claim with; or I've ha
19 had them get their SSI money,, spend it, I sue them to get my
20 money, they take bankruptcy, and I get a notice from the
21 Bankruptcy Court, and that ends my claim there.

22 QUESTION: Well, that's not peculiar to your
23 clients, either, is it? Most lawyers who get a judgment and
24 get a payment and satisfaction have it made out to a lawyer
25 and the client both.

1 MR. BARTELS: Yes, that's true, when we settle
2 automobile tort claims, if you're in that area of the law.

3 And of course, the social security law is a
4 regulated law, attorney fee areas. That is to say, there are
5 a lot of attorneys who won't take a social security case
6 because, hey, there's nobody out there going to tell me what
7 I can charge these guys for my services. They don't want
8 some bureaucratic agency dictating the amount of their fee.

9 And of course, you have problems like that. This --
10 there is a bureaucracy problem with your attorney's fee,
11 whether it's an SSI or a Title II, and whether it's at the
12 administrative level. If you win a case at the administrative
13 level, and you're not happy with your attorney's fee, you can
14 appeal it one step. But there's no judicial review of that,
15 and the Social Security Administration right now is reducing
16 all requested fees. And of course, when you get it into
17 court, you can file for an EAJA fee.

18 And you probably are asking yourselves why I didn't
19 file an EAJA fee petition and then file my other fee petition,
20 you see, because under the Equal Access to Justice law, an
21 attorney is supposed to file that EAJA first. He's supposed
22 to do that, and I know that, and I know it in this case here.
23 But I couldn't raise that issue if I had filed EAJA and the
24 judge would have granted my EAJA petition. Then I would not
25 have had this claim to present to the Court. That would have

1 ended. So I just went ahead and filed a claim for my one
2 fourth of past due benefits, based on an hourly rate. And --

3 QUESTION: And this claim is more valuable to you
4 than an EAJA claim because you don't have to show for this one
5 that the government's position was not substantially justified
6 in this --

7 MR. BARTELS: You don't have to show that, Your
8 Honor, and also I have a lot of other Title XVI cases whose
9 fees I know I'll get if I get this Court to approve that.
10 That's the reason, Your Honor.

11 Now, I had a case recently, an SSI case recently,
12 where a man, after seven years of litigation, he died. That
13 was an SSI case. They hadn't made the award yet. Had they
14 made the award, I -- and paid him, I could have maybe gotten
15 my money from him. But I had -- I went ahead, when I
16 discovered his death, and no payment made by the Social
17 Security Administration under Title XVI, I immediately filed
18 an EAJA fee petition to get paid for what I did in the federal
19 court level. I won't get anything at the administrative level;
20 I got about \$1200 off that case, working with that older,
21 alcoholic tramp for seven years. That's what my -- I really
22 made off that case.

23 Now, so I filed an EAJA real quick in that one. So
24 you see, if the client dies before the money comes, you don't
25 get anything. That's the law. And I daresay about 50 percent

1 of the people I represent and get on social security are dead
2 within three years.

3 I have the -- I can definitely tell you that. Most
4 people don't last very long,, where they are sick, disabled.
5 And you don't go into federal court and try to get a
6 substantial evidence case overturned without having a good
7 case. You'll go broke practicing law doing that out there.

8 Now, I'd like to talk a little bit more about the
9 Social Security Administration's attitude about attorney's
10 fees; that is to say, first,, they deny the people; the people
11 get in a lawyer who gets them on. Then they say, well, now
12 you got the money coming, we're going to regulate the fees.

13 And a thing or two they do, and I've showed it in
14 one of my briefs, maybe miscalculate the benefits, you submit
15 your fee petition based on that benefits they've submitted.
16 Then six months later you find out they made a mistake. They
17 write back and say, the client, we made a mistake, we
18 undercalculated by 6000, we're mailing a check, client
19 directly, \$6000. You don't get any of it, we're sorry, we
20 made a mistake.

21 I've had that happen to me, and I attached two more
22 in my briefs, a case where that has happened before, too.

23 What I'm saying is, the administration, the Social
24 Security Administration, is taking a very hard attitude
25 towards attorneys getting paid. And if you'll read books on

1 the subject by Mr. Francis or Mr. McCormick, who I'm sure
2 you're all acquainted with those books, point out that problem
3 you have in collecting your fees. And that just drives the
4 lawyers out of the social security legal representation
5 business.

6 QUESTION: Well, that may be, but what -- I suppose
7 if the statute expressly said just plain out that no mailing
8 of fees to lawyers, you would just have to put up with it.

9 MR. BARTELS: Or else get out of the business.

10 QUESTION: Exactly.

11 MR. BARTELS: And you see, if the lawyers get out of
12 the business, then those people don't have legal
13 representation, Your Honor.

14 QUESTION: So if we decide against you, as you say,
15 it'll be just like the statute said it.

16 MR. BARTELS: It's going to be -- the statute hasn't
17 really made it --

18 QUESTION: Then you'll have a choice of staying in
19 or getting out.

20 MR. BARTELS: Your Honor, the statute that they
21 talked about was at the administrative level. They didn't
22 talk about the court level. The statutes they're talking
23 about, and the most recent case on this point, the, as you all
24 know, the circuits are split. The first -- on this issue of
25 whether they should withhold.

1 The Reid case came down in '84. They said the court
2 had the power to do -- to order the Social Security
3 Administration to withhold.

4 At that point, shortly after, and this is referred
5 to in the most recent case on the point, which went against my
6 point of law, this, the Howard case, there's a footnote, and
7 the judge pointed out that the House committee apparently
8 believed that attorney's fees could be awarded out of SSI
9 benefits, see House -- see the -- he cited the Congressional
10 code it comes from.

11 And, of course, that was the only case on point.
12 Congress just thought they had it after they had a meeting
13 over there. And I daresay a lot of our legislators are
14 lawyers, the two US Senators, my Congressman, are all
15 lawyers. I knew them back when they were down in the pits,
16 fighting and making a living. But now they're on Capitol
17 Hill.

18 QUESTION: Working.

19 MR. BARTELS: Yes, sir. I was by their offices
20 yesterday and didn't find any of them.

21 QUESTION: We won't quote you.

22 QUESTION: Mr. Bartels, it seems to me your argument
23 should be made across the street.

24 MR. BARTELS: Well, Judge, there are arguments --

25 QUESTION: I think you're in the wrong place.

1 MR. BARTELS: Sure. Now, Judge, let me -- because,
2 you know, when this legislation comes down, the Social
3 Security Administration has their representatives there at
4 that hearing, too. And they politick, and they saw where
5 Congress was missing the point here, and didn't rule on it.
6 They stayed silent, Congress had to adjourn, the boys had to
7 go back to their home fields to run for office. And, of
8 course, well, Social Security says, we'll cover that with a
9 regulation.

10 And I've attached a copy of their regulation, most
11 recent regulation at this point, after the Galbreath case came
12 down. They wanted to come up with another regulation to make
13 sure they covered it. It said in there, we do not -- and I've
14 supplied it to the Court already -- we do not pay money
15 directly to those attorneys; we just don't do it. Even if you
16 got a court order, you don't do it.

17 And sometimes you have a court order to collect the
18 title to fee, and you -- it's just pretty hard to get the
19 government in contempt to get that check out. Those are some
20 of the things you run into in the practice of law.

21 But the circuits are split. The First Circuit says
22 no, the government doesn't have the -- have to pay the checks,
23 because the court doesn't have the inherent authority.

24 The Third Circuit's the Reid case. Motley vs.
25 Heckler says yes, they do. Galbreath vs. Bowen says yes.

1 And the McCarthy and Howard out of the Sixth and Seventh
2 Circuits say to the contrary.

3 Now, when they first passed this social legislation
4 for disability back in the early '40s, they forgot to put in
5 there whether the court could order it to be withheld. And
6 it took a court decision back then, which our counsel referred
7 to earlier -- it was the court decision of Celebrezze vs.
8 Sparks, which came down on March 16th of '65, and that case
9 held that court did have the inherent authority to order those
10 payments made out of Title II benefits.

11 Then, later, -- now that decision was in March of
12 '65 -- then in May, April and May of '65, Social Security
13 Administration lobbyists did appear before a Senate committee
14 and said yes, we think it's all right to go ahead and do that,
15 but there should be a cap on the lawyer fees. So they came up
16 with the 25 percent cap on past due benefits.

17 Now, that's great if you won every social security
18 case you took. But you take 10 cases out there, and you got
19 to be pretty good sometimes to figure out, pick the winners,
20 because you pick a lot of losers, you're going to go broke
21 practicing law now, and we all know that.

22 That's -- but you take 10 cases. You lose three of
23 them, you don't get paid for it. So there's no past due
24 benefits to take any fee out of. You got seven you win, so --
25 and of course, if you hit a big fee on social security cases,

1 you don't automatically get one fourth of the past due
2 benefits. That's just the amount the government holds back.
3 You have to submit an hourly fee petition, and then they take
4 a look at the hours you worked.

5 Suppose a guy came in, all you had to do was
6 interview him, write for three or four medical reports, submit
7 them to Social Security, get them in. You got him, say,
8 22,000 in back pay. You might get an attorney fee of \$550,
9 based on that hourly rate.

10 QUESTION: I take it you haven't been paid in this
11 case yet, have you?

12 MR. BARTELS: Yes.

13 QUESTION: You have?

14 MR. BARTELS: Yes. The government sent a check.
15 That surprised me.

16 QUESTION: And yet you have to pay your own way
17 down here, so you don't get too much net, do you?

18 MR. BARTELS: No, no, Your Honor, but see, like this
19 is one case; it'll affect, oh, many, many -- you don't realize
20 how big this social security system is out there. And like I
21 say, it's a wonderful thing.

22 QUESTION: So you don't resent the expenses?

23 MR. BARTELS: I'm going to have to eat them, as
24 they say. But I get to bring my wife and children, two of my
25 children, with me to Washington.

1 (Laughter.)

2 MR. BARTELS: Now, Your Honor, I want to tell you,
3 too, the -- you know, we talk about politics. Here's how
4 things are done over on Capitol Hill, and, you know, I knew
5 some of those guys over there. Like I say, I was a claim
6 adjuster against them on some points. We helped them work for
7 reelection on things.

8 You go over there when they're having those social
9 security hearings and you'll find out how social security
10 people politick. But the government's Justice Department's
11 also a little bit of a sharp politician, and I'll tell you
12 why. Here's why I say that. They lost some cases on this
13 point in different circuits, but they didn't appeal them.
14 Now, they know, they kind of gauge those circuits out there.
15 We know where our strength is in the First Circuit, we know
16 what the Ninth Circuit'll do on this point.

17 And I do wish Mr. Kennedy would be here, because I
18 did have a case before him on a three-judge panel about a year
19 ago this time, and he ruled against me on a substantial
20 evidence test. And like I say, that's a hard one to overcome
21 as a plaintiff lawyer.

22 But you got to -- you know, to win a social security
23 case and overcome that substantial evidence test, you got to
24 have a winner. And I really didn't have too good a winner.
25 But on this case, he didn't, you know, bump. The woman had

1 been, from the time she applied, about a year later she'd been
2 involved in a very severe automobile accident and almost
3 ground up to hamburger. Then they set the hearing again, or
4 the onset date at a different time.

5 And so, but you have to -- the government hasn't
6 always picked the cases they've lost; they just don't try them
7 in, say, that circuit. And of course, the fact that the law
8 of the Sixth Circuit's one way is not res judicata in the
9 Eighth, as I've had to find out the hard way.

10 See, like in submitting fee petitions, okay, you do
11 some work at administrative level, you have to submit it at
12 the administrative level for what you do there. They make a
13 finding on your fee. They always reduce it a little bit. You
14 can appeal it one step, but there's no court review of it.

15 QUESTION: You're not happy --

16 QUESTION: Why don't you think Title XVI forbids
17 this?

18 MR. BARTELS: The Congress just overlooked it. They
19 have an oversight committee over there who later on goes and
20 tries to straighten things out, but they just overlooked it.

21 QUESTION: On the legislative -- the legislative
22 history sort of indicates they didn't expect to permit the
23 administration to do this.

24 MR. BARTELS: Well, they were talking about the
25 administrative level fees. That was, if you'll read the cases,

1 Your Honor, of -- I'll read you the most recent case that was
2 adverse to my point of law, the Howard case. And at Page 187,
3 the court states that the Social Security Administration, they
4 used the term -- oh, with respect to representation before the
5 administration. It's in the first paragraph. See, they've
6 talked about your representation at the administrative level.
7 They even had that; they didn't talk about what happens if it
8 gets to court.

9 QUESTION: You're saying that the provision in
10 Title II was not adopted in order to permit fees to be
11 withheld, but rather in order to put a cap on --

12 MR. BARTELS: Well, I don't know if --

13 QUESTION: -- the fees that had already been
14 declared by the courts to be withholdable?

15 MR. BARTELS: That's right. What I'm saying is,
16 Your Honor, when Title II was enacted, they didn't have
17 anything in there about withholding for attorney's fees.
18 There was the Court's decision of Celebrezze vs. Sparks that
19 held the courts had the inherent power to do this.

20 Then later on, they have some social security
21 hearings later on, says yes, we'll go along with that, but we
22 put a cap on it of 25 percent. That's the most a lawyer can
23 get.

24 But I submit to you, the 25 percent isn't always
25 what you'll get. You'll get a lot less, and that's assuming

1 you win the case. You have a lot of cases out there you lose.
2 That's just part of your office overhead. Then you have cases
3 where you do win and you get a big back pay award for the
4 client, but, because of the hourly rate scheme, you don't get
5 anything.

6 QUESTION: Does Title II have an assignment
7 restriction?

8 MR. BARTELS: Yes, it did, Your Honor.

9 QUESTION: And it did at the time Celebrezze was
10 decided, too?

11 MR. BARTELS: Yes, and the government immunity was
12 still the law, too, then.

13 QUESTION: Mr. Bartels, if you lose this case, are
14 you going to have to disgorge?

15 MR. BARTELS: Give the money back?

16 Well, you see, my client -- I'll have to give the
17 money back to the government, and I'll try to have to get my
18 money from the client. Yes --

19 QUESTION: Of course, you can always go through
20 bankruptcy the way they do, can't you?

21 MR. BARTELS: Well, I tell you what, a lot of
22 lawyers will think about bankruptcy who do social security
23 work if they don't get paid.

24 But we are dealing, gentlemen, about a large issue
25 here. And I talk to a lot of lawyers, and a lot of lawyers

1 will tell me, I wouldn't handle a social security case for
2 anything.

3 And I look at them and say, well -- then I find, in
4 talking to them, I find out they're really not up on what the
5 social security law is. There's big money on -- in it;
6 unquestionably there's big money on it. Now that lawyers can
7 advertise, although I've never advertised, I got a large
8 social security business, probably have 350 cases pending in
9 federal court right now on various issues, issues like under
10 the EAJA, they don't want to allow us to get paid for our
11 billing time, they don't want to let us get paid for advance
12 costs, like for photocopying, telephone calls.

13 I have that pending before the Eighth Circuit in a
14 case of Payton vs. Bowen.

15 QUESTION: This is all fee litigation?

16 MR. BARTELS: All fee litigation, Judge. I see
17 where they're cutting down on lawyers every day, see. And
18 then, of course, once they award the fee --

19 QUESTION: Are there lawyers who just represent
20 other lawyers, and because they're specialists in fee
21 litigation?

22 MR. BARTELS: Listen, they may have to, Judge. It's
23 going to have to -- I tell you, it could come to that.

24 See, this is the point now that I have before the
25 Eighth Circuit. You see, it takes -- you take a case -- this

1 case here is one of my shorter-lived cases; it's only about
2 five, six years old in my office. I've had cases that, like
3 with the alcoholic man who died, on Title XVI, that case had
4 drug on for seven years. I got, you know, just for one case
5 sometimes, you'll have a file this thick.

6 ~~question~~ And then they want you to compute your billing time,
7 and you go back through there and compute that billing time,
8 it may take six, seven hours to get all the billing time in
9 on that case. And they don't want to pay you for that, but
10 yet you got to submit the billing time, and they want you to
11 get paid by the hour rather than by the 25 percent contingency
12 fee contract.

13 So, gentlemen, I don't want to take any more time.
14 I'm -- I just -- I've had a chance to -- and, believe me, I'm
15 very grateful for having this chance to come before you to
16 tell you my side of the story.

17 Thank you.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bartels.

19 Mr. Lazarus, do you have something more?

20 ORAL ARGUMENT OF RICHARD J. LAZARUS, ESQ.

21 ON BEHALF OF PETITIONER - REBUTTAL

22 MR. LAZARUS: I just have two very short points.

23 One is, of course, ultimately the wisdom of the
24 statute is for Congress and not for the Court.

25 As to the impact of Congress's decision, one can

1 speculate that perhaps Congress hoped that the financially
2 needy would be eligible for Legal Services Corporation or
3 other things, and therefore the impact would be less in the
4 Title XVI context.

5 I have nothing else if there are no further
6 questions.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lazarus.

8 The case is submitted.

9 (Whereupon, at 2:28 o'clock p.m., the case in the
10 above-entitled matter was submitted.)

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1
2 REPORTER'S CERTIFICATE

3 DOCKET NUMBER: 86-1146
4 CASE TITLE: Otis R. Bowen, Secretary of
5 HEARING DATE: December 9, 1987
6 LOCATION: Washington, D.C.

7
8 I hereby certify that the proceedings and evidence
9 are contained fully and accurately on the tapes and notes
10 reported by me ~~at the~~ hearing in the above case before the
11 United States Supreme Court
12 and that this is a true and accurate transcript of the case.

13 Date: December 9, 1987

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16 *Margaret Daly*
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