ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT,	)	
Petitioner,	)	
v.	)	No. 86-1512
MYRNA UNDERWOOD, et al.	)	
Respondents.	)	

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IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, Petitioner, v. MYRNA UNDEREWOOD, et al. Respondents. : No. 86-1512

Washington, D.C.

Tuesday, December 1, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

THOMAS W. MERRILL, ESQUIRE, Deputy Solicitor General, U.S. Department of Justice, Washington, D.C., on behalf of Petitioner.

MARY S. BURDICK, ESQUIRE, Los Angeles, California, on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument now in Number 86-1512, Samuel R. Pierce versus Myrna Underwood. Mr. Merrill, you may proceed whenever you are ready.

ORAL ARGUMENT OF THOMAS W. MERRILL, ESQUIRE

ON BEHALF OF PETITIONER

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

This is the Court's first encounter with the unique attorneys' fee statute, the Equal Access to Justice Act, or EAJA. EAJA reflects an attempt by Congress to balance two competing objectives.

On the one hand, Congress was concerned that individuals and small businesses might be discouraged from challenging unreasonable Government action because they could not afford the expense of hiring an attorney.

On the other hand, Congress thought that if attorneys' fees were routinely awarded against the Government in a case where the Government was not the prevailing party, this might inhibit vigorous enforcement of the law, or chill attempts by the Government to advance in good faith novel but credible extensions and interpretations of the law.

In an effort to accommodate these two competing objectives, Congress adopted two provisions which are both at

issue in this case.

First, EAJA does not award attorneys' fees to everyone who prevails. It specifically provides that an award of fees is available only if the Government takes a position that is not substantially justified.

Second, although EAJA provides that an attorney's fee must be reasonable, it imposes a cap on what is considered to be a reasonable attorney's fee equal to $75.00 an hour, which can be exceeded only because of inflation or other narrowly defined special factors.

QUESTION: Other such factors?

MR. MERRILL: Other special factors such as.

QUESTION: Such as.

MR. MERRILL: Yes. I hope to get to that issue later in my argument, Justice White.

QUESTION: Yes, I'm sure you will.

MR. MERRILL: The first issue in this case, however, is the meaning of "substantial justification." The legislative history makes it clear that in general the Government's position is substantially justified if it is reasonable.

Thus, even if the Government ultimately loses the case, it is not required to pay attorneys' fees under EAJA if its position was one as to which reasonable persons might genuinely disagree about the outcome.

The 1980 legislative history repeatedly equates

substantial justification with reasonableness. Eleven Courts of Appeals interpreted "substantially justified" to mean "reasonable." When EAJA was re-enacted in 1985, several minor changes were made in the statutory language, but Congress maintained the substantial justification formula without modification.

Thus, we think that the meaning of "substantial justification," at least in the abstract, is clear. It means "reasonable." The difficulty comes in applying this standard in individual cases, as this case illustrates.

Here, looking at virtually identical facts, the Court of Appeals for the Ninth Circuit held that the Secretary of HUD was not substantially justified in refusing to implement the operating subsidy program authorized by Congress in 1974, and subsequently repealed in 1981.

The Second Circuit, however, held that the Secretary was substantially justified in refusing to implement that subsidy.

QUESTION: Is there any reason why Congress didn't use the perfectly good word "reasonable," if it meant "reasonable"?

MR. MERRILL: Well, Justice Scalia, the legislative history suggests that the substantially justified formula was borrowed verbatim from Rule 37 of the Federal Rules of Civil Procedure. And I think there is also some indication in the

legislative history that Congress was particularly attracted to that because it was clear under that formulation that the Government had the burden, and Congress was particularly anxious to establish that the Government had the burden of showing it as substantially justified, or reasonable, or whatever.

Now, obviously, they could have done that by saying the Government has the burden of showing that it is reasonable. But Congress chose not to do that.

There is an episode in the legislative history, the 1980 legislative history, which is discussed in the briefs, where the Senate, without explanation, the Senate committee, rejected an amendment that would changed "substantially justified" to "reasonably justified," but there is no explanation for that. And the Senate Committee Report goes on to say that "substantially justified" means "reasonable."

So I cannot answer the question any better than that.

There are a number of reasons why in this case we think the Second Circuit was right and the Ninth Circuit wrong in the substantial justification inquiry.

First of all, the Secretary's decision not to implement the operating subsidy was quintessentially a policy choice about what to do with limited resources. Although Congress had authorized the Secretary to enter into contracts to implement the operating subsidy program, it had not released

sufficient contract authority to permit the Secretary to implement that subsidy program and to meet her commitments under other programs.

QUESTION: I suppose just the disagreement between two Courts of Appeals almost makes your case on your approach?

MR. MERRILL: Ironically, Justice White, there is a pending application or motion, I guess, before the District Court in California to award fees for the expense of engaging in the fee litigation in this case; and if our theory is right about what "substantially justified" means, we should be able to win that litigation because of the conflict in the Circuits.

QUESTION: Mr. Merrill, may I ask what standard we should use to review the lower court's finding that the Government's litigating position was not substantially justified? Is it an abuse of discretion thing or do we look at it de novo as a matter of law, or does it vary from case to case, depending on whether it is a matter of failure to meet a burden of proof or a legal question?

MR. MERRILL: Certainly we think that in this case the appropriate standard is de novo. Most of the lower courts that have considered this question have so concluded. A few lower courts, including the Ninth Circuit, have held that an abuse of discretion standard is appropriate.

We think a de novo standard is particularly critical at this stage, or with respect to the issues involved in this

case, because the primary thrust of our argument here is that the Court should, if at all possible, try to construe the "substantially justified" requirement in terms of objective indicators of reasonableness, and if the courts are to develop such objective indicators of reasonableness, it is important that we have appellate review of decisions as to what kinds of circumstances constitute substantial justification and which kinds do not. If everything is simply left up to the ad hoc discretion of the trial courts, then we will be faced with a totality of the circumstances kind of approach in almost every instance, which we argue is highly wasteful and duplicative.

QUESTION: May I ask, in that connection, do you think that the Judge who tried the case, or the Court of Appeals that might have handled the appeal, the feeling of that Judge as to the difficulty of the issues, how close they were, and so forth, is that one of the objective factors that would be counted, or not?

MR. MERRILL: No. Our notion of objective indicators of reasonableness is essentially keyed to what we think "reasonableness" means. "Reasonableness" means that a reasonable person or attorney could have agreed with the Government's position at the outset of the litigation.

QUESTION: What if the District Judge said, I don't see how any reasonable attorney could have brought this case, based on my study of the law in the case and the arguments on

both sides? You would say that?

MR. MERRILL: We do not think that would be an objective indicator that would be conclusive.

QUESTION: I am no suggesting it is necessarily conclusive. But would it be one of the factors that would be appropriately weighed?

MR. MERRILL: Yes.

QUESTION: By the Judge and by the Court of Appeals? Its own reaction to the case?

MR. MERRILL: In a case where there is no objective indicator of reasonableness --

QUESTION: Well, I am asking, is this one of the objective indicators?

MR. MERRILL: No, it's not.

QUESTION: It's not.

MR. MERRILL: We understand objective indicators of reasonableness to be something which basically ends the argument about whether the Government was substantially justified or not. I don't think the views of the Trial Judge would be that kind of factor. I think that in a totality of the circumstances case where you didn't have an objective indicator, that would certainly be something that would be taken into consideration.

QUESTION: Assume it is a case of first impression. The issue has never arisen before. What else could he or she

look at?

MR. MERRILL: In that kind of situation, it may very well be that the only thing to do is to engage in a kind of totality of the circumstances analysis, in which the Trial Judge's subjective reactions to the case obviously loom fairly large.

Bear in mind that EAJA does not say that the Government is not substantially justified simply because it failed to win on the merits.

QUESTION: No, of course not.

MR. MERRILL: And it is a little bit hard, obviously, for District Judges, having just ruled against the Government, to turn around and say well, even though I find the Government lost, they are substantially justified.

QUESTION: I think judges very frequently decide one way but acknowledge to themselves that the case was not an easy one. That is certainly not an unusual situation for a judge to be in.

MR. MERRILL: We certainly do not argue that every case can be resolved by objective indicators either of reasonableness or of unreasonableness, and when there are no such objective indicators, we simply think that the lower court's approach in looking at the totality of the circumstances is the best way to proceed at this point in implementing EAJA.

QUESTION: Mr. Merrill, do you agree with the Respondent that in every case, the Government has the burden of proof on the question of whether its position was substantially justified?

MR. MERRILL: Yes, Justice O'Connor, we do agree with that. That is clear in the legislative history, that Congress to intended.

QUESTION: Mr. Merrill, I can understand your search for objective indicators when the objective indicators are those that pre-existed the Government's action in a suit. That is to say, if it is a matter on which there has been a circuit split, before this particular suit is litigated, and the Government chooses to litigate it, I would acknowledge that a sensible litigator would say, we have a chance of winning. But that is not the case here. You are relying on subsequent views of the court. And that seems to me to be no more significant as bearing upon the intent of the Government initially, before that view on appeal came out, I mean the split in the decision.

It seems to me that had no bearing upon the Government's judgment at the time, any more than the personal views of the District Judge.

MR. MERRILL: It has no bearing on the -- it didn't motivate the Government, clearly, to do what they did, by definition. The even does not happen until after the Government made the decision to litigate.

But we think it is important to draw a distinction between the analytical question of at what point in time do you ask whether or not the Government was substantially justified, and in this case there is general agreement that the point in time is when the Secretary of HUD decided to defend against this nationwide class action suit -- to distinguish between that issue and the issue of what kind of evidence a Court can look at, in order to make up its mind as to whether or not a reasonable person could have disagreed about the Government's position. We think that evidence which emerges or develops after the time the suit is instituted can be very highly probative on that question.

For example, if there were no circuit split when the case was filed but subsequently one developed, we think that certainly that would be relevant evidence that sheds light on the reasonableness of the Government's decision to have litigated. And in this case, we think that the fact that this Court granted a stay pending review as subsequent phase of the litigation, and granted certiorari to cases raising the identical issue, is highly probative.

QUESTION: Do you ever think you could win a case that it was unreasonable to litigate?

MR. MERRILL: Excuse me?

QUESTION: Don't you think it is possible to begin litigation which is unreasonable, and you were foolish to do

it, but for some reason, something comes up, a new argument is developed, and you win? Isn't that possible?

MR. MERRILL: Yes, that is quite possible.

QUESTION: Well, if that is so, then, then if even winning the case does not prove that you were reasonable teo begin it in the first place, how can the mere fact that some of the judges thought you should have won it prove that you were reasonable to bring it in the first place?

MR. MERRILL: Well, subsequent developments, I think, are highly probative in the context where the basic legal issues are the same when the subsequent rulings come down as they were when the initial decision was made. And I think that although there were some modest changes in the statute that took place in this case, the basic issues, the basic statutory language was the same, the basic rationale that the Secretary gave was the same. And so this Court's decision to grant a stay pending review and the grants of certiorari, we think, are extremely probative of the question of whether it was reasonable for the Government to essentially defend the decision of the Secretary in the first place.

Now, you are right. It is possible to imagine a case where something happens, Congress passes a new statute that suddenly changes the Government's position so that it is no longer justified, for example. Those kind of unique cases may present a special inquiry as to whether the Government was

substantially justified in persisting with the litigation.

I suppose it is also possible to imagine a situation where a subsequent event could change the landscape such that --

QUESTION: Like the Supreme Court changing its mind. You know, no reasonable lawyer would have thought that we were ready to change a settled course of law, and someone takes a run at it, and it's a very foolish thing to do, and he wins.

MR. MERRILL: Yes. I think it is analytically possible that one could say in some case -- I don't think it is this case -- but in some case, the Government was not substantially justified at the outset, but then the legal landscape changed and it became substantially justified. I don't think that is the case here because I think that the basic elements of the law remain unchanged and all we really have is confirmation through this Court's decision and through the grants of certiorari of the reasonableness of a decision that the Secretary took to defend the case in the first place.

QUESTION: If you can't take into consideration any subsequent events like lawsuits analyzing the Government's contentions, and the Court opinion, then I suppose that the District Court deciding has simply got to study the law as it existed and almost make a brand new lawsuit out of the thing.

MR. MERRILL: That is correct, Justice Rehnquist. It would be, we think, quite artificial to have an absolute line

that says you have to draw the veil and you cannot look at anything that happens after the complaint was filed.

I should point out that the Respondents don't agree with any such rule, either because they stress the fact that the case was resolved without a trial and that there was ultimately a favorable settlement of the case in favor of Plaintiffs and clearly those are subsequent events that occurred after the filing of the complaint. The settlement occurred quite a bit after this Court granted a stay and certiorari. So both sides in this case are, in effect, arguing that courts should be able to look to events that occur after the filing of the complaint. No party in this case is genuinely arguing that the courts have to draw the curtain at the time the complaint was filed and cannot look to subsequent events.

QUESTION: What consideration are you giving a hypothetical case where everybody agrees that you cannot lose -- and you lose?

MR. MERRILL: What do you mean, Justice Marshall, by everybody? All the courts that have considered the issue?

QUESTION: No. The trial court ruled against you but told you quietly that you would win in the Supreme Court, and the highest court in the state tells you the same thing. Then you come up here and you lose.

MR. MERRILL: Well, Justice Marshall, I think our

objective indicators of reasonableness theory would be limited to things that are on the record, like stays and grants of certiorari and decisions by judges. I don't think that anything like a wink or a nod or a private communication could constitute an objective indicator.

QUESTION: That's what I say. If you go outside the record, you are going to get in trouble.

MR. MERRILL: That's right. And in fact, Congress, in its 1985 amendments -- Congress made a number of modest amendments in 1985. One of them was to make it clear that the substantial justification inquiry was to be made on the record and that the courts were not to essentially take additional evidence on the question of reasonableness.

In any event, we think that in this case, although there are several indicators that support the reasonableness of the Secretary -- the discretionary nature of the policy choice, the statutory language, the fact that the D.C. Circuit in the Lindy case had decided only one year before on basically identical statutory language, that the Secretary had discretion not to implement the larger program under the Housing Act, Section 236, that was at issue, that the Secretary's judgment to litigate was reasonable. But the stay and the certiorari grants, we think, not only confirm that judgment, but are so probative that they constitute objective indicators of reasonableness.

Now, with respect to the stay, we say that, because it is well established that one of the elements that a party has to show, has to make a strong showing on in order to grant a stay, is a showing of a reasonable possibility of success on the merits. So that is a necessary element of a stay and the Court must have concluded that there was a reasonable possibility of success on the merits when it granted the stay in the Underwood case.

The cert. petition, similarly, there was no conflict in the --

QUESTION: But isn't it true on the stay, just reflecting, I don't remember the particular application, but this is a case that involved a great deal of money, did it not? Fifty or sixty or seven million dollars?

MR. MERRILL: It involved $60 million.

QUESTION: And it was perfectly clear that if the judgments were not stayed, the money would be disbursed and it couldn't have been recovered, which is a very powerful reason for granting a stay without looking too closely at the merits.

MR. MERRILL: Yes.

QUESTION: The Government also comes in in these cases. Don't we almost routinely grant the stays with that kind of fact pattern?

MR. MERRILL: I don't know. I can't speak to that, Justice Stevens, as to whether it's routine or not.

QUESTION: You would like it to be, and would not want to discourage that, would you?

MR. MERRILL: No, not at all. I must say though, that although we would concede that there may be some tradeoffs in deciding whether or not to grant a stay between the balance of equities or the irreparable harm element, and the likelihood of success on the merits, there is no suggestion in any of the Justice's In Chambers Opinions or in any of the decisions about stays, that a showing of success on the merits, or a likelihood of success on the merits, is not a necessary element of a stay. It may not be a sufficient element, but it is necessary.

QUESTION: Mr. Merrill, was that view of when we grant stays clear in the 1970s at the time this particular stay was entered? Do you think that it was crystal clear that that was the criterion we would use?

MR. MERRILL: There is some discussion of that in the briefs, Justice O'Connor. I would pu it this way. I think that, as a matter of logic, it was clear. It was clear in appeals, for example, that the Court had to consider probability of success on the merits. In certiorari cases, the Court would frequently speak only of the likelihood that four Justices would agree to grant certiorari. But I think that there would really be no point in granting a stay, even if one concluded in a strange or unusual case that four Justices

wanted to grant certiorari only to affirm, there would be no point in granting a stay if there was not a significant chance that the judgment below was going to be reversed.

QUESTION: Well, I think that is perfectly clear now. But of course, the concern is that at the time this one was granted, maybe the Court was just concerned about the dispersal of the money, as Justice Stevens had suggested.

MR. MERRILL: Well, I think the dispersal of the money probably was a substantial factor.

QUESTION: Isn't there another factor, too, Mr. Merrill, in all candor? I think the Court does have great respect for your office. And when your office comes in and represents that there is a substantial question here, that carries a good deal of weight. It does with me, I can very candidly say. And so you have the Solicitor General of the United States representing to this Court that there is a substantial question involved and $60 million is going to be disbursed and cannot be recovered. You may not go into the details of complicated statutory case very closely, but there were representations that you might in another case, in all candor.1

MR. MERRILL: Well, perhaps we could have a judgment by the Solicitor General to be an objective indicator of reasonableness in these cases, too, Justice Stevens.

QUESTION: On the grant of the stay, the mere fact

that the Solicitor General has been willing to apply for a stay shows that the Solicitor General thought it was a close question, and he is a reasonable person. Can you think of any other area in which we decide whether a particular thing is reasonable by deciding whether any reasonable person holds that position?

We would affirm all agency action. You know, the test is, usually, was the action reasonable. Do we say well, of course, it was taken by a Cabinet Secretary. That is a reasonable person. Therefore, it must be a reasonable action. That isn't true. Reasonable people sometimes do unreasonable things, including courts that sometimes come out the wrong way. Right?

I cannot think of any other area where we determine reasonableness on the basis that a reasonable person did it.

QUESTION: And the Solicitor General doesn't always do what the department asks it to.

MR. MERRILL: Well, I think Congress clearly did not intend that any judgment by the Solicitor General or by any responsible Cabinet Officer would be, by definition, a reasonable act under EAJA. The whole point of EAJA was to make sure that officials of the Government thought long and hard before they took action and therefore that the incidence of unreasonableness would be reduced.

QUESTION: Mr. Merrill, I have a little concern that

if we were to place the amount of weight that you would have us place on a grant of certiorari or a stay here, which, as has been indicated, we often do out of substantial deference to the request of the Solicitor General, that we would have to change our posture on that if we knew that then that was going to be determinative in a later fee application under EAJA. And I just wonder if that is wise?

MR. MERRILL: We certainly would not want the Court to change its standards in response to attorneys' fee litigation, Justice O'Connor.

The stay situation is, quite frankly, probably somewhat of an unusual one in EAJA litigation. I think that a much more common situation that the Government encounters is one where there is some kind of disagreement among the courts on the question and our approach of objective indicators I think would only in an unusual case involve assessments of stay and certiorari grants, and much more commonly would involve things like whether or not a disagreement among lower court judges was sufficient to establish the reasonableness of the Government's action.

There are really two issue here. One is whether or not the objective indicators approach makes sense, as a general matter, and secondly, whether or not, in this case, the stay and the certiorari grants were bona fide objective indicators of reasonableness.

We would strongly urge the Court to consider the utility of the objective indicators approach, and even if the Court disagrees with us about the stay and the certiorari grant, we think that, when you look at the total circumstances in this case, that our action was substantially justified from that perspective as well as under an objective indicators analysis.

Let me turn, if I may, to the second issue in this case, which is whether or not the lower courts properly adjusted the fees to levels as high as $120.00 an hour. EAJA is unique among attorneys' fee statutes in that it imposes an cap on reasonable attorneys' fees equal to $75.00 an hour. The statute sets forth two exceptions to the cap: first a finding that there has been an increase in the cost of living, and second, a finding that a special factor such as the limited availability of qualified counsel for the proceedings involved requires a higher fee.

The lower courts in this case we think all but wrote the $75.00 cap out of the statute. In effect, they found that the "special factor" language of EAJA permits courts to look to any and all of the 12 factors that were identified in Johnson v. Georgia Highway Express in making upward adjustments above and beyond the $75.00 limit.

The problem with this approach is that the Johnson factors were designed to establish reasonable attorneys' fees i

a situation where there is no cap. Thus, if each of the Johnson factors can be taken into account as a special factor which justifies an increase above the $75.00 limit, the net effect would be the same as if Congress had mandated no cap at all.

Moreover, there is nothing in the legislative history of EAJA that suggests that Congress wanted the courts to look at the 12 Johnson factors in deciding whether to go beyond the $75.00 cap. In this respect, EAJA is quite different from the Civil Rights Attorneys' Fee Act, 42 U.S.C. 1988, for the legislative history, as this Court has recently discussed in several cases, expressly refers to and incorporates or endorses at least the Johnson factors.

By a curious logic, the Respondents have said that they are entitled to more than $75.00 because they satisfied the one special factor mentioned in the statute -- to wit, the limited availability of qualified counsel. But their argument is that there was a limited availability of attorneys that were willing to serve in this case pro bono. They have not submitted any evidence, and the lower courts did not find, that there was a limited availability of counsel at established market rates or at $75.00 an hour.

That, we submit, is the relevant question under EAJA, and the fact that there is no evidence in the record supporting that demonstrates that Respondents were entitled to fees, at

most, no higher than $75.00 per hour.

With the Court's permission, I would like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Merrill. We will hear now from Ms. Burdick.

ORAL ARGUMENT OF MARY S. BURDICK, ESQUIRE

ON BEHALF OF RESPONDENTS

MS. BURDICK: Mr. Chief Justice, and may it please the Court:

Analysis of the issue of whether Plaintiffs' counsel will receive any fees turns on the meaning of two words: "substantial justification." Analysis of how much Plaintiffs' counsel will receive turns on two more words: "special factors."

These seemingly simple words unfortunately have spawned complicated and prolonged litigation. Fortunately, analysis of the legislative history that Congress had some specific factual contexts and patterns in mind when it selected these words.

Today, I would like to focus my argument on the legislative history and specifically on the fact patterns which Congress said it was contemplating when it chose the words of the Equal Access to Justice Act.

As this Court said in Garcia v. United States, and in Blum versus Stenson, Committee Reports are the best source of

legislative history for the intent of Congress. In this case, both the House and the Senate Reports contain very concrete examples of the fact patterns of objective indicia Congress was contemplating when it adopted the Equal Access to Justice Act.

The first, and most often-repeated example, from the legislative history, is when the Government persists in pressing claims that have already been rejected in the courts.

In this case, the complaint was not filed until the Government had lost nine consecutive, basically identical cases. By the time this case was settled, ten District Court Judges and six Court of Appeal Judges had unanimously rejected the Government's position.

QUESTION: I take it that means there were two appeals to the Court of Appeals?

MS. BURDICK: That is correct.

QUESTION: And the Government did not appeal the adverse rulings from the other eight District Judges?

MS. BURDICK: There were other appeals pending which were abandoned and remanded at the time of the settlement of all of the nationwide actions on the operating subsidy issue.

QUESTION: But at any rate, of all the District Court judgments against the Government, only two were appealed, and in both of those, only two finally produced Opinions in the Courts of Appeals, and both those were adverse to the Government?

MS. BURDICK: The Government appealed every judgment below that it could. Some were not in appealable posture. And it abandoned those appeals only at the time of settlement.

Despite this string of losses --

QUESTION: Excuse me. So that means it had two losses that it had pursued through to the end, right? And it had how many others that it was still fighting?

MS. BURDICK: I believe there were appeals pending in eight cases. Eight or fewer. There were eight cases the Government had lost below. As many of those as were in appealable posture had been appealed. I don't remember the number. Two were lost on appeal -- Abrams and Dubose.

QUESTION: Do you think the Congress meant, and you say the prototype it had in mind was the Government keeps litigating a matter it has lost. It really had finally lost only two, and it was still litigating somewhat less than eight. Surely the Congress didn't mean if you lost one District Court case, that that is the end of it, or two District Court cases, even though you have eight others pending?

MS. BURDICK: No. What Congress said was, repeated losses may be evidence that the Government had a weak case. Now, interestingly, the string of operating subsidy losses was given by one committee of Congress as a specific example of unjustified repeated losses by the Government.

In 1984, when the Equal Access to Justice Act was

being debated for revival, the Senate Committee on the Judiciary said, quote: "To ignore precedent is not a substantially justified position." Close quote. And they gave three cases as examples.

One of those cases was Dubose v. Pierce. Dubose was the third loss the Government suffered in the consecutive string of nine losses which preceded Underwood, which it also lost.

QUESTION: Do you think that Committee Report is binding on us as to the meaning of "substantially justification"?

MS. BURDICK: I think that Committee Report is very strong evidence of what Congress meant when it said "substantial justification."

QUESTION: Do you think the rest of Congress knew what that case was? Do you really think that any of the other Senators, and indeed do you think the whole Committee knew what that case had held?

MS. BURDICK: I know that this Court has said that Committee Reports are the best source of legislative history because you assume that Members of Congress know the law and know what is in the Committee Reports.

QUESTION: Surely it has to depend on what the Report says. And when the Report just cites, string-cites a number of cases, to really assume that the entire Committee knew what all

those cases had held, much less that the whole House knew what they had held, isn't that a little bit fanciful?

MS. BURDICK: It is the best source we have to determine what Congress may have meant.

QUESTION: Which may mean we don't have a good source.

MS. BURDICK: I understand there is a split in the Court on this issue.

Despite this consecutive string of losses, the Secretary argues that his position must have been substantially justified because this Court issued a stay. Now, we don't dispute that in the proper circumstances, issuance of a stay can be evidence that the Government's position was or was not substantially justified.

However, this stay was not given substantial weight for the very good reason that it was issued with no statement of reasons. The District Court and the Ninth Circuit had no way of knowing whether you stayed the injunction because you thought the Government's position had merit, or whether you stayed the injunction because if you did not do so the case would be mooted and the $60 million would already have been expended before the case came before you on the merits.

I am not saying that the Government did something for which it should be punished, by entry of a fee award when it decided to pursue all ten cases to final resolution. What I am

saying is that the Government was engaging in a pattern of litigation strategy that Congress has identified as a situation that required a shifting of the cost of litigation from those people who prevailed in court to the Government in the form of an award of attorneys' fees.

I would like to point out on the issue of the legislative history that mentioned the Dubose case, that the existence of that Committee Report was not brought to the attention of the Second Circuit. Therefore, I think the split between the Second Circuit and the Ninth Circuit on the operating subsidy issue is possibly explainable simply son the ground that more information on legislative history was brought to the attention of the Ninth Circuit and it had a better basis for reaching its conclusion.

QUESTION: What if the Committee Report, Ms. Burdick, had said, what if the statute said in so many words, Congress directs the courts to award attorneys' fees to the prevailing litigants in all of these particular cases? Do you think we would then have to go ahead and do that?

MS. BURDICK: I think that would be very strong evidence that that was Congress' intent that when the Government persisted in litigating the way it did the operating subsidy case, that fees were appropriate.

QUESTION: Can Congress tell a court, with respect to a specific case, that we want you to each thus and such a

result?

MS. BURDICK: No, it cannot. But it can give you a idea of the kind of cases it had in mind when it said if the Government is not substantially justified fees should be awarded. And I think it is very telling that one of the examples that they had in mind was this very string of cases.

QUESTION: Which are now before us.

MS. BURDICK: Yes.

QUESTION: Was it the same Congress that wrote this Report that had adopted the language? You said the Congress can tell you what it had in mind as though Congress is a continuing body that doesn't change. We number the different Congresses because it is a different Congress each time. Now, was it the same one that wrote this Report that had adopted the language?

MS. BURDICK: No, it was not.

QUESTION: Do we also need to look at the underlying litigation issue in litigation to know whether the Government's position was reasonable, and look at such things as the fact that the language was permissive rather than mandatory, and so forth, in the statute, to determine whether that was reasonable to litigate?

MS. BURDICK: In any equal access case, I believe the District Court Judge does have to unavoidably re-examine the strength and weakness of the Government's case.

QUESTION: Must we do so, too? Do you agree that we should make a de novo review here?

MS. BURDICK: No, I do not. And the Solicitor had not asked the Court to review the standard of review below, and so we did not brief whether or not the Ninth Circuit was correct.

QUESTION: But of necessity, we will have to know what our standard of review is or we couldn't apply the proper one here. Isn't that so? We have to apply the proper standard.

MS. BURDICK: I believe the Ninth Circuit used the proper standard, which was not de novo but abuse of discretion.

QUESTION: Well, what if it is really a question of law?

MS. BURDICK: It is not really a question of law. Below in the District Court, when the nationwide injunction was first sought, there was considerable evidence about the cost of implementing the program, about the wisdom of the program, and then there was analysis of the statute.

And the District Court Judge reached a conclusion which was really a mix of law and fact.

QUESTION: What is our standard of review if it is a mixed question of law and fact?

MS. BURDICK: I think the analysis has turned on what are the practical implications of having a de novo review or

leaving the initial determination appropriately with the District Court Judge, which was analyzed, I believe, fairly well in the amicus brief of the Alliance for Justice, ACLU, and I would join in the arguments that they made there on these practical implications.

This Court, for example, has said repeatedly that attorneys' fees litigation should be simplified and appeals on attorneys' fees issues should be discouraged. Giving deference to the District Court's determinations on fee issues would serve this policy.

Congress set forth some other factual patterns which they said evidenced that the Government's position was not substantially justified, in addition to persisting with unsuccessful claims. One of those was whether the Government settled the case on terms which were extremely favorable to the opposing party, evidencing that the Government recognized it did not have a strong case.

In this case, the settlement gave to Plaintiffs every penny they could have received in court.

QUESTION: Wasn't that partly the nature of the case? When Congress has appropriated a certain amount of money and the Government says well, we don't have to contract for it, or whatever the Government said here, you're not going to settle a case like that, if the Congress has appropriated $60 million, you are not going to settle it for $40 million. I mean, if the

Government settles at all, aren't you just bound to get the face amount in that particular situation?

MS. BURDICK: Not necessarily. By the time we sat down to talk about settlement, Congress had identified and approved some other uses for the reserve fund. It would have been quite possible that we would have settled for a lesser amount than was in the reserve fund for operating subsidies, agreeing that the remaining amount could be used for new subsidies created by Congress after the initial decision below.

Finally, Congress also said, through its Committee Reports, that one way that you can see through an objective indicator whether the Government's position was weak or strong was whether the District Court below was able to resolve the case on the merits easily.

In this case, we went in in a nationwide class action and sought only a preliminary injunction for prospective relief. The District Court Judge was so persuaded that the Government's case was without merit that, sua sponte, he treated our motion as a motion for permanent injunction under summary judgment, he issued a nationwide permanent injunction and certified a nationwide action.

If prevailing parties are ever going to be entitled to an equal access award, on the ground that they opposed a Government position which was not substantially justified, as Congress understood those terms, this must be the case.

I would like to then, then, to how much we would be entitled to. The operative language here is "special factors." In the statute, Congress gave one very concrete example of a special factor which justifies an award in excess of $75.00 per hour, and that is the limited availability of qualified attorneys.

We introduced below uncontroverted evidence for the commonsense proposition that there is an extremely small pool of attorneys who will undertake nationwide class actions against the Government on behalf of plaintiffs who will not be paying on a fee for service basis, win or lose.

On this basis alone, the full award was affirm by the Ninth Circuit and should be affirmed by this Court.

QUESTION: Was part of the Ninth Circuit's or the District Court's reliance on this the fact that it was a lawsuit against the Government as opposed to somebody else?

MS. BURDICK: I think the idea was that the suit was against a party who could be expected to bring substantial resources and who had already evidenced that they intended to take the case as far as they could go on appeal.

QUESTION: But that would be an argument in every EAJA case, because all you get attorneys' fees from is the Government.

MS. BURDICK: But in the majority of EAJA cases, the issue is simply disability payments. As many of the amici

pointed out, the most common EAJA case is a disability case against the Social Security Administration. In fact, there is a pool of attorneys who will take these cases, even though they are against the Government, and the pool is not limited. It is not just the fact that the Government is the opposing counsel. It is the fact that it is a nationwide class action where the Government has already shown, through litigation strategy, that they intend to use the case as a test case for the limits of their discretion.

QUESTION: So then it was not used as a factor simply that this was a case against the Government, but it was this particular kind of case against the Government?

MS. BURDICK: That's right. You are correct. Every EAJA case is against the Government.

QUESTION: Let me ask you a question there. Does the fact -- in the first part of your argument, you are persuading us that there really was no merit to the Government's case. It is pretty obvious that it was a weak case. But it seems to me that is the kind of case a lawyer will be glad to grab on to when there is a lot of money at the end of the line.

MS. BURDICK: Well, interestingly enough, no one grabbed on to this case except our program.

QUESTION: So you seem to be arguing in the second part of your argument that it is really a tough case. It's hard to find lawyers to handle this.

MS. BURDICK: What made it tough was first, that the Government had decided to use it a test case, so that it became protracted and difficult.

QUESTION: That still doesn't make it a hard case. Your chance of losing you told us is practically nil.

MS. BURDICK: What made it a hard case was the fact that it evolved into a six-year settlement process which required Plaintiff's counsel to undertake what the District Court Judge said was --

QUESTION: Your chance of losing still wasn't very great. And for all that time, you are going to be paid.

MS. BURDICK: The fact that we are going to be paid should be irrelevant. The issue is who would have taken this case. We were not paid by Plaintiffs, and so the pool of attorneys available to Plaintiffs was extremely limited.

QUESTION: I know, but didn't the District Court take into consideration other factors that the availability of attorneys?

MS. BURDICK: Yes, the District Court did.

QUESTION: What do you think about that?

MS. BURDICK: It is clear that Congress intended, first of all, that there be other factors, having adopted the language --

QUESTION: Well, how about these factors that the District Court mentioned?

MS. BURDICK: In this instance, the legislative history does not tell us if the paradigm examples that Congress had in mind --

QUESTION: What do you think about these factors that the District Court used?

MS. BURDICK: I think the factors the District Court used were exactly what Congress had in mind. And I think that your analysis --

QUESTION: If the Government's case was so weak, how can you get enhancement over $75.00 because it is so tough?

MS. BURDICK: Because the case, by the time it ended, after six years of settlement administration, proved to be difficult, complex --

QUESTION: That just means it was protracted.

MS. BURDICK: It wasn't protracted. The District Court Judge said that it was difficult, during the six years that he spent watching the case.

QUESTION: You mean there was a pretty good chance you would lose, Plaintiffs would lose?

MS. BURDICK: No, there was no chance we were going to lose. But the issue is how great was the burden on counsel and what is a fair compensation for the work that they had to do.

QUESTION: Is the conclusion of this discussion that you can never get enhancement in EAJA cases, since the only

time you get fees at all is when the Government's case is not substantially justified?

MS. BURDICK: That is the logical extension of the Government's argument, that if the Government is not substantially justified, you necessarily are going to lose.

QUESTION: There must be some cases in which even though the Government is not substantially justified it is not an easy case. Right?

MS. BURDICK: Whether it is an easy case or not --

QUESTION: It doesn't make a lot of sense, but it has to be, doesn't it?

MS. BURDICK: Congress intended that there would be cases where Plaintiff's counsel would be awarded more than $75.00 per hour, because it expressly said, if there are special factors, more shall be awarded.

I think this Court's analysis of legislative history in Lorillard v. Ponds gives us our best analytic framework for determining what Congress had in mind when it talked about special factors.

This Court said in Lorillard that when Congress re-enacts statutory language, we are to assume that Congress intended to adopt judicial interpretation of the re-adopted statutory language, absent some directive from Congress that it had a different intention.

You said in Lorillard that this assumption is

especially strong when Congress evidences through the Committee Reports an understanding of the evolving case law.

Re-adoption of the Equal Access to Justice Act is a classic example of this legislative process of the re-adoption of statutory langauge. For more than a year, the Congressional committees debated the Equal Access to Justice Act and they reported on and reviewed in their Committee Reports more than 50 court decisions, criticizing more than 20 of those decisions, all because they were too restrictive of fee awards.

The Committees did not criticize any of the then existing precedents which allowed for award of more than $75.00 per hour, because of special factors. The existing precedents at the time of the re-enactment of the Equal Access to Justice Act were: Action on Smoking and Health v. C.A.B., a D.C. Circuit decision, and the Ninth Circuit affirmance in this very case, Underwood.

In Action on Smoking v. C.A.B., the D.C. Circuit said that exceptional quality of representation, contingency and delay could be special factors. The Ninth Circuit in this case said exceptional quality of representation, exceptional success complexity, difficulty, duration and again, contingency, could be special factors.

In addition, the Committees heard the testimony that courts were awarding more than $75.00 per hour to attorneys who provided extraordinary services in complex and protracted

cases.

Armed with this knowledge, Congress re-enacted the words "special factors" without change and without comment. Thus, we are compelled by a common-sense rule of statutory construction to assume that when Congress re-adopted the words "special factors," it understood those special factors to include exceptional representation, exceptional success, contingency, delay and difficulty of the case.

As the District Court Judge in the Ninth Circuit recognized, this is a case raising every single one of those special factors, as well as the one special factor which Congress stated in the statute:-- limited availability of qualified counsel.

QUESTION: Do you mean because it makes it difficult?

MS. BURDICK: No, that's not what I mean.

QUESTION: What was difficult about it?

MS. BURDICK: Let me give you a few examples. The settlement required the Government to give to Plaintiffs' counsel a list of all 4,000 housing projects where Plaintiff's were entitled to receive subsidies.

After signing the settlement, the Government proved unable to turn over such a list, and we spent a year going through hearings back and forth trying to determine why we didn't have a list, how we could get the information --

QUESTION: What did you do, other than go back and

forth to Court? You didn't do any research?

MS. BURDICK: No, we didn't do any research.

QUESTION: All you did was go to court.

MS. BURDICK: Let me give an example of what we did outside of court. More than 150,000 applications for past benefits were filed. The attorneys on the case took a random sample of those, reviewed those applications and determined what reasonably we could require in terms of evidence that the person making the claim actually resided in the apartment and lived in the apartment during the period --

QUESTION: How long did that take?

MS. BURDICK: The settlement was signed in 1979 and the first checks were mailed out in 1981.

QUESTION: How long did it take to do what you were just talking about?

MS. BURDICK: About three months.

QUESTION: Three months?

MS. BURDICK: For reviewing the claims, coming up with the --

QUESTION: How many claims?

MS. BURDICK: Pardon?

QUESTION: How many claims in three months?

MS. BURDICK: I believe that we reviewed several hundred claims.

QUESTION: In three months?

MS. BURDICK: Then we came up during that same period with a procedures manual that the accounting firm could use that would give them guidelines as to what evidence was acceptable and what was not. We took those to the court. We argued to the court whether those were acceptable standards. Then we let the accounting firm try it for a while. They brought back to us the cases that our general rules did not help them resolve.

We then refined the rules, went back to the court, got approval on the refined rules.

QUESTION: It's a shame that the courts can't get paid like everybody else does in this.

MS. BURDICK: In closing, I would like to urge the Court to highlight the deference that should be given to the district courts' findings on attorneys' fees. If appellate courts are directed to defer to the district courts --

QUESTION: That is a problem.

MS. BURDICK: -- fewer appeals will be taken. And if fewer appeals are taken, we hope that counsel will, instead of litigating fees, spend their time doing what Congress was trying to encourage -- representing people who otherwise would be shut out of the courts.

QUESTION: The Court of Appeals here didn't totally defer to the District Court's award. The District Court gave you a multiplier, didn't he?

MS. BURDICK: That is right. The Court of Appeals here first said as a matter of law, EAJA does not provide for multipliers. It then modified its decision and said it chose not to reach that issue and that we were adequately compensated by the market rate award that we received.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Burdick. Mr. Merrill, you have four minutes.

ORAL ARGUMENT OF THOMAS B. MERRILL, ESQUIRE

ON BEHALF OF PETITIONER - REBUTTAL

MR. MERRILL: Let me first briefly address the three factors that Respondents have relied on from the legislative history in support of a finding that the Government was no substantially justified in this case.

First is the string of District Court Opinions. We agree that in the proper case, where you have a subtle body of authority, that would be something to be taken into account in deciding whether or not the Government was substantially justified. But in this case, what you had was a string of District Court decisions that were, most of them, associated with individual housing projects, all of them rendered in very short order, one after the other, and the Government was vigorously trying to appeal those decisions during the time that the cases were being rendered.

The Government's choice, if it wanted to obtain

appellate review in this situation, was quite limited. They either could continue to fight the District Court actions until they got appellate decision or I guess, as Respondents would have it, we could just simply fold up and concede our case before we got a decision on appeal. The Secretary felt very strongly that appellate review was warranted and so incurred the additional District Court defeats.

I should point out that in response to some questions from the Bench as to how many final judgments there were against the Secretary, except for the cases that were not appealed on the District Court level, there were no final judgments. The two cases decided by the Court of Appeals both resulted in petitions for certiorari that were granted, and before those cases were heard on the merits, the nationwide class action was settled. And so in fact, other than some isolated District Court cases where the Government elected not to appeal, there was no body of finally-determined law in existence at the time this case was filed.

With respect to the settlement, there are really two key variables in understanding the settlement in this case, and I think to illustrate why it is dangerous to treat a settlement as an objective indicator of unreasonableness, first of all, in 1977, Congress substantially amended the operating subsidy statute.

First of all, it made the operating subsidy program

mandatory as to the future. It did not address the situation from 1974 to 1977, but it said starting in 1977, it is mandatory in the future.

Secondly, Congress made it clear that the reserve fund that had been accumulating -- this was the source for the $60 million -- could be spent without separate release of contract authority from Congress. The Secretary up to that time had taken the position that she could not spend the reserve fund without separate contract authority from Congress.

So in light of that clarification of the law, there was no legal impediment to distributing the $60 million at that point in time, there was no real dispute on an ongoing basis about the policy because that had been resolved by Congress, and it made sense to settle the case.

Secondly, following up on the elections of 1976, there was a new Secretary of HUD. And it is reasonable to conclude that policy differences had a great deal to do with the decision to settle the case here.

Regarding the District Court's ruling sua sponte in favor of the Plaintiffs, what happened was there was a motion for preliminary injunction that was fully briefed and argued, and after the Judge decided to enter a preliminary injunction, the Judge decided there would be no point in hearing additional argument on a permanent injunction and so entered a permanent injunction without further argument.

Given that the issues involved were strictly legal, we don't think this sheds any light one way or another on the weightiness of the Government's argument.

Turning to the debate about attorneys' fees, and whether or not counsel are entitled to enhanced fees either because of the one special factor identified by Congress or because of the Johnson factors, several points.

First of all, there is no evidence in this case, as Respondent suggests, that there is a limited supply of attorneys who would have taken this case on a win or lose basis. The evidence that was submitted was that there was a limited supply of counsel who would take the case on a pro bono basis, and that we submit is simply not the relevant question under EAJA. EAJA simply indicates that if there would be difficulty in retaining counsel --

QUESTION: Was this realistically the kind of case in which, apart from EAJA, you could get lawyers to handle except on a pro bono basis?

MR. MERRILL: No, I don't think it really is, without EAJA or some other basis for --

QUESTION: But isn't the fact that there are no pro bono lawyers available, doesn't that satisfy the statutory requirement?

MR. MERRILL: We don't think so, Justice Stevens. The statute basically is addressed to the situation where an

attorney has been hired for $85.00 or $100.00 an hour and the statutory cap is $75.00 an hour. And the issue is whether or not that additional fee was necessary in order to attract counsel in this particular case.

In this case, you had counsel hired basically for nothing, and the issue is whether or not we think $75.00 is an adequate fee in that case, not whether or not you would leapfrog above $75.00.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Merrill. The case is submitted.

(Whereupon, at 1:48 p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-1512

CASE TITLE: Samuel R. Pierce, Jr. v. Myrna Underwood

HEARING DATE: December 1, 1987

LOCATION: Supreme Court, Washington, D.C.

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

Date: 12/1/87

Margaret Daly
Official Reporter

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