OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ZAKHAR MELKONYAN, Petitioner

v. LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

CASE NO: 90-5538

PLACE: Washington, D.C.

DATE: April 15, 1991

PAGES: 1 - 54

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IN THE SUPREME COURT OF THE UNITED STATES

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ZAKHAR MELKONYAN, :

Petitioner :

v. : No. 90-5538

LOUIS W. SULLIVAN, SECRETARY :

OF HEALTH AND HUMAN SERVICES :

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Washington, D.C.

Monday, April 15, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

BRIAN WOLFMAN, ESQ., Washington, D.C.; on behalf of the Petitioner.

CLIFFORD M. SLOAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 90-5538, Zakhar Melkonyan v. Louis W. Sullivan.

Mr. Wolfman.

ORAL ARGUMENT OF BRIAN WOLFMAN

ON BEHALF OF THE PETITIONER

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

This Court is called upon in this case to construe the following language in the Equal Access to Justice Act, a law which provides for attorneys' fees against the Federal Government, and that language is, "A party seeking an award of fees and other expenses shall within 30 days of final judgment in the action submit to the court an application for fees and other expenses which shows that that party is the prevailing party."

The question here is whether, as we maintain and as was universally the law prior to the decision below, that this limitations period may only be triggered by a court judgment, or whether, as the respondent, Secretary of Health and Human Services contends, this statute can be triggered by an administrative decision of an administrative agency.

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This case began in 1982 when petitioner applied for Social Security disability benefits under the SSI program. He appealed adverse administrative decisions through the administrative process and the case proceeded to the Federal district court. After a period of time, the case was remanded before any proceedings on the merits or any decisions on the merits by the district judge. The case was remanded for the taking of new evidence before the administrative agency.

This decision did not trigger the statute of limitations, because at that point there was no prevailing party in the litigation. The case was simply remanded for the taking of new evidence. A few months later, in May of 1985, the appeals counsel of the Social Security Administration found this petitioner disabled, and later in that year, approximately 4 months later, benefits were actually paid to this petitioner.

In May of 1985, approximately 5 months after -- excuse me, 8 months after that, the petitioner filed an application for attorney fees under the Equal Access to Justice Act. That was considered by the district court, and the district court denied attorney fees on the ground that the Government's position had been substantially justified. At no time did the district court or the Secretary indicate in any way that the petition, the

application for fees, was untimely.

Petitioner appealed to the Ninth Circuit, and again the Secretary did not argue that the petition, the application was untimely. In fact the case was fully briefed, and after that full briefing but before argument, the Ninth Circuit, sua sponte, raised the issue of the timeliness of the fee application, although the sua sponte order indicated that the first judgment of the district court remanding the case might have triggered the statute.

Later, however, when the Secretary did take a position in response to the sua sponte order, the issue became whether the administrative decision could trigger the limitations period.

Later the Ninth Circuit did indeed hold that the administrative decision could trigger the limitations period and that the decision of the administrative agency would become final within 30 days of that decision, thus triggering that a fee application would have to be filed within 30 days of that administrative decision. The Secretary originally in his opposition agreed with that position, but on the merits, the brief on the merits in this Court has adjusted his position somewhat and says that the decision of the administrative agency becomes final 65 days after it is issued, and then the 30-day period is thus triggered after that.

In explaining why the Ninth Circuit's decision ought to be reversed we want to focus here on three things: the statutory language, the legislative history, and some practical considerations which we think merit reversal.

Turning first to the statutory language, the term "judgment" is quite clearly a reference to the decision of a Federal court, and that is indeed the language used by Congress. Decisions of administrative agencies simply are never called judgments. The Secretary -- indeed the Secretary himself does not call any of his decisions judgments, but rather decisions, determinations, denials of review, and such like that. In administrative law generally administrative agencies make awards, issue orders, make decisions, rulings, but they do not render judgments.

QUESTION: Mr. Wolfman, I think I agree with you that normally that's, that's the way we would interpret words like that, but we have already interpreted other words in d(1)A in a way that's a little unusual. That is to say, we have held that although you're entitled -- it only says you're entitled to fees -- fees and other expenses incurred by that party in any civil action.

Now I would normally think that civil action meant only a suit before a law court as well, and not an

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action before an agency. But we have interpreted that to entitle you to a fee before the agency. It seems to me that if we give that phrase a little bit of an unusual meaning, in order to make sense out of the whole provision we're going to have to give the phrase "judgment" a little bit of an unusual meaning too.

MR. WOLFMAN: Well, you're referring, of course, to the Sullivan v. Hudson case.

QUESTION: That's right.

MR. WOLFMAN: In that case the Court said that if there is existing a pending civil action, that administrative decisions on remand can be considered part of that civil action if they have a very intimate relationship with the remand. The Court of course did not hold that administrative proceedings in the first instance are compensable under the EAJA, unless of course there are adversary proceedings under a different provision of the EAJA section --

QUESTION: But they do consider them part of the civil action.

MR. WOLFMAN: Those particular type of narrow -- the narrow exception for a particular type of proceedings which are intimately related to the civil action.

QUESTION: Right. But that's what gets us into the situation we're in. And if you're going to interpret

civil action broadly that way to include everything, it seems to me you ought to interpret judgment broadly to include anything at either level.

MR. WOLFMAN: I would submit, Justice Scalia, that they are two entirely different phrases, and I don't -- when we get to the practical considerations, which I would be glad to address, there is no reason to expand that.

I think in the Sullivan v. Hudson case the Court was expanding upon earlier decisions in the attorney fee area that said administrative proceedings that are necessary for the vindication of rights that are asserted in that civil action must be compensated, or you would really make illusory the purpose behind the fee statute. I don't think we have that with the definition of "judgment."

QUESTION: Mr. Wolfman, if you read further on in the language you're construing, where it says a judgment is final and not appealable, I get the sense Congress was not using terms of art here. What does the phrase "not appealable" mean about a judgment?

MR. WOLFMAN: Well, in this particular case that was a response in the 1985 amendments to the law which, after a district court, for instance, issued a judgment, Congress felt it was best not to force the applicant to

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file a fee petition while the Government could still appeal to the court of appeals, for the purposes of efficiency, to have everything complete in the district court, and then allow the period to run. And that is what the phrase means. It makes -- it is not a reference whatsoever to the decision making of administrative tribunals.

QUESTION: Well, so Congress meant by saying not appealable that the time for appeal must have run?

MR. WOLFMAN: That is correct.

In the American administrative law generally, as I was saying, judgments are not normally issued -- never are issued in our procedures. Indeed the APA, the Administrative Procedure Act, sets definitions for scores of agency proceedings -- before scores of agencies, and it uses various terminology such as order, disposition, and so on, but never the term judgment.

But even conceding that an agency could call its decision a judgment, the question here is what Congress believed when it enacted the EAJA, and it surely drafted that terminology with the ordinary usage in mind.

Indeed at four different points in the provisions that are before the Court today the term "judgment" is used, and each time it appears to be a reference to the decision of a court. In fact twice there

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are cross references to other statutes which talk about collecting on that judgment, the clerk tax -- the clerk of the court taxing court -- costs, and so on. There is no indication whatsoever, or however, that there is a reference to the decision of an administrative agency.

QUESTION: Mr. Wolfman, in circumstances such as we have in this case, where your client obtained the relief sought and where the Government is precluded from filing any appeal, who is it that's going to go back to the district court and get a judgment, do you suppose?

MR. WOLFMAN: It could be either party. As a matter of practice, and is still as a matter of the Secretary's practice, and the Secretary still tells every claimant nationwide that he will go back and file certain papers, but that he also will get some type of final disposition in the action. So ordinarily, and in my experience, practicing in this area, has been the Secretary, but surely --

QUESTION: What kind of a judgment does the court enter?

MR. WOLFMAN: Well --

QUESTION: What does it say?

MR. WOLFMAN: Frequently -- excuse me, I'm sorry.

QUESTION: Well, what does it say?

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MR. WOLFMAN: Frequently it will simply dismiss the action or affirm the final decision of the appeals counsel. But of course if there are further proceedings to be taken, that the party is not fully satisfied, there could be further proceedings on the merits.

QUESTION: Here your client won before the Secretary.

MR. WOLFMAN: That is correct. He fully won.

QUESTION: And there was nothing else going on in the administrative agency?

MR. WOLFMAN: Well, that is true, but that is a determination that we make in hindsight.

QUESTION: Yes, yes. So, you say the Secretary's practice is to go up after that to the court and have a judgment entered?

MR. WOLFMAN: That is indeed the Secretary's practice by and large. It did not happen in this case, but my experience and in the forms attached to our brief it is clearly the Secretary's intention to do that in every case. The Secretary says in his responding brief that he doesn't intend to follow that practice in every case if he prevails here, a concession that he still follows that practice and sends forms to every claimant and every claimant's representative that he will do so now.

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The EAJA itself draws the distinction I am suggesting between agency decision making and court judicial decision making, the same distinction that we urge. In section 504 of the EAJA, the part which pertains to work done only at the administrative level in adversary proceedings without the requirement of a court action, the fee petition must be filed within 30 days of final disposition in the action, where in the provision at issue here for work associated with court proceedings, the fee application must be filed within 30 days of the final judgment, as we have said.

Indeed, taking it a step further, section 504 says, and I am quoting now, the party shall within 30 days of final disposition in the adversary adjudication submit to the agency -- to the agency, the fee application. While under section 2412(d), the provision at issue in this case, the party shall within 30 days of final judgment in the action, and I am quoting, submit to the court the fee application. Now this juxtaposition of the words strongly suggests it is the court whose judgment triggers the limitations period.

But turning to the legislative history, if the statute left any doubt as to the validity of our position, the 1985 legislative history of the EAJA dispels it. The legislative history refers numerous times to this

limitation period, and it is the judgment of the court that is being referred to. And this in response to Justice Rehnquist's question as to what is a final judgment that is not appealable. There is a discussion of waiting for the period from the district court's judgment to expire before it comes final; waiting for the appellate court's decision to become final -- in other words when the period for filing for certiorari expires; and even a reference to a decision of this Court, waiting for the time for when filing a petition for rehearing expires. But never is there a discussion in the legislative history that that could be --

QUESTION: Could you have filed a petition for fees when the court entered -- within 30 days after the court entered its remand?

MR. WOLFMAN: No, Your Honor. If such a petition had been filed fees would have been denied because the party seeking fees had not yet prevailed. That is -- that's in fact what this Court said in Sullivan v. Hudson, and follows standard attorney fee law --

QUESTION: You mean it hadn't finally prevailed, but it, you had prevailed in the court.

MR. WOLFMAN: That's correct. There was -- well --

QUESTION: And that was certainly a final

judgment then.

MR. WOLFMAN: Well, what there was was a remand at -- in fact --

QUESTION: Well, it was still a final judgment.

MR. WOLFMAN: It was a judgment, and it was at the behest of the Secretary and it was remanded. But the party had not yet prevailed. And in fact what this Court has said is fees cannot be obtained on what may ultimately be a Pyrrhic legal victory. What you need is to actually get what you want, and the material relationship between the parties had not been altered. The Secretary does not contest that point with us.

Most importantly as to the legislative history, the committee report actually addressed the very issue before the Court today. It proved the existing case law and stated that in this context, in the Social Security context, the administrative decision after remand is not a final judgment for statute of limitations purposes, and only a post-remand decision of some sort could provide that trigger.

And finally, the thrust of the 1985 amendments, both in the amendments and its legislative history, were generally -- was to eliminate technical barriers to fees that might become traps for the unwary, and that that should not be the basis for denying a fee application. As

we stated in this case, it had been universally the law -- our position had universally been the law, and the Secretary is still following that position by sending these forms to the claimants. That would really thwart the purposes of Congress in 1985.

And the final thing I would like to turn to is some of the practical considerations. The Secretary argues that our view would place a great administrative burden on the court. That is simply not the case. We are not requiring the Secretary to file an enormous number of post-remand pleadings with the court. If there is a reason to do so for merits litigation, then that needs to be done. But for this purpose, to trigger the statute, all that is necessary is some type of post-remand final adjudication that discontinues this piece of litigation. We are talking about a one-page form order that can be gotten by the Secretary, if the Secretary desires, to run the statute of limitations.

QUESTION: What if the Secretary doesn't get it? Does that then mean that your client is not in a position to argue -- to request attorneys' fees?

MR. WOLFMAN: Absolutely not, I think, and there is two reasons for that. First of all, if a judgment, post-remand judgment was necessary, then clearly a petitioner, a claimant, an applicant, could get such an

order.

QUESTION: Yes, but if the Secretary doesn't get it, then your client would have to get it in order to be able to move for attorneys' fees?

MR. WOLFMAN: No, Chief Justice Rehnquist. The statute says that in order to trigger the limitations period that the 30 days runs from the final judgment. The statute has no requirement whatsoever that the limitations period necessarily run. If the Secretary wants to provide a time bar and put the onus on the claimant, he can do so. Not only does the statute not indicate that, but the legislative history makes quite clear that applications that are filed -- and let me give you an example. For instance, a district court issues a memorandum order and opinion granting summary, in effect granting summary judgment, but the court does not until much later, which is sometimes the case, file a judgment under rule 58 of the Rules of Civil Procedure.

QUESTION: Well, the statute says a party seeking an award of fees and other expenses shall within 30 days of final judgment. Now, are you saying that you don't have to have a final judgment in order to file application for attorneys' fee?

MR. WOLFMAN: That is correct. You have to have prevailed and obtained the benefits you want, but there

does not need to be that piece of paper filing -- dismissing the case, in order to -- the statute of limitations need not run. The legislative history also addresses this point, rejects a previous case of the Ninth Circuit called Auke Bay, saying that that would be an overly technical construction to simply require it.

Now, we're not suggesting that it may not be a good idea for either party or for the, particularly for the Secretary to get such an order. And as I said, on the merits this is what the Secretary --

QUESTION: Well, what does the language "within 30 days of final judgment in the action" mean?

MR. WOLFMAN: That means that after the final judgment of the district court in the case that the applicant has 30 days in which to file a fee petition. If that judgment is never sought or obtained, if the petitioner has prevailed he can get fees. And the legislative history, as I said, explicitly addresses that scenario.

QUESTION: Well, but the statute seems to address it in a different way, at least it seems to me. If it says you shall within 30 days of final judgment in the action file an application for fees, I would think that would presuppose that there is a final judgment.

MR. WOLFMAN: We respectfully disagree, Mr.

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Chief Justice.

QUESTION: Well, how do you read that language? A party seeking an award of fees shall within 30 days of final judgment submit to the court an application.

MR. WOLFMAN: That language, Your Honor, sets the outmost time in which someone could file a fee application if there exists a final judgment. As Judge Posner said in the McDonald case, that deadline -- that is not a starting point, it's a deadline. It's not a requirement, but it is a deadline if it does exist.

Now, we are not suggesting that --

QUESTION: Well, you could, on your theory you could wait, you could wait a couple of years after you prevail, I don't suppose you would because you want your money, but you could wait a year and never have a final judgment, and anytime you wanted to you could just file for fees? Is that -- that's your position, I take it?

MR. WOLFMAN: Well, our position is that, but that occurs only if the Secretary allows it to --

QUESTION: I would suppose the requirement for being relatively prompt at filing fees indicates that there should in all cases be some sort of a deadline.

MR. WOLFMAN: And that I think is precisely why the Secretary is telling every claimant around the Nation that he will make post-remand filings and get an order.

But as you suggest, I think there are two answers to that as a practical matter. One of those answers is that attorney will generally file because he wants to see some cash. The other answer is that this will happen only if the Secretary allows it to occur. It will not otherwise happen.

QUESTION: Mr. Wolfman, you talk as though the position you're arguing applies only in Social Security cases, and you say it's the practice of the Secretary to file these things automatically. But the Equal Access to Justice Act doesn't just apply to the Social Security Act. So it would have to be every agency of the Government which, upon remand from a court, when the agency action has been reversed, every agency of the Government would then have to come back to that district court, I take it, in order to cut off, you know, years later seeking fees under the EAJA. Isn't that right?

MR. WOLFMAN: That is right, but I think there is an answer to that. First of all I think frequently in the administrative -- not always, but sometimes in the administrative context that first order may in fact be an order in which the person prevailed, in which they actually got some or all of what they wanted. In other contexts very frequently the court remanding does retain jurisdiction, and it is indeed expected, like it was in

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this context, that they will come back to the court.

QUESTION: You're talking about the equivalent in the Social Security context of a 405(g) sentence 6 remand, correct?

MR. WOLFMAN: That is correct, although it may --

QUESTION: Which do you consider this? Is this a sentence 6 --

MR. WOLFMAN: Yes, it is.

QUESTION: -- or sentence 4?

MR. WOLFMAN: This is a sentence 6. It was a remand for the taking of new evidence before there was any decision on the merits by the court.

QUESTION: Well, you should have been making a different argument then, because under a sentence 6 remand you have to come back to the court.

MR. WOLFMAN: I absolutely agree, Your Honor. Our point, however, is that we believe that the Secretary is absolutely required in a sentence 6 case to come back on the merits of the case. For some type of post-remand --

QUESTION: No problem there. Then the final judgment is the judgment of the court when you come back. The only problem, I guess, is when it's a sentence 4 remand under the Social Security Act, and God knows what

under all the other statutes to which the EAJA applies. Right?

MR. WOLFMAN: That is correct, and perhaps -- our view is that that is not a major problem. It requires a form order if there is truly nothing further to happen on the merits, which is only a post hoc determination. We don't know that when the administrative decision first comes down. But we're not saying that the Secretary needs to file -- make post-remand filings in each case for EAJA purposes. We completely concur with your suggestion that it's absolutely required in sentence 6 cases on the merits.

QUESTION: And do I understand you to say this is in your view a sentence 6 remand case here?

MR. WOLFMAN: Yes, Justice O'Connor, it is. And the reason it is is because the substance of what occurred in the district court is that the Secretary, having seen evidence, additional evidence that was not previously available at the first administrative hearing, asked the court to remand the case to consider that new evidence. That is a particular provision that makes for a sentence 6 remand.

QUESTION: Under your theory of the statute that the 30-day final judgment rule is simply an outside limit, would a prevailing party be entitled to make multiple

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applications for fees?

MR. WOLFMAN: At what point, Your Honor? I'm not sure I --

QUESTION: Well, I thought you told the -- your answer to the Chief Justice was that the 30 days was just an outer limit, and that you could make application for fees at any time before that?

MR. WOLFMAN: Well --

QUESTION: And if you're prevailing as to part of the action, can you then apply for fees as to that part, and then come back and apply for more fees when the final determination is made by the agency?

MR. WOLFMAN: Indeed I think that's -- that is a possibility. The legislative history makes clear that interim fees, if you will, are permitted under this statute, and sometimes that is necessary in litigation in which you have prevailed on a substantial amount of what has occurred but you haven't completed all your work, there is some post-judgment work to be done. And case law generally permits that.

But that's one of the nice things about our approach, because in this case, where it usually is pretty much over if the remand decision is favorable, and we can tell that by the time it gets back to the district court, then that decision, if the Secretary desires to get that

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judgment as he says he will do in every case, then that will pretty much be the time where the entire petition with all the work can be presented to the district court. So I think that's one of the nice things about the position that we take, not only that it comports with the statute that Congress has drafted.

Indeed, just to finish up on some of the practical considerations, we have explained --

QUESTION: Excuse me. Was the Secretary's motion in this case to send it back, was that made before the answer?

MR. WOLFMAN: It was not before the answer.

QUESTION: Well, then how can it be a section 6 remand?

MR. WOLFMAN: Sentence 6 has two categories of remands. One is the one before he files an answer.

QUESTION: I see. And it may at any time order additional evidence to be taken before the Secretary. Did the court order the additional evidence?

MR. WOLFMAN: The court did not order, but that was the substance of what occurred. Indeed, that's --

QUESTION: Well, but -- it's the substance -- there are two parts to sentence 6. The first part is the court may on motion of the Secretary made for good cause shown before he files his answer send it back. Now, the

Secretary initiated it here, but not before he filed his answer. Right?

MR. WOLFMAN: That is correct.

QUESTION: The second part is it may at any time order additional evidence to be taken. Did it order additional evidence to be taken?

MR. WOLFMAN: Did the court order additional evidence?

QUESTION: Right.

MR. WOLFMAN: Not in the words of its remand order, no.

QUESTION: Well, then neither the first part nor the second part of sentence 6 seems to apply.

MR. WOLFMAN: I respectfully disagree with that, Justice Scalia, and the reason is that in substance what had occurred is that the Secretary learned of new evidence. And sentence 6 provides that either party can ask for a remand.

QUESTION: Before answer, if you intend to be under section 6 -- sentence 6.

MR. WOLFMAN: No. Under sentence 6 either party can ask for the second type of remand, and then the court may order such a remand if there is good cause and if there is new evidence.

QUESTION: I see.

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MR. WOLFMAN: And the fact is that is not necessarily perfectly recited in every remand order. And that is another reason why the Secretary's position is unworkable. If, indeed, we're going to have EAJA petitions -- the timeliness of EAJA petitions, depending on whether it's a 4 sentence or 6 sentence remand, it will be extremely difficult to determine in each case without getting into the substance of each case.

QUESTION: You think the Secretary would have been in contempt of court if he had not taken additional evidence in this case, if he had just reconsidered the case on the basis of the same evidence? Did he take additional evidence?

MR. WOLFMAN: Yes. And that was the basis for the award.

QUESTION: But you think he had to? That he could not just have used the evidence already there and altered his decision, because impliedly the court ordered additional evidence to be taken?

MR. WOLFMAN: Yes. I think that -- I think, whether he would have been in contempt of court, I think if I were representing the claimant I would have come back to the court and explained what had transpired. It would have been a breach of what he said he was going to do in this case. It's very clear if you, the briefs that are in

the record in this case, both in the district court and the Ninth Circuit, which are cited in my brief, make clear that the purpose of this was to look at some additional evidence, a small bit of additional evidence that had arisen.

In fact cases are not remanded, in my experience, simply to take another shot at it. That's not the purpose of it. It is to take another look at evidence under that second clause of sentence 6.

And it is one reason under the practical considerations that we want the Court to consider why this doesn't necessarily apply to the EAJA, because as the Secretary concedes in his brief, these remand orders are often very short and boilerplate in nature, and you would have to look at the substance of what occurred to determine when it was timely. Rather, under our view, you need a judgment of the district court, regardless of whether it's a fourth or sixth sentence case. You need a judgment of the district court to trigger this limitations period.

Our position therefore fixes one time deadline for the filing of all EAJA petitions. But more importantly, it comports with the statute that Congress has written.

QUESTION: Thank you, Mr. Wolfman.

Mr. Sloan, we'll hear now from you.

ORAL ARGUMENT OF CLIFFORD M. SLOAN

ON BEHALF OF THE RESPONDENT

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

The Equal Access to Justice Act imposes a time limitation on applications for attorneys' fees. The act requires that an application for attorneys' fees be filed within 30 days of final judgment in the action. In our view the Secretary's post-remand decision is the final judgment in the action, when it is final and not appealable, and has therefore effectively terminated the action on the merits.

We believe that this interpretation is the correct reading of the Equal Access to Justice Act and the Social Security Act, and that it is strongly supported by this Court's decisions in Hudson and in Finkelstein. We also believe that it provides a fair and practicable approach for all concerned.

Petitioner's interpretation is that courts must enter orders solely to start the attorneys' fees clock running, and that if they do not do so there is simply no attorneys' fees time limitation at all. We believe the petitioner's interpretation is contrary to the governing statutes, and that it mandates a cumbersome procedure

which is neither compelled nor warranted by the governing statutes.

This Court's decisions in Hudson and in Finkelstein greatly clarify the issue in this case. In Hudson the Court held that post-remand administrative proceedings are part of the civil action for which attorneys' fees can be recovered. By an analogous principle, the event that conclusively resolves those proceedings should be considered the final judgment in the action.

Indeed in Hudson it was argued to the Court that civil actions should be interpreted solely with respect to events that happen in a courtroom, and the Court rejected that position. By a similar principle the Court should also reject petitioner's argument that the final judgment in the action is only something that can occur in the court and cannot be --

QUESTION: Is this a relatively new position of the Secretary, or --

MR. SLOAN: It is a relatively new position, Your Honor.

QUESTION: Like real new?

MR. SLOAN: Well, the -- yes. And this has been a difficult issue for the Secretary, for the Government generally. There is no question about that. I cannot

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stand here and say that our position on this issue has been clear and consistent, because it has not. But we think that the answer to the question is clear now, particularly in light of the Court's decisions in Hudson and in Finkelstein, which have greatly clarified the landscape.

QUESTION: Is the Secretary's present position based at least in part on those two decisions?

MR. SLOAN: It is based on those two decisions in that we believe that they greatly clarify the issue and support it. We think that this is a clear answer from the reading of the statutes in any event.

QUESTION: You do? You would be arguing for this if Hudson had come out the other way?

MR. SLOAN: It would be a more difficult argument, Your Honor, but --

(Laughter.)

MR. SLOAN: But we would, because as petitioner pointed out, the remand order itself is not, does not entitle somebody to prevailing party status. What would entitle them to prevailing party status is if they succeed in the post-remand administrative proceeding. And so even if those post-remand administrative proceedings are not part of the civil action for purposes of recovering attorneys' fees, it has a critical significance in the act

because the conclusion of those post-remand administrative proceedings defines the time when somebody is the prevailing party.

QUESTION: Mr. Sloan, you talk about the administrative difficulty of accepting the petitioner's position, but what about the administrative difficulty of accepting yours? It may be easy enough with respect to the Social Security Administration, but I can think of a lot of other agencies that the thing is remanded and the thing sort of goes on forever. I mean, a major proceeding, atomic licensing or an FCC proceeding. I'm not sure that in major administrative cases of that sort it's as easy to identify the moment of judgment, as it is in Social Security. How do you expect us to -- I mean, are we buying into a whole grab bag of future petitions to decide when a judgment occurs in administrative actions?

MR. SLOAN: I would make two points in response to that, Your Honor. First of all, the question is whether, even in these mammoth proceedings that have dragged on, what is the point at which they have become final and no longer reviewable. And there is a definite point to that, and it's one the courts have to resolve in any case in determining whether further review in the court would be timely, and the statutes are structured in such a way that a party knows his rights and knows when

review is still available and when review has run out. And when review has run out, the proceedings have been terminated on the merits.

The second point, though, is that this brings up a fundamental point about the Equal Access to Justice Act and a fundamental problem in petitioner's position. And that is that the Equal Access to Justice Act takes other statutes and statutory schemes as it finds them. It does not impose additional requirements of its own force on those statutory schemes. And to the extent that there are difficulties in complicated -- other statutes and administrative proceedings, the difficulty is in those proceedings.

But that doesn't mean that the attorneys' fees statute itself has some kind of power or authority to impose additional requirements on the administration of those statutory schemes solely for the purpose of facilitating attorneys' fees applications, which is the burden of petitioner's position, that somehow the attorneys' fees statute, which in its structure is designed to allow for the recovery of attorneys' fees for actions in other proceedings, somehow has the power to engraft additional requirements onto the administration of those schemes.

QUESTION: I guess under petitioner's scheme,

he's going to have to decide when there is a final judgment in the agency as well. I mean, you're going to have to know when to go back to the district court. So that may be a problem under anybody's resolution.

MR. SLOAN: Well, I would think so, Your Honor. It's possible the petitioner would say well, it doesn't matter because he can go back at any time in terms of timeliness. But I guess in terms of the prevailing party issue, that would certainly suggest, if he wants to establish that he is the prevailing party --

QUESTION: Well, he could go back too late, but he can't go back too early. I mean, he's going to have to figure out at least when the judgment occurs that enables him to go back. He may not have to do it right away, but he's going to have to figure out when the judgment occurs before the agency.

MR. SLOAN: That enables him to go back as a prevailing party. That's correct.

QUESTION: Mr. Sloan, as your exchange with Justice Scalia illustrates, at least if it was necessary to get a judgment from the district court, everyone would then know what triggers the time limit, I suppose.

MR. SLOAN: That's correct, Your Honor.

QUESTION: That would be the positive side of that interpretation. Now, has the Secretary in fact been

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returning to the district court even in a case like this where the applicant has fully prevailed on remand in order to get a judgment?

MR. SLOAN: Well, there are --

QUESTION: The petitioner's attorney referred to some form and some rather uniform practice that the Secretary -- has that been the Secretary's practice generally?

MR. SLOAN: It has been the general view that filings are appropriate, not necessarily getting additional orders. And let me distinguish between the two. The forms that petitioner refers to refers to making filings in the district court. Even with respect to filings it is my understanding, I have been informed by the Department of Health and Human Services, that that has been the general view of the Secretary. In fact the practice has --

QUESTION: That what has been the general view?

MR. SLOAN: That there would be filings in the district court.

QUESTION: A filing of what?

MR. SLOAN: Of the transcript and the decision on remand, that the --

QUESTION: And a request for an order of dismissal or something of the sort?

MR. SLOAN: Sometimes. That -- it appears that the view on that, which has been -- first of all, the general view on filings is in forms and so on. There's not a regulation that speaks to it. The view on seeking orders and so on seems to have been less crystallized than the view on seeking filings. The forms that he refers to --

QUESTION: Can't you answer the question more definitively, Mr. Sloan?

MR. SLOAN: Well, I'm sorry, Chief Justice, it's just that it's been a complicated area.

QUESTION: Well, but the question calls for a fairly simple answer, I think.

MR. SLOAN: Okay. If the question is has it been the general practice that there be a request for orders, it is my understanding that has not been the uniform practice. It has been --

QUESTION: Well, why did he ever file anything, then?

MR. SLOAN: Well, because there was a lot of confusion on this issue, frankly, Justice White.

(Laughter.)

MR. SLOAN: There has been, and it is -- it is our belief that the issue has now been greatly clarified.

QUESTION: Why is -- why is this such a big

issue? Do you agree that without -- do you agree that a judgment of a court is not necessary in order for a successful claimant to file for fees?

MR. SLOAN: A final judgment of a court is not necessary for a claimant to file for fees. But --

QUESTION: So the claimant could -- if you didn't go to court and get an order, the claimant can just wait around and file for fees whenever he wants to?

MR. SLOAN: Under his view, and we think that's a flaw in his view. If I could just elaborate on my earlier answer --

QUESTION: Well, let's assume that we don't buy your notion that the Secretary's final order is a final judgment. Then do you agree that the claimant could just wait forever to file for fees, without getting a final judgment?

MR. SLOAN: No, we would think that in that circumstance it would be appropriate to get something that --

QUESTION: Appropriate, but suppose he doesn't get a judgment and neither do you, but he files for fees. Would that be proper?

MR. SLOAN: Well, the logic of petitioner's position is that it would be proper under his view.

But let me just distinguish this situation from

the situations that petitioner is trying to align himself with. The typical circumstance in which someone can file for attorneys' fees before a final judgment would be, for example, if it is in the district court and it's going to go up on appeal and somebody files for attorneys' fees so that in the interest of judicial economy the fees and the merits can go up at once. The Government has not opposed that practice, and we think it's allowed under the statute. But the critical difference in that kind of situation is there will ultimately be a final judgment in the action. It won't be permanently open-ended in the way that petitioner is arguing for here.

QUESTION: I kind of -- I sort of wonder why the case is even here. It seems to me that if you want to avoid the bother of going up to the district court, why, you just don't need to go. And the claimant can go and file for fees whenever he wants to. And normally you would think that they would be rather prompt in trying to get their money.

MR. SLOAN: The problem with that --

QUESTION: Why is it such a big bother for the Secretary?

MR. SLOAN: Because the 30-day time limitation is a central part of the Equal Access to Justice Act. When Congress passed the Equal Access to Justice Act it

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did not in the act make the choice that you're suggesting, that it would rely on attorneys' incentives, and they're going to be hungry for cash and so they'll go to court. Congress made a different choice. It specifically imposed a 30-day time limitation.

QUESTION: Well, you can -- if that really worries you, you can go and start the clock running just by filing your piece of paper and asking for an order.

MR. SLOAN: Well, first of all the structure of the act puts the burden on the applicant for fees to go to court, and that gets to the other half of petitioner's argument, that if they want an attorney fee -- if the Government wants an attorney fee time limitation, the Government can simply go to court and seek some kind of order. And so therefore if the Government wants there to be any time limitation, the Government has to go through this additional procedural requirement that isn't contemplated by the Social Security Act, and that is, in many cases would be a useless filing because there are many cases in which attorneys' fees are not sought, there are many cases in which they are not contested, and it would require the district court to enter orders in thousands of cases --

QUESTION: What would require, Mr. Sloan? What is it that requires the district court to enter an order?

I mean, you can ask him to enter an order. What provision of law requires a district court to enter an order?

MR. SLOAN: No provision of law, Your Honor. What Justice White was referring to is an order to get the attorneys' fees clock running.

QUESTION: You have to persuade some district court to enter an order.

MR. SLOAN: To issue an order.

QUESTION: Suppose I'm a district judge and I say I don't want to be bothered with these things. I had this case and I got rid of it.

MR. SLOAN: That's --

QUESTION: I entered judgment and the case is gone. Stop bothering me. I don't want to enter an order. Is there any provision of law that requires a district judge to enter an order?

MR. SLOAN: No, there is not. And the result would be that the alternative that Justice White was suggesting would not in fact start the attorneys' fees clock. So even in that instance there would be no attorneys' fees time limitation.

QUESTION: Well, but Mr. Sloan, is it correct there is no provision of law that requires an order? If the form that's in page 17 of the joint appendix is followed, where they refer to the fact that the, if it is

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issued a favorable decision and the U.S. Attorneys if appropriate have the action discontinued or dismissed. If the U.S. Attorney then filed a motion to discontinue or to dismiss the action there would be a provision of law that would require the judge to rule on that motion, wouldn't there? You can't just let motions sit forever.

Would it not be the duty of the district court to act on a motion if the U.S. Attorney filed one saying -- reciting what had happened and saying it is therefore prayed that the action be dismissed or discontinued?

MR. SLOAN: One would ordinarily expect the district court to act on that motion.

QUESTION: But he'd have a legal duty to do so, would he not?

MR. SLOAN: I would think that he would, Your Honor.

QUESTION: Couldn't he deny the motion? Simply say I deny the motion to dismiss, because I have already dismissed. This was a section 4 remand, not a section 6 remand. The case has been dismissed. I deny the motion.

MR. SLOAN: Yes. He could deny the motion. He would have to act on the motion, but he would. And indeed in this case there's, provides a good example of a district court that would likely react that way, and it illustrates why, contrary to petitioner's submission, this

is not a sentence 6 remand. The district court's order said it is remanded for all further proceedings, period. There is absolutely no indication in that remand order that it was contemplated that it would come back to court. And it would seem likely that a district court would be surprised if a year later or a few months later somebody came back and said okay, now dismiss this action, when the district court had specifically said it is remanded for all further proceedings, period.

QUESTION: Oh, but that can't be right, Mr. Sloan. Supposing they had the further proceedings and the petitioner lost? He didn't get his money. You don't think the judge would expect him to come back and renew his appeal?

MR. SLOAN: Well, no --

QUESTION: He doesn't know at that point the Secretary is going to give the award, does he? Does the judge?

MR. SLOAN: No, the judge does not.

QUESTION: So he can't by those all further proceedings mean he is precluding any further review by him or her.

MR. SLOAN: No, it doesn't mean that he is precluding, but it does mean that a party that is not satisfied with the result would have to come back. And in

Finkelstein the Court said that every final decision of the Secretary is reviewable in a separate piece of litigation. And what I'm saying is that the district court would be surprised if the claimant or if the Secretary came back when neither was dissatisfied with the outcome of the administrative proceeding.

QUESTION: Would that be a new action when he came back or the same action? Do the district courts have to keep their dockets open interminably until somebody finally walks back and says by the way, this case that you remanded 5 years ago, close the docket on it? Do they have to keep it open --

MR. SLOAN: Well, as to --

QUESTION: -- forever until it's closed? I would have assumed it's a new lawsuit when the Secretary doesn't act properly on remand, and you open a new docket number.

MR. SLOAN: Well, it's a new piece of litigation. Whether it has to be a separate lawsuit is something that could perhaps be addressed by local district court practice. We don't take the position that that is a substantive difference, but it would --

QUESTION: Well, the form that you use seems to contemplate using the same number. They've got the number of the case on it, say please take this to court. Isn't

it routinely done? I mean, this case, this, the U.S. Attorney just failed to act on this. Isn't it normally, normal that he would act on this form request?

MR. SLOAN: Well, this is -- I was trying to elaborate on the problems with saying whether normally or not, and --

QUESTION: I think it would be most unlikely for him to give it a new number in the district court when this case comes back.

MR. SLOAN: That's correct, Your Honor. But as to whether it was unusual that the U.S. Attorney did not go back, that's the point I was trying to emphasize before, at the risk of sounding nonresponsive, which was that the practice varied in local U.S. Attorneys' offices. It varied according to a number of variables, as I understand it, what people thought that the local district court would expect, the particular kind of order -- all kinds of variables. There was a general view on the part of the Department that it was appropriate to go back and make the filings, but the practice was varied.

QUESTION: How about under other statutes, Mr. Sloan? I mean, this applies to all statutes. Is there a general practice under all other statutes under which agencies are sued?

MR. SLOAN: To go back to the district court?

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QUESTION: Right.

MR. SLOAN: I am not aware of such a practice. Not to my knowledge, Your Honor.

QUESTION: To your knowledge the practice is not to go back?

MR. SLOAN: That's right. To my knowledge the practice is not. And in part, part of the practice here has grown up in the particular context of the Social Security Act administration, in which there is a very high percentage of remands of district court actions, and also in which there is --

QUESTION: Is it also -- not also true that a very high percentage of EAJA applications are in Social Security Act cases?

MR. SLOAN: That's correct. That's correct.

QUESTION: You rely on Sullivan v. Hudson, and there we said the procedure set forth in 42 U.S.C. 405(g) contemplates additional action both by the Secretary and the district court before civil action is concluded following a remand. Is that observation just inapplicable to this case, or is it wrong?

MR. SLOAN: Well, we believe that it is inapplicable to this case because, as the Court clarified in Finkelstein, that would apply in a sentence 6 remand, and we believe this was not a sentence 6 remand. And the

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court had addressed the comments in Hudson in its decision in Finkelstein, it said that that applies to sentence 6 remands rather than to all other remands.

QUESTION: Is this under 405(g) at all?

MR. SLOAN: Yes, it is. The action was filed pursuant to 405(g). There is a provision -- 405(g) applies to title II of the Social Security Act. This was under title XVI, and there's a provision in title XVI that incorporates 405(g) by reference.

QUESTION: Well, under your view what statutory authority did the court act under when it remanded the case?

MR. SLOAN: It acted under an implied authority as part of 405(g). This was not a sentence 4 remand either, but it was --

QUESTION: So then it's a little odd to say it's a 405(g) action. You say it was implied? I supposed it's just the general supervisory powers of the courts, or the general authority of the courts?

MR. SLOAN: Well, one could view it that way, or also as an incident to the grant of authority in 405(g) itself.

QUESTION: So then our observation in Sullivan v. Hudson was, at the least, incomplete?

MR. SLOAN: Well, as the Court clarified in

Finkelstein, it should be read as being limited to sentence 6 remands.

QUESTION: So the case you rely on is incomplete?

MR. SLOAN: Well, we are relying on Hudson and Finkelstein taken together, Your Honor.

QUESTION: At least you want us to complete it?

QUESTION: And I take it you do take the position that if it is a sentence 6 remand it has to go back to the district court and there would have to be a final judgment from that court?

MR. SLOAN: We do take that position, Your Honor. And --

QUESTION: So we're only talking here about what, sentence 4 remands and this other vague implied remand that you say exists under the statute?

MR. SLOAN: That's correct, Your Honor. And the distinction between sentence 6 remands and other remands is important because it illustrates the difference between the kind of remand that is contemplated under sentence 6, in which the court retains jurisdiction explicitly and it remands only for a very limited purpose, the taking of additional evidence. And then it is specifically envisioned in sentence 6 that it will come back to the court, as opposed to the situation in other remands.

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Because of the special category of sentence 6 remands and its implications both for the administrative action and for the district court, we suggest that it's appropriate to have a clear statement rule with respect to sentence 6 remands. And if the court wants to take the action of retaining jurisdiction and requiring additional filings and additional proceedings in the district court, the district court should clearly and unequivocally say so, because of the special nature of these sentence 6 remands.

QUESTION: There are other statutes that have the equivalent of section 6 remands in them that specifically authorize the court to remand to the agency for the taking of further evidence, aren't there?

MR. SLOAN: Yes, there are.

QUESTION: And do you think an agency has authority to do that even apart from an explicit provision in the statute? In the middle of a case to say, you know, it seems to us the record is incomplete.

MR. SLOAN: To go to the district court or the court of appeals and ask for a remand based --

QUESTION: No, no, no. The district court. It's a case in the district court. Do you think -- or the court of appeals. Could the court of appeals ever send it back for the taking of --

MR. SLOAN: It could send it back for the taking of additional evidence.

QUESTION: They do that sometimes, even without explicit authority, don't they?

MR. SLOAN: Yes. For a clarification of the administrative record.

QUESTION: And you would treat that the same way you would treat a sentence 6 under the Social Security Act?

MR. SLOAN: If it was pursuant to a provision that explicitly required coming back to the court for further proceedings, yes, we would.

QUESTION: Suppose it was unclear --

QUESTION: A provision of the statute or of the court's order.

MR. SLOAN: Or of the court's order. Exactly, Your Honor.

QUESTION: Suppose it were unclear.

MR. SLOAN: Well, we would urge in those other contexts as well that there should be a plain statement rule in terms of remands. That if the court wants to take the exceptional step or the burdensome, in some respects, step -- I was hesitating to say that -- but the burdensome step of retaining jurisdiction and absolutely requiring further proceedings, the court should clearly say so. And

then if the court does not clearly say so, the inference should be the other way.

Now, petitioner has emphasized as a great practical problem with our approach the fact that it requires distinguishing between sentence 6 remands and other remands, but the key point about that is that we're not creating that distinction. The Social Security Act creates that distinction, and this Court elaborated on that distinction in Finkelstein. And again this relates to that fundamental principle of the attorneys' fees statute, that it takes the other statutory and regulatory schemes as it finds them. It does not impose upon them, it does -- or change them in any way to the extent that the distinction between sixth sentence remands and other remands is difficult. It's a difficultly, number one, that is created by the statute itself, and number two, that we think could be plainly resolved by this kind of plain statement rule.

Now, there is an apparent anomaly even in a sixth sentence case about the fact that a fully favorable decision to the claimant still has to come back to the court for additional proceedings. And we would suggest that that anomaly could be resolved by relatively simple practice that would allow sixth sentence remands and other remands to be treated essentially the same in this

context. And what that would be is that at the time that a sixth sentence remand was going to be ordered by the court, the Government could simply in each case ask that there be a provision in the court's remand order that jurisdiction would terminate 65 days or whatever the period of review was after the administrative decision, unless any party brought it back to the court.

And the result of that would be that you would have a final judgment at exactly the same time that you have in other remands, but it would be faithful to the statutory scheme that the district court is setting the terms of its jurisdiction under a sixth sentence remand.

QUESTION: Mr. Sloan, can I ask you this question about the sequence in this case? As I remember the chronology it was, according to their brief, on May 7th, the -- '85, they -- appeals counsel announced that they decided the man was disabled.

MR. SLOAN: Correct.

QUESTION: And then subsequently he got a check for his back award. Is it occasionally the case that there will be a finding of disability, but remaining some possible dispute over the amount, specific amount, due him?

MR. SLOAN: Yes, there is, but we would not think that that keeps open the action on the merits.

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That's an entirely separate matter, the amount of benefits, and it is treated as such in the Secretary's regulations. And if one wanted to challenge the benefits determination that would require new administrative appeals, it would require a new request for judicial action. In fact, benefits determinations are typically fairly routine and do not engender that type of complicated administrative appeals and judicial appeals.

QUESTION: So the clock would start to run from the time that the appeals counsel announced that they agree the man is disabled?

MR. SLOAN: Well, it, in our view, Your Honor -- that was the view that the court of appeals took.

QUESTION: I don't mean to -- the calculation of the time when the clock would start to run would have that as its initial reference point?

MR. SLOAN: Right. And that -- what we would say the appropriate position would be is that after the appeals counsel's decision, then there is 65 days for review -- 5 days presumed for mailing of the notice, and 60 days. And at that point if there is no further review, the appeals counsel's decision has become final and not appealable, and the 30 days would begin at that time.

QUESTION: Right. Does the Secretary contemplate issuing regulations for the benefit of the

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lawyer who has this kind of case only once in a while and wouldn't know when that time period would run?

MR. SLOAN: Well, it would certainly be appropriate to have regulations on that. The general regulation on review of appeals counsel decisions is it is clear under the existing regulations --

QUESTION: I understand that.

MR. SLOAN: But, were you referring specifically to a regulation directed to EAJA?

QUESTION: Yeah. It appears to me that there probably are some neighborhood lawyers who get this kind of case and are not specialists in the field, and might not realize that the final judgment is something that occurs 65 days after the end of the administrative proceeding.

MR. SLOAN: Well, it would certainly be appropriate to have the administrative documents be as clear as possible on that so that everybody knows what the applicable rule is. As we have said, we think it's clear under the existing regulations that there is the 65-day period for review of the appeals counsel decision.

QUESTION: Right. But it might not be perfectly clear to the average lawyer that that's the final judgment date, 65 days in the future after that.

MR. SLOAN: That -- and to the extent that it's

not, administrative clarification would be appropriate.

QUESTION: Mr. Sloan, lest silence be deemed consent, don't associate me with your suggestion that in a sentence 6 case the Secretary can avoid going back by simply saying something to the district court. As I read that, that sentence 6, he has to go back with a new judgment.

MR. SLOAN: Your Honor, I was not saying at all that the mere fact that the Secretary says something means he won't come back. What I was saying is that the Secretary can ask the district court to include in its remand order a provision which says that the district court's -- my jurisdiction will terminate 65 days after the appeals counsel issues its decision unless --

QUESTION: In the face of the statute which says that he has to come back with the -- with a new order. Well, that's another case, but --

MR. SLOAN: Okay.

QUESTION: Are you -- is the Government defending the Ninth Circuit decision --

MR. SLOAN: Yes. We're defending the Ninth --

QUESTION: -- and the reasoning?

MR. SLOAN: We're defending the judgment of the Ninth Circuit. We're defending their decision with modification, because in their view because it was fully

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favorable to the claimant it became a final judgment on the day that it was issued.

QUESTION: And it was not appealable.

MR. SLOAN: That's right. And we would have the 65-day for review as the calculation.

QUESTION: Thank you, Mr. Sloan.

Mr. Wolfman, do you have rebuttal? You have 1 minute remaining.

REBUTTAL ARGUMENT OF BRIAN WOLFMAN
ON BEHALF OF THE PETITIONER

MR. WOLFMAN: Very briefly, Your Honor.

First to respond to Justice Stevens. Approximately 93 percent of all EAJA petitions were in the Social Security context in the last fiscal year. And it is simply not the case that the Secretary's position differed in different judicial districts. In my experience, and as evidenced by the form presented to the Court, they promised every claimant, and continue to promise every claimant, to go back to the district court.

Now, what is being proposed --

QUESTION: Yes, but it may be true that the U.S. Attorney's position has been different in different cities. Sometimes they may just file a form away and sometimes they may go into court with it.

MR. WOLFMAN: That is not my experience. What

is being suggested here is this microscopic look at the difference between a sentence 4 and sentence 6 remand, which serves no purposes of the EAJA, not to mention the next time we come back to this Court with a hybrid sentence 4/sentence 6 case, or looking at the particular problems with other agencies or situations where there was a district court order.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wolfman.

The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

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ZAKHAR MELKONYAN, Petitioner v. LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

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

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