OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner v. RICHARD H. SCHAEFER

CASE NO: 92-311

PLACE: Washington, D.C.

DATE: Wednesday, March 31, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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DONNA E. SHALALA, SECRETARY OF :

HEALTH AND HUMAN SERVICES, :

Petitioner :

v. : No. 92-311

RICHARD H. SCHAEFER :

- X

Washington, D.C.

Wednesday, March 31, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

WILLIAM K. KELLEY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

RANDALL J. FULLER, ESQ., Anoka, Minnesota; on behalf of the Respondent.

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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 92-311, Donna E. Shalala v. Richard H. Schaefer.

Mr. Kelley.

ORAL ARGUMENT OF WILLIAM K. KELLEY

ON BEHALF OF THE PETITIONER

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

The question in this case is whether respondent's application for attorney's fees under the Equal Access to Justice Act was filed on time.

The case involves the interplay between two statutes, section 2412(d) of EAJA, and 42 United States Code, section 405(g), which is the provision in the Social Security Act that gives unsuccessful applicants for benefits a right to bring a cause of action challenging that decision in district court.

Respondent in this case applied for benefits, and his claim was denied at all levels of the administrative process. He then filed a civil action pursuant to section 405(g) in district court.

The district court concluded that the agency had made a mistake and reversed the decision denying

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respondent benefits and remanded the case for further proceedings. It is undisputed here that the court acted pursuant to sentence four of section 405(g). That sentence gives district courts the authority to enter a judgment affirming, modifying, or reversing the decision of the Secretary with or without remanding the case as well.

Respondent did not at that time file his EAJA fee application, but instead waited until after he was awarded benefits on remand and filed an application at that point. We contend that that application was untimely.

Under the language of subsection (d)(1)(B) of EAJA, a fee application must be filed within 30 days of final judgment in the underlying civil action for which fees are being sought. Subsection (d)(2)(G) of EAJA, in turn, defines the term final judgment to mean a judgment that is final and not appealable. Sentence eight of section 405(g) says that the judgment entered pursuant to sentence four is a final judgment. It follows under the language of these statutes that respondent's fee application was due at the time that the sentence for judgment was entered and this case was remanded to the Secretary.

Now, this Court's recent decisions in Sullivan

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against Finkelstein and Melkonyan against Sullivan confirm our reading of the statute as correct. In Finkelstein, the Court held that sentence four remands constitute a final judgment and that such judgments are appealable. In that decision, the Court said that any action a court takes under sentence four must include a judgment, whether or not a remand is included as well. That conclusion followed from the language of sentence four which the Court in Finkelstein said, quote, directs the entry of a judgment. The statute does not say that a district court can do anything under sentence four without also entering a judgment.

QUESTION: Well, what if a court makes a mistake? Isn't that possible? I mean to say that the court should have entered a judgment is not necessarily to say that the court did enter a judgment.

MR. KELLEY: In Finkelstein, Justice Scalia, that very argument was made, and the Court rejected that point saying that regardless of the label the district court attaches to its order, it is a judgment and it is final and effective as such.

QUESTION: It shall be deemed a judgment whether the court says so or not.

MR. KELLEY: Yes, otherwise a court would simply be free to act contrary to what the statute permits.

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Now, sentence six of section 405(g) stands in contrast to sentence four, for in that sentence Congress gave district courts the authority to remand cases without entering judgment and also to require the Secretary to return to district court after the remand for further proceedings in district court, at which point a judgment would then be entered.

The unanimous opinion a year later in Melkonyan confirmed -- further confirms our reading here. In Melkonyan, the Court said explicitly that section 405(g) only authorizes district courts to act pursuant to the procedures of sentence four or sentence six. There is no room in that statute for a hybrid procedure, such as the one respondent urges here.

QUESTION: Well, now, Mr. Kelley, I think that in the Hudson case, which was the first, that the Government conceded there was no final judgment for Equal Access to Justice Act purposes until the administrative proceeding on remand was concluded.

MR. KELLEY: That is correct, Justice O'Connor. We did concede that in that case. This Court's decisions in Finkelstein and Melkonyan following Hudson have --

QUESTION: Well, Melkonyan certainly said it wasn't overturning Hudson.

MR. KELLEY: That is certainly true as well, but

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Melkonyan referred to Hudson as encompassing a narrow class of cases.

QUESTION: On sentence six.

MR. KELLEY: And our submission is that Hudson applies only in sentence six cases because under the terms of sentence four, as the Court interpreted that sentence in Finkelstein and Melkonyan subsequent to Hudson, the Court has concluded that there is no such jurisdiction.

QUESTION: And just what is it you think that one of these Social Security claimants should do who wants to have an EAJA claim?

I mean, it's -- there has to be some way to work this out. Congress intended under EAJA that these claimants, if the Government's position was substantially unjustified, are going to recover their costs. And just how is it you think this is going to work?

MR. KELLEY: We quite agree that Congress intended applicants who succeed in litigation against the Government and obtain benefits in which in our case -- our position was not substantially justified to get benefits.

QUESTION: And the time of the remand, they don't know whether they're going to obtain benefits.

MR. KELLEY: That is quite true, and that problem is easily solved, we would submit, simply by filing an application at the time Congress has required

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under the terms of the two statutes. That application can be held in abeyance until after it is clear whether the person is a prevailing party and resolved at that time.

QUESTION: It can also be held in abeyance for the duration of life on this planet so far as the statute is concerned. Isn't the problem there that if you do that, you have no time limit disciplining the point at which the claimant has got to come in for the fees?

MR. KELLEY: I don't believe that is a problem, Justice Souter, for this reason. The claimant, after proceedings on remand have been finished, has every incentive to rush back to district court for his fees.

And I would also point out that under respondent's view there is similarly a problem of no time limit. Under respondent's submission, the burden is on either the Secretary or the claimant to go back to district court at some unspecified time, without time limit, after the remand proceedings are completed and obtain a judgment.

QUESTION: Well, that may be, but there's a third possibility in which the claimant who cannot at the point of remand certify that he is entitled as a winner, that the claimant, in effect, is going to take the benefit of the tolling of the statute until the prevailing -- his prevailing party status is clear, and then the 30 days

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runs.

MR. KELLEY: Well, that's precisely -- in effect, I should say, precisely the submission the Court rejected in Melkonyan, which is that matters should stand in abeyance until the proceedings on remand are finished and the decision of the administrative agency will demonstrate whether the party is a prevailing party, and the time period should then start then. That -- the Court rejected that position of the Government in that case unanimously.

And it seems to me that that position would have workability problems as well because it would be -- it will be an inchoate time which -- at which the fee application would be due. Congress made a very deliberate decision here to put a strict 30-day limit --

QUESTION: Why would it be -- I'm sorry. No, you go ahead. I was going to say why would it be an inchoate time. I mean, you'd have to determine it in relation to the conclusion of the administrative proceeding.

MR. KELLEY: I suppose that is correct, and perhaps I misspoke, but the point remains that the Court in Melkonyan concluded that that very regime was unauthorized by the statutes. The Court in Melkonyan said that EAJA requires the time period to be measured from the

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judgment of a court.

QUESTION: But, Mr. Kelley, if we're talking about what EAJA requires, it -- the provision says within 30 days of final judgment, the party seeking the award shall submit to the court an application for fees, not just an application for fees, but an application which shows that the party is a prevailing party and is eligible to receive an award under this subsection and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the -- blah, blah, blah, and so forth. That can't possibly be done at the time you say it's supposed to be done because he won't know what his attorney's fees are.

MR. KELLEY: Oh, but he will, Justice Scalia. At that point, he will know how much time and money has been spent in litigation, and --

QUESTION: In the court of appeals.

MR. KELLEY: In the district court.

QUESTION: In the district court. But -- well, you do not contend then that he's entitled to any of the fees from what occurs on remand.

MR. KELLEY: We contend that he is not entitled to such fees in sentence four cases if Hudson is limited as we have submitted. Even if Hudson is not limited in that fashion, however, it is a small matter.

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QUESTION: Well, then why do you have to wait? Why do you -- oh, you have to wait for the completion of the proceedings below not in order to get the fees, but simply to be sure that he's the prevailing party.

MR. KELLEY: That's exactly right.

QUESTION: I see. I see.

QUESTION: That's a real limitation on Hudson. Hudson was, in fact, despite what we said in Melkonyan, a sentence four remand, wasn't it?

MR. KELLEY: It has never been adjudicated as such, but we agree that it was, yes. And --

QUESTION: And that case held the litigant was entitled to fees for the agency proceedings, didn't it?

MR. KELLEY: The case did so hold, and we would submit that the Court's subsequent decisions in Finkelstein and Melkonyan have demonstrated that the statutory authorization for the district court to retain jurisdiction in the manner the Hudson court contemplated is limited to sentence six cases.

QUESTION: Is that a sub silentio overruling of --

MR. KELLEY: Well, I don't believe it's an overruling, Justice Kennedy. We believe it has been limited in -- just by terms -- in terms of the logic of the Court's subsequent cases.

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QUESTION: You say that there's just no fee allowable for attorney's fees and other expenses before the agency --

MR. KELLEY: Well --

QUESTION: -- either -- or -- either initially or on remand.

MR. KELLEY: Well, it's quite clear we believe, Justice White, that initially that is certainly true. 5 United States Code, section 504(c) governs fees for adversary adjudication before agencies, and these are not adversary adjudications. And the Hudson court did not suggest that you're entitled to fees for the initial administrative process.

But under our submission in this case, it would -- we do contend that the fees on remand in sentence four cases are inappropriate because of the Court's subsequent decisions in Finkelstein and Melkonyan. I would hasten to add, however, that that is not necessary to our prevailing in this case. It is a small matter for a fee applicant to supplement his fee application that is already on file if the court subsequently determines that he's entitled to fees.

QUESTION: Well --

QUESTION: True, but it makes mush of subsection (b), which obviously anticipates that at the time you --

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within that 30 days, when you have to appeal the final judgment, simultaneously have at hand the amount of your fees. That's what it assumes

MR. KELLEY: Well, it assumes that you will know what amount of fees you are entitled to to that point, but it is not a known in the law -- and we do not believe it makes a mishmash of subsection (b) to supplement a fee application. For example, the court -- courts frequently award fees for proceedings on appeal, and fee applications are supplemented to cover those fees. In fact, the fee application in this very case was so supplemented.

QUESTION: Well, Mr. Kelley, the First Circuit and the Eighth Circuit have a different view, don't they?

MR. KELLEY: Yes, they do, Justice O'Connor.

QUESTION: And what's the matter with that view? They presume an intent in the district court to retain jurisdiction unless there is some express indication to the contrary.

MR. KELLEY: The problem with that position we believe that it is inconsistent both with section 405(g) and the terms of sentence four and sentence eight and with this Court's decisions in Finkelstein and Melkonyan. In Finkelstein, the Court held that a sentence four action by a district court had to be a judgment and that that judgment terminates the civil action.

QUESTION: Well, we certainly were concerned in Finkelstein with the right of the Government to raise its arguments --

MR. KELLEY: That is true.

QUESTION: -- at that stage. We weren't dealing with the claimant.

MR. KELLEY: That is true, but --

QUESTION: Is it conceivable that the judgment is final for one side and not the other?

MR. KELLEY: I would suppose it is conceivable, but --

QUESTION: It's kind of odd.

MR. KELLEY: We believe it is odd, and the Court in Finkelstein rejected our -- I'm sorry -- declined to adopt our alternate submission under the collateral order doctrine which would more readily lend itself to one side appealing and not the other.

But in any event, we don't think that it matters whether the claimant can appeal a sentence four judgment because a claimant who has reason to appeal has no reason to file a fee application ordinarily. The time for filing a fee application -- the fee application issue only arises if the Government has had an unfavorable ruling against it.

QUESTION: Now, tell me again how -- under

2412(d)(1)(B), how does the party applying for a fee within the 30 days show that he is a prevailing party?

MR. KELLEY: He submits --

QUESTION: Just because he's a -- he has prevailed in the district court?

MR. KELLEY: Well, he has done everything he can to that point --

QUESTION: Yes.

MR. KELLEY: -- to be a prevailing party. That's correct.

QUESTION: And -- but then -- and he has to show that he is eligible to receive an award under this subsection.

MR. KELLEY: He has to show that as well. Now, we believe --

QUESTION: Well, how does he show it at that time?

MR. KELLEY: The eligibility provision we believe is naturally read to refer to the financial status of the fee applicant, which is further down in section 2412(d), which is having a net worth of less than $2 million. That is the eligibility.

QUESTION: Well --

MR. KELLEY: But in any event --

QUESTION: -- why can't the -- well, why can't

then -- why couldn't a fee -- the fee be immediately awarded?

MR. KELLEY: The reason it could not be immediately awarded is that under current law and as the courts of appeals have held and this Court has recognized in Hudson and Finkelstein, that simply obtaining a remand is not enough to qualify one for attorney's fees. One has to gain benefits after remand.

QUESTION: So, you have to actually prevail at the agency level?

MR. KELLEY: That's correct. What these people are after, of course, is benefits, and if you don't get --

QUESTION: Well, then you certainly can't show that you are a prevailing party in that sense --

MR. KELLEY: At that point --

QUESTION: -- because you don't -- you have no idea whether you're going to win or lose.

MR. KELLEY: At that point, we would acknowledge he cannot state that he is for certain a prevailing party.

QUESTION: So, you do have to sort of, as Justice Scalia said, make mishmash out of this provision.

MR. KELLEY: Well, we would suggest that it is not so much of a mishmash. The only difficulty here is the --

QUESTION: You can't have it both ways.

MR. KELLEY: -- is the verb tense of the word is. And a fee applicant is fully able to state --

QUESTION: You read is to mean will be, and that is not making mishmash of it.

MR. KELLEY: Well --

QUESTION: Or not even will be, may be.

MR. KELLEY: Well, in any event, we would suggest that the alternative to that view is an amendment to the substantive terms of the cause of action, which is a standalone cause of action provided in section 405(g). We would submit it would be quite odd for an attorney's fees statute to be interpreted so as to change the very nature of a cause of action that was otherwise provided by Congress.

Now, it is not an unworkable regime. It is a small matter we believe to file a fee application.

QUESTION: Well, it sounds pretty unworkable. I mean, there are hundreds of thousands of these claims, and you're proposing that people who have no idea whether they're going to prevail at the end of the line have to file these things, and the district court has to sit on them. And we have some amicus briefs that say about 40 percent of those who get a remand never get benefits and never become a prevailing party.

MR. KELLEY: In recent years, it has been --

QUESTION: I mean, this thing sounds to me like a real bureaucratic nightmare that you want us to institute.

MR. KELLEY: Oh, I don't think so at all, Justice O'Connor, and let me tell you why. The -- there are not hundreds of thousands of these cases. In fact, in the most recent fiscal year for which we have statistics, 1991, the maximum number of possible fee applications that would have been filed that turned out to be unnecessary would have been somewhere around seven or eight per judicial district across the country.

QUESTION: In other words, that's the 40 percent factor?

MR. KELLEY: That -- in the last 2 years, it has run roughly about a third have not gotten benefits on remand, and that -- so, the --

QUESTION: So, the average of the judicial districts would be, say, 20, 21 applications, and a third of those would result in no fees? Is that the calculation?

MR. KELLEY: 25 perhaps per district, and a third would result in no fees. That would be my estimation. It's very close to that.

And it's a small matter for a district court to have that fee application on its docket. It requires the

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district court to do nothing, and when matters on remand are completed, the claimant certainly has every incentive to come back and say I'm ready to get my money. So, I --

QUESTION: In all of those, I take it, though, the Government is not substantially unjustified.

MR. KELLEY: That is true.

QUESTION: He still has to show that.

MR. KELLEY: That is true. He has to show that, and I would also point out that that number includes both sentence six and sentence four remands. Our statistics don't yet distinguish between the two. So, it's even fewer than that. So, I don't want the Court to be thinking that this really is an enormous number of cases that we're talking about here.

QUESTION: If we write a few more cases on this in the next -- coming terms, maybe the statistics will break it down then.

(Laughter.)

MR. KELLEY: Well, the --

QUESTION: Mr. Kelley --

MR. KELLEY: Yes, Justice Stevens.

QUESTION: The more you demonstrate the lack of likelihood of their coming back to get fees, the more you are demonstrating the fact that there's going to be an

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awful lot of wasted filings because everybody who gets a remand would file.

MR. KELLEY: We would agree that people who get a remand would thus have to file.

QUESTION: And really our -- I mean, maybe the statute compels it. I don't know. Things are kind of confused I have to confess, but it is true that your approach would require more than half of the litigants to file papers that will not produce any result and just clutter up the files.

MR. KELLEY: No, I don't think that is true, Justice Stevens. It's about a third at the maximum --

QUESTION: I'm talking of those who have gotten remands.

MR. KELLEY: Oh, I see, but only a very small number of those will turn out not to be -- turn out to be unnecessary. Excuse me.

QUESTION: Only a small number will be --

MR. KELLEY: About a maximum of a third, in recent years at least. The other two-thirds succeed in getting benefits on remand and they have -- their fee application will be litigated on the merits.

QUESTION: Oh, all right.

QUESTION: But I suppose if they can wait until they are actually prevailing before the agency, you're

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just ignoring the fact that the remand judgment was a final judgment subject to appeal.

MR. KELLEY: We would submit, Justice White, that the statute doesn't permit that to be ignored.

QUESTION: Exactly. I mean, you either -- it looks like you would either have to ignore the 30 days from final judgment rule or play games with the word is.

MR. KELLEY: That's -- we believe that that, in effect, is true. And --

QUESTION: It's a -- you have to do something with the first part of this provision or the last part of the provision.

MR. KELLEY: It's not only these two provisions, Justice White. It is also section 405(g). If, as you pointed, that you play games with the first part of the provision and just wait and ignore the 30-day time limit, what you've established then is the system the Court rejected in Melkonyan, which is that the administrative decision will be the triggering event.

QUESTION: Well, but you don't have to play games, do you, if you prevail in the court of appeals whether or not you prevail before the agency on remand. Have we ever held that in order to be a prevailing party, you must prevail in a section 4 -- in a sentence four case, not a sentence six case? Have we ever held that in

a sentence four case you're not entitled to fees unless you prevailed before the agency on remand?

MR. KELLEY: No, Justice Scalia, the Court has never held that. The courts of appeals --

QUESTION: I know they have, but we haven't.

MR. KELLEY: Yes, you have.

QUESTION: And doesn't the scheme make total sense if we hold that you prevail in a sentence four case as soon as you win the court of appeals judgment? Thereupon, you file your application for fees, you get your fees in the court of appeals, and whatever happens back below on remand, happens back below on remand. The game is over. Just as far as the mishmosh problem is concerned, wouldn't that solve it?

MR. KELLEY: That would go a long way toward solving it, but I would hasten to add that it would also upset a lot of settled law in the lower courts to hold that.

QUESTION: In the court of appeals.

MR. KELLEY: That is correct. But those cases --

QUESTION: Yes. Well, but maybe it's wrong law.

MR. KELLEY: I was going to get to the point that those cases are -- have a lot going for them.

QUESTION: Well, from the standpoint of the

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Government, I'm sure that's true.

MR. KELLEY: Well, they make sense, Justice Scalia, because these people, the claimants, are not after simply getting a remand. What they're after is benefits, and it is well established, as I've said, in the courts of appeals that it is not enough. You haven't won anything, in effect, if you just get a remand.

QUESTION: Of course, you have. You've won your point that the agency procedure or whatever it was was wrong, and the agency wouldn't straighten it out. And you go to the court of appeals, and the court of appeals says to the agency straighten it out and sends it back down. You've certainly won that. I mean, yes, you haven't gotten your money yet, but --

MR. KELLEY: It certainly is a favorable legal ruling. I would agree with that. But the point is that it doesn't require the Secretary to give you anything.

QUESTION: No, but is it not true that if you have been a prevailing party at that point and if the Government's resistance to the claim at that point has not been substantially justified, isn't there good reason to say that the claimant ought to get his fees up to there whether he wins or loses on remand because he has been put to a lot of unnecessary expense is the theory? Otherwise, he doesn't get any fees at all.

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MR. KELLEY: Well, that is true in theory.

QUESTION: But the Government wins on remand.

MR. KELLEY: About a third of the time.

QUESTION: And how can your position be unjustified?

MR. KELLEY: Well, it's theoretically conceivable that your initial decision and your decision to contest it was unjustified, but when you go back and do it right, it turns out that the --

QUESTION: The real problem here is our decision in Hudson, not in Melkonyan.

MR. KELLEY: Well, we would submit, Mr. Chief Justice, that Hudson, as limited to sentence six cases, is fully consistent with Finkelstein and Melkonyan.

QUESTION: In a sentence six case, you have not won anything because the court hasn't made its decision yet. It sends it back to the agency, retains jurisdiction because it needs more information, the agency has to develop more, whatever. And only after it comes back do you know whether the claimant has won or lost. So, it makes total sense in the section 6 case to wait until it comes back. But, of course, in the sentence six case, the judgment is not final until it comes back, and you take the final action.

MR. KELLEY: That is quite right, Justice

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Scalia. But I would hasten to point out that the question of what you need to do to become a prevailing party really isn't presented here. It certainly is lurking behind the scenes, but it hasn't been briefed by the parties, and it hasn't been passed upon by the lower courts. So, I would urge the Court not to make a holding on that basis.

In our view, our submission --

QUESTION: Not to make a holding on what basis?

MR. KELLEY: On the basis Justice Scalia is suggesting that one is a prevailing party simply by virtue of getting a remand. That would work a large change in the law in the lower courts, as I fully recognize.

QUESTION: If I think that that's the only solution that makes sense out of the statute, how can I avoid -- I mean --

MR. KELLEY: Well, we would -- I would agree, Justice Scalia, that you should not rule against us on the premise that you're not a prevailing party. It does make sense, if you're truly concerned about the is issue, to hold based on the premise that one might be a prevailing party at the time of remand. It does make sense of the whole scheme.

But I would hasten to add that it is fully consistent with the statute and very workable to say that you can file a fee application when the proceedings on

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remand begin or -- excuse me -- after you get your remand, and you can state at that time you've done everything you can to be a prevailing party, and it is a small matter to come back to court after the proceedings on remand are finished.

If there are no further questions --

QUESTION: Well, the -- Justice Scalia's suggestion, which is very attractive since it's so simple, but it also would involve deciding here, which has never been decided here before --

MR. KELLEY: That's exactly right.

QUESTION: -- that you're not entitled to fees on remand.

MR. KELLEY: That is true, Justice White.

QUESTION: Which is inconsistent with what we held in Hudson before the Melkonyan gloss.

MR. KELLEY: That's right, Justice Kennedy.

QUESTION: Wait, Mr. Kelley. I don't understand that. I asked you earlier. The Government does not contend that you're entitled to fees on remand in a sentence four case.

MR. KELLEY: Well, that's true.

QUESTION: Okay.

QUESTION: They're not.

MR. KELLEY: They are not. That's true.

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QUESTION: But that is not -- but we've never decided it.

MR. KELLEY: That's true as well, Justice White.

QUESTION: And have some other courts decided that they are entitled to remand in a sentence four remand?

MR. KELLEY: Entitled to fees?

QUESTION: Entitled to fees.

MR. KELLEY: Well, since Hudson and the subsequent cases in this Court, I don't believe that the lower courts have focused on that issue.

QUESTION: So, it is sort of a wash for the Government really. You have to pay the fees in the district court whether or not the claimant wins on remand, but on the other hand, the Government doesn't have to pay the fees that are incurred on the remand --

MR. KELLEY: That is exactly right, and we believe it's very important, if you go on the prevailing party side, to recognize that Hudson fees are not available in sentence four cases.

If I may reserve the remainder of my time, Mr. Chief Justice.

QUESTION: Yes, Mr. Kelley.

Mr. Fuller, we'll hear from you.

ORAL ARGUMENT OF RANDALL J. FULLER

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ON BEHALF OF THE RESPONDENT

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

Today the Court is presented with the question whether the Equal Access to Justice statute permits a Social Security disability claimant, whose case is remanded from the Federal court to the Secretary for further administrative proceedings, under the fourth sentence of section 405(g) to file his application for EAJA fees upon successful completion of the administrative remand proceedings, or whether as urged by the Government, every such claimant must immediately after receipt of a sentence four remand file a conditional EAJA application at that time.

We contend that the decision below of the Eighth Circuit Court of Appeals granting my client, Mr. Schaefer, an EAJA award in the amount of $1,372.50 should be affirmed, and today I would like to focus upon the three main reasons why it should be affirmed.

The first is that the lower court decision, in accordance with nationwide practice since at least 1989, is consistent with the plain terms and the intent of the EAJA statute.

Secondly, considering the matter from a common sense standpoint, our approach is much more practical and

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reasonable than the unworkable solution posited by the Government today.

Finally, the procedure that we followed in asking for EAJA fees in this case was directly consistent with and, indeed, may be mandated by this Court's decision in Hudson.

QUESTION: Well, didn't we say in one of the later cases that Hudson applies only to sentence six cases?

MR. FULLER: I don't believe that that was said at all, and Hudson in fact was a sentence four case, as the Government has indicated today.

QUESTION: Well, did we say it applied only to sentence four cases then?

MR. FULLER: No. Hudson was decided before all this litigation regarding the distinction between the two. Hudson simply stood for the proposition that a claimant, after remand, was entitled to EAJA fees for the work performed by his counsel during the remand process.

QUESTION: Well, then what was the limitation on Hudson in one of the -- either Melkonyan or Finkelstein? I can't remember which one is was.

MR. FULLER: Well, Melkonyan and Finkelstein both discussed Hudson. They did not overrule Hudson. They said that Hudson was not to the contrary. Melkonyan

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was a sentence six case. It was clearly not a sentence four case. And there the question was whether the administrative agency decision or the Federal court decision was what started the time limit ticking.

Finkelstein was not -- that was also a sentence four case, but there the issue importantly and very significantly -- this is crucial. That was not an EAJA case. In Finkelstein, what this Court said was that that decision of the district court was appealable as a final order.

QUESTION: Well, didn't Finkelstein say that Hudson was discussing sentence six remands, not sentence four remands?

MR. FULLER: I don't think that it explicitly said that.

QUESTION: Well, don't you think that's the fair import of it when it says it applies to a narrow category of cases? Now, the Government takes the position that Hudson applies to sentence six. What is your position? Do you think --

MR. FULLER: Our position is that Hudson applies to both types of remands. Hudson did not limit itself by its holding --

QUESTION: No, Hudson didn't, but didn't Finkelstein limit Hudson?

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MR. FULLER: I don't believe it did.

QUESTION: You don't read that language as limiting it?

MR. FULLER: I don't read it that way, Your Honor.

QUESTION: Well, your position is that Hudson is correct and that the later cases, to the extent they impinge upon Hudson, are perhaps confusing and wrong.

MR. FULLER: Well, I don't know that I would say that they're wrong. I would say that there has been some confusion caused by some of the later holdings, but it's not confusion which cannot be harmonized. And let's talk about that.

Melkonyan seems to be the case which the Government relies upon most significantly and particularly the dicta in Melkonyan relative to sentence four remands. Now, Melkonyan is not against us in this case because it specifically discusses Hudson and says that Hudson is not to the contrary. Melkonyan was a sentence six. Ours is a sentence four case, just as Hudson was.

And even the dicta referring to sentence four from Melkonyan in this case can be harmonized and reconciled completely with our position, and the reason for that is because under sentence four and my experience and a reading of that sentence indicates that there are

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two potential types of sentence four remands. The first would be that present in our case, and that is where the Secretary's decision is reversed on legal grounds and sent back for further proceedings. The second possibility under sentence four is that the decision of the Secretary is out and out reversed and simply sent back for a ministerial or administrative calculation of benefits.

QUESTION: I think that's contrary to our whole description of what the basic distinction between four and six is. I thought the basic distinction is under sentence four, the district court is done with the case. It reverses the Secretary and sends it back. The claimant has won on the point that is the subject of the appeal; whereas, in a sentence six case, the court says, well, I can't decide this without some further action below and I'm going to sit on it and send it back for more -- a bigger record to be made or whatever. And I'm not making any decision yet. I'm just asking the agency to give me more action, more information. I thought -- well, I don't --

MR. FULLER: I would say that the distinguishing feature between the sentence four and sentence six remands is what the statute calls for, which is good cause for evidence, which was not developed in the record. And the reason under sentence six that cases get sent back and the

reason that sentence six permits the Secretary to -- before she even files her answer in a case, to move for a sentence six remand is that new evidence was not present and needs to be developed. That is the distinguishing feature as I read those --

QUESTION: Right, so that the case is really not over in the district court --

MR. FULLER: Right.

QUESTION: -- under sentence six.

MR. FULLER: Yes.

QUESTION: But it is over under sentence four.

MR. FULLER: Well --

QUESTION: Somebody has won and you go back, just as any other administrative agency case is remanded after the agency has reversed and the case is remanded for continuation of the agency action.

MR. FULLER: Let me turn to that.

QUESTION: But the lawsuit is over.

MR. FULLER: Let me turn to that and discuss why, even if that is true, Justice Scalia, that does not start the time limit ticking for EAJA fees. And the reason --

QUESTION: Right. I'm not saying -- that doesn't necessarily answer the question.

MR. FULLER: And the reason that it doesn't

start the time limit ticking is because that decision, that sentence four remand, is not appealable by the claimant, while it is appealable by the Secretary. The EAJA statute contemplates a final judgment for which the appeal time has run as to the party seeking the fees. Finkelstein reserves the question of whether a claimant can appeal a sentence four remand. It's not allowed at the present time under the law, and in the Eighth Circuit, it has been held that a claimant cannot appeal such a remand in the Bohms case, which is cited.

QUESTION: Of course, he can't appeal it because he has won. He has won what he -- we're talking about a sentence four.

MR. FULLER: Sentence four remand.

QUESTION: Well, he has won. Why -- how could he appeal it. That's absolutely right.

MR. FULLER: That's right.

QUESTION: So, maybe at that juncture, as Justice Scalia has suggested, maybe at that point, the claimant is entitled to seek EAJA fees for the court proceeding that resulted in a sentence four remand order.

MR. FULLER: And that may, in fact, be the case, as was discussed previously by counsel. The Court has not held --

QUESTION: All right. So, what's the

consequence of that if we were to so hold? It would mean in this case your client would fail because no application was made on a timely basis at the end of -- at the time of the order of remand.

MR. FULLER: Actually it would not affect our case. Mr. Schaefer would still prevail in this case for two reasons. First, there was no rule 58 judgment issued at the point in time of the sentence four remand in our case. Therefore, that appeal time had not started to run. The time limit had not started to run.

More importantly, we followed the practice that was the law at the time. Under the Secretary's theory -- and you have to look at the time frame and the background of our case. The administrative remand occurred on April 5, 1989. Under the Secretary's theory, we then had until July 5, 1989 in which to make that application.

At that point in time -- and this Court did not decide Hudson until June of 1989. So, at that point, there was no way for us to know or anticipate that not only would Hudson come, but -- although we may have filed after Hudson under the Secretary's theory, in which case we never would have filed at that point because Hudson tells us to wait until the administrative process is complete and the prevailing party status is determined.

At that point in 1989, there's no way that we

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could have anticipated that Finkelstein would come later and Melkonyan would come after that. So, the position of Mr. Schaefer is vindicated regardless of what the Court finds.

QUESTION: Is there any court of appeals that holds that you don't have to be a -- to win below to be a prevailing party?

MR. FULLER: I don't believe that that has been held.

QUESTION: But there are a lot of courts of appeals that say that you do have to prevail below --

MR. FULLER: Right, that you must --

QUESTION: -- to be a prevailing party.

MR. FULLER: Right, that you must win your benefits to be the prevailing party. Exactly.

QUESTION: Well, is that correct? I mean, can it be demonstrated that the claimant has prevailed insofar as the district court action is concerned at the time the claimant gets an order for remand? You've prevailed to that extent.

MR. FULLER: You've prevailed in the sense of a sentence four. I think it's arguable that you have prevailed at that time because a sentence four usually contemplates a reversal of some action by the Secretary in denying the benefits.

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QUESTION: So, that certainly is a potentially workable theory. What's the effect of that for other claimants, not yours? Let's talk about other claimants. It would mean then that there would be no EAJA fees obtainable for the administrative work after the remand I assume.

MR. FULLER: Unless this Court held that to effectuate Hudson, that a second petition for EAJA fees was possible for the administrative work if the claimant prevailed.

QUESTION: Well, yes, but as the Chief Justice has noted and I think others, the Court has limited Hudson and has distinguished between section -- sentence four and sentence six remands.

MR. FULLER: I think what -- Justice O'Connor what you're suggesting is probably true as to the practical effect of a decision that the claimant became the prevailing party upon remand. Then lots of claimants would get fees. Those 31 to 38 percent of the claimants who lose upon remand would have gotten fees at that time.

QUESTION: Yes. It means the Government may end up paying more in fees because it will be paying fees even though the claimant might lose ultimately.

MR. FULLER: That's possible, but there would not be the Hudson fees added on later. So, it may work

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out to be essentially a wash.

QUESTION: Well, I would think you would embrace Justice Scalia's proposal if you assume that you're not going to get fees for your work after remand.

MR. FULLER: And as we have -- as I have indicated, Justice White, we would not be opposed to such a ruling.

QUESTION: Yes, and if -- I would think you would just like to be able to collect fees immediately and -- because your fee won't depend on whether or not you win below, but you will still want to win below for your -- on behalf of your client.

MR. FULLER: Yes. We want to win at all times on behalf of our clients.

(Laughter.)

QUESTION: Yes.

QUESTION: And it is the case that there's no doubt that you cannot get fees in the district court for the agency work that is done before the district court action. Right?

MR. FULLER: That's true.

QUESTION: So, it really is a strange scheme where you don't get any fees for the work up to the district court, but then if the district court reverses the agency and says do it again and do it right this time,

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then you do get fees for the -- for that one, or maybe.

QUESTION: Well, that's what the Chief Justice suggests isn't true because Hudson was limited.

MR. FULLER: And if it's limited, then it isn't true.

QUESTION: Would you tell me how it is that you think you win under that one anyway? I thought you hadn't filed an appeal within the 30 days from the district court judgment.

MR. FULLER: That is true.

QUESTION: But you think that that can be waived because you couldn't know from Hudson that you had to.

MR. FULLER: Well, that's the second reason. The first reason was there was no rule 58 judgment entered in our case --

QUESTION: That's true.

MR. FULLER: -- at the time --

QUESTION: That's true.

MR. FULLER: -- of the sentence four remand, which is required. It's an absolute requirement of the rule.

QUESTION: Right.

MR. FULLER: And therefore --

QUESTION: And you'd say it was a mistake on the part of the district court not to enter that judgment, but

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nonetheless, there was no judgment entered.

MR. FULLER: That's true, and that's why Mr. Schaefer prevails. That's the first reason why he prevails. The second reason is what I indicated --

QUESTION: Well --

MR. FULLER: -- developments in the law --

QUESTION: Well, on that basis, we don't need to decide all of this stuff about the is or anything like that. I mean, you just have a -- you have an independent reason for winning your case.

MR. FULLER: Right. We contend the statute means what it says, that when you make your application for fees, you must show at that time that you're the prevailing party. And under the Government's scheme that is not possible. That's one of the reasons why it is totally impractical and unworkable.

I'd like to focus on some of the other --

QUESTION: In these appeals to the district court, is new evidence sometimes a ground for asking that the case be remanded, new evidence of disability, new medical evidence?

MR. FULLER: It is sometimes. Those are typically sentence six remands.

QUESTION: Those are typically sentence six remands.

MR. FULLER: Yes.

QUESTION: What I was wondering was whether or not it's going to be difficult to determine whether there was lack of substantial justification on the part of the Government if we make the fee assessment at the -- after the district court proceedings in sentence four cases. What are the typical cases --

MR. FULLER: Well --

QUESTION: -- in which the Government would be substantially unjustified? If the hearing examiner hears only one doctor instead of three?

MR. FULLER: In a sentence four case, it could be numerous things. It could be a lack of the appropriate experts being present. It could be an improper hypothetical given to one of the experts, a vocational or medical witness. It could be, as in our case, the failure to follow the Eighth Circuit law relative to the evaluation of pain and certain factors set forth in the circuit case --

QUESTION: And the Government is substantially unjustified because -- for raising an objection before the hearing examiner?

MR. FULLER: No. They would be unjustified if they failed to follow the legal principles set forth in that circuit, such as in our case where there's a

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precedent in the Eighth Circuit which says that these are the factors you must look to to evaluate chronic pain. In our case it was found that the Secretary had not properly followed those factors. That is one of the reasons -- one of the legal reasons why the sentence four remand was given. So, sentence four has lots of legal aspects to it which I think would be relatively easy to make a finding as to whether there was substantial justification at that point.

The practicalities --

QUESTION: Do you agree that the substantial justification referred to in (B) is whether the United States position before the district court was substantially justified? Is that what it refers to?

MR. FULLER: No. It refers to the denial of benefits by the Secretary. Typically the kind of analysis that the Federal courts engage in is to review very carefully the decision of the administrative law judge which becomes the final decision of the Secretary and to determine whether or not the appropriate legal standards were followed.

QUESTION: Well, the denial of benefits -- if the denial of benefits was unjustified, the Government's position before the district court will always be unjustified. Right?

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MR. FULLER: Yes.

QUESTION: But in some cases, the denial of benefits might have been quite justified, but for some procedural reason, nonetheless, the Government's position before the district court may be unjustified.

MR. FULLER: That is true.

QUESTION: Do you follow me?

MR. FULLER: Yes.

QUESTION: So that you may be able to get fees before the district court on the basis of unjustification there.

MR. FULLER: Oh, yes. There are several ways in which the position could be found unjustified.

The practicalities in this situation strongly favor our approach as opposed to the Government's approach. I believe the Court has a good understanding of what the Government's approach entails. Let me highlight some of the practical problems with it.

The first is that their scheme is the ultimate in setting traps for the unwary. They have indicated that a conditional filing must be made shortly after the sentence four remand is issued by the district court. They don't indicate what documents they would deem necessary at that time. They don't indicate what would have to be filed. It is very possible that district

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courts for failure to fulfill all of the requirements of the EAJA statute, particularly the showing of prevailing party status, the showing of the specific amount of fees requested and so forth, could dismiss those type of premature petitions as being inappropriate under the plain language of the EAJA statute.

I think what the Government's approach invites is a potential of a multiplicity of litigation and further appeals and so forth dealing with what the proper filings would be under a conditional type filing theory, as the Government urges.

In addition, the amount, which Justice O'Connor asked about, of needless filings that would be required. If you look at our brief, we cite the 1990 statistics in which there were over 4,300 remands nationwide from district courts to the Secretary. 38 percent of those claimants lost on remand. So, when you analyze those figures, at least 1,600 of those petitions that would have had to have been filed were superfluous or unnecessary and were clogging up the district court dockets.

QUESTION: Do you agree with the -- with Mr. Kelley's figures on the numbers of cases involved?

MR. FULLER: Mr. Kelley is citing some figures that are a little bit more recent than the 1990 figures. In 1991, the total number of remands nationwide went down

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to 2,526, and the percentage of claimants which lost on remand went down a little bit to about a third at that time.

I think that he attempts to minimize the nationwide impact by breaking it down to 21 or whatever per judicial district when, in fact, you have to look at the nationwide effect because they're not necessarily spread out on an average basis among judicial districts.

The Secretary is concerned about delay. Let's talk about delay because they contend that, under the present system and the approach urged by our side, the respondent in this case, there is this great potential for delay.

First of all, there's no evidence that claimants or their counsel have been dilatory or routinely delayed these type of filing. In fact, even as the Secretary concedes today, there is a tremendous incentive on the part of claimants and their counsel to get these in and to get the fees paid as quickly as possible.

Under the Government's theory, you'd have to first file this conditional application for fees. You would then have to go back and go through the remand proceedings before the Secretary, but then significantly, the Government's theory contains no mechanism for triggering any further time limits upon the claimant or

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their counsel to come back to court and file for those fees. Under their theory, assuming that there was the incentive to delay, which we deny, the claimant and their counsel could wait forever before coming back and having the district court finally act upon those fee petitions.

Under our system, it's very simple. Once the administrative process is complete, the Secretary herself, if she's concerned about delay, can come in and simply file a motion for entry of final judgment, which will automatically trigger that EAJA time limit to start running. Therefore, the Secretary under our theory has within her own power the power to limit the untimely applications that she fears would be coming.

QUESTION: Mr. Fuller, could you tell me -- and you just have to give me your impression because I don't know there would be any statistics on it, but as a general matter, when a claimant wins before the district court and there is a sentence four remand and he's victorious on the remand -- he's among the -- what is it -- the --

MR. FULLER: Two-thirds.

QUESTION: -- two-thirds who are victorious. Does that normally take a lot more time or basically has the agency been beaten into the ground and they throw in the towel? I mean, does it normally take a lot more work back before the agency?

MR. FULLER: It really varies widely from case to case, frankly, Justice Scalia. The averages -- and we cited some of the statistics in our brief. The average length of time that elapses from a remand -- and again, this isn't broken down sentence four versus sentence six. But the average length of time is 13.9 months from the time the court orders the remand until you know whether you won or lost in the administrative process. And in my experience, it varies greatly from a year and a half, possibly as short as 6 months in some cases. It just depends upon the individual calendars and dockets of the administrative hearing judges that hear these cases.

So, tremendous delay is going to ensue under the Government's theory, and there's no need to have these useless, superfluous fee petitions sitting before the district court judges and magistrates for a year or so on the average until --

QUESTION: So, the judgment is final for the Secretary, but not for you.

MR. FULLER: That's what the holdings are at this point. The claimant cannot appeal that sentence four remand, and therefore it's not a final appeal.

QUESTION: And so, he doesn't need to do anything in the district court within 30 days.

MR. FULLER: That's true, until the case is

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over. And that goes back to the intent of the EAJA statute. And what Justice Scalia was focusing on earlier --

QUESTION: But what -- let's just assume that it is irrelevant as to whether you prevail on remand or not, as to whether or not you are entitled to fees for the work in the district court.

MR. FULLER: Assuming that the remand is the victory, makes us the prevailing party?

QUESTION: Yes.

MR. FULLER: Well, then that makes it very easy, as Justice Scalia pointed out.

QUESTION: Yes, it makes it very easy. Yes. Well, which would you rather have?

MR. FULLER: If I had my druthers, in the perfect world I would say that the existing system should continue and the reason being that when you look at --

QUESTION: Well, yes, but just -- but also on the assumption that you're not entitled to fees for your work after remand.

MR. FULLER: In a sentence four or sentence six?

QUESTION: Sentence four.

MR. FULLER: Okay. I think that we should continue the way things are at the present time, and here's why. Because when you talk about the prevailing

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party status, that gets into the question of fees and benefits. And at the present time --

QUESTION: Oh, you think you'll get more if you prevail.

MR. FULLER: Well, I'm trying not to analyze it from the standpoint of what I'm going to get.

QUESTION: All right. Well, but you are.

MR. FULLER: I'm trying to analyze it from the perspective --

(Laughter.)

QUESTION: Yes, but you are.

MR. FULLER: I'm trying to analyze it from the perspective of the Social Security claimant whose fees or whose abilities financially are very limited by definition.

And the claimant is affected by the EAJA fee process. He's affected because, as we did in our case, for example, we waited until the contingency fee was fixed, the 406(b) fee, and then we came in and asked the court to award the EAJA fee in addition to that so that the court could compare those two fees and see --

QUESTION: I see.

MR. FULLER: -- that the proper refund was given to Mr. Schaefer, which he was refunded the less -- would be refunded, if we are successful, the lesser amount,

which is the EAJA fee amount in this case --

QUESTION: So, your preference to leave the present system intact is a dollars and cents calculation.

MR. FULLER: On the basis of what's good for the claimants, yes.

We contend in the final analysis that the system urged by the Secretary, the change in the existing practice, is unworkable and impractical and does not give effect, as the present system and as our approach does, to the intent and the plain language of the Equal Access to Justice Act. On that basis, the lower court decision should be affirmed and the award of EAJA fees in the amount of $1,372.50 to my client, Mr. Schaefer, should be affirmed.

QUESTION: Thank you, Mr. Fuller.

Mr. Kelley, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF WILLIAM K. KELLEY

ON BEHALF OF THE PETITIONER

MR. KELLEY: Thank you, Mr. Chief Justice.

I have two points. First, we believe that our approach, as set forth in the brief, accommodates the language of all the relevant statutes in this Court's cases, quite unlike respondent's approach. But if the Court disagrees with that, we believe it would be preferable to adopt the approach suggested by Justice

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Scalia that one is a prevailing party when one gets a sentence four remand. But we would also urge at that point that there is simply no basis for an award of so-called Hudson fees for the proceedings on remand.

The second point is as to the application of the rules in this case, respondent's argument regarding rule 58 and retroactivity was not raised or passed upon below, and we would urge the Court to remand the case for the court of appeals to consider those issues in the first instance.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kelley.

The case is submitted.

(Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.)

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Donna E. Shalala Of Health & Human Services
V Richard H. Schafer Case No: 92-311

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

BY Lynn M. May

(REPORTER)