ORIGINAL

In the

Supreme Court of the United States

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,

APPELLANTS

V.

JERRICO, INC.,

APPELLEE

No. 79-253

Washington, D. C.
March 19, 1980

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RAY MARSHALL, SECRETARY OF LABOR, ET AL.,

Appellants

v. No. 79-253

JERRICO, INC.,

Appellee

Washington, D. C.

Wednesday, March 19, 1980

The above-entitled matter came on for oral argument at 10:12 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

KENNETH S. GELLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of Appellants

THOMAS W. POWER, ESQ., Power & McDonald, 1919 Pennsylvania Avenue, N.W., Suite 504, Washington, D.C.; on behalf of Appellee

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 79-253, Marshall, the Secretary of Labor v. Jerrico, Inc.

Mr. Geller, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GELLER: Thank you, Mr. Chief Justice, and may it please the Court:

This case is here on direct appeal from the District Court here in the District of Columbia because a single judge of that court has declared unconstitutional and enjoined the Secretary of Labor from enforcing the civil penalty provisions of the child labor statute.

Specifically, Judge Gasch found that the due process clause of the Fifth Amendment is violated by the last sentence of section 16(e) of the child labor statute which provides that the sums collected by the Secretary as civil penalties may be applied towards reimbursement of the costs of determining child labor violations.

The facts in this case may be briefly stated. Appellee runs a chain of restaurants in the Southeastern United States. In 1969 and 1973 and again in 1974 the Department of Labor compliance officers found that appellee

had employed a number of busboys and waitresses in violation of the Federal child labor laws.

When two more such instances came to light in March 1975, the Department ordered an investigation into the hiring practices in all of appellee's restaurants. And thereafter the Assistant Regional Administrator of the Employment Standards Administration, which is the part of the Department of Labor that enforces the child labor laws, cited appellee for 169 separate child labor violations and assessed a civil penalty of $103,000. This sum represented a penalty of $300 each for unlawfully employing seven persons under the age of 14 plus a penalty of $100 each for unlawfully employing 162 persons under the age of 16.

In addition, the Regional Administrator assessed a penalty of $500 for each of the 169 children or a total of $84,500, because he believed that the history of child labor violations in appellee's restaurants, stretching back to 1969, showed that appellee had been aware of the child labor violations but had done nothing to correct them.

Now, appellee filed an exception to this citation and after a hearing the Administrative Law Judge found that the existence of the trial labor violations was clearly established but he disagreed with the Assistant Regional Administrator on whether these violations were willful.

The Administrative Law Judge therefore struck the

$84,500 assessment and reduced the civil penalty to $18,500.

Now, appellee did not seek judicial review of this decision. Instead several months later it began the lawsuit seeking a declaratory judgment that section 16(e) is unconstitutional and injunction prohibiting its enforcement.

QUESTION: Is there any reason why he couldn't have raised that at an earlier stage within the framework of this case?

MR. GELLER: Appellee could, we believe, sought judicial review of the Administrative Law Judge's assessment of the $18,500 and raised this constitutional objection as well as any other objections he had.

QUESTION: Without having raised it before the Administrative Law Judge?

MR. GELLER: It was raised -- I don't believe it was raised before the Judicial Law Judge, although the Administrative Law Judge could not have given relief on that ground. So I am not sure that that precludes raising it.

QUESTION: The first time he could have raised it would have been on review in an Article 3 court.

MR. GELLER: Well, he could have raised it earlier but I think the first time he could have had it -- it could have had any expectation of relief was in an Article 3 court. That is right.

Now, as I mentioned a moment ago, the District Court agreed with appellee's contentions; relying on a line of cases beginning with Tumey v. Ohio, Judge Gasch held that the reimbursement provision of section 16(e), and I quote: "... creates a situation in which bias may creep into the decisions of the regional office officials who impose civil penalties and that the statute is therefore invalid under the due process clause."

Now, it is the Government's position that the injunction entered by the District Court is erroneous for three separate reasons.

First, we submit that the due process standards established in cases such as Tumey and Ward v. Village of Monroeville are applicable with full force only to officials exercising judicial or quasi-judicial functions.

Second, even assuming that those standards do apply to the situation in this case, we contend that the court below erred in concluding that the child labor civil penalty scheme creates a significant risk of personal or institutional bias.

And finally, even if the reimbursement provision of section 16(e) does violate due process, the court below should have enjoined only the enforcement of that provision, it should have left the remainder of the civil penalty statute in force.

Acceptance of any of these three arguments would require reversal of the judgment below.

I would like to turn first to our broadest contention which is that the principles recognized in cases such as Tumey and Ward are inapplicable here because the Assistant Regional Administrator in citing an employer for a violation of the child labor laws and assessing a proposed penalty is acting as a plaintiff for a prosecutor and not as a judge. The basic notion that underlies Tumey and Ward is that a litigant is entitled to have his case adjudicated by someone who is free of any substantial likelihood of personal or institutional bias. The Court in those cases struck down statutory schemes that in the Court's words "offered a possible temptation to the average man as judge to forget the burden of proof required to convict a defendant or which might lead him not to hold the balance nice, clear and true between a State and the accused."

Now, we certainly have no quarrel with these principles but they cannot be easily transferred, we think, to situations such as this one involving governmental officials exercising prosecutive rather than adjudicative functions.

QUESTION: Mr. Geller, let us assume a mine run prosecutor, just an ordinary prosecutor, and let's say that

his compensation depended entirely upon the fines assessed against people he was able to get a court to convict.

Would there be any constitutional problem there? I don't know of any case.

MR. GELLER: Well, there is a case in fact, because Tumey v. Ohio, there was no aspect of Tumey which involved that and was not challenged by anyone. In fact this Court had language in its opinion which I hope to quote to the Court which said that that would be all right.

I don't see any due process problem there. It might be an unwise piece of legislation but defendant is entitled as a matter of due process to a fair and impartial judge. I don't know of any case that holds -- or any decision of this Court, certainly, that holds that as a matter of due process he is entitled to a neutral and impartial prosecutor.

QUESTION: Well, we have a great deal of prosecutorial discretion, as you know --

MR. GELLER: That is right.

QUESTION: -- in our system but if that discretion were distorted by an economic motive, one wonders.

MR. GELLER: I think that in light of the traditional deferance which courts have given to decisions by the Executive of who to prosecute and what to prosecute for that there would not a prophylactic or pro se rule such as the Court

imposed on judges in cases. I think it would be up to an individual defendant if he wanted to get the charges against him dismissed to show that his particular prosecution was somehow motivated by some improper or invidious reason. Appellee has never made that charge in this case.

QUESTION: In this case could any individual anywhere in the chain of command in the Labor Department have profited personally?

MR. GELLER: No, there is absolutely no evidence of any personal problem.

QUESTION: This apparently is a means of getting some funds without having them appropriated by Congress directly.

Is that the case?

MR. GELLER: Well, one of the unfortunate aspects of this case is that there is nothing in the legislative history to explain why the reimbursement provision worked its way into the statute but I think that that is a very reasonable speculation; that is correct. We are not dealing with very large sums of money here, as I intend to get to in a moment, in terms of ESA, the Employment Standards Administration's total budget. But I think that you are right, Mr. Chief Justice, that in part it was a desire by Congress to place some of the costs of investigating prosecuting child labor violations on the perpetrators of

those violations.

Now, in our view, the appropriate standard of judicial review should be different when scrutinizing factors that arguably influence the institution rather than the adjudication of civil or criminal proceedings. And as I say, I think that is attributable to the traditional judicial deference to prosecutorial discretion in bringing cases. In fact the Court recognized this crucial distinction in the Tumey case itself, because Tumey involved an Ohio liquor control ordinance which provided that the town mayor who sat as a judge in prosecutions under the ordinance would receive fees in addition to his salary if he convicted the defendant but not if he acquitted the defendant. And the Court found this provision to be unconstitutional.

There is another part of the very same ordinance that was involved in Tumey which provided that 50 percent of the fines collected were to be placed in a so-called secret service fund for the purpose of enforcing prohibition laws. And the ordinance specifically provided that 50 percent of any fine was to go to the deputy marshals, 10 percent of the fine was to go to the prosecutor and 15 percent was to go to the town detectives as compensation for their services in enforcing the liquor laws. And no one challenged the legitimacy of these latter provisions of the ordinance in Tumey, involving law enforcement officers rather than

adjudicative officers. In fact the Court expressly stated at the end of its opinion that in contrast to the situation with judges the legislature, and I quote: " ... may and often ought to stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people."

We think this proposition should govern the case here.

Appellee's answer to this argument is essentially to assert that ESA Assistant Regional Administrators function much like judges but there is simply nothing in the child labor statute or the accompanying regulations to support that assertion. Regional Administrators don't preside over hearings or make findings of fact based upon evidence presented in an adversaxy context. In issuing a notice of violation or assessing a proposed penalty they act just like an Assistant United States Attorney in determining what charges to bring or what relief to seek, as in a civil complaint.

Most importantly, perhaps, if the employer disagrees with the Assistant Regional Administrator's determination, either that there is a violation or what the penalty should be, it may seek review and it is entitled to de novo review before the Administrative Law Judge who is unquestionably

neutral. And the Administrative Law Judge's ruling is then subject to judicial review in an Article 3 court.

It is clear then that an Assistant Regional Administrator in imposing a child labor violation, assessing a proposed penalty does not act as a judge and that the standards developed in Tumey and Ward for assuring the neutrality of judges do not apply.

Our system contains a number of incentives, both direct and indirect, to motivate Executive branch officials to do their job diligently. Section 16(e) is one such incentive, because it stimulates child labor enforcement which Congress prior to the 1974 Amendments thought was an area that had been sorely neglected. We submit that Congress' efforts to achieve this beneficial result and, as I said, to impose some of the costs of ferreting out child labor violations on those who perpetrate the violations is not inconsistent with any notions of fundamental fairness embodied in the due process clause.

Now, if the Court disagrees with this contention and holds that the Assistant Regional Administrator's assessment of civil penalties for child labor violations is subject to the due process standards of Tumey and Ward, we believe that the judgment below must still be reversed because any possibility of bias resulting from the reimbursement provision is wholly insubstantial and remote.

This Court stated in Tumey and, indeed, Judge Gasch acknowledged that due process does not prohibit the exercise even of judicial power when the judicial officer's personal interest is so remote, trifling or insignificant that it may fairly be supposed to be incapable of affecting his judgment.

And that describes the situation in this case. First, as I said in response to the Chief Justice's question, unlike in Tumey, here no Labor Department official stands to benefit even by one dollar, personally, from any civil penalty assessment.

QUESTION: Well, maybe not personally but it can get into the Regional Office in a way, can't it?

MR. GELLER: It can but that is dependent upon a number of other things happening over which the Assistant Regional Administrator has no control. The case is in some way similar to Ward, I assume, because in Ward the mayor there also had no personal interest in the fines but the fines would go into the town treasury and the mayor was dependent upon the revenues in the town treasury. But here --

QUESTION: This whole argument is based on the assumption that the Administrator is the decision-maker?

MR. GELLER: I think that's right. I don't think the Court has to reach this portion of our argument if it

agrees with us in our initial assertion which is that the District Court erred in relying on cases like Tumey and Ward.

But if Tumey and Ward are applicable, we still think that the judgment should be reversed because the interest here is so insignificant that it couldn't possibly have affected the decision-making of the Assistant Regional Administrator. Unlike in Ward where the moneys went right to the town treasury, here all of the moneys go to ESA's national office which may or may not decide to distribute the money back to the regional officials. It doesn't have to.

And the statute is clear that even when ESA's national office decides to distribute the money to the regional officials it does it on the basis of costs actually incurred by the regional officials and not the penalties that are assessed.

QUESTION: Nevertheless you are speaking of fairly large sums.

MR. GELLER: Well, I don't think we are talking of fairly large sums in comparison to ESA's total budget. In Tumey and Ward the amounts that were involved represented almost half of the town's budget, it was quite substantial. And there was direct evidence in each of those cases that the mayor was quite concerned about the possible loss of

that revenue source.

Now, here by contrast the evidence shows that the sums collected in civil penalties represent less than one percent of ESA's total budget and that far from being fiscally dependent on these moneys ESA in each of the years since this reimbursement provision was enacted has turned back to the Treasury as unused funds an amount far greater than was even collected as civil penalties.

So it is quite difficult to imagine how any Assistant Regional Administrator would be influenced to even the slightest extent by the possibility that some of the moneys collected as civil penalties for child labor violations might be returned to his office at some later point.

We set forth at some length in our brief the series of increasingly improbable assumptions that the Court would have to indulge in in order to conclude that there is any real possibility of prejudice from the reimbursement scheme.

QUESTION: What happens if the Washington office notifies all the regional offices that you haven't reported any money in the last year and we need money?

MR. GELLER: I assume that would be -- I don't know that any such communication would go out. I think it would be a proper communication for the national office to say to the Atlanta Regional Office, "You have uncovered X percent of the total Nation's" --

QUESTION: No. "Everybody else has uncovered it but you."

MR. GELLER: I think that would be a proper communication. I think that these regional offices --

QUESTION: Wouldn't that sort of bend somebody's arm?

MR. GELLER: No, because --

QUESTION: I am not saying I am sure this wouldn't happen.

MR. GELLER: Well, I am sure it wouldn't happen; but even if it did, it wouldn't have the influence that Judge Gasch attributed to it because the amounts that the Assistant Regional Administrators assess are really irrelevant. It is the amounts that are collected and anyone who challenges the assessment gets de novo review before the Administrative Law Judge who can reduce the amount of the penalty to zero or any figure between zero and the amount initially assessed.

Now, I would like to turn briefly in the few minutes remaining to an issue that the Court need not reach unless it agrees with Judge Gasch that the reimbursement provision, section 16(e) renders the civil penalty statute unconstitutional. That is the question of proper remedy. The District Court struck down the entire civil penalty statute. It is our position that that remedy is over-broad and totally unwarranted, that at most the District

Court should have severed the last sentence of section 16(a) providing for the reimbursement of civil penalty funds that are actually collected.

The question of severance of course is essentially one of legislative intent. In this case there is strong proof that Congress would have wanted to have a civil penalty statute without any reimbursement provision rather than have no civil penalty remedy for trial labor violation at all.

First the statute contains a broad severability clause.

And second, the legislative history of section 16(e) shows that Congress' overriding concern was to provide the Department of Labor with a new tool to strengthen trial labor enforcement because the injunctive and criminal provisions of the trial law were found to be totally ineffective. This congressional objective would obviously be frustrated if the entire civil penalty statute were struck down.

The last and best piece of evidence perhaps that Congress would have wanted the reimbursement provision severed if it were found unconstitutional is that in a number of similar civil penalty statutes Congress has provided that the funds collected as civil penalty shall go into the United States Treasury. And that is the result that would occur here if the last sentence of section 16(e) were severed from

the rest of the statute.

So for all these reasons we believe that the District Court erred in declaring the civil penalty statute under the child labor laws unconstitutional and in enjoining its enforcement and we believe that the judgment below should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Geller.

Mr. Power.

ORAL ARGUMENT OF THOMAS W. POWER, ESQ.,

ON BEHALF OF THE APPELLEE

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

Our differences with the arguments of the Solicitor General can be summarized in, I believe, four very brief statements.

First, the most significant issue here, in our judgment, is not actual bias but rather, and far more importantly, the potential for bias and the appearance of bias. It does not matter how much money was actually collected or how much money was distributed to a given regional office. The potential is here for these moneys to be used to increase salaries and to substantially increase the appropriation of the various offices involved.

Secondly, the Administrator and his assistant,

acting under section 16(e), are judges under the clear statutory language under section 16(e). And they cannot be likened to prosecutors.

Third, potential for bias and actual bias under section 16(e) is very substantial and not remote.

And finally, severance of the reimbursement provisions will not cure the potential for bias or the appearance of bias.

QUESTION: Mr. Powers, don't you concede that there is a good deal of attenuation here?

MR. POWER: I am sorry --

QUESTION: Don't you concede that there is a good deal of attenuation here between what in fact happens and what might be a genuinely undesirable and perhaps unconstitutional situation?

MR. POWER: Well, Your Honor, I think that what in fact actually happened was an unconstitutional situation and in fact you had actual bias in this particular case. But nevertheless I see the potential as the far greater evil inherent in this particular section 16(e) of the Fair Labor Standards Act, which is entirely unique in any civil money penalty section not only in the United States but, to the best of my knowledge, in the country. I cannot find anything anywhere near like this in any statute.

QUESTION: Well, admittedly it is unique but an

entire series of steps would have to occur before the actual bias could be reached, wouldn't it?

MR. POWER: Well, the statute provides for example, Your Honor, that the funds shall be used to reimburse the assessor of the fines. And those funds go directly to the salary and expense budget of the various offices involved.

QUESTION: But the particular individuals aren't going to get more money because they levy more fines.

MR. POWER: I think that that is entirely possible, if not likely. If you read the statutory language that is precisely what is provided. I think that is discretionary with the Secretary of Labor and --

QUESTION: You mean they will get a raise in pay?

MR. POWER: I think that is entirely possible. I think it is discretionary to the Secretary of Labor to give them that money. Why not? The Act provides that they will get the money and that it shall be used in the discretion of the Secretary of Labor to reimburse them for their ordinary expenses. It further provides that the funds may be used notwithstanding any other provision of the law to hire individuals outside of the United States Government to effectuate the purposes of this Act.

Moreover, the funds can be quite substantial as related to an individual office of the assessment. And

frankly, I see no prohibition in the statutory language from the funds going directly to the so-called Administrative Law Judge. That is an office of the Department of Labor. And although it is argued by the Solicitor General that we are entitled to a fair and impartial judgment, at that level we do not see it. Because we think that the ALJ or the Administrative Law Judge rightly under the statute not only could have but the Secretary of Labor was required and mandated under the statute to reimburse the Administrative Law Judge for his expenses as well.

Now, I don't think he ever got around to it, because we raised the issue right at the outset at the administrative level and I guess this was really the first case that came up on these civil money penalties. This was adopted in 1974 and regulations were issued more like '75 and this was the first case really to come before the Administrative Law Judge. And he never really did any work that would gain him the share of the split on the moneys that have been raised earlier. But the statute provides that he shall receive the funds that he got, he is responsible for determining the funds, he is part of the process and he should have got a proportionate share.

QUESTION: Are you suggesting that the Secretary exercising this discretion could provide that annually he would give awards of $1,000 each to every Administrative Law

Judge that sustained a fine?

MR. POWER: Pardon me, Mr. Chief Justice. Did you say "could" or he "would"?

QUESTION: Could.

MR. POWER: Yes, I think he clearly could. And there is nothing in the statutory language to prevent him. And the statutory language says "notwithstanding any other provision of the law." So unless there is some subsequent law that would prohibit that kind of action from him, I don't see why not. And I believe he would violate the Constitution but I think even the potential for that violates the Constitution.

QUESTION: And he could be fired too, couldn't he?

MR. POWER: I would say that virtue of section --

QUESTION: He could be fired for doing it.

MR. POWER: The Secretary of Labor could be fined?

QUESTION: Yes. That would stop him from doing it, wouldn't it, it would slow him down.

MR. POWER: Well, I think that would be sufficient to hold he couldn't do it if he was going to be subject to a fine but it seems to me --

QUESTION: I said "fired" -- discharged.

MR. POWER: I am sorry, I thought you said "fined."

QUESTION: Permitted to resign.

MR. POWER: Yes, he could but that would be a political consideration. He could be fired and I am not suggesting he would do it. But in this country we have had men in position that could take that kind of action. It could be a very lucrative, rewarding propositio Several millions of dollars could be raised.

In the instant case the Respondent, the appellee, had some 8,000 minors employed over a period of two years and they found 169 of them to be in violation and assessed a fine of $103,000. Now, you could multiply that into the billions in the United States.

So the potential is there.

We believe the greatest issue is that 16(e) mandates that a penalty --

QUESTION: Excuse me, Mr. Power.

MR. POWER: Yes.

QUESTION: Which is the provision of 9(a). I guess it is 9(a), is it?

MR. POWER: I think --

QUESTION: Which is it that covers the Administrative Law Judge?

MR. POWER: The Administrative Law Judge?

QUESTION: Yes.

MR. POWER: The section 16(e) of which 9(a) is a part and it provides that the funds shall be used to --

QUESTION: Well, it says, "for the ordinary expenses of the agency and/or to secure the special services of persons who are neither officers nor employees of the United States."

But I don't see -- what is the language that covers the Administrative Law Judge?

MR. POWER: Well, the language that says that the money shall be credited to the appropriation of the office --

QUESTION: Well, I read in 16(e):

"Sums collected shall be applied toward reimbursement of the costs of determining violations necessitating collecting such penalties."

That is not it, is it?

MR. POWER: No, I am referring to the language that says --

QUESTION: 9(a)?

MR. POWER: 9(a):

"All moneys --

QUESTION: Oh, yes.

MR. POWER: -- "hereinafter received by the Department of Labor in payment of the cost of such work" --

And this would be the work of collecting, determining and assessing the fine --

"shall" --

Not "may" --

"shall be deposited to the credit of the appropriations of that bureau, service, office, division or agency of the Department of Labor" --

And of course the Administrative Law Judge is an office of the Department of Labor --

"which supervises such work" --

And then it goes on further and says:

"may be used in the discretion of the Secretary of Labor and notwithstanding any other provision of law for the ordinary expenses of such agency" --

And as Judge Gasch found, those expenses include the salary and include the other overhead items --

"the ordinary expenses of such agency or to secure the special services of persons who are neither officers nor employees of the United States."

So the Secretary of Labor --

QUESTION: Well, in any event, the Administrative Law Judge you say is within that language "bureau, service, office, division or other agency." Is that --

MR. POWER: Yes, he would be.

QUESTION: How would he benefit from the collection of fines?

MR. POWER: Well, he would be reimbursed from --

QUESTION: Well, his salary is set, isn't it?

MR. POWER: Well, again, his salary and the amount of work, the expenses of his office are definitely restricted by the budgets under which he operates, both as recommended by the President and approved by Congress.

Well, now, if he could substantially increase --

QUESTION: Don't all Administrative Law Judges get the same or are they from bureau to bureau?

MR. POWER: I am not certain --

QUESTION: Don't you have to be sure of the answer to that question?

MR. POWER: Beg pardon?

QUESTION: Don't you have to be sure of the answer to that question?

MR. POWER: Well, when --

QUESTION: If what Administrative Law Judges get is set by statute --

MR. POWER: Yes.

QUESTION: -- and regardless of how many cases they hear or what fines are collected -- well, how does he benefit or not?

MR. POWER: Well, I think he expands his overall operation.

QUESTION: Just explain that.

MR. POWER: He gets an increased appropriation, if you will --

QUESTION: How do you know that?

MR. POWER: Well, I am sorry, Justice White. I am suggesting that it is entirely potential within the language of section 16(e) of the Fair Labor Standards Act.

QUESTION: It just goes into the -- it just goes to defray the overall budgetary expenses.

MR. POWER: If it went into the treasury that would not --

QUESTION: Oh, no, it goes to defray the budgetary expenses of the agency or whatever it is. But all it means is -- all it means is that maybe that agency will give back to the United States some of its budget.

MR. POWER: That is only a potential. Maybe they will not.

QUESTION: Well, maybe they will not but --

QUESTION: Well, you must be saying, Mr. Powell, that this authorizes something in the way of a bonus to the Administrative Law Judge.

MR. POWER: Yes, it permits a bonus. In other words it permits the -- let us assume that --

QUESTION: But surely you don't suggest that it increases his income for that year?

MR. POWER: I am suggesting very definitely that, Your Honor. I think it is mandated that his income, or at least his budget authorization is increased for that year

and it should be in --

QUESTION: The Administrative Law Judge's own salary?

MR. POWER: Oh, I am sorry. I don't know how the Secretary of Labor would handle it. But in his discretion I think that is entirely permissible because it says "notwithstanding any other provision of the law."

QUESTION: You don't suggest the Secretary has ever given it that interpretation, do you?

MR. POWER: No, sir.

QUESTION: You are just suggesting --

MR. POWER: But I am --

QUESTION: -- it might happen under this language?

MR. POWER: That is correct.

QUESTION: Could the Secretary give it to himself?

MR. POWER: Again, with the language that says, 'notwithstanding any other provision of law, in the discretion of the Secretary he can use it for the ordinary expenses, I think perhaps he could.

QUESTION: And he would then raise his salary above that of Congress? I wouldn't like to see what would happen to him.

MR. POWER: Well, again, that is a political consideration and --

QUESTION: Well, talking about the broad language,

you say it is so broad, it was broad enough to give the money to the judge, it was broad enough to give the money to himself.

MR. POWER: That is correct.

QUESTION: And do you know of any statute that has ever been passed like that?

MR. POWER: No, I do not.

QUESTION: Do you think Congress meant to do that?

MR. POWER: No, Your Honor, I do not. I think Congress has a bill pending right now to change the proposition but I don't think Congress really intended it all. I think because of the way the language was drafted Congress never realized what the impact was. I know myself, I was working on the legislation at the time and I had no idea of the significance of it.

It comes from a very unique provision in the law where the Department of Labor has a division that gathers statistics called the Bureau of Labor Statistics, I believe, and under that provision of the law it is permissible for the Secretary of Labor to have outside sources fund statistical research work. In other words, while they are conducting one survey they might pick up a certain amount of money from a company to gather additional information that they are more efficient at gathering and can do more economically. And in the process they add to their

appropriation.

But in this instance, for example, with respect to an Administrative Law Judge, let us assume that an Administrative Law Judge has an appropriation of $1 million. If he spends enough --

QUESTION: Wait a minute.

An Administrative Law Judge has an appropriation?

MR. POWER: The office of the Administrative Law Judge.

QUESTION: Well, an Administrative Law Judge doesn't have an appropriation any more than a Law Clerk of this Court has.

MR. POWER: I am sorry, he has a budget within the Department of Labor.

QUESTION: A line item.

MR. POWER: A line item.

QUESTION: Right. That is no budget.

QUESTION: Going back to the detail concerning the Administrative Law Judge that seems to have exercised some of the Brethren up here, Judge Gasch was not with you on this point, was he?

MR. POWER: I think that Judge Gasch was responding to a --

QUESTION: Well, let me read to you -- this is from his findings:

"Thus the interest of an Administrative Law Judge in assessing or affirming the imposition of penalties is too remote to warrant the conclusion that due process requirements are not met at the Administrative Law Judge level."

It seems to me to cut directly against your argument as to detail on his salary.

MR. POWER: Again, I agree with you, although I do not think that it was necessary for Judge Gasch in that proceading to consider that question. He reached his decision based on the potential for bias at the lower level and he reached it on the motion for summary judgment.

QUESTION: That may be true but you are certainly arguing it here.

MR. POWER: Yes, sir; that is correct. And the argument has been made that it is clear that he has not potential for bias and I do not believe that issue was addresse by the Solicitor General. He said that was conceded, and I do not agree that was conceded at the lower level.

QUESTION: Do you say that each Administrative Law Judge assigned to the Labor Department has a line item appropriation for his salary?

MR. POWER: Not for his individual salary. I believe it is to the entire office, the salaries are set.

QUESTION: If they have 150 Administrative Law

Judges there is a lump sum in the budget which is a line item, compensation; but no Administrative Law Judge has any budget or any part of any budget allocated to him, no more than any other branch of the Government.

MR. POWER: That I understand, Mr. Chief Justice.

Again, on the question of the actual right to appeal to Administrative Law Judge, the argument being made that the Administrator or the Assistant Regional Administrator can be likened to a prosecutor rather than to a judge, we disagree with his contention.

First, the argument is made that we are entitled to de novo review by the Administrative Law Judge. We do not believe the statutory language permits the Administrative Law Judge to give us a judicial review or a de novo review. The language of the statute permits a party who has been assessed a fine, an employer assessed a fine with a right to a hearing only under very limited conditions, expressly limited to an objection by the employer to the determination that the violations actually occurred. So, for example, an employer were charged with 169 violations of the child labor laws and in fact those violations occurred, he could not obtain a hearing before an Administrative Law Judge as to the reasonsbleness of the penalty.

And that is the clear and unequivocal reading of the language. It is our contention that this is -- was

the argument that was made by the Department of Labor in this particular case before Judge Gasch and it is our contention that it was made in other cases by the Department of Labor. And there is one specific Administrative Law Judge that did in fact hold that in light of the fact that the employer only objected to the reasonableness of the penalties assessed rather than the fact that the violations actually occurred, that he could not give him an administrative hearing.

And consequently we assert that the Administrator of the Fair Labor Standards Act and the Assistant Administrator is in fact a judge under section 16(e) and cannot be likened to a prosecutor.

Also I would like to make the point that in the instance of -- unlike a prosecutor, in this instance the Assistant Regional Administrator sets the penalties. He has the discretion and the mandate of the Congress to determine how much of this $1,000 fine should be set. The prosecutor doesn't set the penalty. The prosecutor, moreover, doesn't get to keep the penalty. The penalty goes to the Treasury of the United States, it doesn't go back to the office to reimburse the prosecutor for his expenses.

Again, we see no reason why the prosecutor in our instance could get the increase in salary.

I would also like to make the point that in truth,

in fact that it is not so much the Assistant Regional Administrator who assesses these fines or who is the first judge in the first instance. It really is the Employment Standards Administration in Washington, D.C. They approve all of these individual fines. They negotiate or approve individual settlements and they get the benefits of the penalties that are actually assessed.

The argument was made that --

QUESTION: Is this the same pattern of assessing fines as under the Mine Safety Act, if you know?

MR. POWER: No, I know not, Your Honor, because, for example the OSHA Act with which I am familiar, the fines assessed go directly to the Treasury of the United States. This is the only area where the fines go back to the assessor of the fines to reimburse him for his cost of assessment. So this is unique --

QUESTION: Well, we had a case argued here last session two or three weeks ago in which they were not criminal fines but they were as here, penalties. And those went toward enforcement of that statutory scheme, which was an anti-pollution scheme.

MR. POWER: If it is an anti-pollution, Your Honor, I don't beliave they went back to the assessor of the fines. I believe that Act provides that the fines -- and I question the constitutionality of it myself but I think this is far

more serious in this case -- those fines I believe were used to provide a fund to clean up waters. But they didn't go back to reimburse the assessor of the fines. That is about the closest --

QUESTION: That was not an issue in that case.

MR. POWER: I see.

QUESTION: The question was whether they were civil penalties or criminal fines.

MR. POWER: I question the constitutionality even of that provision, although I think this is far more serious, because I think an assessor of fines in the Environmental Protection Agency is probably highly motivated for assuring adequate funds to clean waters. And I think he could be readily biased by his desire to increase the coffers to clean waters; and I think that is probably a function of Congress. But nevertheless the fines in that instance do not go back to the party assessing the fines.

The argument was made by the Solicitor General that the potential for bias and actual bias is not substantial and is too remote. We believe that this argument cannot be properly made. The reimbursement of the actual cost, including salaries and expenses, go directly to the assessor, to the Administrator, to the Assistant Regional Administrator. And I emphasize that this was the finding of Judge Gasch in his opinion. Whether the fines were in fact used to increase

salaries or not, they can be used under the clear statutory language.

In the instant case, $39,200 went to the Atlanta office. That was 2-1/2 times what any other office got from fines collected that year.

QUESTION: Mr. Power, are you suggesting that of that $39,000 the Regional Administrator in Atlanta could simply decide to put it in his own private bank account?

MR. POWER: No, I am not, Justice Rehnquist. I think that he would not have the discretion but I do think the Secretary of Labor has that kind of discretion under the Act.

QUESTION: The Secretary of Labor could tell the Regional Administrator in Atlanta: "You have collected so many fines this year that I am going to give all of them to you."?

MR. POWER: It appears to me since the Act has such broad language and says "notwithstanding any other provision of law," that he has this kind of discretion.

QUESTION: And did you suggest he could put it in his own pocket?

MR. POWER: The Secretary of Labor could put it in his own pocket?

QUESTION: Yes.

MR. POWER: I think it is permissible, directly

or indirectly; yes.

QUESTION: Well, I suppose the Secretary of Labor could take all the furniture out of his office and take it home and try to keep it but he might run into some other problems?

MR. POWER: Yes, I think that would be in violation. I think that he would have to relate any remuneration to himself to reimbursement for the cost of doing work in connection with child labor enforcement.

But I think the more significant thing for example in that Atlanta Regional Office is the question: The Administrator or the Assistant Regional Administrator, is there a potential for bias here? And if the man has a budget of let us assume $100,000 a year to operate his office, to employ his secretaries, for his travel and expense budget and he can increase that budget by really slapping it to employers by way of civil money penalty fines and increase that budget from $100,000 a year to operate and get to $200,000, then I think he has got a real potential for bias, without even looking into the question of whether or not he can increase his salary.

Finally, the question of severance I would like to touch upon in my remaining couple of minutes.

Actually, if you were to sever, if this Court were to sever the reimbursement provision of section 16(e)

alone, we do not believe it would cure the potential for bias or appearance for bias, because severance of an unconstitutional section or language of 16(e) would not in fact give actual notice to investigators out of the Department of Labor or to Assistant Regional Administrators or to Administrators or, for that matter, Administrative Law Judges or employers. The language would still read as it presently reads, that the moneys shall be used to reimburse the assessor of the fine.

Also, severance ignores the fact that all regulations currently adopted and the schedule of fines and instructions to assistants at the Department of Labor in determining the amount of the fines are predicated on the assumption that the home office, the Washington office, will get its share. So what we are suggesting is that even the -- that we would be back here in the Supreme Court if you severed the reimbursement provision, because we would challenge the constitutionality of the regulations themselves because they were based on the assumption that the Department of Labor was going to get its share of the funds and that they did not meet their responsibility to set fines on the basis of the gravity of the offenses as instructed by Congress.

And finally, we do not believe that severance would accomplish congressional intent. Congress directed these moneys should be used to reimburse the Department of

Labor and be used for child labor enforcement purposes.

If the speculation is going to be made that they would be just as satisfied to have the moneys go into the Treasury of the United States, we question that. We think they might well have not intended that the existing child labor regulations be enforced. They might well have intended that these funds be used to revise what we consider to be an antiquated and grossly inadequate set of child labor laws which are the primary responsibility, in our judgment, for the teenage and minor unemployment we have in the United States today.

And it is our feeling, as is actually the case, there is a bill pending in Congress right now that would not only require that the civil money penalty be set and go to the Treasury of the United States but, in addition to and as part of the same piece of legislation, would require the Secretary of Labor to completely review existing child labor regulations so as to assure justice in enforcement of this particular statute by having a logical and reasonable set of child labor regulations.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Power.

Mr. Geller, do you have anything further?

MR. GELLER: Just a few short points, Mr. Chief Justice.

REBUTTAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GELLER: First I would like to lay to rest this notion that Administrative Law Judges might be entitled to reimbursement under section 16(e). There is absolutely nothing in the statute to back up that statement, the Secretary of Labor has never construed the statute that way and, as Mr. Justice Blackmun noted, Judge Gasch rejected that argument. Section 16(e) allows reimbursement only to those officers have supervised the work of assessing and collecting civil penalties. The officer in the Department of Labor that supervises the enforcement of the child labor law is the Employment Standards Administration. Administrative Law Judges are not part of the Employment Standards Administration.

Moreover, it would raise problems, I think, not only under the Fifth Amendment but under the Administrative Procedure Act to construe the statute so that any moneys went to the Administrative Law Judges. And I think it would be a sort of bazaar form of statutory construction to construe a statute so as to make it unconstitutional.

Now, as to this notion that the Secretary --

QUESTION: Administrative Law Judges get set salaries.

MR. GELLER: They get set salaries, set by law,

can't be varied.

QUESTION: Do they all get the same or does it vary --

MR. GELLER: I don't know.

QUESTION: -- on the basis of seniority or --

MR. GELLER: I assume they do. Once they hit the ceiling they may not be able to get any --

QUESTION: Article 3 judges don't.

MR. GELLER: Excuse me, Article 3 judges, well, that is an issue that may be up in this Court.

The Secretary or the Assistant Regional Administrator cannot put the money in his pocket, the statute is quite clear that the sums collected must be applied toward the reimbursement of the costs of determining child labor violations.

Finally, as to appellee's point that de novo review is not available before the Administrative Law Judge solely on the question of the reasonableness of the penalty, this very case shows that that is false. Because appellee never challenged the violations in this case, conceded that it had violated the child labor laws before the Administrative Law Judge. The Administrative Law Judge still reduced the penalty from $103,000 to $18,500.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.