ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Appellant V.

SPERRY CORPORATION, ET AL.

CASE NO: 88-952

PLACE: WASHINGTON, D.C.

DATE: October 10, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, :

Appellant :

v. : No. 88-952

SPERRY CORPORATION, ET AL. :

Washington, D.C.

Tuesday, October 10, 1989

The above entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 o'clock a.m.

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Appellant.

JOHN D. SEIVER, ESQ., Washington, D.C.; on behalf of the Appellees.

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PROCEEDINGS

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 88-952, United States versus Sperry Corporation. Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE APPELLANT:

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

In this case, the court of appeals for the federal circuit held unconstitutional an act of Congress, Section 502 of the Foreign Relations Authorization Act, that requires, as relevant here, the deduction and payment to the federal treasury of one and a half percent of an award made by the Iran-United States Claims Tribunal in favor of the United States claimant, and paid out of the security account established pursuant to the Algiers Accords that were described in some detail in this Court's opinion in Dames & Moore against Regan. The one and a half percent fee is stated by the text of Section 502, and I am reading from page two of the government's brief, to constitute reimbursement to the United States government for expenses incurred in connection with the arbitration of claims of the United States claimants against Iran before the Tribunal, and the maintenance of the security account.

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The statutory fee schedule not only was designed for that purpose, as the legislative history corroborates, but our experience to date has shown that the receipts from the fee in the aggregate not only do not exceed the purpose for which the fee was required, but, as we recount in some detail in our reply brief, page 12, note 11, they cover only about one half of the expenses of servicing the Tribunal and claimants before the Tribunal and the security account. And this is calculated against only the expenses of maintaining these institutions in operation. No component was included, as it well might have been, for the preliminary expenses that were incurred by the government in negotiating the Algiers Accords themselves and in the military deployments that were undertaken to support those negotiations. So --

QUESTION: At what point, Mr. Wallace, do you get to the point where it really wouldn't be permissible to attribute these costs to --

MR. WALLACE: Well, I am just -- I think insofar as they can be related to a benefit that is conferred upon the special class of persons they could be included. I am merely making the point, Mr. Chief Justice, that the costs are -- against which these fee receipts are being compared -- are very conservatively calculated in showing benefits received by complainants who use the Tribunal and the security account. Because it is only the post negotiation maintenance of the

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Tribunal and security account that is taken into the calculations.

There is no claim in this case that the award was an inadequate payment of the claim. Indeed, there is no basis for such a claim in this case, because the award merely effectuated the settlement between the parties that the appellees agreed to, and the award was paid in full from the security account. There is, accordingly, no basis in the facts of this case for the dis -- the court of appeals invocation of the concern expressed in Justice Powell's separate opinion in partial dissent in Dames against Moore, that perhaps some of the commercial claims of particular Americans would be used as bargaining chips for foreign relations purposes, for release of the hostages, et cetera. Since -- and perhaps the security account would prove inadequate to pay the claims in full, even if the award is properly made by the Tribunal.

Nor, may I add, has experience in general with the functioning of the Tribunal and the security account borne out the concern that these claims might be sacrificed. We have, on page 21 of our brief, recounted that more than $1 billion of payments have thus far been made out of the security account to successful United States claimants, and that Iran has replenished the security account on 21 occasions when its balance fell below the $500 -- $500 million minimum that is,

that requires it under the Accords to replenish the account. Thus far, it has been able to satisfy its obligations to replenish the accounts --

QUESTION: Well, that's not really this case, is it? Sperry would say, I suppose, that we settled for a figure that was satisfactory to us but then the government added on the additional deduct, and that is what we are here to discuss.

MR. WALLACE: Exactly so.

QUESTION: And I would -- I don't think they concede that the settlement was adequate if you take into account the deduct. I see nothing to that effect in the pleading.

MR. WALLACE: Exactly so, Mr. Justice. The challenge here is solely to the one and a half percent fee rather than to the award itself, but it is a fact that the award was made by means of a negotiated settlement to which Sperry agreed, and that at the time the award was submitted to the Tribunal for its entry of an award and for payment of the fee, of the award, out of the security account, Sperry knew that the government had provided, through a treasury directive license, that two percent of the award would be deducted. So that there was a basis in the settlement negotiations for Sperry to take into account the likelihood that a fee would be deducted.

QUESTION: Well, you could say that, though, about a 25 percent fee, that didn't purport to be equal to the cost. It was many times the cost. You could say that Sperry knew about

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that when it made the settlement, so perhaps it should have gotten 25 percent more than it thought it should have.

MR. WALLACE: Well, that is quite so, but the point nonetheless is relevant to the foreseeability of what the consequences of the settlement would be, and --

QUESTION: Well, of course, I suppose Sperry could foresee that that fee would be declared unconstitutional, or unauthorized rather, by the United States claims court, so that still brings us back to square one, it seems to me.

MR. WALLACE: Since Sperry did not waive its right to challenge the fee -- there is, however, Justice Kennedy, another respect in which these aggregate figures are relevant here, and that is that, as we have pointed out in our footnote 16, thus far Iran has managed to satisfy its obligations to replenish the security account by means of payments out of an escrow fund that has been created for the interest earned by the security account.

Therefore, Iran is able to make payments from the security account pursuant to awards entered by the Tribunal without having to call upon any other funds. It can make these payments from funds that are not otherwise at its disposal for any other purpose. So that the existence of the security account, pursuant to the awards, undoubtedly serves as an inducement for Iran to settle and discharge claims through that mechanism and through use of these funds that are

not otherwise available to it. So there is, in that sense, a benefit being conferred in the negotiating process itself by the mere existence of the Accords and their implementing mechanisms.

Now, the one and a half percent fee, as I have recounted, constitutes what is known in the law as a user fee, since it is reasonably calculated merely to defray the costs of services being provided by the government for the special benefit of a limited class of persons using those services. This Court has on numerous occasions upheld the validity of such a fee. One recent example was Kadrmas against Dickinson Public Schools, involving a fee for school bus transportation services. As the Court stated in Massachusetts --

QUESTION: Mr. Wallace, excuse me. Do we know if Sperry had any security -- or had any other means by which it could have effectuated its claim had the government not entered into these international agreements and set up the fund?

MR. WALLACE: Well, --

QUESTION: I mean it just seems to me a little bit unreal to say, were I Sperry, I would feel a little bit aggrieved when the government says you cannot pursue your claims through normal legal means; we are going to erect a barrier to that. And then we are going to make you pay for the privilege, as well. I mean, that is what is going on

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here, right?

MR. WALLACE: Well, that depends on what you mean by normal legal means, Mr. Justice. Sperry had brought --

QUESTION: Attaching any of the assets of Iran in this country and levying upon them.

MR. WALLACE: Eleven months after the president froze Iranian assets in this country, at a time when there was a threat by Iran to withdraw all those assets, Sperry did attach the assets. But under this Court's holding in Dames and Moore, that was entirely contingent and subordinate to the orders of the president saying that, while such attachments would be allowed, they could be nullified at any time, and the assets could be moved out of the country. The likelihood is that by the time Sperry brought its suit in the United States courts, there would not have been any assets to attach.

QUESTION: Because of the government's order that we approved previously, correct?

MR. WALLACE: Well, the assets were there only because the president froze them in the first place because of the international crisis that had arisen. When one is doing business with a foreign country there are risks involved beyond the risks of doing domestic business. For one thing, it is not easy to sue sovereign powers. They enjoy sovereign immunity and other defenses that other defendants would not enjoy. There is a limited waiver of that sovereign immunity

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in the Foreign Sovereign Immunities Act, but there is still active state doctrine defenses, difficulties in collecting judgments, if there are no assets here to attach.

There is always a risk that a foreign government will fall, that our relations with the foreign power will change in a substantial way that would affect commercial relations and result in financial disputes. And those doing business with foreign governments do it against a long his -- background of experience in which they share both the risk and the benefit that they may have to rely on the president's intervention to resolve financial disputes that otherwise would not easily be resolved in the courts. This is a risk that in some ways is comparable to the risk undertaken by doing business with a domestic corporation that may fail, and then instead of being able to pursue your claim against that corporation in the ordinary courts, you might find your claim subject to the automatic stay in bankruptcy, and to be submitted only in the bankruptcy court. And it is subject to --

QUESTION: You are saying that this is a user fee that has a nexus to the transaction that Sperry entered into, and therefore it is essentially reasonable. Is that the proposition?

MR. WALLACE: Well, that is correct. This Court --

QUESTION: What about the retroactivity aspect of it? I assume that user fees are generally related to the service

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provided. Can they be retroactive? Can the District of Columbia say we are in bad financial straits and we are charging a user fee of $100 every time the fire truck comes out? I assume they could do that. Could they make it retroactive, and say everyone who has had a fire truck in the last five years now has to pay us $100?

MR. WALLACE: Well, it is common for tax laws to be made retroactive, as this Court has upheld many times, the United States against Darusmont, and others, where there is no specific service that was provided to the taxpayer, but Congress wanted to achieve uniform treatment of the taxpayers under this Court's decisions dealing with the question of retroactivity of legislation regulating economic relationships, the Pension Benefit Guaranty cases, and Usery against Turner Elkhorn.

The question is whether there is a rational legislative purpose for the retroactive application itself. And here there clearly was a rational purpose of treating all claimants who benefitted from the Tribunal and the awards uniformly and having them all share the cost, rather than just having some of the claimants who benefit from these special institutions that we negotiated to protect American claims pay the cost.

QUESTION: So you would say that anyone who uses services of the government is under the contingent liability that they may be charged a retroactive user fee?

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MR. WALLACE: It does not exceed the cost to the government of providing those services -- if it is reasonable to do that. We are not talking about a confiscatory fee of any sort here. We -- Sperry received an award of $2,800,000 and has been charged a fee of $42,000, a very modest fee compared to attorneys' fees or other fees that are often incurred in securing such an award, and a fee that does not exceed the direct expenses to the government of maintaining these special procedures for the benefit of American claimants, such as Sperry, to enable them to recover their claims against the government of Iran.

QUESTION: Well, what if Congress decided that the filing fees in the district court have been low for a lot of years. They haven't nearly covered expenses. So we are going to now charge $200 to file a complaint in the district court and we are going to go back 10 years, and anyone who filed a complaint in the district court in the last 10 years will be assessed the difference between what the filing fee he paid was and $200.

MR. WALLACE: That would raise problems considerably beyond the problems here since there was already a two percent fee prescribed before Sperry submitted its claim, even though Sperry had a legal argument that that fee would not be valid, and the fee is also much less than the five percent fee that historically has been charged under the Foreign Claims

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Settlement Act for the president's undertaking to settle claims of American companies against foreign governments, such as in the Shanghai Power case. So we had a history of more than 40 years in which fees in excess of this one and a half percent were regularly charged for this purpose.

QUESTION: Mr. Wallace, is it not true that in this case Sperry filed its claim before the treasury two percent regulation was put into effect?

MR. WALLACE: It filed its claim, yes, but submitted the settlement for the entry of the award after it went into effect.

QUESTION: Well, I understand they settled it after it, but when they invoked the jurisdiction of the Tribunal, there was no notice that any claim would be filed, any two percent or one and half percent would be collected.

MR. WALLACE: Not at that time, but --

QUESTION: Under your rationale, would it be permissible for the United States, after the whole claims process is completed, then to say we think the claimants should pay the expenses, and then assess it at that time, rather than after claims are filed but before judgments or awards are issued. And then just figure out what the cost was and then send everybody a bill for their pro rata share.

MR. WALLACE: I think that that would meet the standards this Court has applied in its retroactivity cases,

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yes, but this is an easier case because Sperry --

QUESTION: Would you say the same thing if the assessment also included the use of the claims Tribunal by unsuccessful claimants? They also invoked it, had the benefit of having their disputes resolved by the Tribunal, but they just didn't happen to recover anything.

MR. WALLACE: The, the fee could have been assessed against all claimants who invoked the Tribunal, but Congress chose not to do it that way. The fee is assessed only if a payment is made out of the security account.

QUESTION: I understand.

MR. WALLACE: And Sperry and Iran did not have to seek a payment out of the security account or an award from the Tribunal. There were benefits that Sperry got from using the Tribunal and the security account, much less risk that the award would not be paid or that it would be delayed in payment. And, of course, a delay in payment could result in a loss of much more than one and a half percent of the value of the award.

QUESTION: You say Sperry did not have to seek an award from the Tribunal. What were the realistic options Sperry had?

MR. WALLACE: Well, that depended entirely on settlement negotiations between the parties to the dispute, Sperry and Iran. They did settle one of their other claims,

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as we recounted in footnote 20 on page 31 of our brief, without seeking an award from the Tribunal. These claims often involved counterclaims and the like. We don't know, because there was no occasion for them to provide the government with the information, whether Iran made a payment to Sperry in settlement of that other claim.

QUESTION: Never mind options that depend upon Iran's agreement to the options. That is not much of an option. What other options, within its own control, did Sperry have, other than proceeding to the Tribunal?

MR. WALLACE: No other option within its own control, but --

QUESTION: All right. Well, so then, you know, don't tell us well, they undertook this voluntarily.

MR. WALLACE: Well, it was Sperry who undertook to do business with Iran. We were not a party to the commercial transaction. And we provided the Algiers Accords, a $1 billion fund that Iran was obligated to keep in the security account, and a Tribunal to make awards on behalf of United States claimants. That was a considerable service that we were providing.

QUESTION: Yes, but even with regard to the settlement that did not come from the payment from the Tribunal, they had first filed a claim with the Tribunal, had they not?

MR. WALLACE: They had.

QUESTION: So that they really, apparently at that time, didn't have any alternative but -- for seeking relief, except through the Tribunal.

MR. WALLACE: Well, that may well have been a part of their negotiation strategy. Many people file a claim and then settle the dispute as part of their negotiating strategy.

QUESTION: Or the settlement may have been part of their litigating strategy.

MR. WALLACE: That is quite true. It may have been related to the other claim that did go to judgment before the Tribunal. We don't really know that, because they were not required to disclose to the government what the terms of settlement were with respect to the claim that was not pursued before the Tribunal.

In any event, there was a voluntary element in the sense that Sperry, as this example shows, was not required to proceed before the Tribunal in order to settle its claims with Iran if the parties could find another mechanism for doing that. Nor did the appellees in this case have either a property right or some other constitutional right to have their claim against Iran adjudicated in a particular Tribunal, in a United States court, or a cost-free forum.

If the Court please, I would like to reserve the balance of my time for rebuttal.

QUESTION: Very well, Mr. Wallace. Mr. Seiver, we'll

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hear now from you.

ORAL ARGUMENT OF JOHN D. SEIVER

ON BEHALF OF THE APPELLEES

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

In this appeal, the Court is presented with four distinct constitutional challenges to an act of Congress which attempts to retroactively authorize the imposition of these deductions from the awards of the Iran claims, Iran-U.S. claims Tribunal. These deductions work as the taking of property without just compensation, a denial of equal protection of the laws, a denial of due process, and also run afoul of the origination clause of the Constitution.

At the time litigants were forced to abandon their district court litigation and pursue their claims against Iran at the Tribunal, there was no legislative authority or policy in existence at the time which would have supported any user fee or any deductions from awards of the claimants at the Tribunal. The Algiers Accords, which established the Tribunal and forced us to proceed with our claims there, providing it as the only forum for adjudication, expressly provided that the government would bear the costs of operating the Tribunal. There was no discussion of a user fee being charged or any deductions from awards.

Similarly, the Tribunal modified its rules of

procedure. At the time we filed our claim, UNCITRAL Rule 38 was modified to provide that the costs of running the Tribunal would be paid for by the contracting parties, that is the governments, not the arbitrating parties, and such costs could not be an item of an award between the arbitrating parties.

Finally, in May of '81, when the Senate had before it authorizations for funding the Tribunal and paying the State Department for paying the expenses of running the Tribunal, the Senate said this Tribunal is very important to U.S. interests. We want the State Department to devote sufficient personnel and resources to the operation of the Tribunal to protect U.S. citizens interests abroad. Please keep us informed of the need for any additional resources or any additional personnel; nothing about charging a fee for the use of it, nothing about making a deduction from award to fund this particular expense.

When the treasury went ahead and assessed its -- and issued its directive license in June of '82, that was some six months after the filing deadline for claims of the Tribunal. It did so without any prior notice and without any authority. It did allege it had the Independent Offices Appropriations Act when it issued that license for a two percent deduction. But that just didn't apply.

We challenged that in the claims court, and then Chief Judge Alex Kozinski agreed. The Independent Offices

Appropriations Act could not be used to justify a user fee. So we have no express authority for charging user fees, we have no latent, perhaps inherent authority in the government to charge us a fee for any particular purpose for the use of the Tribunal.

QUESTION: Well, might not this come out of the Curtiss Wright doctrine where they say in foreign affairs, there is a much looser legislative delegation doctrine, and that sort of thing?

MR. SEIVER: Well, we're not really in foreign affairs anymore. What we have here is a crisis that was settled, the Accords had been written, the Tribunal had been up and running and issuing awards, and now the deduction that we are challenging occurs in New York, when the Federal Reserve Bank of New York happens to get the award before it is passed on to the claimant. So the foreign relations power is not really implicated. And the government didn't even really rely on that.

QUESTION: But the fact that the deduction occurs in New York surely can't be a complete answer if a good deal of the rest of the transaction relates to foreign affairs. Wouldn't you agree with that?

MR. SEIVER: Well, yes, I agree that is not a complete answer, but it demonstrates that really what is going on here is something that is removed from foreign relations and the

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general concept of what the executive has power to do in furthering foreign relations. There was nothing left to be done once the Accords were implemented and once the Tribunal was up and running.

Because this occurred in New York we can say, really, there was no exercise of any foreign relations power. There was no dealing with a foreign sovereign, there was no regulation that was trying to say well, this is the way the claims are going to be presented or tried or adjudicated. There was nothing of that sort.

It was a pure reaching into the pocket of the claimants and taking their property interest in that award. The government's --that wasn't the government's money that was represented in the award. The government hasn't challenged that. They originally said that was public money that was on its way back from the security account, but they abandoned that below. That was our award, and unless they had some separate authority, and the court of claims -- the claims court did not think there was any inherent power over foreign relations to reach in and invade that particular property to pay for the costs of a Tribunal which had been up and running, and which they could not even justify by a reasonable calculation, we should pay for the use of the Tribunal.

QUESTION: Where did the Tribunal set?

MR. SEIVER: In The Hague, in the Netherlands.

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QUESTION: In The Hague.

MR. SEIVER: When treasury went about promulgating its directive license, it made no reasonable calculation of what the costs were that could be attributable to successful claimants. What it did was make an estimate, and in a two-page document which is in the Appendix to our motion to dismiss or affirm, what the costs would be for one year, and extrapolated that out over a number of years to figure out, this is what our entire cost of operating the Tribunal would be, and then worked backwards to determine what percentage fee will reimburse us for this entire cost. Not whether certain claimants were getting more benefits or less benefits, whether some services would be used more or less by others, not whether --

QUESTION: May I ask, may I ask you a question about this point, Mr. Seiver. Supposing, in ordinary litigation in the United States, Congress decided that it was too expensive to, unnecessarily -- we were spending too much money collecting judgments, and they decided that they would impose a one and a half percent fee for the services of the marshall or whatever federal official had to go out and levy on bank accounts or property and all the rest. Could they constitutionally apply such a -- and then they passed a statute based on a rough calculation authorizing that -- could they apply that statute to cases that are pending?

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MR. SEIVER: I think not, Your Honor.

QUESTION: You think not.

MR. SEIVER: I think that that, there would be a retroactive problem, but even as to cases that were pending, or the day before they were filed, we have a situation where a revenue-related assessment, that is purportedly to reimburse costs, has no relationship to the costs that are sought to be reimbursed. The perfect example of this, I think, was brought up. Those that use the services of the Tribunal but don't get an award, or if there was a possibility of getting an award from a separate account, don't pay a single cent for the use of the Tribunal.

And that was exemplified by the way the banks handled their claims. Under the Accords, they could file and present their claims to the Tribunal, and they have settled their claims there. Their claims, though, and their awards, are not paid out of the security account; it is paid out of a separate account in England, and no deductions are assessed. So here we have a separate set of successful claimants that are at least -- have benefit as much as Sperry, have the same ability to pay, but are not charged anything for their use of the Tribunal or the benefit, that is argued that was so strong for us, to have the availability of the Tribunal's procedures to adjudicate our claim.

When Justice Kozinski looked at the revenue-related

assessment, he also made note that the government really did not have any other authority. And if we look at what Congress has been told about the authority of the State Department or the treasury to assess these fees, in June of '85, when the act in question was under consideration, the State Department told Congress, we can't fashion an IOAA administrative fee that would satisfy the cost-benefit nexus. It would really take into account what are the costs of the benefits conferred as opposed to the costs of the benefits derived by users of the services.

In December of '82, prior to us -- Sperry, instigating this litigation, that was the, one of the first attempts at getting legislation. Mr. Michael, one of the State Department advisers told Congress well, we are going to go ahead with this administrative process. We have been doing it since June of '82. But we really need statutory support; we really need Congress to make the policy determination.

So here we have now knowledge on the part of the government, be it through one of its executive agencies, that it was assessing fees without authority, a determination by the U.S. Claims Court that it had no authority, and now, some four years after the Accords, some three years after the claim period had been closed at the Tribunal, but three weeks after the ruling by the claims court, a retroactive assessment.

Now, the denial of due process in the retroactive area

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is looked at with a analysis of the cases of Heinszen and Forbes. The government cannot reach back and retroactively change substantive policy, and that is what it was doing here when it reached back and provided the authority for the assessments. There had been no prior existing authority, no prior existing notice that any fee or deduction would ever be assessed against the ward, except for the illegal administrative assessment in June of '80 and June of '82.

QUESTION: That is notice, isn't it?

MR. SEIVER: Well, I think, Your Honor, if we take any illegal act by an executive agency as notice that that could be retroactively authorized by Congress at some future time when it wished, then we are subject to no control on the authority of the executive. They act pursuant to enumerated powers, as does Congress. If they can exceed their authority, and that we're going to have to cross our fingers and hope that they don't get a retroactive authorization from Congress, then really we're not living in a democratic government. That is not the way our system of laws have designed -- have been designed.

And the Court's opinions in Heinszen and Forbes made that clear, that a retroactive assessment could not really change substantive legislative policy.

QUESTION: Is it your view that the government here is bound by the claims court opinion that there was no authority

in the various acts the government relied on for the assessment of this fee, prior to the congressional adoption of it?

MR. SEIVER: Well, bound to the extent that they did not ever pursue another course of action except to go to Congress to ask --

QUESTION: Well, I mean bound in the sense of res judicata.

MR. SEIVER: Well, Your Honor, it has been mooted, and I am not sure whether or not we could have an argument for res judicata, but probably collateral estoppel. At least to the extent that they have abandoned the administrative assessments --

QUESTION: Well, I don't -- thinking it over though, this is the same case, isn't it?

MR. SEIVER: Yes, it is, Your Honor.

QUESTION: Well, then, there wouldn't be any collateral estoppel. Collateral estoppel just applies to a final judgment.

MR. SEIVER: Well, there wasn't a final judgment. Judge Kozinski did never, never issued an order finally adjudging the violation. But the action of the government estop -- basically mooted the controversy in the middle, and I think from the government statements that they could not ever satisfy the IOAA with a fee. It appears that that really is

on the verge of being res judicata.

Now the argument that the government has also made --

QUESTION: Excuse me, why is it that the government can apply a tax retroactively, but not a fee of this sort?

MR. SEIVER: Well, Justice Scalia, when a tax is applied retroactively, we look at it basically as it is involuntary. The receipt of income is something that we are not going to give up to avoid a tax. However, if we are going to use a government mandated service, generally it is looked at -- you have to know what you are going to be getting into at the time you get into it. And even in the tax area, a voluntary transaction, for instance a gift, cannot be retroactively changed. I believe the tax legislation says that when it is a voluntary act, even a week or a month retroactivity would be unlawful.

QUESTION: Now how much voluntary -- it seems to me you are really trying to ride two horses going in different directions in some of your argument. This portion of it asserts voluntariness on your part, that had you known of the fee, you wouldn't have proceeded this way. Other portions of your argument emphasize the fact that you had no choice but to go to this Tribunal. Now, which is it, did you have a choice or didn't you?

MR. SEIVER: Well, Your Honor, you are absolutely right. We didn't have a choice. And the reason we bring up

the voluntariness aspect is because the government has said this is a user fee, and the user fees are imposed in the context of having a choice, because of --

QUESTION: Is that so? Why?

MR. SEIVER: Well, generally that is the process of determining when someone has gotten a special benefit that is not available to everyone else.

QUESTION: I can impose a user fee for water, couldn't I, for water services from the municipality, and I guess you would have a choice to not have any water, if you consider that a choice. Just as you had a choice not to get your money.

MR. SEIVER: We had a choice to give up a $2.8 million settlement, or an $18 million claim, however we looked at it, but is that really a choice?

QUESTION: No, it isn't. But neither is going without water.

MR. SEIVER: Well, Your Honor, as far as the involuntariness aspect, that has been our main argument, and we only brought up the voluntariness to try and say this is not really a user fee, it is a tax.

QUESTION: Are you saying a user fee can't be charged for items that are involuntary, is that it?

MR. SEIVER: I believe if it is involuntary, then it is really a tax, because you don't have a choice. You can't say,

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I mean, I presume Your Honor is correct in saying if they want to put a charge on the water, people are still going to take the water. If they are going to say you are going to be charged for breathing the air, then presumably you are not going to stop breathing, of course. But with the involuntariness of being forced to go to the Tribunal, then really it does become a tax.

But the government has said well, this is really not a tax because we wanted to go there. We voluntarily packed up our bags, left district court and went to The Hague. So we're only making the voluntariness argument to dispute their concept that we walked into this and should have expected that some fee would be charged against us for using the process of the Tribunal.

I don't for the minute think that we had any other choice. I think that the stockholders of Sperry would have been very upset if we walked away from a claim. And that's, that's what really shows the power of the government here. It could have been two percent, it could have been 10 percent, it could have been 50 percent, 80 percent. Of course, we would have gotten something, and how could we have said well, we really don't want to go after it, walk away from $1 million or a half a million dollars.

QUESTION: But the government says the fees were less than compensatory for its expenses, which would surely put a

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limit on the percentage.

MR. SEIVER: Well, Your Honor, but what are the expenses that are being incurred on our benefit? There are expenses for others that we're paying for in that calculus, if you add up the total expenses of running the Tribunal. So, in a sense, to say well, we happened to be lucky, we didn't collect enough, really is irrelevant. It just happens to be a post hoc justification that they could have charged us more, so we shouldn't be upset that we're getting charged anything at all.

QUESTION: That may not be an answer to some other points in your case, but it seems to me it is an answer that this is no different than an 80 percent charge, or a 50 percent charge.

MR. SEIVER: Well, I am trying to analyze it in the terms of what was the legislative and administrative record at the time these were imposed. I think that if we had a situation the government could have said well, we'll keep 100 percent of it, wait 10 years, see what has happened with the Tribunal, what the real expenses are, how many awards we have gotten, and how much we can take, and then distribute it. And I think that would have been a very arbitrary act on the part of the government, given the fact that this was our litigation and our claims which were suspended and sent to the Tribunal in order to obtain the resolution of the hostage crisis.

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QUESTION: Well, how much chance for success would you have had in your litigation in the district court if the president hadn't frozen the assets?

MR. SEIVER: Well, I guess we'll never really know what we would have done. The -- we still would have had a judgment. The president could not have suspended our claims --

QUESTION: We all know that there are judgments and there are judgments, though.

MR. SEIVER: Perhaps we would have had a judgment for, let's say, the $18 million of our claim, and we'd go to Europe; we'd try to find some Iranian assets. Perhaps Iran would have been so upset when we found some assets that we could execute on, they would have said well, we'll give you 5 million or 6 million.

And we're not arguing that the suspension has somehow or other diminished our property rights in those claims. We're not arguing that today. What we are arguing is that particular award, which was a result of this process of settling our claim, was our property. And unless there is a separate justification, not that the government could have done something worse, could have made it less, not something that is allowing the government to say we created value so we can just take it away to whatever degree we might determine is reasonable at any point in time. If they could have come up

with a situation where costs and benefits and everything was analyzed, and it wasn't a revenue-related fee, then we might have had a legitimate user fee. We never got our filing fee back from the district court, our $100, or whatever we paid down there.

And that makes it a lot like the Webb's case. There a filing fee or a user fee was charged and then the state government sought to take all the interest that was earned on the interpleader fund. Now, the Court did not hesitate to strike that down as a forced contribution to governmental revenues of the state. And here the gov -- the Congress is doing the exact same thing. They have not provided any reasonable relation between the fee that is charged and the use of the Tribunal.

QUESTION: Mr. Seiver, you assert two reasons for that, two principal reasons for that, I think. One is that the fee is only assessed against those who use the fund and not other victorious claimants who chose not to get their payments out of the fund. Is that right? Or through the New York bank.

MR. SEIVER: Well, the other bank claimants -- we had no choice to take anything but our payments from the security account. The banks had established the procedure that they would always be paid from a different account in the Bank of England.

QUESTION: But some victorious claimants did not have

to use that procedure, and therefore didn't pay any fee.

MR. SEIVER: That is correct.

QUESTION: And that is one respect in which you claim you have been treated inequitably in the sense that what you pay doesn't have any relationship to how you benefit.

MR. SEIVER: Yes, it is.

QUESTION: And the other respect is that the losers get as much benefit as the winners.

MR. SEIVER: Yes. There is an additional aspect to it in that the U.S. government is litigating its own claims against Iran, and in the Tribunal, Iran has official claims that it is litigating against our government. So those are additional claims which are not satisfied by the security account, from my understanding, and again that is a benefit which is not being apportioned out. And if I can add --

QUESTION: Let's just take one of those, the fact that the fees are only assessed against the victorious claimants. You really think that is not an, a rational assessment of who gets the benefit?

MR. SEIVER: No, it isn't, Your Honor. Because if we look at the benefit of the Tribunal and when it was established in this situation, we didn't ask for it. We didn't want it. We -- it culminated in a big fight in this Court to prohibit that to stay in district court. Iran didn't want us to stay in district court. Their demands had always

been: terminate the litigation in district courts if you want the hostages back. Our claims were used really as bargaining chips to help resolve that crisis. And in that situation the benefits of the operational --

QUESTION: That is water over the dam. But once you have the Tribunal set up, would it be irrational for a state to allocate its court costs on that basis, that those who recover in litigation shall pay one percent of their judgment award for court costs?

MR. SEIVER: Well, that contradicts the entire process of this country's adjudicatory process where losers pay costs. We always have a situation when we go into court --

QUESTION: I didn't ask that. I said whether it would be an irrational way of allocating that.

MR. SEIVER: I think -- I am using the prior existing policy of showing that it is irrational. It has been determined for hundreds of years that this is the system, that the costs -- and when you go into it --

QUESTION: Anything else has to be irrational therefore?

MR. SEIVER: Well, not necessarily everything else has to be irrational, Justice Scalia, but if we look at it, at least we know when we go to court what we're in for.

QUESTION: But those are two different kinds of costs, the costs that are assessed now against losers in favor of

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winners are the out of pocket costs of the party. What I think Justice Scalia's question is, these are the costs of operating the court system. And you could say that the party assessment of costs could remain and still the assessment of the government's costs could be different, I would think.

MR. SEIVER: Well, Your Honor, yes. The filing fee, I presume, is supposed to be part of the cost process, cost recovery process. And that filing fee is one of the items that could be recovered in a successful district court litigation. The filing fee that is paid goes into a special fund to help offset the authorizations and expenditures for the running of the district court system. So you could recover the same kinds of costs back --

QUESTION: No, but wait. We say we're going to go to a new system, we're going to really, really get all the expenses for the court, not this piddling filing fee. We're going to really try to recover, going to make, put courts on their own bottom, pay as you go, enormous fees to run the court system. And we decide we're going to take it out of the winner's judgment. That's, that would not be constitutional in your mind?

QUESTION: Well, in my mind, yes. But I don't think we even have to reach that, in this case. I think that is a question that we don't have to reach, whether or not they could have done it at the right time, with the right kind of

concept, calling it a tax, suffering the political consequences, and dealing with it on that aspect. To bring it into the situation here, on the theory that it could have been done in another context, really doesn't justify it. Because then we have the situation here where it has not been analyzed what the costs are.

Presumably before Congress would implement a fee such as that, for charging for services of use of the courts, there would be an extensive analysis of the use. For instance, in an administrative proceeding, the FCC charges a fee for people that go to hearing and for using other services of the commission, and that has been sustained under the IOAA as the government trying to recover the costs of its executive agencies.

We don't have a policy like that for the court system. The adjudication of disputes and resolutions has always proceeded in the situation that everybody pays their costs going in, they pay their filing fee, and if the court believes that the winner is entitled to it, they can award the costs. At the Tribunal, we did not have that opportunity. The costs of operating the Tribunal could not be eliminated and be awarded to the winners, as they are in the court systems here.

QUESTION: May I make sure about one point, Mr. Seiver. Would your position be the same if the original drafts of the Accords spelled this out and they had a plan from the outset

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to impose this kind of "user fee" on the victorious claimants?

MR. SEIVER: I think that is a very, much more difficult question, and one again which we don't have to answer, but I will venture one. That we probably would have had a more difficult time challenging it due to the treaty exception to the court's jurisdiction; if we wanted to say that was a take, you know, unconstitutional, then they might have said, well this is part of the negotiation of the Accords. But at least then we would have known on our way into court that there was going to be a user fee, and we could have either adjusted our claim or done something. We'll never know whether people --

QUESTION: In the practical matter, you make a very forceful argument, that your choices were quite limited. And I am not sure if you really were put in a position where you really had no remedy except to go to the Tribunal. If that is true, presumably you would have done everything else exactly the same, even if you had known that one and a half percent was going to be deducted.

MR. SEIVER: Well, we might have added something to our claim to include the possibility of recovering that award from Iran, so instead of taking 2.8 million we would have taken 2.8 million, five hundred thousand dollars, or something that would have at least accounted for that. We had no notice of that, and as far as --

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QUESTION: I see. And the only reason you didn't get another 100, one and a half percent from Iran, was that you didn't know that you would need another $42,000. You could have gotten that, but you said heck --

MR. SEIVER: Well, this was our agreement. This was what we got.

QUESTION: You got as much money from Iran as you could get from Iran, I hope, didn't you?

MR. SEIVER: Well, Your Honor, to -- what went into the decision to take that amount of money at that point --

QUESTION: I mean, to say I would have got another 42 if I had known I would have had this expense, my goodness, I should think the shareholders of Sperry would be very upset to know you just left $42,000 on the table.

MR. SEIVER: Well, Your Honor, we sued to get the $42,000 back, and had won. And we had found that that particular administrative assessment was illegal. The concept that the government could have done something differently at another time, and could have imposed a user fee if they could have designed one, really doesn't justify reaching back and changing it now, because they didn't do it at the proper time.

They also established a mechanism that doesn't evenly charge the claimants who do successfully use it, whether it be to $40,000 or $4,000, it really doesn't matter, because it was taken without prior notice and without our ability to do

anything about it. And we don't really need to speculate well, we could have gone and done something else, we might have gone and tried to get it paid from a different account, it might have changed our negotiations. And, really, we don't have to worry about that.

In this situation, where the government has allowed banks to escape paying these, we really have an unfair assessment that is on a subset of American businesses, American claimants. And with the expectations from the Accords, the UNCITRAL rules, and the Senate report, that there was nothing going to be charged for the use of this, to reach back and change that is really, really where our focus is, the taking of our interest.

Our founding fathers recognized that even democratic governments could take and tax citizens' property to excess, so constitutional limits on the exercise of these powers were imposed. Here the government has invented a new concept of a user fee that is supposed to be outside of these constitutional limitations. The Court should look closely at how the fee is defined and imposed before it gives the government constitutional carte blanche. With due regard for these constitutional safeguards, the fee at issue is violative of the Constitution. Thank you.

QUESTION: Thank you, Mr. Seiver. Mr. Wallace, do you have rebuttal?

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REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE APPELLANT

MR. WALLACE: Yes, Mr. Chief Justice. Under this Court's decision in Bradley against Richmond School Board, and related cases going back to the Schooner Peggy, appellate courts ordinarily are to apply intervening changes in the law to pending cases, even though those changes occurred after a final judgment was entered in the trial court, and even though the legislature did not specify whether the intervening change in the law would be applied to pending cases.

Now, surely, that is relevant to the question that Justice Stevens posed, for example, about whether Congress could specify that a one and a half percent fee for enforcing judgments should be levied and should apply to pending cases. The bars to retroactive application on intervening changes in the law while pending, to pending cases, are simply not what they have been portrayed to be in this case. Even when the legislature has not specified, and under this Court's decisions, when there is a rational basis for the legislature to specify uniform treatment, including retroactive application, so that similarly situated persons will be treated the same, that legislative judgment should be respected by the courts.

Now, the Appellees complain about the particular manner in which the fee is calculated and that it isn't more

precisely calibrated to the extent to which particular claimants used the Tribunal, the security account, the federal reserve bank, et cetera. There is considerable latitude in the methodology for imposing user fees, just as there is in rate regulation. The --

QUESTION: I agree with that, Mr. Wallace, and it doesn't seem to me that to make the winner pay is very bad, but I don't understand why only those who use the particular payment mechanism should be those that were hit with the fee. Why is that?

MR. WALLACE: Well, that -- there is considerable expense involved in maintaining the security account and the services supplied by the federal reserve bank.

QUESTION: True, but you didn't calculate the total amount of the fees that had to be collected solely on the basis of that account. You threw a lot of other weight into the total amount of the fee. So why should those, only those who use that particular aspect, be charged?

MR. WALLACE: Well, that is a, an easy method to calculate what bottom line benefit from the whole mechanism a particular claimant is receiving through a payment being made through the security account and through the rest of the mechanism. And, incidentally, government agencies pay the one, the same one and half percent fee, as we recount in footnote 11. They get their payments from the security

account -- federal government agencies that have claims -- and pay the same one and half percent fee. So there is no differentiation made there.

It is true that bank claims are treated differently, but the government incurs relatively little expense. This was a reasonable and easily administered method of calculating how to apply the user fees without deterring claimants who might not succeed and use the entire mechanism. Of course, other methods would have been permissible. In New York City, there is a flat charge for using the subway and you can ride as far as you please. In the D.C. metro system, there is a fare card system that calibrates the cost according to the length of your ride. Neither one is an unconstitutional taking of property or an invalid user fee, any more than a museum is obliged to charge a different admission fee for someone who is going to leave in an hour.

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

(Whereupon, at 10:59 o'clock a.m., the case in the above-entitled matter was submitted.)

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BY Lona M. May

(REPORTER)