

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

RANDALL C. SCARBOROUGH, :

Petitioner :

v. : No. 02-1657

ANTHONY J. PRINCIPI, :

SECRETARY OF VETERANS :

AFFAIRS. :

- - - - -X

Washington, D. C.

Monday, February 23, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

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

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
BRIAN WOLFMAN, ESQ.	
On behalf of the Petitioner	3
JEFFREY P. MINEAR, ESQ.	
On behalf of the Respondent	26
REBUTTAL ARGUMENT OF	
BRIAN WOLFMAN, ESQ.	
On behalf of the Petitioner	53

1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 02-1657, Randall Scarborough v. Anthony J.
5 Principi.

6 Mr. Wolfman.

7 ORAL ARGUMENT OF BRIAN WOLFMAN

8 ON BEHALF OF THE PETITIONER

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

11 In 1999, Randall Scarborough won his disability
12 appeal before the Veterans Court on the ground that the
13 Government's position constituted clear and unmistakable
14 error and that that position was, quote, not reasonably
15 debatable. End quote.

16 He then immediately filed a fee application
17 under the Equal Access to Justice Act that contained three
18 of the elements called for by the act, but it did not
19 initially allege that the Government's position lacked
20 substantial justification.

21 The Government seized on that alleged omission
22 and without any mention of this Court's path-marking
23 decision in Irwin v. Veterans Affairs, both it and the
24 Federal Circuit determined that this omission of this
25 legal conclusion was jurisdictional, meaning in effect

1 that Mr. Scarborough's amendment to the application could
2 not relate back to his timely filed application.

3 The Federal Circuit and the Government persisted
4 in this view even after this Court remanded in light of
5 Edelman v. Lynchburg College, which embraced the relation-
6 back doctrine both in a judicial and an administrative law
7 context.

8 The Federal Circuit's fundamental error here,
9 the basic mistake, is that it perceived EAJA's limitations
10 period as jurisdictional. As I said, that holding can't
11 be squared with the decision in Irwin or as reiterated by
12 this Court just two terms ago in Franconia Associates, and
13 that principle is this: unless Congress has provided
14 otherwise, limitations periods that run in favor of the
15 Government like those involving private parties are not
16 jurisdictional, but rather are subject to ordinary statute
17 of limitations principles that provide exceptions under
18 certain circumstances.

19 And so then the question is, what does EAJA say
20 to this? There's nothing in EAJA that even hints that the
21 statute creates the absolute --

22 QUESTION: EAJA is Equal Access to Justice.

23 MR. WOLFMAN: Equal Access to Justice Act.

24 That's the acronym, Your Honor.

25 There -- there's nothing that even hints that

1 the Court -- that the Congress created that type of
2 absolute time bar under EAJA. In fact, quite the
3 contrary. The statute makes clear that a court
4 entertaining an EAJA application already has jurisdiction
5 over the action. Simply put, EAJA can't be jurisdictional
6 in that sense, absolute in that sense, because as this
7 Court just reiterated in Kontrick v. Ryan, EAJA doesn't
8 serve to place a class of cases within a court's
9 adjudicative authority.

10 QUESTION: Mr. Wolfman, if you're right about
11 that it's not jurisdictional, so there should be equitable
12 tolling, why should there be equitable -- what's equitable
13 about allowing a lawyer to overcome his carelessness? I
14 mean, the -- the case of a layperson not getting a
15 verification is one thing. A lawyer reads a statute, it
16 says, do this, that, and the other, and he doesn't do the
17 other, and then it says, oh, but be equitable, court. Why
18 should a lawyer's carelessness be an occasion for
19 equitable tolling? Is there anything in it for the client
20 if this is just the lawyer's fee?

21 MR. WOLFMAN: No. Well, I think there are
22 several answers to that, but let me take the last part
23 first, Your Honor.

24 First is that here actually the -- the client
25 has much coming. These are the client's fees, and the

1 veterans statutes provide that the contingent fee, which
2 cannot exceed 20 percent, would be reduced dollar for
3 dollar by the EAJA recovery. So the client here, as all
4 veterans claims, do have money at stake.

5 Let me turn to the question of equitable tolling
6 that you asked.

7 QUESTION: Excuse me. Explain that again. The
8 contingency fee would be reduced dollar for dollar by the
9 recovery on --

10 MR. WOLFMAN: By the EAJA recovery, yes. The --
11 the statute -- the -- the veterans statutes provide that
12 the lawyer can enter a contingency arrangement with the
13 client, but that the fee can't -- can't exceed 20 percent
14 of the claimant's back benefits if he or she prevails.
15 But when --

16 QUESTION: That's the recovered back benefits?

17 MR. WOLFMAN: That is correct, Your Honor. So
18 there -- there can be no fee taken unless there's victory.
19 The statute also provides that.

20 However, a -- a statute also provides on what do
21 we do about the interaction between EAJA and this
22 statutory contingency fee. And what it provides is that
23 for the same work, if there is an EAJA recovery, the
24 client must benefit by that. There can't be a double
25 recovery and that the contingent fee would be reduced

1 dollar for dollar for the EAJA recovery.

2 QUESTION: You could easily just reduce it if it
3 was the lawyer's negligence and stopped him getting the
4 contingency.

5 MR. WOLFMAN: That is correct, but the law does
6 not provide.

7 QUESTION: So -- so then we're back to where
8 Justice Ginsburg's question was. You say, really, the
9 person who should suffer is the lawyer, if the lawyer is
10 negligent, not the client. That would be pretty easy to
11 arrange. And you really want a rule that says whenever
12 the lawyer is negligent, well, the other side has to
13 suffer the consequence rather than the lawyer.

14 MR. WOLFMAN: Your -- Your Honor, first, there
15 could be such a rule if Congress so provided, and I
16 suppose --

17 QUESTION: Why couldn't you do it under a rule
18 of the court? Why couldn't you just say -- I mean, if I
19 were sitting in that court, it wouldn't take me long to
20 try to figure that out unless Congress thought of --
21 unless it forbid it somewhere. I mean, if it forbid it,
22 you couldn't do it, but -- but I don't know -- what you've
23 read me doesn't sound as if it forbids it.

24 MR. WOLFMAN: I think it is true that the -- the
25 statutes that I've just talked about don't forbid that.

1 Whether rulemaking authority enters into that kind of
2 substantive arena, I think that would be unusual because
3 ordinarily that would be governed by State malpractice --

4 QUESTION: I don't know what we're talking about
5 here. Whether -- whether the -- whether the client can
6 resist the lawyer's request for the 20 percent contingent
7 fee on the ground that it's the lawyer's own fault that I
8 didn't get compensation that would enable me to pay that
9 fee.

10 MR. WOLFMAN: I think that's -- that's what the
11 --

12 QUESTION: I don't know if that --

13 MR. WOLFMAN: -- the question --

14 QUESTION: Well, anyway, okay, let's skip that
15 because the question is --

16 MR. WOLFMAN: I would like to go back to the --

17 QUESTION: Let's go back to the main issue.

18 MR. WOLFMAN: -- question of equitable tolling,
19 if I might. And -- and let me answer that in two ways.

20 First of all, there is a category of equitable
21 tolling that's set out in the Irwin decision and others
22 which if -- if a claimant filed -- timely files a -- an
23 action, that -- that is properly filed but
24 jurisdictionally defective in some way, that equitable
25 tolling is a -- is a basis for allowing some forbearance

1 in that circumstance --

2 QUESTION: Mr. Wolfman, I -- I don't understand
3 why we have to first address equitable tolling. I mean,
4 why don't we look at the statute and see whether it is
5 necessary that this allegation that the U.S. was not
6 substantially justified has to be made within 30 days? I
7 mean, if it doesn't, why do you get into equitable tolling
8 at all? Why don't you start with what the statute
9 requires? I thought that was what the split was about.

10 MR. WOLFMAN: We -- Your Honor, with all
11 respect, no. The split was not on the question of what
12 the -- this -- whether the statute requires the allegation
13 of no substantial justification in the 30 days. The split
14 was on the question --

15 QUESTION: Do you take -- do you take the
16 position that under the statute, the Equal Access to
17 Justice Act statute, subsection (B), that that allegation
18 does not have to be made within the 30-day period?

19 MR. WOLFMAN: We do and we briefed that
20 extensively both in our opening brief and our -- and our
21 reply brief.

22 QUESTION: And do you plan to address it this
23 morning with us?

24 MR. WOLFMAN: I'd be happy to address it right
25 now if -- if Your Honor will allow, which is that --

1 QUESTION: Well, it just looks like a lot easier
2 argument to me than equitable tolling.

3 MR. WOLFMAN: Let me answer that. The -- the
4 answer is the plain language of the statute, the first --
5 the first sentence of (d) -- of section (d)(1)(A) --
6 (d)(1)(B) -- excuse me -- says that there shall be three
7 things alleged and that they must be done within 30 days.
8 The next sentence, which is the one that is at issue here,
9 says that the -- the parties shall also allege that the
10 position of the Government is not substantially justified,
11 and that sentence does not include the 30-day time limit.
12 That is one of our arguments in this case.

13 QUESTION: And that's similar to the kind of
14 interpretation the Court had to face in Edelman, isn't it?

15 MR. WOLFMAN: It is.

16 QUESTION: I mean, you know --

17 MR. WOLFMAN: And that -- we make that argument
18 directly in our brief.

19 QUESTION: In Edelman, it wasn't in the -- it
20 didn't follow immediately as part of the same paragraph
21 and the -- the what leaps to mind when you read a sentence
22 that says the parties shall also allege, is where? Where
23 shall the party allege this? Is he supposed to file a
24 separate paper later? The logical answer to that question
25 is found in the preceding sentence: shall within 30 days

1 submit to the court an application which shows that the
2 party is a prevailing party and is eligible to receive an
3 award stating the actual time, blah, blah. The party
4 shall also allege. Surely it means where? In that
5 application that is referred to in the preceding sentence.

6 It seems to me you're making a -- a -- just a
7 mess of -- of that paragraph to say, you know, you can
8 file a paper, who knows, 9 months later alleging that.
9 That -- that's just not a -- that's not a reasonable
10 reading of it, it seems to me.

11 MR. WOLFMAN: But, Your Honor, we disagree and
12 the reason is it's in that separate sentence and there are
13 subsequent proceedings in the case. There are subsequent
14 filings made. There are sometimes hearings where that --

15 QUESTION: It doesn't matter at all when it's
16 alleged? You can wait until, you know, the very end of
17 the case?

18 MR. WOLFMAN: That -- that is --

19 QUESTION: The Government has to go along not
20 even knowing whether you claim that the Government's
21 position was substantially justified?

22 MR. WOLFMAN: Well, on that question, the -- the
23 burden is on the Government to show that its position was
24 substantially justified.

25 QUESTION: That's the point. The statute places

1 the burden on the Government to prove that its position
2 was not substantially justified.

3 MR. WOLFMAN: That is correct, and that is our
4 submission. So the question is why might Congress have
5 parsed it in this way.

6 QUESTION: It's the burden of proof as opposed
7 to the burden of making the allegation of -- of setting
8 the -- the point in controversy.

9 MR. WOLFMAN: That -- that is correct in the
10 sense that -- that the statute is unusual and that it --
11 it's -- it does say that the party seeking fees shall
12 allege the position of the Government lacks substantial
13 justification. But there's no question -- and it is
14 conceded here that the Government has the burden of
15 persuasion on that question. So in -- in this respect --

16 QUESTION: You mean, even if you don't allege
17 it, the Government has to come in and show that its
18 position was -- even though it's never alleged. Surely
19 you don't say that.

20 MR. WOLFMAN: Your Honor, it --

21 QUESTION: What -- what if you have a lawyer
22 that hasn't read the statute and he doesn't realize, that
23 he thinks if he won the case, he gets his fees? And so he
24 just files this without any allegation that the
25 Government's case was not substantially justified.

1 MR. WOLFMAN: We --

2 QUESTION: The Government still has to come in
3 and prove that its case was substantially justified?

4 MR. WOLFMAN: No. We -- we believe that at some
5 point the statute makes clear that at some point the
6 applicant will have to make that allegation.

7 QUESTION: What would be the logical point --

8 MR. WOLFMAN: I think the --

9 QUESTION: -- for that -- for that claim to be
10 made?

11 MR. WOLFMAN: In all candor, Your Honor, the
12 most logical point is at the outset.

13 QUESTION: Of course.

14 MR. WOLFMAN: We don't disagree with that. But
15 our position is that if you look at the statute, the
16 statute doesn't contain that 30-day limit within the
17 second sentence, and following on Justice O'Connor's
18 question, there is potentially good reason for that which
19 is that the burden on that question is on the Government.
20 We don't know why because it is not revealed entirely why
21 the 30-day limit is not in the second sentence.

22 QUESTION: Well, that would be a good reason for
23 omitting the requirement entirely, but I don't think it's
24 a very good reason for saying that the 30-day rule doesn't
25 apply.

1 MR. WOLFMAN: The 30-day -- well, that is our
2 position, Your Honor, and I think -- I think we've
3 exhausted the reasons why Congress might have done it.

4 May I go back to the initial question? Because
5 I want to -- I want to clarify something. I initially got
6 a question about equitable tolling, but our principal
7 submission here and I think the easiest way to resolve
8 this case is that this -- this provision is not
9 jurisdictional. Mr. Scarborough filed on time, and so
10 it's a perfect example of where the relation-back doctrine
11 would apply.

12 This is a typical relation-back situation. The
13 -- the application was filed. It was timely. There was
14 an omission and Mr. Scarborough, immediately upon the
15 omission being brought to his attention, filed an
16 amendment that made this 10 -- this 10-word legal
17 conclusion, and that should be the end of the matter.

18 QUESTION: Mr. Wolfman --

19 QUESTION: Will you just clarify one thing for
20 me? I want -- I think I understood your answer, but -- to
21 Justice Ginsburg, but if he has a contingent fee of 20
22 percent, he gets a \$1,000 recovery and a \$200 fee, and he
23 goes -- now he gets -- files an EAJA position, if he
24 recovers precisely \$200, that goes to the client?

25 MR. WOLFMAN: That would be correct.

1 QUESTION: What if he recovered \$300?

2 MR. WOLFMAN: Then the \$100 -- then \$200 would
3 go to the client and \$100 would go to the lawyer.

4 QUESTION: But in all events, the client would
5 get a piece of the recovery under EAJA.

6 MR. WOLFMAN: That is correct unless, for some
7 reason, there was not a contingency fee. That is correct.

8 QUESTION: Not a contingency fee.

9 MR. WOLFMAN: Right.

10 QUESTION: But you're saying --

11 MR. WOLFMAN: And -- and in almost all cases --

12 QUESTION: -- they are -- typically they are --

13 MR. WOLFMAN: -- there is. Yes.

14 QUESTION: -- contingent fee cases.

15 MR. WOLFMAN: In almost all cases there are.

16 And as I say, the statute allows it up to but not in
17 excess of 20 percent.

18 QUESTION: Am I right in thinking that your
19 client did not file the allegation about the Government's
20 position being unjustified until after the Government
21 moved to dismiss?

22 MR. WOLFMAN: That is correct. That is correct,
23 and that was approximately 33 days after the 30-day period
24 expired.

25 QUESTION: But there -- there is an argument the

1 other side I'd like you to deal with. There's a -- you --
2 you look at the statute, and it looks like Congress was
3 intending to have in front of the judge and in particular
4 to have in front of the Government all the facts right
5 there the first day. There are a lot of these things.
6 They have to process them quickly and they want to decide
7 whether to settle it or not settle it. And what they
8 have, therefore, you say right in the application within
9 30 days. Did I win? It's not so clear sometimes because,
10 you know, they're mixed claims. Explain it. Show that
11 you're eligible and also say how much it's going to be.
12 Right there, first from day one. And although this next
13 part is a formality and is in a separate sentence, that
14 doesn't matter. It happens to be really in the same two
15 sentences and there's no reason to treat it differently.
16 All right? So that's their argument.

17 And now I'd like to see what your response is.

18 MR. WOLFMAN: My response is -- and if I
19 understand the question -- is take -- to take as a given
20 that the -- that the statutes contemplates that the no-
21 substantial-justification allegation be made within the 30
22 days. And then our response is that this is not a
23 jurisdictional provision. The statute does not create an
24 absolute bar, and then we look to the common law
25 exceptions to statutes of limitations.

1 QUESTION: You could do that. You might do
2 that. So that -- that's -- in other words, you're saying
3 -- that's Irwin. I mean, you're arguing --

4 MR. WOLFMAN: It's Irwin. It's -- it's Edelman.
5 It's Becker and so forth.

6 QUESTION: So you want to say that that would
7 apply to every one of these four provisions.

8 MR. WOLFMAN: It would and the courts --

9 QUESTION: All right, and -- and treat them all
10 alike and therefore the separate sentence is a kind of
11 make-way.

12 MR. WOLFMAN: No. I'm not saying that. I'm
13 saying that your question -- I -- I took your question to
14 ask me to assume that all four allegations have to be made
15 within the 30 days.

16 QUESTION: Okay. So --

17 MR. WOLFMAN: If I assume that, then yes, the
18 answer to your question is yes, that we would apply those
19 ordinary common law exceptions.

20 Now, judges --

21 QUESTION: Aside from that, now -- now take the
22 other part of your argument and say, no, no, it's really
23 different, this fourth one. This fourth one is really
24 different. And I got it that it's in a separate sentence.
25 I don't know how much to make of that. Is there -- is

1 there any other basis for saying -- I mean, maybe that's
2 conclusive. I'm not saying it isn't, but I want to be
3 sure I have everything in front of me that would make it
4 different.

5 MR. WOLFMAN: I think the other thing that --
6 that I would like to put in front of you -- and this had
7 to do with my colloquy with Justice O'Connor -- which is
8 that there is a different character that -- to that
9 allegation. It is a mere allegation and it simply
10 notifies the Government about its substantial
11 justification defense.

12 QUESTION: Well -- well, there's -- there's more
13 than that to it. This -- this is always filed by an
14 attorney, and as an officer of the court, I assume that he
15 cannot just come in and say the Government's position was
16 not substantially justified when it is very clear that it
17 was substantially justified. I assume he'd be -- he'd be
18 liable for a sanction from the court if he did that.

19 MR. WOLFMAN: I think that is a fair point, Your
20 Honor, and let me answer that this way.

21 QUESTION: So to follow up, I mean, what -- what
22 this means is we -- we want to be sure, when this thing is
23 filed, that it's not just nuisance stuff. We want a
24 lawyer, when the thing is filed within the 30 days, to be
25 standing on his reputation as an officer of the court

1 that, in fact, the Government's position wasn't
2 substantial.

3 MR. WOLFMAN: I got that, and let -- if -- if I
4 might let me answer that. Because then I think if we
5 conceive of the purpose of this allegation as making a
6 lawyer think twice, then it puts the case in the realm of
7 Edelman and Becker where in Becker you had a signature
8 requirement, Edelman you had a verification requirement,
9 and those -- those requirements are things that are
10 supposed to make the filing party think a little bit
11 before he or she does the filing.

12 But in both of those cases, the Court said,
13 okay, we realize the purpose of it, but we will still
14 allow supplication -- supplementation of the application,
15 and we'll allow them to amend and to relate back unless
16 the adverse party is prejudiced.

17 And it's hard to conceive of the prejudice here.

18 QUESTION: We -- we may not be as tender to
19 attorneys who should know better as we are to -- to
20 litigants who maybe had a bad attorney or didn't know
21 better themselves.

22 MR. WOLFMAN: Well, with -- with all respect,
23 Your Honor, I think that might in part, at least in part,
24 explain Edelman. But I do not believe it explains Becker.
25 Becker did involve a pro se applicant, but as we know,

1 most appellants in the courts are -- are parties that are
2 represented by lawyers, and Becker held unequivocally that
3 the failure to sign was not fatal and that, in fact, the
4 -- the amended, signed notice of appeal could relate back.
5 And that's all that's being requested here.

6 QUESTION: Mr. Wolfman, I was surprised that you
7 didn't cite 1653 of title 28 which says defective
8 allegations of jurisdiction may be amended upon terms. I
9 mean, if you say, okay, even assuming it were
10 jurisdictional, if it were jurisdictional -- even if it
11 were jurisdictional, you could still amend with the
12 court's permission.

13 MR. WOLFMAN: I think you're right, Your Honor,
14 and that is neglectful on our part and we could have -- we
15 could have cited 1653 as well. It stands for the same
16 principle I think as the --

17 QUESTION: Well, excuse me. Nobody says that
18 this is an allegation regarding jurisdiction.

19 MR. WOLFMAN: Well, that -- that is true too.

20 QUESTION: I mean, what -- what the issue is is
21 whether the 30-day limit is a jurisdictional limit or not.

22 MR. WOLFMAN: Right. And -- and --

23 QUESTION: But I don't think any --

24 MR. WOLFMAN: -- it's not. And -- and I think
25 that's the key point. It is not and the -- the Irwin and

1 Franconi a Associates I think so clearly stand for that
2 proposition. That is the argument that we went to first
3 and most directly, that unless Congress explicitly
4 provides otherwise, limitations periods will be governed
5 by the same types of limitations principles that -- that
6 govern private litigation.

7 QUESTION: I -- explain this relation-back
8 theory. Anything can relate back? You can do any -- is
9 there no limit to the -- to the sweep of that proposition?

10 MR. WOLFMAN: No. I think there are limits.
11 For -- and -- and I think --

12 QUESTION: What are they?

13 MR. WOLFMAN: -- a court would look to rule 15
14 which codifies the relation-back doctrine and says, number
15 one, does it -- does the matter arise out of the same
16 transaction as occurrence -- as the original filing. Does
17 it arise out of the same thing that the adverse party was
18 given notice of?

19 And then I think the other thing that's quite --
20 that's quite apparent the courts would apply is, is the
21 other side prejudiced by this? How long of a time period
22 had gone by? How important or how new is the information?
23 Here, there's never been any claim of prejudice nor could
24 there be, I don't think, because the Government responds
25 -- they point out that -- that this legal allegation was

1 not made. The other side comes in and immediately amends
2 or -- and -- and that's all there is to it. This matter
3 would have been resolved years ago if that had transpired.

4 QUESTION: Suppose you had a statute that --
5 that provided a -- I don't know -- 3-year statute of
6 limitations for -- for negligence in a particular context,
7 but it -- it went on to say, however, all causes of action
8 claiming intentional wrong must be filed within 1 year.
9 Do you think that after 2-and-a-half years you could
10 revise a filing that did not allege intentional wrong and
11 say it relates back? And -- and some States do have
12 different statutes for intentional torts versus negligent
13 torts. Do you think you could revise your --

14 MR. WOLFMAN: I think that would be a much more
15 difficult claim for relation-back, and the reason is is
16 because the court -- the State apparently has said, as a
17 matter of our substantive policy, that we want to give
18 notice of this type of claim much earlier.

19 QUESTION: Right.

20 MR. WOLFMAN: But let me answer that --

21 QUESTION: So it really does come down to
22 whether this -- this allegation was -- whether there was
23 some particular reason why it had to be --

24 MR. WOLFMAN: But might I extend my answer a
25 little bit?

1 QUESTION: Sure, sure.

2 MR. WOLFMAN: Because -- because I -- I think
3 your hypothetical stands in contradistinction from the
4 ordinary rule, that if you've alleged the -- the relevant
5 facts, you can -- actually amendment is freely given to --
6 to state the legal theory under which those facts arise.
7 And I cite those cases in my brief.

8 QUESTION: Complaint -- in a complaint, you
9 don't even have to state the legal theory. That would be
10 in a brief opposing a motion to dismiss.

11 MR. WOLFMAN: That -- that is correct that --
12 that you have to state jurisdiction and you have to state
13 the facts. And the -- the forms that appear at the end of
14 the Federal Rules of Civil Procedure do say that the --
15 the pleader ought to state the -- the type of action,
16 whether it be negligence or otherwise.

17 But I think it does stand in distinction to
18 Justice Scalia's hypothetical where the State has made
19 very clear that there is a substantive policy that we want
20 to follow such that we want to give more notice and
21 quicker notice of this type of action. That's not what we
22 have here.

23 QUESTION: All right. The -- the problem with
24 this -- and there is a problem maybe just for me, but
25 there's a lot of legislative history here that says that,

1 for example, the deadline for filing the fee application
2 is jurisdictional and cannot be waived. And then there
3 are a lot of other stuff. The Administrative Conference
4 has said you ought to make this subject to waiver for good
5 cause, and that was rejected. And so there is a lot of
6 history that says you just can't do an Irwin kind of
7 thing. We don't mean that. We don't mean you can waive
8 this.

9 Now, what am I supposed to do with that?

10 MR. WOLFMAN: Well --

11 QUESTION: Sort of parse the thing and say,
12 well, this -- this portion of it is -- is subject to the
13 equitable exception and the doctrine itself -- the -- the
14 application itself is not subject to it? Or how am I
15 supposed to handle that in your view?

16 MR. WOLFMAN: Well, we deal with the legislative
17 history in quite some detail in our reply brief, but let
18 me -- let me deal with it briefly here, which is that the
19 -- the one line that you quoted about the jurisdiction --
20 the application is jurisdictional and cannot be waived was
21 in a -- a committee report that was submitted with
22 legislation that was vetoed by the President.

23 The next year when the legislation was actually
24 enacted, very similar legislative history appears, and
25 it's -- it drops that line and says as follows. The court

1 should avoid an overly technical construction of these
2 terms, the terms being the 30-day rule. This section
3 should not be used as a trap for the unwary resulting in
4 the unwarranted denial of fees.

5 QUESTION: Who said -- who said that?

6 MR. WOLFMAN: That's in the legislative history
7 cited in our brief.

8 QUESTION: Yes, what is it? I mean, just --
9 just --

10 MR. WOLFMAN: It's a House report No. 99-120 at
11 -- at page 6, footnote 26.

12 But it -- what I'm -- what I'm getting at is the
13 legislative history, from which this was taken, the one
14 line that they rely on, was -- accompanied legislation
15 that was actually vetoed. It was then replaced by other
16 legislative history which supports our position.

17 I want to be clear. I'm not -- I'm not
18 suggesting that this legislative history, either way,
19 bears great weight, and we don't rely on it in our opening
20 brief. But to respond to that question, I think the
21 legislative history at best for -- for the Government is a
22 wash.

23 Unless the Court has any further questions, I'll
24 reserve the balance of my time.

25 QUESTION: Very well, Mr. Wolfman.

1 Mr. Minear, we'll hear from you.

2 ORAL ARGUMENT OF JEFFREY P. MINEAR

3 ON BEHALF OF THE RESPONDENT

4 MR. MINEAR: Mr. Chief Justice, and may it
5 please the Court:

6 Section 2412(d) requires that EAJA fee
7 applicants submit an application within 30 days of a final
8 judgment that includes an allegation that the Government's
9 position was not substantially justified. Petitioner's
10 lawyer failed to do so in this case and for that reason
11 fails to qualify for fees.

12 This Court has no power to amend EAJA or to
13 excuse lawyers from their carelessness in failing to
14 follow its requirements.

15 QUESTION: Are there any instances in which the
16 Government is liable for fees even if its position was
17 substantially justified?

18 MR. MINEAR: Yes, under section 2412(b), EAJA
19 subjects the United States to fees on the same basis as
20 other parties in other legislation.

21 By contrast, section 2412(d) provides a special
22 provision, distinct from those provisions that apply to
23 private parties and the United States generally, that
24 requires there be a showing that the Government's position
25 was not substantially justified.

1 QUESTION: There are also some -- some other
2 statutes besides EAJA in which the Government, when it
3 loses, whether its position was substantially justified or
4 not, is subject to -- to fees. Isn't that -- isn't that
5 correct?

6 MR. MINEAR: Yes, if I can clarify. Section
7 2412(b) indicates the Government is waiving its sovereign
8 immunity as to those other statutes.

9 QUESTION: Right.

10 MR. MINEAR: So in the case of 2412(b), it puts
11 the United States on the same par as private parties, and
12 in that sense, it's comparable to the situation that was
13 faced in Irwin where the United States is subject to Title
14 VII actions on the same basis as private parties.

15 QUESTION: Well, I -- I think you know where I
16 was going. Was -- was the Government somehow puzzled or
17 confused when it received this document or did it
18 naturally assume that it would have to show that this
19 position was substantially justified? In other words,
20 would there have been some other theory in which the
21 Government might have thought it would have been really
22 liable for these fees?

23 MR. MINEAR: Justice Kennedy, I have two answers
24 for that. First of all, the statute requires that these
25 conditions be met, and these are conditions on the

1 Government' s --

2 QUESTION: Well, that' s the issue we' re -- we' re
3 talking about.

4 MR. MINEAR: And these are conditions on the
5 Government' s waiver of sovereign immunity. So the
6 Government has an obligation to insist that parties comply
7 with those conditions --

8 QUESTION: Well, that' s -- that' s true. The
9 question is whether this allegation has to be made within
10 the 30 days or whether it can be offered subsequently as
11 an amendment.

12 MR. MINEAR: That' s --

13 QUESTION: Clearly it has to be made. And the
14 Government certainly was not in doubt about the fact that
15 its -- it wasn' t going to be liable for the fees unless it
16 was in due course made.

17 MR. MINEAR: I' d like to make two points with
18 regard to this.

19 QUESTION: Yes.

20 MR. MINEAR: First of all, with regard to the
21 30-day time limit --

22 QUESTION: Right.

23 MR. MINEAR: -- this Court indicated in *INS v.*
24 *Jean*, 496 U.S. at 160, that the 30-day requirement does
25 apply to the allegation of no substantial justification.

1 As we explain in our brief, Jean indicates it's a 30-day
2 requirement and at page 160 they say that the fee
3 application has to include --

4 QUESTION: Mr. Minear, can I --

5 MR. MINEAR: -- this allegation.

6 QUESTION: Can I ask you sort of a basic
7 question? Sometimes these things are negotiated I think,
8 aren't they? After the fee application is filed, the
9 counsel may meet and discuss whether they can settle the
10 fee application?

11 MR. MINEAR: That is correct.

12 QUESTION: During -- if such a meeting took
13 place 15 days after the application was filed, do you
14 think the Government lawyer would have an ethical duty to
15 tell the plaintiff's lawyer -- say, you goofed and forgot
16 the no-substantial-justification allegation in your -- in
17 your request?

18 MR. MINEAR: The Government -- the Government
19 attorney might have that obligation in the course of
20 settlement negotiations.

21 QUESTION: What would be the --

22 MR. MINEAR: But in adversary litigation, the
23 United States certainly doesn't have the obligation --

24 QUESTION: What would be the basis of settlement
25 -- of the obligation in settlement negotiations? I mean,

1 long ago the Court said that you didn't -- that opponents
2 couldn't live by their adversaries' wits.

3 MR. MINEAR: Yes, that's -- and I agree with
4 that, Mr. Chief Justice. But in the course of discussing
5 these matters, there's a possibility that there could --
6 that the Government has to be careful not to mislead the
7 party, and so that's where an ethical obligation could
8 come forward.

9 But in this case, there were no negotiations of
10 that type. Rather, there's simply the Government's
11 obligation to respond to the fee application, and we
12 responded appropriately.

13 QUESTION: But -- but in this -- in this case
14 the application did say that it was pursuant to 2412. So
15 as I indicated and Justice O'Connor said, the Government
16 was under no -- no mistaken assumptions about the
17 applicability of this section and this section only.

18 MR. MINEAR: But the United States was not on
19 notice whether this party was contesting that the
20 Government's position was not substantially justified.

21 QUESTION: Do you take the position that there
22 is any point in requiring that allegation to be made other
23 than the point that was described in the earlier half of
24 the argument? And that is, to put the -- in effect, to --
25 to put the lawyer on notice that there is a responsibility

1 here to be serious before one goes forward with a -- with
2 fee litigation under this act.

3 MR. MINEAR: There --

4 QUESTION: Is -- is there any other reason for
5 it?

6 MR. MINEAR: There are three reasons. First of
7 all, it's a condition that Congress placed on sovereign
8 immunity. And by that alone, the courts and lawyers and
9 the United States representing Congress' will must respect
10 it.

11 Second, this obligation requires the party, as
12 was articulated earlier, to examine the Government's
13 position and make a determination of whether or not they
14 wish to contest whether it is substantially justified or
15 not. So that does put that additional obligation on
16 counsel.

17 Third, it's of use to the United States in
18 determining how to respond to a fee application. The
19 United States --

20 QUESTION: Yes, but all the United States has to
21 do, in the absence of an -- of the allegation, is what it
22 does here and say, you didn't make the allegation. We
23 move to dismiss. If the lawyer is really serious, the
24 lawyer is going to come back and say, whoops, I -- I do
25 make that allegation. At that point, the United States

1 knows where it stands and presumably it has the -- the
2 benefit of the lawyer's sense of responsibility for going
3 forward and you go forward.

4 MR. MINEAR: Except that the party did not
5 comply with the condition that Congress imposed on its
6 waiver of sovereign immunity.

7 QUESTION: Mr. Minear --

8 QUESTION: But other than that, the Government
9 has not really been prejudiced in anyway. The Government
10 knows of the substantial justification rule and it's
11 either ready to defend or -- or acquiesce on that point.

12 MR. MINEAR: Well, the Government and the courts
13 are both prejudiced by this because it requires two
14 additional filings that otherwise would not need to be
15 made if the lawyer had not been careless.

16 In this situation -- we face thousands of suits
17 that potentially implicate EAJA claims, and Congress
18 recognized that these are matters that need to be resolved
19 quickly with minimal litigation in contradistinction to
20 what's happened in this case. And --

21 QUESTION: Mr. Minear, the -- the Federal
22 Circuit obviously doesn't agree entirely with the position
23 you're now saying, you have to do everything up front.

24 And what struck me as curious is the Federal
25 Circuit allows you to flesh out allegations. So, for

1 example, you say I -- I want a fee of \$1,000 but you don't
2 put in the itemization. As I understand the Federal
3 Circuit's position, they allow you to flesh out something
4 that -- that really seems to me is a lot more substantial,
5 to document your fee. But this is a pro forma allegation.
6 So it seems to me, if you're saying -- if you're taking
7 the position you must do everything within 30 days, then
8 you would have to say the Federal Circuit is wrong in
9 saying you can flesh out allegations.

10 MR. MINEAR: Well, those issues are not before
11 the Court at this time. The United States does have a
12 different view on that.

13 But I must disagree that is a pro forma
14 allegation. That -- that suggests that -- that we need
15 not require the lawyers to comply with the letter of the
16 law because we don't think they're going to comply with
17 the spirit of the law. Rather --

18 QUESTION: No. They have to comply. The
19 question is can they be excused if they're a little late.

20 MR. MINEAR: Yes, and in that respect, the
21 parties have -- petitioner has -- the petitioner has made
22 two arguments. One is the relation-back doctrine and the
23 other is equitable tolling. I'd like to turn to each of
24 those issues specifically.

25 QUESTION: Before you do that, could you finish

1 your answer before where you said you had two points and
2 you raised a case with regard to point one, and then I
3 never did hear point two because a question came up. You
4 don't remember it either.

5 MR. MINEAR: This -- probably -- I'm not sure if
6 it was --

7 QUESTION: Let's forget about it.

8 MR. MINEAR: On -- on the relation-back
9 doctrine.

10 QUESTION: You said you'd give us some reasons
11 why this is important to the Government.

12 MR. MINEAR: Yes, and the reasons were, first of
13 all, our obligation to defend those conditions that
14 Congress places on its waiver of sovereign immunity, and
15 second, to ensure that there is efficient processing of
16 attorney application fees. Justice Breyer made allusion
17 to this in the first part of the argument, and as I said
18 before, the Government faces thousands of these requests,
19 and it's very important they be -- be resolved promptly.
20 And they can only be resolved promptly if parties follow
21 the rules that Congress has laid down. We believe that's
22 why Congress set these rules, because they wanted to make
23 sure that attorney claims would be resolved efficiently,
24 and they cannot be resolved efficiently if parties don't
25 play by the rules.

1 Now, the relation-back doctrine is really an
2 exception to the rules that Congress set forward, at least
3 the -- the relation-back doctrine, as the -- as
4 petitioners are suggesting it ought to be applied here.
5 As a general matter, the relation-back doctrine is a
6 principle that's codified in rules, such as rule 15 of the
7 Federal Rules of Civil Procedure. And it provides an
8 exception for, in that case, pleadings being amended after
9 the fact.

10 But this isn't a case of initiating civil
11 litigation and this is not a case where rule 15 applies.
12 Rather, the question is what did Congress intend. If
13 Congress had wanted a relation-back doctrine, it could
14 have specified that.

15 QUESTION: Wasn't there a relation-back doctrine
16 that courts were applying before it was codified in 15(c)?

17 MR. MINEAR: The examples that petitioner points
18 to are cases involving the Federal Employees Liability Act
19 involving the injuries to interstate -- to railmen who are
20 working in interstate commerce. And in several instances,
21 the Court had applied that as a common law principle
22 indicating, as in Keene, that those arguments on either
23 side for that particular rule. But I don't think we can
24 say that there's a general principle of relation-back.
25 And certainly --

1 QUESTION: You wouldn't want to generalize from
2 FELA cases, would you?

3 MR. MINEAR: No, I would not.

4 QUESTION: But there was in States -- some
5 States also had a relation-back doctrine.

6 MR. MINEAR: And the note in rule 15(c), the
7 1937 note to the Federal rules talks about codifications
8 of this, but we're talking here about a situation where
9 Congress has set a time limit and has not provided for
10 relation-back, a case where we're dealing with sovereign
11 immunity, where this is a charge against the Federal fisc.
12 And so we have --

13 QUESTION: Of course, the timeliness argument is
14 somewhat strange in this case because he filed the
15 application prematurely, as I remember the case, didn't
16 he? And then said, no, you got to wait until the mandate
17 comes down, and then after the mandate came down, he
18 refiled it, and then the 30 days went by and the
19 Government asked for an extension. It didn't -- to get it
20 -- to get it disposed of. So the Government's argument
21 that you've got to get this done as fast as possible seems
22 a little strange in this particular case.

23 MR. MINEAR: Well, Your Honor, in this case
24 there were two premature applications that were filed.
25 The first application was filed prematurely. The court

1 returned it and said until the 60-day period runs.

2 QUESTION: Right.

3 MR. MINEAR: The parties then filed another
4 premature application.

5 QUESTION: Which was identical to the first.

6 MR. MINEAR: That's right. And the court held
7 it until the mandate issued and at that point asked the
8 United States to file a response, a 30-day response.

9 So the Government acted quite appropriately. It
10 acted --

11 QUESTION: Well, they took more than 30 days to
12 respond.

13 MR. MINEAR: Yes, it did, but it could well be
14 because we are dealing with --

15 QUESTION: Because they wanted to wait and see
16 whether he'd catch his goof.

17 MR. MINEAR: No, not at all. At the time we
18 filed our extension, the time had already run for that.

19 But the -- the problem that we face in the
20 Government is that we have numerous cases and numerous fee
21 applications. It could very well be --

22 QUESTION: But why doesn't all that fit within a
23 -- an equitable exceptions doctrine because that's one of
24 the things you take into account? My basic question is,
25 why not read the statute of limitations -- say what this

1 Court said in Irwin and others -- as they're normally read
2 subject to equitable exceptions? Or at least if the -- if
3 the legislative history makes that impossible -- and I was
4 just told it doesn't at all -- read the filing of the
5 paper as absolute but the contents of the paper is subject
6 to equitable exceptions? So you'll win 99 percent of the
7 time. It's just the lawyer really had a heart attack on
8 the way to the post office, you know. I mean, something
9 awful came up and why not give him the advantage of that
10 equitable exception?

11 MR. MINEAR: Your Honor, in this case the
12 equitable tolling argument, I have to point out, was not
13 raised before the court --

14 QUESTION: No, no, no, but I mean, we're trying
15 to interpret this statute. And would it be -- is there
16 any reason not to interpret the statute -- whether they
17 win or they lose in this particular case is a matter of
18 lesser importance perhaps, but not to them, but to -- to
19 others.

20 But to get the statute right is important. And
21 -- and therefore, do you think the correct interpretation
22 of this statute is like other statutes, as I said, A,
23 subject to equitable exceptions or, B, at least the
24 content of the document is subject to equitable
25 exceptions?

1 MR. MINEAR: Your Honor, we would say neither is
2 subject to equitable exceptions.

3 QUESTION: I knew you would say that.

4 MR. MINEAR: Yes.

5 QUESTION: And I'm interested in why.

6 MR. MINEAR: Yes. First of all, the statute
7 itself sets a strict 30-day time limit. It does not
8 provide for relation-back. If Congress wanted relation-
9 back, it could have. And to imply a relation-back
10 doctrine is to negate Congress' specific intent in this
11 case.

12 With regard to equitable tolling, this Court
13 said in Irwin that equitable tolling will be presumed to
14 apply in those cases involving Government waivers of
15 sovereign immunity where the Government is held liable on
16 the same basis as private parties as in title VII. But as
17 my colloquy with Justice Stevens pointed out, this is not
18 a situation where the United States is being held liable
19 for attorneys fees on the same basis as other parties.
20 That's what section 2412(b) applies -- provides, and
21 perhaps equitable tolling should apply there, perhaps not.
22 That's a different question.

23 Here --

24 QUESTION: Mr. Minear --

25 QUESTION: Let me ask you another question, if I

1 may. Supposing that a plaintiff's lawyer has trouble
2 finishing his time sheets. It's a long, protracted case,
3 and just before he filed the fee application, he called
4 the Government lawyer and said, I don't think I can get my
5 time statement in in 30 days. Will you agree to a 2-week
6 extension? Would the Government lawyer have authority to
7 grant that -- to -- to stipulate to such a 2-week
8 extension?

9 MR. MINEAR: No, he would not. Under our
10 reading, this is a 30-day time limit and the parties have
11 to comply. After all, this litigation, as in this case,
12 has been going on for several years. The attorneys have
13 an obligation, if they want fees, if they want the
14 Government to pay their fees, to keep good records and to
15 avoid careless acts --

16 QUESTION: But is he -- is there any other
17 reason? So far what I've registered in my mind is the
18 statute says nothing about equitable exceptions one way or
19 the other. The difference between this statute and a lot
20 of other Government statutes of limitations is in the
21 other ones, they're creating an equality between
22 Government liability and private party liability, and in
23 this one it's only the Government that would be liable for
24 the fees.

25 MR. MINEAR: That's correct.

1 QUESTION: And is there anything else? That's
2 quite a -- it's a formal reason but an important formal
3 reason. Is there any other reason?

4 MR. MINEAR: That is our principal basis --

5 QUESTION: All right. So that's it.

6 MR. MINEAR: -- for distinguishing Irwin.

7 But I'd like to point out also that equitable
8 tolling was not raised in the Court's own --

9 QUESTION: Well, Mr. Minear, is it -- could we
10 possibly find for you in this case on the -- on the issue
11 of relation-back while leaving open the question of
12 whether equitable tolling can apply or not?

13 MR. MINEAR: Yes, you can.

14 QUESTION: Because as I understand the relation-
15 back doctrine, it doesn't matter about the equities.
16 Whether -- whether it's his fault or not, you can always
17 relate back.

18 MR. MINEAR: That's correct.

19 QUESTION: Whereas, equitable tolling would
20 generally be -- be eliminated if -- if fault is involved.

21 MR. MINEAR: That's correct. Now -- now, we
22 think that you do not need to reach the equitable tolling
23 issue, but if you do, there's no basis for equitable
24 tolling in this case in any event because equitable
25 tolling is a doctrine that developed with the -- based on

1 the concept of ameliorating or preventing unfairness to
2 litigants. Now, there's nothing unfair in requiring an
3 attorney to comply with Congress' --

4 QUESTION: Mr. Minear, can I ask you to go back?
5 Because I don't think you -- in the relation-back, if it
6 goes by rule 15(c), it's not just that you have an
7 absolute right. 15(c)(3) makes it very clear that if
8 there's prejudice to one side, it doesn't relate back. It
9 isn't an automatic thing that, oh, you can always make up
10 for not having --

11 MR. MINEAR: That's correct, Your Honor. If I
12 could clarify. In answering Justice Scalia's question, I
13 was indicating that there doesn't have to be inequitable
14 conduct in order to qualify for relation-back. But it
15 doesn't mean you would get it automatically.

16 QUESTION: But it isn't -- it isn't -- it isn't
17 automatic. It has to be that the other side knew or
18 should have known that but for a mistake, that you would
19 have put this in.

20 MR. MINEAR: Yes. But again, rule 15(c) by its
21 terms does not apply to this case. It applies to
22 pleadings.

23 QUESTION: You made a distinction in your brief.
24 You said, well, rule 15(c) is a pleading rule. This is
25 not a pleading. This is an application for a fee. So I

1 say, yes, it is an application for a fee, not a pleading,
2 but why should that make any difference to the concept of
3 relation-back?

4 MR. MINEAR: Because rule 15(c) applies to
5 litigation generally. In this case, we're dealing with a
6 specific time requirement that only applies to Government
7 applications -- to applications for fees against the
8 Government when the Government's position is not
9 substantially justified. There's simply no basis for
10 applying rule 15(c) to this situation.

11 QUESTION: But that -- well, that answer does --
12 has nothing to do with whether it's labeled a pleading or
13 an application.

14 MR. MINEAR: That's correct. That -- that may
15 be correct. Ultimately 15(c) simply doesn't apply here is
16 my point, and if we're going to look at the time limits,
17 we have to look to what did Congress intend what it --
18 when it enacted 2412(d)(1)(B). It set a 30-day time
19 limit. It didn't create any exceptions. It didn't
20 provide for any relation-back. And imputing relation-
21 back would destroy that 30-day time limit that Congress
22 specified.

23 QUESTION: You're in the -- I mean, you've
24 raised a number of -- of very good points that make this
25 quite complicated, and I'm looking to try to simplify it

1 in my own mind.

2 Could we say -- and you'll -- could we say that
3 in respect to the 30-day filing requirement, we don't have
4 to decide whether it is absolute or not absolute, subject
5 to equitable defenses of different kinds or not. In
6 respect to the content parts of this, at least the fourth
7 part, it's treated like any statute of limitations, any
8 ordinary statute of limitations, and whatever they're
9 subject to, Judge, you make this one subject to.

10 Now, there you'd meet me with the argument but
11 this is the Government and -- the one we went through. Is
12 there any other reason for not doing it?

13 MR. MINEAR: Well, this is as -- as you point
14 out, this is a content limitation. It's like Torres and
15 other cases where content does need to be included within
16 the specified time limit. It's not simply a formality
17 like a verification or a signature. Rather, we're talking
18 about the threshold allegation that triggers the right for
19 attorneys fees and triggers the obligation of the
20 Government to respond and show that its position was
21 substantially justified. Without that, you really don't
22 have a fee application as Congress conceived of it.

23 When we look at what do we mean by a fee
24 application, we have to look at 2412(d)(1)(B), and
25 Congress indicated what it felt was essential in the fee

1 application. You have to show that you prevailed. You
2 have to show that you're a qualifying party under EAJA.
3 You have to provide your costs, including an itemized list
4 of costs, and you have to make the threshold allegation
5 the Government's position was not substantially justified.
6 Those terms define what a fee application is. And this
7 Court's decision in Jean indicates it all has to be done
8 in that 30-day period.

9 Now, to apply any sort of relation-back doctrine
10 simply negates the very careful, strict rules that
11 Congress imposed on this charge against the treasury.

12 QUESTION: Can you -- can you give me any
13 indication of how -- how many of these applications there
14 are, how many times the Government contests the
15 substantial justification, how many times the Government
16 concedes that? Does the Government ever concede no
17 substantial justification?

18 MR. MINEAR: Well, in many cases the Government
19 will settle it because the costs of litigating aren't
20 worth fighting over the matter.

21 But in terms of statistics, I was able to find
22 this in a -- a quick review. And -- and this outside the
23 record, so I am stepping outside the record and looking at
24 Government files. But in the case of the Social Security
25 Administration, between August 2001 and August 2002, the

1 Government paid 5,500, roughly, EAJA applications in a
2 total amount of \$18 million. Now, Social Security is only
3 one small part. I shouldn't say small, but it's a
4 significant part of the EAJA -- qualifying EAJA cases.
5 But as that indicates there, at least in 5,000 cases the
6 Government made a payment either by settlement or on the
7 basis of a -- of a --

8 QUESTION: Any indication of what percentage
9 that is out of the total?

10 MR. MINEAR: No, I do not have an indication of
11 the total number of cases that are available.

12 But what we do know is that we face thousands of
13 these cases, and efficiency is paramount unless fee
14 litigation is going to become a second major litigation,
15 which is something --

16 QUESTION: That second major litigation I don't
17 see. I see you have to make the motion to dismiss, but
18 beyond that -- and once the allegation is made, it, as
19 Justice O'Connor pointed out, is the Government's burden
20 to show that its position was substantially justified. So
21 what is the satellite litigation beyond your filing the
22 motion to dismiss because they didn't make the allegation?

23 MR. MINEAR: Your Honor, it's satellite
24 litigation like this: over whether or not relation-back
25 should apply, under what situations it should apply,

1 should equitable tolling apply, have the conditions for
2 equitable tolling been met, all of that.

3 QUESTION: But if this -- but once the Court
4 decides this case and suppose it should say that relation-
5 back applies, well, that's -- that would be it and there
6 wouldn't be any satellite litigation.

7 MR. MINEAR: Well, Your Honor, as -- as you
8 pointed out, relation-back is not automatic. So there
9 would be these questions of whether or not whatever
10 criteria the Court decides to create for relation-back
11 were satisfied.

12 And I have to point out the Court is going to be
13 creating all of these rules. As it stands right now, we
14 have a simple 30-day rule. Once we inject relation-back
15 and equitable considerations, then we're at sea in terms
16 of what's necessary to satisfy this requirement.

17 QUESTION: Well, that's -- that's true of the
18 doctrine in the first place, isn't it? I mean, we don't
19 get into relation-back because Congress originally passed
20 a statute saying there's going to be relation-back. In
21 every one of these instances I suppose in which there is a
22 relaxation of -- of a stated rule, we got into it because
23 a court recognized it.

24 And -- and it seems to me your argument about
25 the satellite litigation at most means maybe we'll have a

1 half a dozen cases deciding exactly what exceptions to the
2 -- to the literal statement in the statute book there may
3 be, but as -- as against EAJA litigation in which there
4 are at least 500 a year on -- in the courts around the
5 country on Social Security alone, that seems to be rather
6 a -- a minuscule percentage of -- of extra cases.

7 MR. MINEAR: Well, Your Honor, with respect to
8 how the Court got involved in these matters, in many cases
9 Congress simply deferred to -- to the courts to establish
10 the appropriate procedural rules. It didn't set time
11 limits.

12 QUESTION: Did it say we are deferring to the
13 courts to -- to set procedural rules? I doubt it.

14 MR. MINEAR: Well --

15 QUESTION: Didn't Congress simply pass a statute
16 and somebody says, well, gee, does -- does the 30 days --
17 is the 30 days absolute or not?

18 MR. MINEAR: Your Honor, the rule's enabling act
19 I think is a -- a direct delegation to the courts to
20 create rules to govern practice and procedure where
21 Congress has not otherwise specified the controlling
22 rules. In this case, we have a rule that Congress has
23 set, a 30-day rule that makes a great amount of sense in
24 these circumstances, where the object is to determine fee
25 litigation quickly and efficiently. And if parties abide

1 by the rules and follow those rules, then we can be
2 assured that these cases will progress and that we will --
3 the courts and the United States will be not burdened with
4 this type of additional litigation.

5 These are, after all, charges against the
6 treasury, the area where the Congress' sovereign immunity
7 is paramount, and when Congress --

8 QUESTION: You -- Mr. Minear, I know you've said
9 it's not before us, but would you make a distinction, the
10 one that this Federal Circuit makes between you don't
11 account for -- for the fees and so you want later to
12 document what -- what supports your -- your requests
13 for --

14 MR. MINEAR: Your Honor, our feeling is that
15 these showings can be made very easily. You can show that
16 you're a prevailing party by attaching a copy of your --
17 your judgment. You can show that you qualify for fees by
18 attaching an affidavit showing you have a net worth of
19 less than \$2 million. Itemization is not all that
20 difficult. Attorneys keep these records.

21 QUESTION: But the itemization is -- is what the
22 Federal Circuit allows leeway on.

23 MR. MINEAR: Yes.

24 QUESTION: And I -- I wanted to see your fix on
25 the statute. I suppose you would say the Federal Circuit

1 is wrong to allow any leeway on -- on that.

2 MR. MINEAR: We think that -- that the better
3 rule is that itemization should be -- be complete at the
4 time the application is -- is filed. However we deal with
5 that issue, certainly the threshold allegation that's at
6 issue here does need to be made, and this is the trigger
7 that -- that determines whether or not the Government
8 needs to respond to the fee application at all. And if
9 the party has not made that basic determination --

10 QUESTION: You characterize it as a trigger. Do
11 you defend the court of appeals' characterization of the
12 requirement as a jurisdictional requirement?

13 MR. MINEAR: Your Honor, I think it can be
14 described as jurisdictional in the sense that term is used
15 in *Sherwood v. United States*, that sovereign immunity is a
16 condition -- the conditions of -- that waive sovereign
17 immunity are limitations defining the scope of the Court's
18 jurisdiction. I think that's how that terminology has
19 become applied.

20 QUESTION: So your answer is yes.

21 MR. MINEAR: Yes.

22 I think it might be more accurate to say it's a
23 sovereign immunity-based limitation, but that carries with
24 it the very same point. Namely, it needs to be strictly
25 construed. Courts have no power to expand it beyond what

1 its normal confines would be.

2 So the term jurisdictional is just a label.
3 What's important is the substance of conditions on
4 sovereign immunity, and that is they need to be strictly
5 construed and cannot be enlarged beyond what Congress has
6 provided.

7 QUESTION: What -- what's your best case in
8 support of your position of a strict interpretation of a
9 requirement like this, other than cases about sovereign
10 immunity being -- it can't be expanded?

11 MR. MINEAR: Cases such as -- some of these
12 cases are not cited in the brief, but Brokamp, Locke, a
13 number of these cases involving statutes of limitation
14 where Congress has -- where this Court has ruled that the
15 emphatic statute of limitation that Congress has set is
16 determinative.

17 I'd also point out to Justice Frankfurter's
18 statement in Holmberg v. Armbrecht where he said that when
19 Congress sets a statute of limitation, there is the end of
20 the matter. The statute of limitation that Congress set
21 is definitive.

22 QUESTION: Of course, Locke was a case involving
23 a total failure to file on time, not omitting an
24 allegation in the filing.

25 MR. MINEAR: That's true, but again, I'm not

1 sure a real distinction can be made there because, as I
2 said before, when we look at what is a fee application, we
3 define a fee application by those things that Congress
4 said are defined as content.

5 Ultimately I think the important point here is
6 that strict adherence to these types of statutory rules is
7 the best guarantee of fairness in these cases. This is a
8 case where the burden that is placed on the attorneys is
9 minimal and we believe that this Court should follow what
10 Congress --

11 QUESTION: But the burden of the real result is
12 placed on the client. I mean, the burden -- the -- the
13 real loser here is not the lawyer. It's the client.

14 MR. MINEAR: Well, in the case where --

15 QUESTION: The lawyer gets the same amount in
16 any event in many, many cases.

17 MR. MINEAR: Yes, and an attorney who is
18 careless, I would say, might well have some obligation not
19 to charge his -- his client for his carelessness.

20 If there are no further --

21 QUESTION: Why would he have that obligation?
22 Because the statute is absolute. It says you can get 20
23 percent of the recovery.

24 MR. MINEAR: The statute is not so absolute
25 actually. I believe the provision that we're talking

1 about here, which is 38 U.S.C. 5904, does allow the Court
2 of Veterans Claims to adjust fee applications in the event
3 that they're not fair, if there are some inequities that
4 are involved in them. Now, I'm not sure to what's -- what
5 extent the court has -- has exercised that authority, but
6 it certainly has -- does have that authority under the
7 statutory provisions that are at issue here.

8 QUESTION: Thank you, Mr. Minear.

9 Mr. Wolfman, you have 4 minutes remaining.

10 REBUTTAL ARGUMENT OF BRIAN WOLFMAN

11 ON BEHALF OF THE PETITIONER

12 MR. WOLFMAN: I'd like to go immediately to
13 Justice Kennedy's question. He asked about the best case.
14 Well, the case that the Government relies on principally
15 in its brief is Soriano v. the United States. The problem
16 with that case is it was overruled by Irwin, and the
17 problem here is that the principle we're now operating on,
18 the problem with the Government, is that when we talk
19 about statutes of limitations principles, you apply the
20 same principles that apply among private parties unless
21 Congress explicitly provides otherwise.

22 Now, I did want to, if I might, turn to the
23 relation-back doctrine just briefly. And the -- the
24 question arose in Mr. Minear's presentation, well, this
25 case doesn't involve rule 15(c). But either did Edelman

1 v. Lynchburg College. Edelman is best read as a case that
2 applied the common law doctrine of relation-back. The
3 Court held, regardless of the EEOC's regulation, even if
4 we were interpreting the statute from scratch, we would
5 apply the relation doctrine back here because it has a
6 common law pedigree. And that's all we're asking for
7 here.

8 The other principal submission by Mr. Mi near is
9 the efficiency argument, that these matters have to be
10 done promptly and efficiently and there's thousands of
11 suits. I have two basic answers to that, the general and
12 the specific.

13 The general is that the -- until the Federal
14 Circuit ruled, this was the rule, the rule that we're
15 asking for, in all of the circuits that had ruled on it.
16 And the Government does not present an iota of evidence
17 there were any problems in applying the relation-back
18 principle in those circuits. It's the Third, the Sixth,
19 and the Eleventh Circuit.

20 The specific answer is I think we know what
21 would have happened in this case if my client's amendment
22 had related back. The matter would have been resolved 3
23 or 4 years ago. There is no serious efficiency concern
24 here. The reason we're here much later is both because
25 the Government interposed this jurisdictional defense and

1 it asked for seven or eight extensions of time during the
2 course of this litigation.

3 The final thing I would like to say is that the
4 Government's arguments presuppose that there's no good
5 reason for relaxing rules. But there is. We realize that
6 litigants and lawyers make mistakes and rules such as
7 relation-back serve important purposes so that litigants
8 and lawyers don't get tripped up by technical rules such
9 as the one the court -- that the court below and the
10 Government is trying to impose here.

11 If the Court has no questions.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
13 Wolfman.

14 The case is submitted.

15 (Whereupon, at 12:03 p.m., the case in the
16 above-entitled matter was submitted.)

17

18

19

20

21

22

23

24

25