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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNITED STATES DEPARTMENT OF LABOR,  
Petitioner V. GEORGE R. TRIPLETT, ET AL.; and  
COMMITTEE ON LEGAL ETHICS OF THE WEST  
VIRGINIA STATE BAR. Petitioner V. GEORGE R.  
TRIPLETT, ET AL.

CASE NO: 88-1671 & 88-1688

PLACE: Washington, D.C.

DATE: January 16, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X

3 UNITED STATES DEPARTMENT OF :

4 LABOR, :

5 Petitioner :

6 v. : No. 88-1671

7 GEORGE R. TRIPLETT, ET AL.; and :

8 COMMITTEE ON LEGAL ETHICS OF THE :

9 WEST VIRGINIA STATE BAR, :

10 Petitioner :

11 v. : No. 88-1688

12 GEORGE R. TRIPLETT, ET AL. :

13 -----X

14 Washington, D.C.

15 Tuesday, January 16, 1990

16 The above-entitled matter came on for oral  
17 argument before the Supreme Court of the United States at  
18 10:01 a.m.

19 APPEARANCES:

20 MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor  
21 General, Department of Justice, Washington, D.C., on  
22 behalf of the Petitioner U.S. Department of Labor.

23 JANE MORAN, ESQ., Williamson, West Virginia, on behalf of  
24 the Respondent.

25

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

MICHAEL R. DREEBEN, ESQ.

On behalf of the Petitioner

U.S. Department of Labor

3

JANE MORAN, ESQ.

On behalf of the Respondent

27

REBUTTAL ARGUMENT OF

MICHAEL R. DREEBEN, ESQ.

On behalf of the Petitioner

U.S. Department of Labor

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1 effort to pay disability benefits to eligible coal miners  
2 and their survivors. Under the program, hundreds of  
3 thousands of miners have been paid benefits. The fee  
4 regulations are designed to protect claimants by ensuring  
5 that no claimant must bear his own attorney's fees in a  
6 contested case.

7 They also provide that no fee will be charged if  
8 the applicant does not succeed in obtaining benefits.

9 These provisions serve the goals of maximizing  
10 the use of funds for the benefit of claimants, and  
11 relieving claimants of the responsibility of paying fees,  
12 win or lose.

13 Any system of fee regulation will discourage  
14 some attorneys from participating. But in the context of  
15 this disability program, in which fee regulation is  
16 designed to protect claimants, and where changes to the  
17 fee system will impair other important government  
18 interests, we believe the Congress and the Department of  
19 Labor must have considerable flexibility to structure  
20 appropriate procedures.

21 QUESTION: Mr. Dreeben, this case comes to us in  
22 a rather peculiar posture, does it not? This was not an  
23 enforcement proceeding brought by the Department of Labor  
24 below --

25 MR. DREEBEN: That's correct, Justice --

1 QUESTION: -- against some lawyer who accepted  
2 unapproved fees.

3 MR. DREEBEN: That's correct. This is a state  
4 attorney disciplinary proceeding, in which the respondent  
5 collected fees that were not approved by the Department of  
6 Labor. And the West Virginia Committee on Legal Ethics  
7 commenced a disciplinary proceeding based on the violation  
8 of --

9 QUESTION: And I suppose that decision doesn't  
10 bind the United States, in any event, if it chose to  
11 enforce it some other way?

12 MR. DREEBEN: That's correct, Justice O'Connor.  
13 We do not believe that the decision binds the Department  
14 of Labor, except as to Respondent. It does have the  
15 effect of res judicata as to Mr. Triplett. And in that  
16 sense the United States is bound.

17 But I think the more fundamental interest that  
18 caused us to bring to the Court here is that the decision  
19 below, by holding that the fees are unconstitutional, the  
20 system for awarding fees, casts a cloud over the  
21 legitimacy of the program. And we believe that the  
22 Department of Labor has an interest in establishing that  
23 its program is operated constitutionally and does not  
24 violate any due process interests.

25 We are also concerned that this decision may

1 encourage lawyers in West Virginia and in other states to  
2 violate the Department of Labor's fee regulations,  
3 believing that they can do that with impunity. And to a  
4 certain extent, that may be true, because the Department  
5 of Labor does not have an established mechanism to police  
6 the attorneys who practice before it and to ensure that  
7 they comply with the fee regulations.

8 QUESTION: Do you -- do you think the government  
9 has any standing problem here?

10 MR. DREEBEN: No, Chief Justice Rehnquist, we  
11 don't think the government has a standing problem. The  
12 Department of Labor's interest here is in establishing  
13 that its fee system is constitutional. And to the extent  
14 that it's bound against Respondent by virtue of having  
15 participated in this case as a party, it clearly has the  
16 standing of an aggrieved party to bring the case here.

17 But in any event, there is another petitioner in  
18 this Court, the Committee on Legal Ethics has filed its  
19 own petition. It has an interest in continuing to enforce  
20 its disciplinary rules against Respondent. And the sole  
21 reason given by the court below for not enforcing its own  
22 disciplinary rules was its belief that the fee system is  
23 unconstitutional.

24 QUESTION: Mr. Dreeben, how did you get to be a  
25 party below?

1 MR. DREEBEN: The court, when it issued its  
2 initial opinion, invited the Department of Labor to  
3 intervene in the proceeding as a party, either to seek  
4 rehearing or to file a petition in this Court.

5 And the Department of Labor did intervene. It  
6 had a limited amount of time to supplement the record, and  
7 it did that. And it filed a petition for a rehearing,  
8 which was denied. And subsequent to that we filed a  
9 petition in this Court, as did the Committee on Legal  
10 Ethics.

11 We don't actually believe the Court need to  
12 reach the standing question as to the government in this  
13 case, because the presence of the Committee on Legal  
14 Ethics as a petitioner satisfies any possible standing  
15 concerns from (inaudible).

16 QUESTION: But, Mr. Dreeben, the Committee on  
17 Legal Ethics has virtually indicated that it doesn't care  
18 one way or the other. I mean, if there is a -- a Federal  
19 law that is valid, they're willing to enforce it. If  
20 there isn't, they're not going to.

21 I -- I don't see that they're -- they have a  
22 real interest at stake here by virtue of what they're  
23 saying.

24 MR. DREEBEN: Well, the West Virginia Supreme  
25 Court believed that it wasn't going to enforce the



1 disciplinary rules here, but the Committee on Legal Ethics  
2 has brought a petition to this Court, and it does continue  
3 to assert an interest in enforcing the disciplinary rules  
4 against Respondent.

5 QUESTION: So what -- what business have you got  
6 in taking up their cause?

7 MR. DREEBEN: Well, we believe that we have  
8 independent standing as well, because --

9 QUESTION: Well, then we mustn't reach your  
10 standing -- the question of your standing?

11 MR. DREEBEN: Only if the Court concludes that  
12 the Committee on Legal Ethics does not have standing so  
13 that the case is not properly in this Court, unless the  
14 Department of Labor does. We believe that either of those  
15 grounds would furnish an adequate basis for a decision in  
16 this Court.

17 Turning to the constitutional question --

18 QUESTION: May -- may I just ask one other  
19 question in these preliminary matters? Is there any  
20 enforcement proceeding pending, or has the Department  
21 indicated any desire to bring an enforcement proceeding  
22 against this lawyer?

23 MR. DREEBEN: No, Justice Stevens. The  
24 Department actually doesn't have machinery set up to bring  
25 its own enforcement proceedings against lawyers. It

1 really does rely on state bar organizations like the  
2 Committee on Legal Ethics to enforce its regulations  
3 through the enforcement of their own disciplinary --

4 QUESTION: You mean if a lawyer just, without  
5 regard to local discipline, just went ahead and ignored  
6 the regulations and charged people fees that the  
7 Department didn't approve and all, there would be no  
8 remedy, other than -- other than ethical remedy?

9 MR. DREEBEN: Well, I wouldn't say that there  
10 would be no remedy. There would be possibly a criminal  
11 remedy if there were fraud involved.

12 QUESTION: No, assume no fraud; just assume they  
13 -- they think it's a bad statute and the people are  
14 entitled to representation, and they're willing to work  
15 for a black lung claimant if they get paid.

16 MR. DREEBEN: There -- there is a limited amount  
17 of machinery built into the current system that the  
18 Department of Labor might be able to draw upon to  
19 discipline attorneys or to preclude them from representing  
20 claimants in the future.

21 It doesn't have a -- an adequate disciplinary  
22 mechanism, because its primary function is really to  
23 adjudicate black lung claims and to pay beneficiaries, not  
24 to police attorneys.

25 Now the rules are there, but it's been the

1 long-standing practice of the Department, which it's found  
2 satisfactory, to rely on state committees on legal ethics  
3 to enforce unlawful fee arrangements.

4 QUESTION: May I ask also, is -- is that also  
5 the practice under the Longshoremen's Act, which I guess  
6 is the basis for -- for this procedure, that they -- they  
7 don't really enforce the provision, other than relying on  
8 local bar associations?

9 MR. DREEBEN: That's my understanding, Justice  
10 Stevens.

11 I don't think that this has been a major problem  
12 in the sense that there has been hundreds of cases that  
13 the Department of Labor becomes aware of in which people  
14 ignore the fee regulations, and the Department doesn't do  
15 anything. I think cases like this serve a deterrent  
16 function, and most attorneys probably are not going to  
17 deliberately flout rules that they know are valid.

18 However, there has been something of a problem  
19 in the black lung area, particularly since this case,  
20 because some attorneys have notified the Department that  
21 they believe that the regulations are no longer valid and  
22 they intend to charge contingent fees and to collect 25  
23 percent of back benefits.

24 And that does directly infringe upon the policy  
25 that supports the fee regulations.

1           We believe that the attorney's fee system is  
2 constitutional if evaluated under the Mathews v. Eldridge  
3 test, which the court below purported to apply but we  
4 believe applied incorrectly.

5           I'd like to note at the outset that it's notable  
6 that this decision rests upon an extraordinarily frail  
7 factual record. There is very little in the record, other  
8 -- to talk about how the fee system actually affects the  
9 incentives of attorneys, other than the affidavits of a  
10 relatively small number of attorneys, and some selective  
11 citations from congressional testimony.

12           We do not believe that that is a sufficient  
13 record to support a finding of unconstitutionality in  
14 dealing with a large-scale benefits program like the one  
15 at issue here. Now, we also believe that it's  
16 inappropriate for a court to determine on such a small  
17 record that the Department has not acted in good faith to  
18 develop adequate procedures.

19           But, regardless of the criticisms of the record,  
20 we also think that the court went seriously astray in  
21 applying the analysis directed under Mathews v. Eldridge.

22           There are two important government interests  
23 that are served by the fee regulations. The first is that  
24 benefits go for the benefit of a qualified claimant, or an  
25 applicant's survivor, so that the money that the



1 government devotes to this program serves for the support  
2 of coal miners and their survivors and doesn't, in effect,  
3 turn into a lawyers' relief act, in which substantial  
4 amounts of the benefits are diverted to attorneys.

5 There is also a secondary motive underlying the  
6 fee regulation of ensuring that claimants do not make  
7 improvident agreements with attorneys. And for that  
8 reason there is an approval requirement even when  
9 claimants do bear their own fees, which they do if a case  
10 is not contested.

11 There is a second important government interest  
12 that I believe the court overlooked, and that is the  
13 following. Once Congress determined to protect claimants  
14 by shifting fees to the losing party, the responsible  
15 operator or the trust fund, the government has a  
16 substantial interest in assuring that the system under  
17 which that party must pay the fees determines the fees  
18 fairly.

19 In other words, it's not appropriate that the  
20 fees would be paid before a benefits award is final,  
21 because in that event the attorneys may collect the money  
22 that subsequently has to be repaid, and this could prove  
23 difficult as a practical matter.

24 QUESTION: May I ask one other preliminary  
25 question? What is the impact of the regulations on the

1 situation in which a potential claimant would like to  
2 consult an attorney about whether or not he has a valid  
3 claim that he'd like to pursue? May he do that and pay  
4 the attorney for that advice?

5 MR. DREEBEN: I'm not aware of any case that's  
6 actually raised that, Justice Stevens. But I think we  
7 would take the position that that kind of consultation,  
8 preliminary to a benefits application, could not be  
9 compensated without approval from the appropriate agency.  
10 And if no claim were actually filed, I believe that it  
11 would be impossible for the attorney legitimately to  
12 charge.

13 One important aspect --

14 QUESTION: And what is the government interest  
15 that justifies that prohibition?

16 MR. DREEBEN: The government interest that  
17 justifies that prohibition is in having a program that  
18 offers to claimants and their survivors the opportunity to  
19 apply without having any risk of paying attorney's fees at  
20 all.

21 There is no reason why a claimant who is not  
22 going to receive a benefit under this program pay  
23 attorney's fees in order to find that out. That at least,  
24 I believe, is the theory underlying the total prohibition  
25 of any attorney's fees, unless the claimant actually

1 prevails.

2           And so for that -- that purpose actually helps  
3 claimants, because they can go to an appropriate Social  
4 Security office or Department of Labor office and receive  
5 a claims information form that tells them here are the  
6 basic criteria in the program. It provides that you will  
7 have an attorney and you won't have to pay if you prevail  
8 and it's not contested.

9           And I think that that's a substantial government  
10 interest to be able to offer in a disability program of  
11 this type that was designed to reach hundreds of thousands  
12 of people, many of whom may have no idea whether they  
13 actually do have a valid claim, but might be willing to  
14 pay two, three, four or \$500 dollars to find that out, and  
15 would thereby just lose that money.

16           I was saying that there is a second government  
17 interest in this program, and that is to ensure that if  
18 fees are to be borne by the losing party, they are  
19 determined fairly. And that support is in the requirement  
20 that no fees are paid until a benefits award is final. It  
21 also supports the method of determining fees in this case,  
22 which does not permit great multipliers.

23           It does account, I would like to stress, for  
24 both the delay factor and the risk of loss factor that  
25 were very heavily relied on by the court below.

1           The way in which the Longshore Act and the Black  
2 Lung Benefits Act account for these two factors is by  
3 assuming that the hourly rate of attorneys practicing in  
4 this field takes those matters into account.

5           Attorneys have argued in various papers filed  
6 with the government that these methods are not adequate to  
7 provide sufficient compensation. But I think that the  
8 answer to that is the statute does call for the payment of  
9 a reasonable attorney's fee. The Department of Labor has  
10 interpreted that to include a risk of loss component.

11           And the attorneys who are dissatisfied with the  
12 exact way in which that's been applied can continue to  
13 litigate that, and can attempt to obtain a larger benefits  
14 award -- or a larger award of attorney's fees if they  
15 believe it's justified by the statutory criteria.

16           But any system of awarding fees that is in a  
17 sense contingent, which is this one, will have the effect  
18 of forcing attorneys to be somewhat selective in the cases  
19 that they take. And we do not think that the -- the way  
20 in which the Department of Labor has applied this program  
21 has denied all incentives for attorneys to take on cases  
22 that, after evaluation, appear reasonably meritorious.

23           QUESTION: May I ask this question? Supposing  
24 the government would advance the same interest in all  
25 other claims against the government for which attorneys



1 fees can be recovered if the plaintiff is successful --  
2 civil rights claims of one kind or another and claims  
3 against the government -- would you think that would be  
4 constitutional?

5 MR. DREEBEN: I'm not sure, Justice Stevens,  
6 whether it would or wouldn't. It would -- the -- it would  
7 depend upon a rather particularized analysis of exactly  
8 what is at stake in each type of program.

9 What makes this program special is that it is a  
10 Federal disability benefits program in which the  
11 government is prepared to come up with money to pay people  
12 who satisfy these statutory criteria.

13 QUESTION: Of course, the government has to come  
14 up with money to pay people whose constitutional rights  
15 are violated if they sue them (inaudible).

16 MR. DREEBEN: Yes, that is true.

17 QUESTION: And I suppose they have to budget for  
18 that.

19 MR. DREEBEN: But I think that the -- the -- the  
20 flexibility that -- that is warranted when the -- when the  
21 -- the individual interest at stake is a disability  
22 benefit, is somewhat greater than in some of the other  
23 areas that -- that could be identified, perhaps a Federal  
24 torts claims act suit, or a constitutional rights suit.

25 QUESTION: Mr. Dreeben, I don't understand what

1 you're saying. I -- I thought the government's position  
2 was that there is no -- no constitutional obligation to  
3 provide attorney's fees anyway. And I assume there is no  
4 constitutional obligation to provide attorney's fees for  
5 1983 actions either.

6 MR. DREEBEN: No, there isn't, Justice Scalia.  
7 But the analysis, I think, would be the same as it is in  
8 this case. One would look at the three factors identified  
9 under Mathews v. Eldridge and try to determine whether a  
10 fundamentally fair proceeding can be achieved if --

11 QUESTION: But I thought part of your argument  
12 was that Mathews doesn't even apply anyway because this is  
13 not the taking away of a -- that -- that it -- it is not a  
14 Mathews kind of a benefit. Didn't the government make  
15 that argument here?

16 MR. DREEBEN: Well, the -- the question of  
17 whether applicants have a protected property interest  
18 under the due process clause was noted in the opinion  
19 below and it's noted in our brief. But we don't think  
20 that the Court need to decide in this case any more than  
21 it needed to decide it in the Walters case.

22 There is at least one beneficiary in this case  
23 who is actually awarded benefits, and a -- a hearing was  
24 to be held to be determine whether the operator's  
25 challenge to that award would be sustained or rejected.

1           And in that context we think that under this  
2 Court's cases there is a protected due -- property  
3 interest that would require appropriate procedures.

4           And because the court below --

5           QUESTION: To -- to take the benefit away from  
6 the person --

7           MR. DREEBEN: Yes. Yes.

8           The -- the --

9           QUESTION: But isn't there also a liberty  
10 interest involved, if just any ordinary citizen wants to  
11 talk to a lawyer about the possibility of suing somebody,  
12 and the -- and there's a category of cases that you are  
13 saying the government could say, no, you can't do that if  
14 you have to pay him. The only way you can consult a  
15 lawyer is if he's willing to do it for free.

16           And you can say that in the black lung area, but  
17 you're not so sure about it in the civil rights area. But  
18 is -- isn't there -- that possibly of some constitutional  
19 significance, that just the ordinary citizen's desire to -  
20 - to get advice?

21           MR. DREEBEN: Well, I -- I think that there is a  
22 liberty interest that could be asserted in that context,  
23 but I do not think that it lends any additional weight to  
24 the kind of claim that's being pressed in this case on  
25 behalf of black lung claimants. It might have a different

1 significance in some other context.

2 But here the primary aim is to obtain benefits  
3 the Congress provided under an entitlement program to make  
4 up for the fact that states were not really adequately  
5 affording benefits for this particular occupational  
6 disease.

7 QUESTION: But -- but isn't there also another  
8 interest? I mean of course if you file a claim you want  
9 to get the benefit, but -- but most situations, before  
10 somebody gets involved in a lawsuit, the person wants to  
11 know whether all the -- the turmoil that's associated with  
12 litigation is worth the trouble.

13 And you -- you just don't like to have people  
14 blithely going ahead and suing. Sometimes they need --  
15 need good advice on whether it's worth the -- the mental  
16 anguish and all the other difficulties and burdens  
17 associated with litigation to get involved in it.

18 And what you're saying, in effect, is that that  
19 decision on whether to assume that cost of prosecuting a  
20 claim must be made without the benefit of counsel, unless  
21 counsel is willing to work for nothing.

22 MR. DREEBEN: I -- I think that's essentially  
23 right.

24 QUESTION: Yeah.

25 MR. DREEBEN: And I think that that actually



1 makes some sense in this -- in this program. The -- the  
2 typical beneficiary is not someone who has a vast amount  
3 of resources. It's probably also not the kind of person  
4 who is terribly sophisticated in legal matters.

5 And Congress can take into consideration in that  
6 particular type of situation that there is a danger of  
7 exploitation. And it want -- if it wants to avoid that  
8 danger of exploitation it sets up a fee system in which  
9 the beneficiary doesn't pay fees at the outset. The  
10 program is, in essence, contingent, and the lawyer does  
11 have to undertake the initial analysis of the case without  
12 the benefit of being paid.

13 But that is not very unusual in a personal  
14 injury context. In fact I would suggest that it's the  
15 norm in any area that's a contingent area. The lawyer  
16 evaluates the case up front to try to decide whether there  
17 is a sufficient amount of merit to the case to make it  
18 reasonable for him to go forward, or for her to go  
19 forward.

20 QUESTION: In that respect, is this program any  
21 different from the Veterans' Administration program that  
22 we've upheld? That is to say, would they have allowed the  
23 lawyers to charge fees for initial consultation?

24 MR. DREEBEN: No, I -- I don't think so, Justice  
25 Scalia. I think that the statute there was quite

1 explicit, that -- that there was a \$10-cap on fees in any  
2 context.

3 QUESTION: For everything.

4 MR. DREEBEN: And I think that as a matter of  
5 statutory construction, this program should be dealt with  
6 in the same sense. That is, that the attorney's fees  
7 regulations apply to preliminary consultations just as  
8 much as to pressing the actual benefits claim.

9 Otherwise they would really fail over their  
10 fundamental purpose of making sure that the claimants had  
11 the opportunity to participate in this program without the  
12 risk that they would lose money if their claim did not  
13 succeed by virtue of having to pay an attorney.

14 QUESTION: But suppose it were shown, counsel,  
15 that in a significant number of cases, a meritorious claim  
16 was not prosecuted because the fee schedule was  
17 unreasonably restrictive or unreasonably low. What would  
18 be your position then?

19 MR. DREEBEN: Well, our -- I would like to say  
20 at the outset, of course, that we don't think that's been  
21 shown in this case. But if there were some showing that  
22 the fee system actually was preventing people from getting  
23 counsel, we still think that this program would be  
24 constitutional as applied.

25 The reason is that the Department of Labor has

1 taken some significant steps to ensure that even if a  
2 claimant does not have counsel he has a fair opportunity  
3 to press his benefits claim. And we do not think that the  
4 risk of a loss without an attorney is so significant in  
5 the context of this program that the fee system should be  
6 invalidated and the government interests supported be  
7 denied in order to allow some people to get lawyers. The  
8 program is --

9 QUESTION: Well, part of my hypothetical was  
10 that a significant number of meritorious claims were not  
11 prosecuted as a result of the low fee schedule or  
12 restrictive fee schedule. And I think your answer was, oh  
13 well, the act allows those claims to be prosecuted anyway.  
14 But you then took away one of my factual predicates.

15 MR. DREEBEN: Your assumption, Justice Kennedy,  
16 is that people would not pursue the claim --

17 QUESTION: Yes.

18 MR. DREEBEN: Pro se at all?

19 QUESTION: Yes.

20 MR. DREEBEN: Again, I would note that there  
21 isn't a showing of that's happening. That would be a  
22 different case and perhaps a harder case, because it might  
23 suggest that in some sense the program is so inhospitable  
24 to pro se claimants that they refuse to participate.

25 QUESTION: But what would be -- what would be

1 the grounds for the constitutional objection, the First  
2 Amendment ground that you were barred from seeking an  
3 entitlement?

4 MR. DREEBEN: I'm not really sure what  
5 constitutional provision would be involved. The first  
6 question would be whether the Court was prepared to say  
7 that someone who has a -- someone who was an applicant has  
8 a protected property interest.

9 We would dispute that, and if that contention  
10 prevailed then there would be no constitutional issue,  
11 other than either a First Amendment or some sort of a  
12 liberty issue in consulting counsel, and it's not clear to  
13 me that either of those interests would be sufficient to  
14 determine that this program is unconstitutional.

15 This is, after all, a program in which Congress  
16 is attempting to supplement financial benefits for a  
17 certain category of workers, and it sets up a program  
18 which it believes is fair. And unless there's a showing  
19 that it's fundamentally unfair to people who proceed pro  
20 se, the decision of some individuals not to proceed pro se  
21 probably would not be a ground (inaudible).

22 QUESTION: Do you think the -- do you think  
23 there's a -- Justice Scalia brought this up. Do you think  
24 there's a constitutional right for the government to pay  
25 for counsel and before -- in a hearing to determine the



1 entitlement to benefits? Do you think there's a  
2 constitutional right to counsel in this case? I -- I --  
3 perhaps there is, as in Goldberg, if the party wants to  
4 hire one, you have to permit the counsel. But is there a  
5 constitutional right to provide counsel?

6 MR. DREEBEN: No, I don't think that there is a  
7 constitutional right to provide counsel. This isn't a  
8 case like Gideon v. Wainwright, or Lassiter v. Department  
9 of Social Services.

10 QUESTION: Well Goldberg -- Goldberg said that  
11 the government doesn't need to provide counsel in a pre-  
12 termination hearing --

13 MR. DREEBEN: That's correct.

14 QUESTION: But that the claimant has the right  
15 to --

16 MR. DREEBEN: That's correct.

17 QUESTION: -- hire his own.

18 MR. DREEBEN: That's correct. But in Walters,  
19 the Court noted that the program at issue in Goldberg  
20 didn't have a policy against prohibiting the welfare  
21 applicant from dividing his check with the lawyer, and  
22 that policy is very clearly present here, just as it was  
23 present in Walters, and thus there has to be some sort of  
24 a weighing process to determine whether the program  
25 becomes fundamentally unfair if somebody does not have

1 free and unrestrained access to lawyers.

2 QUESTION: But weren't you suggesting, in answer  
3 to my and several other questions, that there is  
4 constitutional authority to prohibit counsel?

5 MR. DREEBEN: I think there would be  
6 constitutional authority to prohibit counsel, provided  
7 that the procedure itself is designed to operate without  
8 lawyers, which was the case in the Walters decision.

9 It really is not the case here to the extent  
10 that the Department of Labor actually wants lawyers out of  
11 the system. It doesn't want lawyers out of the system.  
12 What it does is provide what it believes is fair  
13 compensation for lawyers, and it provides a procedure  
14 where, if somebody does not proceed with a lawyer, they  
15 still have a fair chance to establish their claim. And it  
16 balances various factors.

17 It tries to ensure that government money is  
18 essentially applied to the benefit of beneficiaries, it  
19 tries to ensure that claimants don't squander their fees  
20 consulting attorneys when they don't have a valid claim.  
21 And we think that Congress really needs to have a  
22 considerable amount of latitude to structure these types  
23 of programs within the general bounds of fairness.

24 QUESTION: But do you think that latitude would  
25 go to the extent that where the Defendants can have

1 lawyers, as I guess they can here, the government could  
2 say that those interests would best be served by flatly  
3 prohibiting lawyers for all claimants because they'll get  
4 a fair hearing, the tribunals will look out for their  
5 interests, and so forth?

6 MR. DREEBEN: I think that would be a much  
7 harder case.

8 QUESTION: Well, sure it would be a harder case,  
9 but what do you think about the -- outcome of that case?

10 MR. DREEBEN: Well, it would really depend on  
11 whether in analyzing the specific procedures that  
12 claimants without counsel could get a fair hearing. I  
13 think it's possible. I think the closer that you move to  
14 a pure adjudicatory model and you unbalance the scales by  
15 allowing one side to have lawyers and the other side not -  
16 -

17 QUESTION: Well, we do have an adjudicatory  
18 model here, unlike the Veterans system, because the  
19 government doesn't pay the awards here, and the people who  
20 do have their own lawyers.

21 MR. DREEBEN: Well, the government does pay a  
22 substantial number of awards.

23 QUESTION: Well, but not in one category. Isn't  
24 one category entirely financed by the operators?

25 MR. DREEBEN: Yes, it is.

1 QUESTION: Well, I'm directing my question to  
2 that category.

3 MR. DREEBEN: Well, as to that category, of  
4 course, the government isn't paying but it still does  
5 provide a variety of protections for claimants. The  
6 initial stage of the process is not adversarial. It's a  
7 claims examiner which helps.

8 Then the ALJ proceeding is really not like a  
9 proceeding in Court. Obviously, evidentiary rules don't  
10 apply, and the ALJs do take some steps to assist the pro  
11 se claimants. And finally, the Benefits Review Board  
12 reviews with particular care any case brought up by a pro  
13 se claimant.

14 QUESTION: And the question is whether all of  
15 that is sufficient if, say, one side can have a lawyer but  
16 the other side can't.

17 MR. DREEBEN: In a certain category of cases  
18 that's correct.

19 QUESTION: Do you think it would be sufficient?

20 MR. DREEBEN: I think that that is sufficient in  
21 this case.

22 I'd like to reserve the balance of my time.

23 QUESTION: Very well, Mr. Dreeben.

24 Ms. Moran?

25 ORAL ARGUMENT OF JANE MORAN



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ON BEHALF OF THE RESPONDENTS

MS. MORAN: Mr. Chief Justice, may it please the Court:

A very interesting thing happened in this case when it was in front of the West Virginia Supreme Court. As you've been told, the Department was given the opportunity to petition for a rehearing, which they did, and they filed a motion asking to be allowed to supplement the record, which was granted.

Now, one would assume that the Department at this point would put together the very strongest evidence that they had to convince the West Virginia Supreme Court that their findings were incorrect.

Included in the evidence that they presented was an affidavit by their own chief administrative law judge, Nahum Litt, and that affidavit is interesting both because of its brevity and because of the limits of its scope.

It does not challenge the findings of the court that too many pro se claimants are being forced to proceed without counsel. It does not challenge the assertions in the briefs below that only 12 attorneys in the entire State of West Virginia will take these cases on a regular basis.

In fact, he goes into some detail explaining the very unusual efforts that are being made by his

1 administrative law judges to help people to find the  
2 counsel that will take these cases.

3 The reason for this can be found in his  
4 testimony before the Congressional Subcommittee on  
5 Government Operations in June of 1985. Judge Litt was  
6 asked at that time what could be done about all these  
7 attorneys complaints about delays, meaning delays in  
8 processing of claims, delays in processing fee petitions.

9 Judge Litt responded, and I quote, "I have not  
10 addressed what other avenues might be explored that would  
11 change that and provide for better representation. One of  
12 the fears I certainly intend to stress is if you go to a  
13 larger and larger number of cases being tried in a given  
14 year with a finite number of attorneys who are willing to  
15 take these cases, that we will end up with more and more  
16 claimants being pro se, and being poorly represented in an  
17 ever-increasing complex area of law."

18 This was in June of 1985, and the Department of  
19 Labor now tells the Court that they have never kept any  
20 statistics that would tell them how often people are  
21 represented in front of the administrative law judges.

22 QUESTION: Ms. Moran, I don't -- it seems to me  
23 that -- I don't know that we can very well tell how many  
24 people are not being represented on the basis of scattered  
25 indications by Judge Litt or anybody else if there are no

1 statistics.

2 But even if we could, can't Congress make the  
3 judgment that even though a large number of people might  
4 not be able to get counsel, in our judgment it's worth it  
5 to enable more funds to be dispensed to those who are  
6 seriously enough harmed that they have enough incentive on  
7 their own, without having to get counsel, to go -- to go  
8 and make claims?

9 Why would that be an unreasonable judgment? It  
10 all comes out of the same pot.

11 MS. MORAN: Well, Your Honor, I would say first  
12 of all I don't think Congress has made that judgment. I  
13 don't think it's that clear. I think Congress has  
14 indicated some very serious concern about this, and they  
15 continue to have hearings on the question of attorney's  
16 fees and the sufficiency of attorney's fees and the  
17 availability of counsel.

18 QUESTION: So if what you say is correct, why do  
19 we have any reason to believe that Congress won't change?  
20 And they're in a much better position than we are to  
21 figure out whether people who should be represented  
22 aren't?

23 MS. MORAN: Well, Your Honor, I mean no  
24 disrespect when I say it's very hard for me to figure out  
25 why Congress does much of what they do, and it's

1 impossible for me to predict whether they are going to do  
2 the things that I think they should do. And our problem  
3 right now, which has been recognized by the West Virginia  
4 Supreme Court, is that we have many black lung claimants  
5 with good claims that are being lost because of the manner  
6 in which the law is being applied by the Department of  
7 Labor.

8 The briefs would have this Court believe that 92  
9 percent of the black lung claimants are being represented.  
10 This figure is grossly misleading, and I would ask the  
11 Court to look very closely at the source of these figures.

12 The Department tells us that they have never  
13 kept any statistics on this, so in December of 1988 they  
14 had their employee, Miss Denney, go to the administrative  
15 law judge's office, and she reviewed approximately 3,700  
16 files which had been docketed with the administrative law  
17 judge's office in fiscal 1987.

18 In December of 1988, she found that 77.1 percent  
19 of those cases had been either dismissed, remanded, or she  
20 found no decision there. In December. This is one  
21 year -- over one year --

22 QUESTION: Now, where do we find this, counsel?  
23 This is in the record of the supreme court -- the state  
24 supreme court?

25 MS. MORAN: These figures that I'm giving you



1 now, Your Honor?

2 QUESTION: Yes.

3 MS. MORAN: These are in the evidence that was  
4 submitted by the Department of Labor to the West Virginia  
5 Supreme Court.

6 QUESTION: Let me ask you, the Supreme Court  
7 made some of its own findings of fact at the appellate  
8 level in the state system?

9 MS. MORAN: They made findings of fact, Your  
10 Honor, based on the affidavits of the attorneys which were  
11 submitted to the Court, the testimony that had been given  
12 in the ethics hearing, two congressional hearings in  
13 which -- I believe there was eight attorneys testified.  
14 Judge Litt testified.

15 QUESTION: Is your challenge to the statute a  
16 facial challenge?

17 MS. MORAN: No, as it's applied, Your Honor.

18 QUESTION: As it's applied in this case?

19 MS. MORAN: As it's applied in this case and  
20 generally in West Virginia, that the fee structure --

21 QUESTION: Did the Department of Labor in the  
22 state Supreme Court ask the case be remanded to the trial  
23 court for further findings?

24 MS. MORAN: No, they did not.

25 QUESTION: This all arises out of a Department

1 of Labor regulation, doesn't it?

2 MS. MORAN: It arises out of Mr. Triplett's  
3 failure to comply with the Department of Labor regulation,  
4 yes, Your Honor.

5 QUESTION: Well, the regulation is what sets the  
6 fee, isn't it?

7 MS. MORAN: Well, the regulation does not set  
8 the fee, no. There is no --

9 QUESTION: Well, it sets --

10 MS. MORAN: Standard fee. That is determined --  
11 when an attorney applies for fees, he must -- he must --

12 QUESTION: Is it the regulation that sets  
13 consent?

14 MS. MORAN: Pardon me, Your Honor?

15 QUESTION: Do you have to have -- does the  
16 regulation or does the statute say that you need consent  
17 to have a --

18 MS. MORAN: The regulation.

19 QUESTION: Well, isn't that what's at issue  
20 here?

21 MS. MORAN: Yes, and that's why I argue, Your  
22 Honor, that the --

23 QUESTION: You must argue that the regulation is  
24 inconsistent with the statute.

25 MS. MORAN: I argue -- yes, that it is

1 inconsistent with the intent of the black lung law.

2 QUESTION: And you say that there's no basis for  
3 the Department of Labor to construe the statute the way it  
4 has under its regulation, is that right?

5 MS. MORAN: I say that it is inconsistent with  
6 the intent of the law, and that the effect of it is to  
7 prevent people with good claims from getting an attorney.

8 QUESTION: So you think it's just irrational to  
9 construe the statute in this way, that there's no other  
10 way to construe the statute other than what you urge?

11 MS. MORAN: Let me say, Your Honor, one of the  
12 positions that the Department of Labor has taken is that  
13 we are holding out for straight contingency fees with no  
14 regulation. That is not our position. It has never been  
15 our position. We think that regulation is appropriate.  
16 We have -- the first thing that I am asking this Court  
17 today is to support the West Virginia court in their -- in  
18 their finding that the statute is unconstitutional as it  
19 is applied. However, we have other suggestions that we  
20 would make.

21 QUESTION: Ordinarily, we wouldn't get to the  
22 question of whether the statute is unconstitutional as  
23 applied until -- if you're arguing that the regulation  
24 isn't supported by the statute. And if you were to accept  
25 that --

1 MS. MORAN: I think -- I must say it is not  
2 supported by the statute, because I think it's effect is  
3 inconsistent with the statute and with the intents of the  
4 statute.

5 QUESTION: Do you have anything more to say on  
6 that subject? I mean, ordinarily we give a considerable  
7 deference to the views of a Department to whom Congress  
8 has confided the administration of the act as to  
9 regulation.

10 MS. MORAN: Well, Your Honor, I have -- I would  
11 say in response to that, that we now have in excess of a  
12 96 percent denial rate on initial application, and after  
13 three levels of appeal we only add 1 percent to that. I  
14 think that we have to ask whether Congress put this whole  
15 system together for 4 percent of the people who are  
16 applying for benefits to be able to qualify, and that one  
17 of the problems is, these cases come down again and again.

18 QUESTION: I think maybe they're very -- maybe  
19 they're very generous at the first level. I mean, that  
20 would explain it as well as anything else.

21 MS. MORAN: No, Your Honor, I'm saying --

22 QUESTION: I mean, this is a benefits program.  
23 I assume that Labor regards this as a benefits program.

24 MS. MORAN: I'm saying that they're denied.  
25 That there are more than 96 percent of the cases denied at



1 the initial level.

2 QUESTION: At the initial stage?

3 MS. MORAN: That's correct.

4 QUESTION: What were you saying about the  
5 appeals?

6 MS. MORAN: There is only 1 percent added to  
7 that. There is an overall denial rate of 5 percent -- of  
8 95 percent.

9 QUESTION: I suppose there are an awful lot of  
10 the 96 percent that are denied have counsel.

11 MS. MORAN: No, Your Honor. That -- I was  
12 trying to break down this figure --

13 QUESTION: What percent of that?

14 MS. MORAN: I don't have that figure, Your  
15 Honor. The only people who have those figures are the  
16 Department of Labor, and the only figures that we have  
17 available are the findings of Miss Denney, and what Miss  
18 Denney's figures come down to is that she looked at 800 --  
19 well, if I may go back.

20 She found that 77.1 percent in over a year after  
21 being filed with the administrative law judges have gone  
22 nowhere, and it is our position that the figure of  
23 representation on that 77.1 percent would be the most  
24 informative figure for this Court.

25 QUESTION: Miss Moran, I guess they aren't

1 allowing reasonable fees then. I mean, if they are not --  
2 if lawyers are not coming into the system, the fees being  
3 allowed are not reasonable.

4 MS. MORAN: Your Honor, they are not reasonable  
5 for the amount of work that is entailed, for the level of  
6 expertise that is involved and for the delay in receiving  
7 fees.

8 QUESTION: Well, you don't have any argument  
9 with the agency over that. They say that they're supposed  
10 to be giving out reasonable fees. It seems to me that  
11 what you should be litigating is before the agency whether  
12 they are giving out high enough fees. But the -- I mean,  
13 the system can work so long as they give high enough fees,  
14 isn't that right? There's nothing inherently bad about  
15 the system.

16 MS. MORAN: But, Your Honor, what -- how do we  
17 determine the fee for the affidavit before the Supreme  
18 Court saying -- from the attorney saying that he has been  
19 owed \$30,000 in fees for upwards to ten years, for close  
20 to ten years?

21 QUESTION: Well, however you determine it, it  
22 doesn't render the statute unconstitutional. It just  
23 means the agency is not giving high enough fees to bring  
24 lawyers into the system. Isn't that your basic complaint?

25 MS. MORAN: Well, Your Honor, I believe, based

1 on the prior decisions of this Court that when we find  
2 that, whether it's the fee or whether it's the handling,  
3 the processing of the fee, if generally the effect of this  
4 is to be inadequate, then the regulation is improper. It  
5 is inconsistent with the intent of getting these benefits  
6 to worthy recipients.

7 QUESTION: The regulation says reasonable fees.  
8 I mean, it seems to me what's the matter is that in each  
9 case enough fee is not being given, and the lawyers should  
10 litigate to get more fees. It seems to me that that's the  
11 solution. Every time an agency doesn't live up to its  
12 regulation, we don't strike the regulation down. We say  
13 you have to live up to it.

14 MS. MORAN: If I may, Your Honor, the other  
15 problem along with the actual dollar amount of the fee are  
16 the inordinate delays in waiting for them, the fact that  
17 the attorney who tells us he's owed \$30,000 in fees is not  
18 going to receive one cent of interest on those fees.  
19 There is a procedure that requires the attorney to submit  
20 a petition at each level. At first at the deputy  
21 commissioner, at the ALJ, the Benefit Review Board -- each  
22 one of those persons who determine that fee may come up  
23 with a different level. Therefore, it is impossible to  
24 predict what fee is going to be paid.

25 QUESTION: If he's not getting interest, he

1 should get higher fees. I think a fee without interest  
2 should be higher than a fee that draws interest until the  
3 time it's paid, and that argument should be made to the  
4 agency.

5 MS. MORAN: Well, Your Honor, with all due  
6 respect to the agency and to this Court, I don't that the  
7 Department of Labor administrative law judges or the  
8 deputy commissioners are going to provide for fees for the  
9 lack of interest. They are going to take the position  
10 that nobody is telling them that they have to pay  
11 interest.

12 QUESTION: Take them to court.

13 MS. MORAN: Well --

14 QUESTION: And you will get a judge under the  
15 Administrative Procedure Act to say this is arbitrary and  
16 capricious action.

17 You have a regulation that says reasonable fees.  
18 You are not paying reasonable fees.

19 MS. MORAN: Your Honor, I have taken them to  
20 court in the vehicle that I had to work with.

21 QUESTION: When would -- when would this lawyer  
22 who -- who didn't get consent of the agency, when would he  
23 get paid, if he won?

24 MS. MORAN: You're talking about my client now,  
25 Your Honor?



1 QUESTION: Yes.

2 MS. MORAN: In fact, my client has returned  
3 every cent of fees that he received.

4 QUESTION: Well, I -- I know, but here -- here's  
5 a lawyer who says I should be free from this consent  
6 requirement. I should be able to make my own deal with a  
7 particular client. So, he says he -- he -- establishes --  
8 he -- he makes a contingency arrangement with them.

9 Now, he isn't going to get paid until there's a  
10 final decision, is he?

11 MS. MORAN: That's correct, until -- until --

12 QUESTION: And so the -- that's going to be  
13 considerably delayed, I suppose.

14 MS. MORAN: Well, I -- I think we could compare  
15 what happens --

16 QUESTION: Would he be paid any sooner than he  
17 would be under the -- under the --

18 MS. MORAN: Oh, yes, Your Honor. The litigation  
19 over attorney's fees and -- and the affidavits that were  
20 submitted to --

21 QUESTION: It takes as long after the final  
22 decision --

23 MS. MORAN: Yes, that's correct, Your Honor.

24 QUESTION: -- to -- to litigate attorneys fees  
25 as it did to get the liability judgment, I guess.

1 MS. MORAN: I don't know whether I can  
2 absolutely balance the two --

3 QUESTION: Yeah.

4 MS. MORAN: -- but the affidavits that were  
5 submitted to the West Virginia Supreme Court show that  
6 there are considerable periods of time of waiting after  
7 the fee is approved.

8 QUESTION: And of course he isn't going to get  
9 paid at all if he doesn't win?

10 MS. MORAN: That's right. That's correct.

11 QUESTION: But how does -- how does that bear on  
12 the validity of the regulation? It doesn't seem to me  
13 there is anything in the language of the regulation that  
14 imposes that delay.

15 MS. MORAN: Well, the language of the regulation  
16 directly applies to the -- the necessity to submit fee  
17 applications to different bodies, to different judicial  
18 bodies and -- and as is explained in the affidavit, one of  
19 the things that happens is you present a petition to the  
20 deputy commissioner. The file is in the administrative  
21 law judge's office, and it takes two years to get from the  
22 administrative law judge's office back down to the deputy  
23 commissioner. This is specifically what is described in  
24 the affidavits.

25 QUESTION: Well, isn't it hard to say that the

1 regulation that calls for the payment of reasonable  
2 attorney's fees, isn't it hard to say that's inconsistent  
3 with the statute? What -- what should the regulation say?

4 MS. MORAN: Well, I -- I'm not arguing with the  
5 -- with the reasonable attorney's fees, Your Honor. I'm  
6 arguing with the method that one must use to attach the --

7 QUESTION: And is there any -- do you think  
8 there's any -- anything inconsistent with the statute to  
9 require consent for a private agreement?

10 MS. MORAN: To require the Department's consent?  
11 No, Your Honor, I do not find some kind of regulation to  
12 be inconsistent.

13 QUESTION: Well, then, what's wrong with this  
14 regulation?

15 MS. MORAN: The regulation is that they have  
16 created a very cumbersome manner of us collecting the fees  
17 which adds a great deal of time to the -- to the time  
18 involved for processing, and also that when -- when this  
19 is applied, that a reasonable fee becomes less reasonable  
20 when you have to wait ten years for it.

21 QUESTION: Well, then, you -- you really don't  
22 argue on the same basis, then, as the Supreme Court of  
23 West Virginia did or -- the -- it's holding was that the  
24 statute was unconstitutional. You're really not arguing  
25 that?

1 MS. MORAN: No, no, they're not -- no, Your  
2 Honor, they do not argue that the statute is  
3 unconstitutional. They argue that it is unconstitutional  
4 as applied. I mean, that's their position, that it is  
5 unconstitutional as applied.

6 QUESTION: Well -- what -- what's the -- what's  
7 the difference? You -- the -- you mean it was  
8 unconstitutional as applied to Mr. Triplett?

9 MS. MORAN: And as generally applied in the  
10 state of West Virginia.

11 QUESTION: Well, what -- what's the difference  
12 between saying a statute is unconstitutional as generally  
13 applied in the state of West Virginia and saying it's  
14 unconstitutional in toto?

15 MS. MORAN: I would say the regulation that is  
16 between the two, between the statute and the application,  
17 and -- and that is what we're attacking -- is that the  
18 regulation creates such a cumbersome way of -- of  
19 proceeding. I -- I --

20 QUESTION: Are you -- are you claiming that the  
21 statute is -- is unconstitutional?

22 MS. MORAN: I am claiming that the -- the  
23 regulation is an unconstitutional application of the  
24 statute.

25 QUESTION: Well, but there is -- do you really



1 need to say that the -- if the regulation doesn't conform  
2 to the statute, I would think say it -- it's not supported  
3 by the statute. It's not authorized by the statute rather  
4 than it's an unconstitutional application of the statute.

5 MS. MORAN: Well, it is unconstitutional, Your  
6 Honor, in that the method in which it's applied prohibits  
7 people access to counsel to represent them in their  
8 claims.

9 Of the 23 percent that Ms. Denney found an  
10 indication of an award or a denial of benefits, she tells  
11 us that claimants with counsel had a better than two-to-  
12 one chance of winning as compared to those who did not  
13 have counsel.

14 Every piece of evidence that was in front of the  
15 West Virginia Supreme Court indicates that there is a  
16 serious problem in the availability of counsel. In  
17 addition, in our brief we cite a Law Review article by  
18 Alan Prunty and Mark Solomons.

19 Alan Prunty is the head of the administrative --  
20 the administrative head of the Black Lung Division of  
21 Jackson & Kelly, which is a law firm in Charleston that  
22 represents more responsible operators than any other law  
23 firm in the country.

24 Mr. Solomons was with the Department of Labor  
25 from 1983 until 1980 and has appeared many times in front

1 of this Court.

2 Both Mr. Prunty and Mr. Solomons concur with the  
3 findings of the West Virginia Supreme Court. They  
4 recognize this as a real and a widespread problem, and  
5 their article says it will not be resolved until there is  
6 some accommodation in the attorney fee structure.

7 Probably the single most important failing in  
8 Ms. Denney's statistics --

9 QUESTION: Excuse me, Ms. -- Ms. Moran, if some  
10 accommodation in the fee structure -- what do you seek  
11 from this Court?

12 MS. MORAN: I seek from this Court --

13 QUESTION: Do you want us to write a whole new  
14 structure or -- or --

15 MS. MORAN: No, Your Honor, I'm not asking that.  
16 I think that appropriately that is to be done by the  
17 Department of Labor.

18 However, if we have suggestions I am asking that  
19 this Court uphold the West Virginia Supreme Court's ruling  
20 that it is unconstitutional in its application.

21 QUESTION: Well, but wait. It -- it seems to me  
22 that in order for the individual who's been -- who --  
23 who's been charged with practicing unlawfully, in order  
24 for him to vindicate himself against that charge, we would  
25 have to strike down that -- we would have to say under no

1 circumstances is it valid to prevent a lawyer from  
2 charging a fee that isn't approved by the agency.

3 Don't we have to find that that provision could  
4 not under any reasonable system be left in place?

5 MS. MORAN: No. And I think --

6 QUESTION: We don't have to say that?

7 MS. MORAN: -- I think that's a very important  
8 point for me to make if I have failed to do it, Your  
9 Honor. I think that is the position that the Department  
10 of Labor is taking, that we are -- we are asking for an  
11 absolute bar of regulation. We are not. We do not find  
12 it inappropriate that there is some form of regulation,  
13 and the amicus brief supports us in that.

14 QUESTION: Well, how does this lawyer win, then,  
15 if it's okay to prevent him from charging a fee that isn't  
16 approved by the agency? If your only complaint is the  
17 agency is not approving high enough fees, he loses.

18 MS. MORAN: That's -- that's not my only  
19 complaint, Your Honor. I am also complaining that the  
20 system is so burdensome that it is a disincentive to  
21 attorneys to take the cases.

22 QUESTION: No, but don't you have to  
23 establish --

24 MS. MORAN: -- along with the actual dollar fee.

25 QUESTION: -- that it's burdensome in the

1 specific respect that it requires a lawyer to get his fee  
2 approved by the agency? That is -- that is what this  
3 lawyer was charged of -- charged with. That's the  
4 provision he violated. If you don't establish that that  
5 provision is unconstitutional, is -- could not be there in  
6 any good system, then it seems to me he was properly --

7 MS. MORAN: Your Honor, I think what the West  
8 Virginia Supreme Court says is that it -- it's more  
9 complex than that, that he was -- that he was asked to  
10 seek approval of a fee which is being controlled in an  
11 unconstitutional manner.

12 I think -- I think the Supreme -- the West  
13 Virginia Supreme Court finds that it is a rather complex  
14 system that he was being asked to follow. It's not -- the  
15 -- I don't think the Supreme Court has said that it an  
16 absolute bar on regulation.

17 One thing that it is very important to  
18 communicate to the Court that is -- that was missing from  
19 Ms. Denney's figures is the picture of representation on  
20 the other side, which has always been an important factor  
21 to this Court in determining due process issues.

22 In fact, the benefit trust fund is always  
23 represented by the Solicitor General's office. It is  
24 virtually unheard of for an identified responsible  
25 operator to appear unrepresented.



1           These claims -- the actuarial tables cited in  
2           our brief show that these claims are worth \$150,000 over  
3           the lifetime of the coal miner and his family, and  
4           responsible operators are --

5           QUESTION: Ms. Moran, may I ask one -- may I ask  
6           one other background fact?

7           MS. MORAN: Yes, Your Honor.

8           QUESTION: These claims, as I remember during a  
9           period before '73 or 4 sometime, were administered by HEW  
10          rather than the Secretary of Labor and the government  
11          picked up the tab.

12          MS. MORAN: That's correct.

13          QUESTION: Did the HEW have the same rules about  
14          attorney's fees that labor does?

15          MS. MORAN: Well, I think at the very beginning,  
16          Your Honor, they were using the same system that we use  
17          now with social security which -- it requires regulation.  
18          It requires fee approval. But the understanding was that  
19          the attorneys could get up to 25 percent of the back  
20          benefits. When they went from --

21          QUESTION: So, it was the social security system  
22          rather than the -- than this particular labor --

23          MS. MORAN: They were applying the system that  
24          is used by the social security system, yes.

25          QUESTION: I see.

1 MS. MORAN: And also, a thing that has to be  
2 considered in evaluating that, Your Honor, is like the  
3 Walters VA system. At that time it was a user-friendly  
4 system. The approval rates were very high, and it -- the  
5 government -- the representatives of the government were  
6 obliged to help people with their claims.

7 In fact, counsel for the Department of Labor --  
8 it -- there is regulation in the black lung regulations  
9 that provide for appointment of counsel. And at one point  
10 the Department of Labor did provide counsel for claimants  
11 to represent an initial award when it was being challenged  
12 by the responsible operator, which it is 90 percent of the  
13 time.

14 They also -- the Department of Labor also  
15 provided informal conferences, as the Social Security  
16 Administration does, to work with people and to help  
17 unrepresented people put their claims together.

18 Both of those practices have been discontinued  
19 without any explanation. There's -- I would contend that  
20 this is a clear recognition on the part of the Department  
21 that people need help.

22 The Department of Labor argues that we should  
23 use fundamental fairness, and I would go along with that.  
24 That's fine.

25 Goldberg and Mathews tell us that it is --

1 fundamental fairness is a procedure that is tailored to  
2 the capacities and circumstances of those to be heard to  
3 ensure a meaningful opportunity to be heard.

4 The Department of Labor argues we can't provide  
5 for better representation of claimants because it will  
6 cost money and because it will make the process more  
7 adversarial.

8 In other words, if we ensure that claimants are  
9 as well represented as the operators and the trust fund,  
10 there's a real danger that eligible miners who are now  
11 being lost in the morass are, in fact, going to be able to  
12 successfully pursue their claim and they're going to  
13 demand benefits.

14 The West Virginia Supreme Court found that this  
15 was an unconstitutional kind of fiscal responsibility  
16 which is denying the benefits that Congress has promised  
17 to sick old coal miners who, by the way, the Department of  
18 Labor tells us three-quarters of the claimants never  
19 attended high school.

20 So, we have the -- these sick old coal miners  
21 with less than a grade school education defending their  
22 claims against highly paid, skillful experts in the field  
23 of black lung law. It is not surprising that we only have  
24 a 5 percent approval rate at this time.

25 The West Virginia Supreme Court found that this

1 was unacceptable and cannot be tolerated. Thank you.

2 QUESTION: Thank you, Ms. Moran.

3 Mr. Dreeben, you have two minutes remaining.

4 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

5 ON BEHALF OF THE PETITIONER

6 MR. DREEBEN: Thank you, Mr. Chief Justice.

7 The low approval rate in the program as it's  
8 currently structured is not an accident. Congress was  
9 aware when it tightened the eligibility criteria in 1981  
10 that there would, indeed, be a low approval rate, and  
11 there is no showing in this record or anywhere else that  
12 I'm aware of that that low approval rate flows from the  
13 presence or absence of counsel in a particular case.

14 The respondent has relied quite heavily on the  
15 affidavit of Ms. Denney. I would only suggest that  
16 affidavit indicates that there is a higher rate of  
17 representation than Respondent would have one believe, and  
18 the burden in this case was not on the Department of Labor  
19 to establish the constitutionality of its program. The  
20 burden was on whoever challenged it to establish that it  
21 was not constitutional.

22 And, finally, the regulation that governs fees,  
23 we believe, is consistent with the statute and can be  
24 applied consistently to provide a sufficient incentive for  
25 lawyers to come into the system.



1. QUESTION: Mr. Dreeben, am I correct that the  
2 agency concedes that the rate has to be high enough to  
3 allow for the contingency?

4 MR. DREEBEN: Justice Scalia, the agency  
5 construes a reasonable attorney's fee to include a  
6 component for risk of loss and for delay.

7 There's going to be some fighting about how you  
8 determine those two factors, and I don't think that the  
9 Department would agree with some of the proposals that  
10 have been made to it to give a multiplier of two, three,  
11 four, five or six because of the contingency factor.

12 In any area where there's a contingency factor  
13 lawyers are going to be selective, but I think that's a  
14 good thing, not a bad thing, and the regulation is  
15 adequate to provide a sufficient fee, we believe. And if  
16 the lawyers disagree, they can litigate that issue.

17 Thank you.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
19 Dreeben.

20 The case is submitted.

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

23  
24  
25

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of*

*The United States in the Matter of:*

No. 88-1671 - UNITED STATES DEPARTMENT OF LABOR, Petitioner V. GEORGE R. TRIPLETT, ET AL.; and

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No. 88-1688 - COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR, Petitioner V. GEORGE R. TRIPLETT, ET AL.

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

BY *Lona M. May*

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