My Visit to the United States Supreme Court

by Jim Leach

Our cave-dwelling ancestors' journeys were not complete until they told the story of their journey to their tribe. After my recent journey, I felt the same way. Here's my story for my tribe.

At precisely 10:00 a.m. on Monday, February 22, 2010, in a large ornate room in Washington, D.C., a long block from the United States Capitol, an electronic signal like a hi-tech foghorn pierced the silence that federal marshals had imposed on several hundred spectators two minutes earlier, and in walked the nine most powerful judges in the world.

I have never been in a courtroom in which the podium sits so close to the judges. It is perhaps eight feet from Chief Justice Roberts, only a hair farther from Justices Stevens and Scalia who flank him, and not more than twenty feet from Justices Alito and Sotomayor who, as the newest members of the Court, sit at either end of the slightly-curved bench. The Justices are elevated only a few inches above counsel. The only word anyone ever finds to describe the arrangement is "intimate."

As the Justices entered the courtroom, I sat next to the podium, ready to argue for my friend and client, Hot Springs attorney Catherine Ratliff. She won a social security case on behalf of an indigent client, then moved for an

attorney fee under the Equal Access to Justice Act (EAJA) in the amount of $2,112.60. (EAJA provides for attorney's fees to be awarded in civil cases against the federal government if the government loses and its position was not substantially justified, in an amount not to exceed $125 per hour plus a cost of living increase since 1996, which at the present works out to a maximum of about $175 per hour.)

The government stipulated that Catherine's fee request should be granted. Accordingly, the district court entered an order granting it. But two weeks later, the government sent Catherine a letter announcing that it had taken her fee to collect a debt her *client* owed the government for a food stamp overpayment.

The government took Catherine's fee as part of a nationwide program it began in 2006. Until then, the government had always—logically enough—paid a court-awarded attorney's fee to the attorney who earned it. But then the government reversed field, and began taking attorney fees awarded under EAJA to pay clients' unrelated debts. No one knows how many clients a year are affected; I think perhaps a couple thousand.

We argued, and the government did not deny, that if the government wins, the same principle will apply to other statutory attorney fee awards. An

example is an attorney who wins a civil rights case on behalf of a prisoner may see the court-awarded attorney fee taken to pay the prisoner's fine. Or an attorney who wins a civil rights case may see the court-awarded attorney fee taken by a pre-existing creditor. Besides the simple unfairness of these results, they undermine the purpose of fee-shifting statutes to attract attorneys to cases that are not otherwise financially viable. Attorneys who can't get paid even when they win are unlikely to take such cases.

Catherine's modest fee was typical. The average EAJA attorney's fee in a social security case is $3,573. But these fees, although small, have made it possible for dedicated lawyers like Catherine to represent disabled people in federal court to obtain benefits wrongfully denied by the government. No such fees are ever payable if the attorney loses the case, so they don't motivate unnecessary litigation, and never reward an attorney if the client's benefits were properly denied.

People told me it was an honor to argue a case in the Supreme Court, but I disagree. It's an honor only in the sense that winning the lottery is an honor. The only qualifications for arguing in the Supreme Court are having the Court agree to hear the case, being in good standing with a state bar, and having been admitted to practice for at least three years. When the government began

taking EAJA fees to pay clients' pre-existing unrelated debts in 2006, lawyers across the country sued. It was just luck that Catherine's case was the one that ended up in the Supreme Court.

We had lost in the district court, and the Fourth, Sixth, Tenth, and Eleventh Circuits all had ruled for the government on the same issue. An Eighth Circuit three-judge panel ruled for us based on circuit precedent, *Curtis v. City of Des Moines*, 995 F.2d 125 (1993), which barred a plaintiff's creditor from taking a court-awarded attorney's fee in a civil rights case. But even though the panel ruled in our favor, it said that had it been deciding the case as an issue of first impression, it might have ruled for the government. The government petitioned for rehearing, and lost by the narrowest possible margin, 6 to 5. The government petitioned for certiorari based on the circuit split, and on September 30, 2009, the Supreme Court granted the government's petition.

We framed the issue as: "Who is entitled to receive an attorney's fee awarded under the Equal Access to Justice Act in a Social Security disability case: the attorney who earned it through knowledge, skill, and industry, or her indigent client, who has not paid her attorney, and for whom the money would be a windfall?" The government framed it as: "Whether an 'award of fees and

other expenses' under the Equal Access to Justice Act, 28 U.S.C. 2412(d), is payable to the 'prevailing party' rather than to the prevailing party's attorney, and therefore is subject to an offset for a pre-existing debt owed by the prevailing party to the United States."

EAJA fees are critical to motivate attorneys to take social security and veterans' disability cases into federal court because federal law makes it a crime for an attorney to charge, collect, demand, or receive a fee in such cases on the usual pay-as-you-go basis. About 5,500 EAJA fee awards are made in Social Security cases each year. Another 2,400 per year are made by the Court of Veterans Appeals in veterans' disability cases. Only about 500 per year are made in other litigation.

On my way to the Supreme Court, I had many new experiences. One was receiving calls from attorneys in big firms on the East Coast, who typically would tell me how great they are, then volunteer to take the case off my hands. They would kindly promise that I could still have my name on the brief, and could come to Washington—even sit at counsel table!—to watch them argue the case. I understood that these attorneys' primary motivation was to get a Supreme Court argument that they could use to promote themselves. I later learned this is typical in Supreme Court cases. A number

of large law firms have associates who watch for cases that may be going to the Supreme Court, so they can try to be first to offer to take over the case.

But I was also contacted by other attorneys who just plain offered to help. I took them up on their offers. Having their help, *pro bono*, was extraordinarily useful, and it renewed my faith in the dedication of some members of our profession to do what's right, not just what's profitable. I received enormous and invaluable assistance from the remarkable Scott Nelson, an attorney with Public Citizen Litigation Group. The law firm of Paul, Hastings, Janofsky & Walker, including especially attorneys Steve Kinnaird, Panteha Abdollahi, and Mitch Mosvick, and the University of Pennsylvania Law School Supreme Court Clinic, including director Stephanos Bibas and many law students, also provided invaluable help. (Scott, Steve, and Stephanos all clerked for the Supreme Court.)

These attorneys and others later helped set up five moot courts (practice argument sessions) for me. By having these sessions recorded and listening to the recordings, I was able to identify problems of both presentation and substance, and improve both. In the end, the brief and the argument were the result of the collective efforts of these attorneys and many others. It has been said "It takes a village to raise a child"; the same could be said of writing a

Supreme Court brief and preparing for argument. Never did I work so hard on one brief and one argument, and never did I write, re-write, re-think, revise, and edit anything so many times.

South Dakota attorneys who have argued in the Supreme Court were also very helpful. From them I received many useful practical suggestions. Perhaps more importantly, I became convinced that I could argue the case effectively. The thought in the back of my mind that maybe I should give the argument away to an attorney who had Supreme Court experience faded away.

Briefing and arguing a case in the Supreme Court is similar to but different from handling a case in other appellate courts. Unlike many courts, the Supreme Court is often not impressed even with its own precedents, and usually couldn't care less what other courts have said. What matters most is logic, policy, practicality, and consequences. My contact with the Court over the years consisted of reading its opinions. But listening to recorded Supreme Court arguments and attending arguments in January told me a different story. The Justices engage with attorneys in the same way that other judges engage with attorneys in trying to understand the case and its implications, although they are more aggressive as a group than any other court. They ask both broad theoretical questions and narrow practical ones. They want to know

what the effect of their decision will be.

Now it was the big day—February 22, 2010. My family and a few close friends, and my client, Catherine, were there. If I was going to fall on my face, it was going to be in front of them. I had read that only three attorneys have ever fainted while arguing a case in the Supreme Court, and they all regained consciousness shortly afterwards, so I figured my chances of surviving were excellent.

I had no idea how the Justices would react to the case. Unlike some other courts, the Justices don't talk about the case among each other before it is argued. I hoped that the Justices who are often characterized as "moderate" or "liberal" (Stevens, Ginsburg, Breyer, and Sotomayor) would be quick to point out that Congress provided attorney's fees to enable Social Security and veterans' disability claimants to get attorneys. I hoped they would assert that to allow the government to take an attorney's fee to pay a client's unrelated debt defeats the purpose of the statute. And I hoped that the Justices often characterized as "conservative" (Roberts, Scalia, Thomas, Kennedy, and Alito) would like my arguments based on the language of the statute, and that their belief in fair limitations on government authority would make them unhappy that the government had pocketed the attorney's fee.

I felt confident that my position was correct, but my confidence was tempered by the four unfavorable circuit court decisions. The key language of EAJA says that in litigation against the federal government, a court "shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." And the statute defines "fees" as including "attorney fees." The four courts of appeal that ruled for the government said basically, "What is it about 'award to the prevailing party' you don't understand?" I agreed that the "prevailing party" is the client, because under *Evans v. Jeff D.*, 475 U.S. 717 (1986), this is indisputable. But I asserted that the "award" means the court's "decision," and that the attorney's fee belongs to the attorney who earned it.

The government, because it lost in the Eighth Circuit, argued first. It was represented by Tony Yang, a member of the esteemed Office of the Solicitor General, which is often said to be the best appellate law office in the world. But the intimidation that I might otherwise have felt ended long before the argument, when I listened to recordings of Mr. Yang arguing other Supreme Court cases. I figured he had me by about 30 points of I.Q., but I

knew that I had talked to a *lot* more judges than he had.

In the Supreme Court, each side gets 30 minutes. I had hoped that the Justices would bombard Mr. Yang with questions demonstrating their belief the government's position was ridiculous. The Justices did ask Mr. Yang some hard questions, but not with the tone I had hoped for. Several Justices clearly were sympathetic to the government's position.

Now it was my turn. The only thing rote about a Supreme Court argument is the words that every attorney is told must first come out of his or her mouth: "Mr. Chief Justice, and may it please the Court." Those words came out of my mouth just fine. And the first sentence of my argument came out just right: "I would like to discuss with you this morning four reasons why Catherine Ratliff—and not the government—is entitled to receive the fee for the legal services she performed, that Congress invited her to perform, to show that the government's position was legally erroneous and was not even substantially justified."

A Supreme Court argument unfolds around questions from the Justices. They are very active. During my 30 minutes, the Justices spoke, to ask a question or make a point, *seventy* times. Only Justices Thomas and Stevens did not speak. Justice Thomas's silence is characteristic; my argument was

the fourth anniversary of the last time he spoke in court. Justice Stevens' silence was unusual. I don't have a theory for why he didn't speak.

The art of a Supreme Court argument lies in the attorney's ability to answer the Justices' questions effectively, while at the same time weaving in (seamlessly if possible) the attorney's own themes and arguments. For a respondent, as I was, the added challenge is to step into the flow of the discussion as it has developed during the petitioner's argument. Or as Chief Justice Roberts said while he was in private practice, a respondent's attorney should "demonstrate having been awake during the questioning of petitioner's counsel." I put Chief Justice Roberts' suggestion into effect by speaking directly to several Justices during my argument about statements they had made, or questions they had asked, during Mr. Yang's argument.

My 30 minutes flashed by. I know for sure now what a total adrenaline rush feels like. I wasn't conscious of anyone in the room except the Justices and me. The podium has a white light that comes on at twenty-five minutes. I didn't see it come on, but I glanced up at the large overhead clock in time to see that I had only a few minutes left, and made the remaining arguments I needed to make.

The most dramatic turn in my argument came toward the end, as I

addressed the consequences for disabled people and veterans if the government's argument succeeds. Mr. Yang had argued that attorneys were not motivated to take cases by the possibility of an EAJA attorney's fee because an attorney could not know at the beginning of the case whether the government would take a position that was not substantially justified. In response, I pointed out that social security and veterans' disability cases are based on a written record, so an attorney in such cases knows in advance what the government's position is.

To support my argument, I cited government data showing that an EAJA fee is awarded in 42% of social security cases and 70% of veterans' disability cases. The 42% figure in social security cases did not seem to move the Court, but Chief Justice Roberts appeared visibly bothered by the 70% figure for veterans. On rebuttal, he pursued this with Mr. Yang:

CHIEF JUSTICE ROBERTS: Counsel, do you – do you dispute your friend's [in the Supreme Court, opposing counsel is traditionally called your "friend"] statement that 42 percent of the time in Social Security cases the government's position is unjustified, and 70 percent of the time in Veterans' cases?"

MR. YANG: Well, I think that reflects the stakes often, your Honor.

Oftentimes the government does not contest, for instance, the $2,000 EAJA award and because it's the government, has to –

CHIEF JUSTICE ROBERTS: So whenever it really makes a difference, 70 percent of the time the government's position is substantially unjustified?

MR. YANG: In cases, in the VA context the number's not quite that large, but is a substantial number of cases at the court of appeal –

CHIEF JUSTICE ROBERTS: What number would you accept?

MR. YANG: It was, I believe in the order of either 50 or maybe slightly more than 50 percent. It might be 60. But the number is substantial that you get a reversal, and in almost all of those cases EAJA –

CHIEF JUSTICE ROBERTS: Well that's really startling, isn't it? In litigating with veterans, the government more often than not takes a position that is substantially unjustified?

MR. YANG: It is an unfortunate number, Your Honor. And it is – it's accurate.

The concession "It's accurate" seemed to deflate Mr. Yang, and there was a murmur in the courtroom. (When I gave the Court the 70 percent figure, I told the Court that it was from the Court of Veterans Appeals website for 2008 and 2009. When the Court looks at the website, it will see that the

exact number is 70.7 percent, not "on the order of either 50 or maybe slightly more than 50 percent," or even perhaps 60 percent, as Mr. Yang told the Court.) A minute later, the government's rebuttal time expired.

I was satisfied with my argument, although I had hoped the Court would appear more receptive to it. I said what needed to be said, and what could be said, in 30 minutes in light of 70 interruptions. With one or maybe two exceptions, I think I answered the Court's questions as effectively as I could have. I had decided going into the argument that I was going to treat the Justices as people, and respond to them as people, not based on how they each have been stereotyped. Several of the more authoritative sources about Supreme Court practice advise a lawyer to approach argument as "a conversation among equals," and to see oneself as a resource for the Justices. I tried to argue in accordance with this advice.

As I prepared for the argument, I knew that when it was over I didn't want to regret not having spent more time preparing. By the time the case was argued, I had spent most of the seven weeks after our brief was filed preparing for the argument. I had read books about the Court, and books by members of the Court, some of them more than once. I had read and summarized every Supreme Court case that was possibly relevant and listened to recordings of

Supreme Court arguments. I had watched videotaped interviews of the Justices. I had attended four arguments on two days in January. I had talked to lots of really smart people. I had spent two days with a consultant. I had prepared, tested, revised, and re-revised possible arguments and responses to questions.

In short, I medicated my anxiety with preparation. It proved, as always, the best medication. By the day before argument, I was calm, and when I stood up to argue, I was still calm.

I believe I was right to keep the argument, not give it up to an attorney who had previously argued in the Supreme Court. Part of the argument turned on Social Security law and practice. No Supreme Court "expert" would ever have known nearly as much about that subject as I know. And I am sure that no Supreme Court "expert" would have prepared as intensely as I prepared.

The consensus among courtroom observers is that the Court is likely to rule in favor of the government. I remain hopeful. I know that judges can change their minds after oral argument. I'm hoping that Chief Justice Roberts' discussion with Mr. Yang about veterans helps. The Court will issue a decision before it recesses for the summer at the end of June. The case is *Astrue v. Ratliff*, No. 08-1322.

Postscript

On June 14, the Supreme Court ruled for the government, 9 to 0. Justices Sotomayor, Stevens, and Ginsburg, concurring, noted that the result undercuts the purpose of the Equal Access to Justice Act. They suggested that Congress change the statute so that attorneys actually receive the fees they have earned.