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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 105 on our original docket, Kansas v. Colorado.

General Six.

ORAL ARGUMENT OF STEVE SIX
ON BEHALF OF THE PLAINTIFF

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

Article III makes a clear distinction between the Court's appellate and original jurisdiction, and expressly grants Congress power to make exceptions and regulations for appellate jurisdiction, but Congress is not granted the same power over original jurisdiction.

CHIEF JUSTICE ROBERTS: That's an extremely sensitive clause in Article III. We can decide this case without relying on the distinction you just discussed, can't we?

MR. SIX: Well, I think can you, and the Court certainly can interpret the statute not to even reach the original jurisdiction of the Supreme Court and avoid that constitutional conflict. And I think the stronger reading of the statute arrives at that very

1 result.

2 The statute at issue, the cost provision, 28
3 U.S.C. section 1920, states: "A judge or clerk of any
4 court of the United States may tax as costs the
5 following." And it lists six subparagraphs, including
6 subparagraph 3 at issue here, Fees and Disbursements for
7 Printing and Witnesses.

8 The statute has two terms in it that are
9 defined, "judge" and "court of the United States," and,
10 importantly, one term in 28 U.S.C. section 451 that is
11 defined but does not appear in the cost provision, and
12 that is "Justice of the United States." "Justice of the
13 United States" is defined as "the Chief Justice and the
14 Associate Justices of the Supreme Court." The cost
15 provision says "a judge." "Judge of the United States"
16 is defined as including judges on the court of appeals,
17 the district court, the Court of International Trade,
18 essentially the listed courts and the Article III
19 judges.

20 JUSTICE SCALIA: But, on the other hand,
21 "court of the United States" is defined specifically to
22 include the Supreme Court. So you have a contradiction
23 no matter which way you flip it. On the one hand, it
24 says "judge," which does not include the Justices of the
25 Supreme Court. On the other hand, it says "court of the

1 United States," which does include the Supreme Court.
2 So why should we pick one -- one answer to the
3 contradiction rather than the other?

4 MR. SIX: You don't have to pick. And
5 you're correct, "the court of the United States" is
6 defined to include the Supreme Court. But the strongest
7 reading of the statute gives meaning to all of the words
8 in the statute, and it says you can be a judge who
9 appears in the court of the United States. And if you
10 think about it, there's a circle of judges that are
11 defined here and a circle of courts that are defined
12 here, and where the two overlap, where you are both a
13 judge and in the court of the United States, the statute
14 should apply.

15 CHIEF JUSTICE ROBERTS: What about --

16 MR. SIX: And that --

17 CHIEF JUSTICE ROBERTS: It also says
18 "clerk." We may not be judges, but we certainly have a
19 clerk.

20 MR. SIX: You do, and 28 U.S.C. section
21 1911, another provision in title 28, specifically deals
22 with the Supreme Court Clerk. And throughout title 28,
23 the Supreme Court is treated differently than the lower
24 courts.

25 JUSTICE KENNEDY: Is 1911 a stand-alone

1 provision that would justify relief for you, or do we
2 have to also refer to the general cost statute?

3 MR. SIX: I don't think the Court would
4 refer to the general cost statute in its original
5 jurisdiction cases at all or any authorization from
6 Congress. 28 U.S.C. 19 --

7 JUSTICE KENNEDY: Well, but let's assume
8 that we think Congress can control this -- this issue,
9 this question. Now, I'm asking if 911 isn't a
10 stand-alone section so that you can interpret it without
11 reference to 1920.

12 MR. SIX: I mean, I would -- if your
13 assumption is Congress has the power to do it and has
14 done so through 1911, I read 1911 more as simply a grant
15 of the discretion the Court already has. They are
16 turning over to the Supreme Court the power to have the
17 clerk set costs.

18 JUSTICE KENNEDY: If I think this case is
19 controlled by 1911, do I have to refer to 1920?

20 MR. SIX: No. I don't believe you have to
21 refer to 1920.

22 JUSTICE KENNEDY: Why can't you rest your
23 case just on 1911?

24 MR. SIX: Because in the original
25 jurisdiction of the Supreme Court, Congress isn't given

1 power to make exceptions or regulations over original
2 jurisdiction. And in the 219 years of the Court's
3 original practice, they have never referred to a
4 congressional cost provision, and --

5 JUSTICE KENNEDY: Are you saying that 1911
6 doesn't cover expert witness fees because it's not
7 included within the term "other necessary
8 disbursements"?

9 MR. SIX: I believe the expert witness fees
10 in this case were vital to the resolution. They were --

11 JUSTICE KENNEDY: Were they within 1911?

12 MR. SIX: I don't believe they were other
13 incidental disbursements. That's not our position.

14 JUSTICE KENNEDY: Other necessary
15 disbursements.

16 MR. SIX: Other necessary disbursements.

17 JUSTICE KENNEDY: Incidental to the case.
18 You don't that think that covers expert witness fees?

19 MR. SIX: If -- if this Court determines
20 that Congress has the power, and it's done so through --
21 since 1911 -- has the power and done it from 1911, I
22 certainly would accept that position as the result.
23 However, I would point out to the Court that I think the
24 expert witness costs and the work was vital to the
25 resolution of the case here.

1 JUSTICE ALITO: If your reading of the
2 statute is correct, then I take it we would have the
3 discretion to decide what would be appropriate expert
4 fees. Is that correct?

5 MR. SIX: Absolutely, and --

6 JUSTICE ALITO: And if that were -- if
7 that's so, why shouldn't we exercise that discretion by
8 saying that the expert fees that are available in a case
9 in the original jurisdiction of this Court should be the
10 same as the expert fees that would be available in a
11 district court? Maybe they are too low in the district
12 court, but why should there be -- why should we, as a
13 discretionary matter if we have the discretion, provide
14 for radically different fees depending on the court in
15 which the case originates?

16 MR. SIX: Clearly, the Court has the power
17 to make that rule for original cases. However, the
18 original jurisdiction was developed when the States
19 agreed to submit and ratify the Constitution, submit
20 their sovereign immunity to resolution in the original
21 jurisdiction to handle unique disputes between the
22 sovereign States. And as the Court said in *Florida v.*
23 *Georgia* in 1854, "The analogies and rules and
24 foundations of law that apply to private parties are not
25 necessarily a good fit for sovereign States."

1 JUSTICE KENNEDY: Well, but Justice Alito is
2 saying we have discretion, we look for guidance, we have
3 guidance from Congress. They have adhered to the \$40 a
4 day limit in very important cases; why don't we just
5 say, Justice Alito is suggesting, that this is -- that
6 this is a good guidepost for us and we will follow it?

7 MR. SIX: Because what Colorado's position
8 is, is they are telling you that the Special Master's
9 hands were tied; that the Special Master couldn't even
10 exercise that discretion in a bright-line rule that
11 would say \$40 a day.

12 JUSTICE KENNEDY: We are saying it's our
13 discretion, and our discretion is guided by what
14 Congress has suggested so there is uniformity in the
15 system and so forth.

16 MR. SIX: Clearly, the Court would have the
17 power to do that. However, there has only been
18 approximately 200 original jurisdiction cases in the 219
19 years of the Court. To suggest that the rules --

20 JUSTICE GINSBURG: In all those -- in all
21 those cases has the Special Master ever called a court
22 witness, that is a court expert, appointed a court
23 expert, and if so what is the pay rate for such a
24 witness? I mean, courts of the United States, district
25 courts, occasionally appoint witnesses, court witnesses

1 as distinguished from parties' witnesses. Do you know
2 if that's happened in Special Master situations?

3 MR. SIX: I can tell you it didn't happen in
4 this case. I certainly can't speak to whether it's
5 happened in other cases involving Special Masters, so I
6 don't know the answer to that. Certainly 1920 makes a
7 distinction for court-appointed experts rather than the
8 expert witnesses appearing under subsection 3 of 1920.

9 I think the important point to consider,
10 though, is in the original jurisdiction the Court in its
11 219 years of developing essentially an interstate common
12 law in these cases has never relied on the trilogy of
13 cost statutes that the Court discussed in Crawford
14 Fitting, which is essentially Colorado's position: You
15 have to apply Rule 54(d) first to have the Court even
16 have the discretion to award costs; then you get to
17 1920, which the Court has said is the arena of costs;
18 and only after that do you get down to 1821, which tells
19 you the limit is \$40 a day.

20 JUSTICE KENNEDY: How do we -- how do
21 Special Master fees work? The Special Master always has
22 fees, and the parties I think usually divide them. How
23 does that -- how is their authority to order them --

24 MR. SIX: Sure. Rule 53 of the Federal
25 Rules of Civil Procedure deals with Special Masters in

1 the lower courts. It has no application here and wasn't
2 used. The Special Master's fees, which total
3 approximately a million dollars, just shy of that, were
4 resolved by the parties after the Special Master was
5 allowed to exercise discretion on that area of cost --

6 JUSTICE SOUTER: Well, what if they hadn't
7 -- what if the parties hadn't resolved it?

8 MR. SIX: If they hasn't resolved the
9 Special Master's --

10 JUSTICE SOUTER: Yes. How would -- how
11 would the Special -- what would be the authority of this
12 Court to make an order that the Special Master be paid X
13 dollars?

14 MR. SIX: Well, I think the authority of the
15 Court comes from the order appointing the Special Master
16 to handle the case and to do the specific things that
17 were --

18 JUSTICE SOUTER: Okay. We just -- we just
19 regressed one step. Where does the authority come from?

20 MR. SIX: To appoint a Special Master?

21 JUSTICE SOUTER: Yes.

22 MR. SIX: It's an inherent authority the
23 Court has in original jurisdiction cases.

24 JUSTICE SOUTER: So that the authority to
25 compensate is inherent?

1 MR. SIX: The authority to compensate is
2 inherent. In the Judiciary --

3 JUSTICE SOUTER: Are you making -- would you
4 make an inherent authority argument here?

5 MR. SIX: Yes. The --

6 JUSTICE SOUTER: Regardless of original
7 jurisdiction and appellate jurisdiction, would you say
8 that this Court simply has the inherent authority to --
9 to -- in effect to decree these sorts of things?

10 MR. SIX: Well, again there is a distinction
11 between appellate and original. And, focusing on
12 original, I think the Court has entirely the authority.
13 The Judiciary Act of 1789, which gave the Court
14 exclusive jurisdiction over these disputes, didn't set
15 forth any procedures to govern the disputes. That's
16 always been carefully preserved to the discretion of the
17 Court to apply to each unique dispute.

18 JUSTICE STEVENS: General Six, under your
19 reading of the statute, 1911 particularly, would the
20 Court have authority to charge your fees to your
21 adversary, shift attorney's fees?

22 MR. SIX: Yes. In the original jurisdiction
23 the Court would have the inherent authority to do
24 fee-shifting if the --

25 JUSTICE STEVENS: Did you make such a

1 request in this case? Why should -- why should
2 attorney's fees be treated differently from expert
3 witness fees? Let me put it that way. Or should it be
4 treated differently?

5 MR. SIX: The Special Master should have the
6 discretion to consider all the costs and the unique
7 circumstances of the case. In this case, we chose
8 expert witness fees --

9 JUSTICE SCALIA: We should have the
10 discretion. Why do you keep talking about the Special
11 Master? He's just -- he's just our amanuensis.
12 Ultimately it's our discretion, isn't it?

13 MR. SIX: It is, and the benefit of having
14 the Special Master make a recommendation is we could
15 have gone through these different categories of costs
16 and come up with a recommendation. The Court certainly
17 could have learned --

18 CHIEF JUSTICE ROBERTS: I take it the usual
19 practice is for the parties to settle this matter and
20 submit an agreed amount to the Special Master; is that
21 correct?

22 MR. SIX: The way it's worked in this case
23 is the Special Master has provided guidance, like on the
24 Special Master's fees. The Special Master suggested it
25 wouldn't be unfair to award them two-thirds Colorado,

1 one-third Kansas. After that the parties resolved it,
2 just like we resolved every other issue of cost where
3 the Special Master was allowed to apply that discretion.

4 CHIEF JUSTICE ROBERTS: So why didn't --
5 then are we here? I mean, we are talking about limited
6 amounts. So much more is at stake on the merits, and
7 why wouldn't the parties just say, well, when it comes
8 to Special Master fees this is what we are going to
9 agree to. It doesn't have to be limited to \$40. You
10 can agree as part of a global settlement to whatever you
11 want.

12 MR. SIX: Well, the Special Master's fees
13 we resolved. The experts fees at issue here, of course
14 that bright-line rule was drawn by the Special Master,
15 and he never was allowed to make a recommendation to the
16 Court to consider that. In balancing -- the remedies in
17 these cases are highly equitable remedies that --

18 JUSTICE STEVENS: Would you just answer my
19 question of a moment ago? Why should expert witness
20 fees be treated differently from attorney's fees?

21 MR. SIX: Well, in this case they should be
22 treated differently because the model at issue that the
23 experts for Kansas developed, the H-I model, was used to
24 prove our claims at trial, which would have --

25 JUSTICE STEVENS: You used lawyers to prove

1 your case, too.

2 MR. SIX: Excuse me?

3 JUSTICE STEVENS: You used lawyers to prove
4 your case, too. Why should they not be compensated?

5 MR. SIX: Because we considered the special
6 circumstances of the model. It proved the claims at
7 trial. It was adopted by the Court in 2004 in Kansas v.
8 Colorado to monitor compliance in the Arkansas River
9 Basin. It's the water use -- it's applied by the
10 Colorado State water use rule. So it was special
11 features like that that we wanted to present to the
12 Special Master to explain why the fees should be fairly
13 balanced and divided in a way other than he did.

14 JUSTICE STEVENS: I don't understand that to
15 be an answer to why you didn't also ask for attorney's
16 fees.

17 MR. SIX: Well, in a particular case where
18 perhaps a order of the Supreme Court wasn't followed or
19 some other situation developed, fee shifting may be
20 appropriate. In this case we felt the expert model we
21 developed was so vital that it would be persuasive to
22 the Special Master and fair and equitable to award it to
23 us.

24 JUSTICE GINSBURG: Do you know whether any
25 other --

1 MR. SIX: So that was the distinction.

2 JUSTICE GINSBURG: You didn't know, in
3 answer to my last question, what the practice had been,
4 but with respect to expert fees in other original
5 jurisdiction cases, has the Court ever deviated from the
6 \$40 or, when it was \$30, \$30?

7 MR. SIX: In original cases the Court has
8 never referred to any of that trilogy of cost statutes
9 discussed in Crawford Fitting.

10 JUSTICE GINSBURG: But have they ever
11 approved a Special Master's recommendation of a rate for
12 the expert witness that deviates from the \$40?

13 MR. SIX: I think the answer to that is yes
14 and I would direct the Court to New Jersey v. New York
15 in 1931, which was a division of the waters of the
16 Delaware River. And the Court pointed out in that
17 opinion that a mass of evidence was presented to the
18 Special Master, and on costs the Court said: "The cost
19 of the cause shall be divided 35 percent to New Jersey,
20 35 to City of New York," and so on. The "cost of the
21 cause" I would argue is the cost to get the case to the
22 point where it was resolved. In the boundary dispute --

23 JUSTICE GINSBURG: Do you know -- do you
24 know whether there were expert witnesses in that case?

25 MR. SIX: It does not say in the published

1 opinion exactly what the cost of the cause is. However,
2 from a fair reading of the -- the water distribution
3 issues, I wouldn't imagine it would be possible to do
4 that without experts. But I would point the Court to
5 the boundary dispute cases where the Court has discussed
6 the costs of surveyors, mappers, geographers,
7 historians, and divided the costs in boundary disputes
8 equally between the States -- not each State to bear
9 their own cost, but divided them equally.

10 And the -- the experts that are involved in
11 resolving a boundary dispute, I think, are no different
12 than the hydrologists and engineers and the type of
13 experts that we used in this case.

14 JUSTICE BREYER: You're right. They -- all
15 different -- they did a lot of work on this. I -- I
16 know they did a lot of work on this. Congress has a
17 statute, and the statute is: We don't care if the
18 witness is Albert Einstein, Steven Spielberg, or the
19 local zookeeper. Okay. We don't care. We don't care
20 if they did a lot of work or a little work. We want
21 them to be paid \$40 a day, period. It's too much
22 trouble to figure out how much work they did. That's
23 what we want. That's the law.

24 Now, Justice Alito said: I agree with you
25 for argument's sake; we are not bound by that rule. But

1 I take it his question, which I heard no answer to, is:
2 Assume you are right; we are not bound by the law;
3 still, why shouldn't we follow it?

4 MR. SIX: Because in the original cases the
5 Court has always tried to reach an equitable balance --

6 JUSTICE BREYER: Have you any example where
7 Congress had a statute which says every court in the
8 United States must pay da-da-da, whatever that number
9 is; it's \$382.50, okay. Now, despite that clear
10 statute, this Court for exactly the same thing paid a
11 different amount. Is there any such case?

12 MR. SIX: I'm not aware of that --

13 JUSTICE BREYER: Okay. Is there anything in
14 the -- in the nature of litigation? And there might be.
15 I'm not asking it as a rhetorical question. Is there
16 anything in the nature of original jurisdiction lawsuits
17 that, as a general matter, would call for higher fees to
18 be paid for witnesses, or to make a distinction between
19 expert witnesses and others, or to do other things that
20 would complicate it?

21 I'm not speaking of your case. You have a
22 wonderfully strong case in your case. I want to know
23 about in general, in original actions.

24 MR. SIX: I would suggest the only
25 difference is the parties. And the Court in its 219

1 years --

2 JUSTICE BREYER: If anything, the parties
3 are in a better position to pay the money than the
4 average person.

5 JUSTICE SCALIA: Well, I assume -- I assume
6 your answer is that -- that it's our business, and we
7 don't have to agree with Congress; that we -- we may
8 think \$40 a day for the zookeeper and for Albert
9 Einstein is ridiculous. And, therefore, if it's up to
10 us, we would adopt a different rule. Isn't that your
11 answer?

12 MR. SIX: That's exactly my answer. And if
13 you think -- if Congress can adopt a congressional --

14 JUSTICE KENNEDY: Well, I'm not sure that
15 answer is -- is at all adequate. Number one, what is
16 there, as Justice Breyer pointed out, that's so
17 different about this case?

18 Let's say one landowner secretly and
19 intentionally is stealing another landowner's water, and
20 -- and he has no legal right to do that. And the only
21 way the injured landowner can recover is to hire a very,
22 very expensive expert, a hydrologist. And by the time
23 he goes to court, he is already going to lose the
24 benefit of the damages. Congress has said too bad.
25 That's the way it is.

1 Why isn't it that way with States,
2 especially, as Justice Breyer said, when States can
3 really afford the -- afford it better than the
4 landowner. What's the difference?

5 MR. SIX: The difference is the Court has
6 indicated for original cases: These are such disputes
7 of a serious magnitude that can affect whole populations
8 that the model case for even taking a case is where the
9 acts between the States would be a *causus belli*, a type
10 of thing that would lead to war. The rules --

11 CHIEF JUSTICE ROBERTS: I haven't seen -- I
12 mean the \$40 limitation makes absolutely no sense, does
13 it? I mean I never saw an expert who would agree to
14 spend the day appearing in court worth being called an
15 "expert" for \$40.

16 I mean the fact that -- I guess I'm just
17 repeating Justice Scalia's question. The fact that
18 Congress has picked an arbitrary number with no basis in
19 reality doesn't mean that we should do the same.

20 MR. SIX: I would agree. The Special
21 Master's fees, for example, for one person -- and he was
22 an excellent Special Master -- were almost a million
23 dollars. The appearance fees for the 22 experts Kansas
24 had amounted to approximately \$30,000. So that
25 difference there, I think, demonstrates the very

1 unfairness of the fact --

2 JUSTICE BREYER: It's not unfair to have a
3 rule which says each party pays his own experts, win or
4 lose. That's the rule, isn't it?

5 MR. SIX: I don't think that's the rule in
6 original jurisdiction cases.

7 JUSTICE BREYER: Why?

8 MR. SIX: At least the Court has never said
9 that. The Court has --

10 JUSTICE BREYER: If you lose this case, if
11 we were to follow Congress, we would have adopted a rule
12 where, because the \$40 is trivial, each party pays his
13 own experts. Is that right or wrong?

14 MR. SIX: I think that's correct, but we
15 didn't lose. And the Court found that Kansas proved
16 that Colorado violated the compact for over -- for over
17 50 years by clear and convincing evidence. But one
18 point I'd like to make --

19 JUSTICE BREYER: Well, can we do this then?
20 I think maybe in many cases that are technical of nature
21 it might be quite a good thing for the losing party to
22 pay the winning side's lawyers.

23 MR. SIX: The Court would have that ability
24 to do that in original jurisdiction --

25 JUSTICE BREYER: Well, should we do that,

1 too? If we are going to have them pay the experts, why
2 don't we have them, the losing side, pay the lawyers'
3 fees? That would be quite a revolution, but --

4 MR. SIX: Because in the original
5 jurisdiction cases involving prevailing parties or
6 litigious cases, the Court has traditionally and
7 historically awarded the prevailing party costs. And if
8 Congress can make a congressional limitation on cost,
9 Congress could pass a statute that says: You have to
10 take all original jurisdiction cases, or you can't use
11 Special Masters, or you can't use certain Special
12 Masters in cases involving Colorado and Kansas.

13 JUSTICE SCALIA: Could it say that for the
14 lower courts? I mean, you are -- you are trying to
15 distinguish what it can say for the Supreme Court when
16 the Supreme Court is the trial court vis-a-vis what it
17 can say, and has said, for the lower courts.

18 MR. SIX: Yes, it could say that for the
19 lower courts.

20 JUSTICE SCALIA: Why?

21 MR. SIX: Because --

22 JUSTICE SCALIA: You think that, so long as
23 Congress could not create the lower courts at all, once
24 it creates them it can -- it can tie their hands to any
25 sort of absurd rules?

1 MR. SIX: I think they could pass a rule
2 like they did, Rule 54 -- 53, which allows for Special
3 Masters, and they could through the Rules Enabling Act
4 pass a rule that says you can't use Special Masters. I
5 think you get into whether that's --

6 JUSTICE SCALIA: I -- I just don't agree
7 with your assumption that just because Congress need not
8 have created any lower Federal courts, the only Federal
9 court required by the Constitution is this Court,
10 therefore once Congress creates them, it can do whatever
11 it wants with them. I -- I don't agree with that.

12 MR. SIX: Well, I would certainly focus more
13 on the original jurisdiction issue here and haven't
14 focused as much on that issue, but --

15 CHIEF JUSTICE ROBERTS: When we award the --
16 the Special Master's fees in original cases, do we
17 specify who will bear those fees?

18 MR. SIX: Yes, you do. And -- you do in the
19 cases that have discussed costs. For instance, in
20 boundary dispute cases you have suggested that the cost
21 -- the costs will be divided equally; in litigious
22 cases, that they will be awarded to the prevailing
23 party.

24 CHIEF JUSTICE ROBERTS: Do we include the
25 Special Master's fees as part of the costs that are

1 allocated?

2 MR. SIX: Yes, and in this case the parties
3 have agreed to that and never made an issue about that.
4 And there is no --

5 CHIEF JUSTICE ROBERTS: Well, why -- why did
6 the parties agree to it if we do it? In other words, if
7 we say in our orders who bears the Special Master's
8 fees, why -- why would the parties agree to it?

9 MR. SIX: Well, in this case -- maybe I
10 misheard your question. The order appointing the
11 Special Master did not resolve the issue of fees.

12 CHIEF JUSTICE ROBERTS: Right.

13 MR. SIX: And the parties did not agree to
14 that ahead of time. It was an issue to be determined
15 and decided at the end of the litigation.

16 JUSTICE GINSBURG: Isn't it -- isn't it
17 customary for it to be divided 50/50? I mean, we
18 periodically will approve the fees that the Special
19 Master charges, and then they are divided between the
20 parties. And I thought that they were divided 50/50.
21 Is that not so?

22 MR. SIX: Well, as the case progressed, the
23 Special Master submitted bills that were divided 50/50.
24 At the conclusion of the case the parties suggested
25 reasons and special circumstances that should allow the

1 Special Master to apply discretion.

2 He then suggested it wouldn't be unfair to
3 award the Special Master fee costs two-thirds Colorado,
4 one-third Kansas because of the unique features of the
5 case. And the parties then settled the Special Master
6 fees with that guidance.

7 JUSTICE KENNEDY: Of course, I think you
8 gave the answer earlier. Rule 53 allows for the -- an
9 order to say that one or both parties shall pay the
10 Special Master fee. So if we are going to follow other
11 analogies, we don't have much problem here with expert
12 witness fees -- pardon me -- with Special Master fees.
13 It's under Rule 53.

14 Of course, you say we don't have to follow
15 that as a model, but it is a model if we -- if we were
16 to look to congressional and -- and to other rules.

17 MR. SIX: It is a model; however, the Court
18 has always carefully preserved its discretion to treat
19 each dispute between the sovereign States as a unique
20 dispute. And the Court never even enacted an original
21 action rule until 1939, so after 150 years. And in 1939
22 the Court enacted Rule 5, which just set up the bare
23 minimums of commencing the action. And Rule 17 today
24 has essentially the same framework that tells the
25 parties how to start the action but reserves all the

1 other rules to the discretion of the Special Master.

2 It does point to the Federal Rules of Civil
3 Procedure and the Rules of Evidence as guides but not
4 binding, mandatory rules that tie the Court's hand.

5 JUSTICE SCALIA: What is magical about
6 original actions? I mean, what -- what is magical is
7 that we are the only court that is required by the
8 Constitution. But we are -- we are not just the only
9 court for original actions in -- in -- in all appeals.
10 Can Congress prescribe division of costs and expenses in
11 the appeals that come to us from the lower Federal
12 courts?

13 MR. SIX: Well, the Court has, in 1913,
14 determined that -- excuse me, in 1912, that when a case
15 is affirmed, the Supreme Court can adjudge costs for
16 damages and delay. So they have directed, I think, a --
17 a regulation at the appellate jurisdiction, but never at
18 the original jurisdiction.

19 CHIEF JUSTICE ROBERTS: You mean Congress
20 has done that?

21 MR. SIX: Congress, I'm sorry.

22 I would like to reserve the remainder of my
23 time for rebuttal.

24 CHIEF JUSTICE ROBERTS: Thank you, General.
25 General Suthers.

1 ORAL ARGUMENT OF JOHN W. SUTHERS

2 ON BEHALF OF THE DEFENDANT

3 MR. SUTHERS: Mr. Chief Justice, and may it
4 please the Court:

5 The Special Master in this case found clear
6 direction from the statutes and rightly so. Section
7 1821 of title 28 is unambiguous. It provides that a
8 witness in attendance at any court of the United States
9 shall be paid an attendance fee of \$40 per day in
10 addition to travel and accommodation allowances.

11 Section 451 of title 28 defines "court of
12 the United States" to include this Court, the Supreme
13 Court of the United States, and that definition has been
14 part of the statute since 1948. Because witness fees
15 are only at issue in the Supreme Court in cases of
16 original jurisdiction, it's apparent that Congress
17 intended the limits set forth in 1821 to apply in such
18 cases.

19 CHIEF JUSTICE ROBERTS: So what if they
20 said, in original actions no fees shall be allowed to
21 any Special Master appointed by the Supreme Court?

22 MR. SUTHERS: Chief Justice, it would then
23 be up to the Court to decide whether that's somehow an
24 intrusion into your --

25 CHIEF JUSTICE ROBERTS: If we allow --

1 MR. SUTHERS: -- authority --

2 CHIEF JUSTICE ROBERTS: If we allow Congress
3 to regulate fees in our original jurisdiction in that
4 matter, it seems to me that we've given up the principle
5 and we are just negotiating over price.

6 MR. SUTHERS: It would not be the first time
7 that you've allowed Congress to legislate some aspects
8 of your original jurisdiction. Congress has told you in
9 what is now section 1251 that your original jurisdiction
10 is not entirely exclusive. Only State versus State is
11 exclusive, and all the rest of your original
12 jurisdiction is nonexclusive.

13 CHIEF JUSTICE ROBERTS: Isn't this an area,
14 though, where we should be particularly sensitive? In
15 other words, one reason that we were given original
16 jurisdiction in these cases is that the States were
17 afraid of what Congress would do in its own courts, the
18 courts it set up -- might set up under the Constitution.

19 I think it would be surprising if you told
20 the States at the framing that Congress gets to regulate
21 this original jurisdiction where you, for example, can
22 sue the Federal Government, that -- I think that would
23 be surprising. It would not be regarded by them as a
24 significant safeguard.

25 MR. SUTHERS: Chief Justice, if it was such

1 a sensitive issue, why is it we are now in 2008 and this
2 Court has never decided to enact any kind of rules --

3 JUSTICE GINSBURG: But we don't know --

4 MR. SUTHERS: -- as to actual witness fees.

5 JUSTICE GINSBURG: General Suthers, do we
6 know what has happened in past original jurisdiction
7 cases? Maybe it hasn't come up because other Special
8 Masters have said, we'll give the expert witness a
9 reasonable fee for services commensurate with the
10 qualifications and the work that the expert has done.
11 We don't know if that has or hasn't happened in the
12 past, do we?

13 MR. SUTHERS: Justice Ginsburg, we -- we
14 looked at it very carefully -- and it's difficult to
15 research -- but we could not find an original
16 jurisdiction case where there was an award of witness
17 fees outside the -- this \$40 per day limitation.

18 JUSTICE GINSBURG: Did you find any cases
19 where the Special Master had appointed his own witness
20 as distinguished from the parties?

21 MR. SUTHERS: No. We did not. But --

22 JUSTICE GINSBURG: But you -- but you
23 recognize that if the Special Master appointed a
24 witness, or the Court, that that witness would be paid a
25 compensatory fee?

1 MR. SUTHERS: Whatever the Special Master
2 determined was appropriate. That's correct.

3 JUSTICE GINSBURG: Now, in a -- in a case
4 like this one, where the nature of the work that the
5 expert did seemed to be very helpful to both sides,
6 isn't it odd that if the Special Master chose the court
7 expert, that expert would be compensated fairly, but if
8 you have one party calls an expert who renders great
9 service to the Court, to both sides, doesn't get
10 compensated, isn't that an anomaly?

11 MR. SUTHERS: The Special Master, Justice
12 Ginsburg, found clear direction from the statute and did
13 not believe that he had an option in the matter. If
14 you're talking about the unfairness of it, number one,
15 this situation here is no more unfair to Kansas than any
16 litigant in Federal court. And, number two, it's an
17 appropriate matter to take to Congress.

18 The last time they changed it was 1990 from
19 \$30 to \$40. I think it's time to revisit it. But it
20 is, in fact, what Congress has dictated should be the
21 compensation --

22 JUSTICE SCALIA: It's not a matter of
23 unfairness to Einstein anyway. I mean, you know, the
24 expert witness is going to get his money.

25 MR. SUTHERS: That's correct, Justice. They

1 certainly did in this case.

2 JUSTICE SCALIA: The question is --

3 MR. SUTHERS: Both sides can vouch for that.

4 (Laughter.)

5 JUSTICE SCALIA: The question is whether one
6 side can get some money from the other to help pay for
7 it.

8 Do you happen to know whether at the time
9 the original jurisdiction of this Court was established,
10 there was such a thing as the charging of expert witness
11 fees?

12 MR. SUTHERS: Justice Scalia, I do not. We
13 do know --

14 JUSTICE SCALIA: I don't either.

15 MR. SUTHERS: -- that it's 1853 when for the
16 first time Congress, desiring to have uniform fees,
17 began the structure of expert witness fees. It started
18 at \$1.50 a day, in 1853.

19 JUSTICE SOUTER: Do you -- may I ask you a
20 statutory question, just about the application of the
21 statute? As -- as you have pointed out, if the \$40
22 applies, it's because it is, in effect, a determination
23 of a particular item under section 1920: Judge and
24 clerk of any court of the United States may tax its
25 cost. My question is this: One of the items covered by

1 1920, one of the items that a judge or clerk may tax, is
2 fees of the clerk.

3 Under section 1911, which relates entirely
4 to the Supreme Court, there is a provision that the
5 Supreme Court may fix the fees to be charged by its
6 clerk. That is totally redundant if 1920 covers the
7 Supreme Court of the United States.

8 Doesn't it follow, therefore, that section
9 1920 was -- despite its reference to any court of the
10 United States, doesn't it follow that that statute was
11 not intended to apply to the Supreme Court? And doesn't
12 it follow from that that either the Supreme Court's
13 authority is to fix the fees if this is a fee to be
14 charged by the clerk or, in the alternative, that there
15 is no statute on it at all?

16 But the main point is, unless 1911 is
17 totally redundant in -- in referring to fixing the fees
18 to be charged by its clerk, then 1920 must not cover the
19 Supreme Court.

20 MR. SUTHERS: Justice Ginsburg, 1920 --

21 JUSTICE SOUTER: I'm greatly flattered.

22 (Laughter.)

23 MR. SUTHERS: Justice Souter. Justice
24 Souter, sorry. Justice Souter.

25 JUSTICE SOUTER: You're not the first to

1 have done that.

2 (Laughter.)

3 MR. SUTHERS: 1920 -- there may be some
4 redundancies in it, but it's much more expansive than is
5 1911. It talks about court reporter fees, printing --

6 JUSTICE SOUTER: Oh, we didn't -- no
7 question about that. I recognize 1920 goes a lot
8 further. But there's no -- there's no need in 1911 to
9 say that the Supreme Court may -- may fix the fees to be
10 charged by its clerk if the Supreme Court is already
11 covered by 1920.

12 MR. SUTHERS: Justice Souter, I think if you
13 look at the history of it, 1911 was enacted at the
14 same -- there's a separate statute -- statute that
15 applies to the court of appeals and to the district
16 courts. I think it's like 1913 and 1914. So I -- I --
17 I don't think that you can --

18 JUSTICE SOUTER: In other words, if it's
19 redundancy, it proves too much, is what you're saying?

20 MR. SUTHERS: Yes.

21 JUSTICE SOUTER: Okay.

22 MR. SUTHERS: I think the important thing
23 about 1911, in response to Justice Kennedy's question,
24 it is limited to fees charged by the Supreme Court
25 clerk, costs of serving process, and incidental

1 disbursements. It does not address witness fees.

2 In Arlington --

3 JUSTICE KENNEDY: Do you think it includes
4 printing fees?

5 MR. SUTHERS: 1911 does not, unless --

6 JUSTICE KENNEDY: You don't -- you don't
7 think that --

8 MR. SUTHERS: Incidental disbursements?

9 JUSTICE KENNEDY: -- what number here? You
10 don't think that 1911 would allow the clerk to charge
11 for printing fees?

12 MR. SUTHERS: As an incidental disbursement,
13 it may. But it clearly does not address witness fees.

14 JUSTICE KENNEDY: Well, but the reason I ask
15 is because printing -- in 1920, printing and witness
16 fees are in -- in the same sentence.

17 MR. SUTHERS: And I -- I don't know whether
18 printing would be considered incidental disbursements.

19 JUSTICE KENNEDY: So if you allowed
20 printing, then I think you would allow witnesses under
21 1911.

22 MR. SUTHERS: I do know that in Arlington
23 Central School District v. Murphy, citing Crawford
24 Fitting, this Court made clear that no statute will be
25 construed to authorize taxing witness fees and costs,

1 unless it refers explicitly to witness fees.

2 JUSTICE BREYER: It is -- I mean, if you
3 want to really get a little complicated, the -- you
4 have -- you have 11, and 11 talks about the Supreme
5 Court fees. And then we have 20 and that talks about
6 all the other fees, right? Okay. So the thing is, you
7 can't pay money in the United States unless have you
8 some authorization, but 1911 gives the Supreme Court
9 some authorization to fix fees.

10 Now, we look back at 1821. And 1821 tells
11 you how much mileage per diem and subsistence will be.
12 It says he will be paid an attendance fee of \$40 per
13 day. Doesn't say you couldn't pay him more. Just says
14 that's what he is entitled to. Now, of course, in the
15 lower courts, you can't pay him more because there is no
16 authority to pay him more. But in the Supreme Court,
17 there is authority to pay him more. That comes out of
18 1911.

19 I mean, I grant you that this is -- what I'm
20 actually doing here is I'm trying to avoid this problem
21 of whether Congress can start legislating the details of
22 original jurisdiction rules and so forth. Just -- there
23 is some desirability here constitutionally to prevent
24 ourselves from going down that road. That's -- I'm
25 deliberately being gimmicky, but what do you think of

1 this gimmick?

2 MR. SUTHERS: Well, not much.

3 (Laughter.)

4 JUSTICE BREYER: That's fair.

5 (Laughter.)

6 MR. SUTHERS: This Court -- this Court has
7 decided three cases regarding the application of 1821.

8 JUSTICE BREYER: Yes. Yes.

9 MR. SUTHERS: Cases in which litigants, like
10 Kansas, were trying to get around, in Federal court,
11 this witness fee limitation, starting with Crawford
12 Fitting. In that case, you held that a prevailing seeks
13 -- who seeks reimbursements for fees paid to its own
14 expert, is limited by the statute unless we're talking
15 about a contract or express statutory authority to the
16 contrary.

17 JUSTICE BREYER: Which part did they think
18 limited it? Was it 1821 they thought limited it?

19 MR. SUTHERS: Yes. And by the way, there is
20 a contract here. It's the compact between -- the 1949
21 compact between Kansas and Colorado, and --

22 JUSTICE BREYER: In an ordinary case, if a
23 witness doesn't -- never does go to court, but just goes
24 to a deposition, that's the only thing, he goes to a
25 deposition, does he get paid the 40 dollars? He goes to

1 a lawyer's office; he's never in attendance at a court.
2 But do they count that as being in attendance at a
3 court?

4 MR. SUTHERS: I don't believe so, Justice
5 Breyer.

6 JUSTICE BREYER: Well, where is this --

7 MR. SUTHERS: But it is liberally construed.

8 JUSTICE BREYER: What?

9 MR. SUTHERS: It's liberally construed. You
10 don't have to --

11 JUSTICE BREYER: If that isn't attendance at
12 a court, where did these witnesses show up?

13 MR. SUTHERS: These witnesses show up for
14 trial.

15 JUSTICE BREYER: Where? Where did they have
16 this proceeding? I don't know. It wasn't here; it
17 wasn't in this --

18 MR. SUTHERS: It was in California.

19 JUSTICE BREYER: Where?

20 MR. SUTHERS: Pasadena, California, for 272
21 days.

22 JUSTICE BREYER: In the courthouse?

23 MR. SUTHERS: Yes. Tenth Circuit Court of
24 Appeals. They show up; they are in attendance; it's not
25 just on the stand; all the time they're there, all the

1 time they're traveling back and forth. It is liberally
2 construed.

3 JUSTICE STEVENS: May I ask -- just to put
4 one thing on the table if I could. How do you deal with
5 the problem that Justice Ginsburg raises: If a court
6 wants to appoint an independent expert and pay him more
7 than \$40 a day? Do you say that's flatly prohibited?
8 And if it's not flatly prohibited, what is the authority
9 for doing so, other than 1911?

10 MR. SUTHERS: Justice Stevens, nothing
11 prevents higher compensation for a court-appointed
12 expert. We are talking about --

13 JUSTICE STEVENS: But what authorizes it?
14 Doesn't 1911 authorize it?

15 MR. SUTHERS: I don't believe 1911 does.

16 JUSTICE STEVENS: Well, then what does?

17 MR. SUTHERS: The inherent authority of the
18 Court.

19 JUSTICE STEVENS: Well, why don't you have
20 inherent authority to pay expert witness fees a little
21 more money, then?

22 MR. SUTHERS: Because the statute addresses
23 that. It does not address --

24 JUSTICE SCALIA: The Constitution says that
25 no money shall be -- shall be withdrawn from the

1 Treasury except by appropriation made by law. I think
2 -- I think you need a law to spend -- to spend the
3 government's money.

4 JUSTICE STEVENS: You're not spending the
5 government's money; you're spending the litigant's
6 money.

7 MR. SUTHERS: Well, in the case of the -- of
8 the Court appointing an expert, it is typical at the
9 conclusion of the case as part of the costs for the
10 judge to determine what was an appropriate award the
11 losing party -- what they should pay as part of that
12 expert's expense. But that's not what we are dealing
13 with in 1821.

14 JUSTICE BREYER: Well, what about -- I mean
15 now, as long as I'm starting down the road to outer
16 space, why not -- could we say, look, they were very
17 impressive models these people did; on both sides they
18 had terrific experts, very expensive. And would we have
19 the authority to say to the master, although you didn't
20 treat them as your experts, you should have done, for
21 purposes of paying them.

22 MR. SUTHERS: Justice Breyer, you are the
23 Supreme Court and if you found that this statute --

24 (Laughter.)

25 JUSTICE BREYER: I don't want to be

1 unreasonable about this.

2 (Laughter.)

3 MR. SUTHERS: Yes. If you found that this
4 statute was an intrusion which somehow violated your,
5 you know, authority as a Court, you could do that. But
6 why would you want to get into the business -- going to
7 Justice Alito's point -- you have so far refrained from
8 enacting your own rules on this highly procedural matter
9 of expert witness fees.

10 CHIEF JUSTICE ROBERTS: Well, we would want
11 to get into the business because it's our business; and
12 it seems to me that if you yield on a basic point like
13 this, that you're giving up, who knows how much?

14 MR. SUTHERS: Justice Roberts, I'm not --
15 you have done it before in -- in highly procedural
16 matters where you do not -- no one here is doing
17 anything that prevents your exercise of original
18 jurisdiction, that expands your exercise of original
19 jurisdiction. The cases also say that your original
20 jurisdiction is self-executing, doesn't need any
21 statutory implementation; but this is a -- a totally
22 procedural matter, much as -- in fact, I think less of
23 an intrusion, when the -- when the Congress said to you
24 these cases will not be exclusive jurisdiction. Even
25 though they are part of your original jurisdiction.

1 This is a very procedural matter.

2 JUSTICE SCALIA: Could I ask you what --
3 what are the fees to be charged by its clerk, referred
4 to in 1911. "Supreme Court may fix the fees to be
5 charged by its clerk," and then the next paragraph says
6 "the fees of the clerk." Is that what the first
7 paragraph refers to, the fees of the clerk? Or does it
8 mean other fees that the clerk charges which could
9 include costs? Are the costs part of the fees to be
10 charged by the clerk?

11 MR. SUTHERS: I don't believe so, Justice
12 Scalia.

13 JUSTICE SCALIA: They are not? Fees of the
14 clerk -- in 1920 says "fees of the clerk and marshal,"
15 but that's to be taxed as costs. Right? A judge or
16 clerk can tax as costs the following.

17 1911 says Supreme Court may fix "the fees to
18 be charged by its clerk." And you say that doesn't
19 include costs. Boy, it's a messy, messy bunch of
20 statutes, don't you think?

21 MR. SUTHERS: Not -- not a whole lot more so
22 than others I've seen.

23 (Laughter.)

24 JUSTICE SCALIA: Well --

25 MR. SUTHERS: By the way --

1 JUSTICE SCALIA: Well, that's no comfort.

2 MR. SUTHERS: -- it has been pointed out to
3 me in response to this compensation of court-appointed
4 experts that that is specifically addressed in section
5 1920, paragraph 6, compensation of court-appointed
6 experts is covered there. So there is that statutory
7 authority which you indicated there should be.

8 JUSTICE SCALIA: Yes, but that taxes costs,
9 and it doesn't say the Supreme Court may fix costs. May
10 fix the fees to be charged by its clerk, which you say
11 don't include costs.

12 MR. SUTHERS: I don't believe they do.

13 JUSTICE SCALIA: So that wouldn't allow to
14 us fix that.

15 JUSTICE KENNEDY: Well, except 1911 may do
16 two things: Number one, it may authorize the Supreme
17 Court to fix the fees to be charged by the clerk. And
18 then in the second paragraph it provides for taxing of
19 those fees, the cost of serving process, and other
20 necessary disbursements. So it does two things.

21 JUSTICE SCALIA: Well, it tells you how they
22 are to be taxed. It doesn't say what their level is to
23 be. May be taxed against the litigants as the court
24 directs, but I don't see any authority to fix them --
25 fix the amounts. It's not a very good statute, really.

1 GENERAL SIX: If I may, once again going to
2 the issue of why I think some uniformity is important in
3 original jurisdiction cases, is because so many of the
4 cases are not exclusive jurisdiction, and there is in
5 fact a need for uniformity here. And the fact that this
6 Court has not chosen to issue a conflicting rule, I
7 think, is very significant.

8 If in fact you had set an appropriate fee
9 for expert witness fees in case original jurisdiction,
10 and Congress came along and said, gee, no; it shouldn't
11 be that, you should be stuck with \$40, then we might
12 have some kind of a constitutional issue here, but
13 absent that, I simply don't --

14 CHIEF JUSTICE ROBERTS: What if --

15 MR. SUTHERS: I would urge you not --

16 CHIEF JUSTICE ROBERTS: What if Congress had
17 done nothing? In other words, let's say they haven't
18 addressed costs at all. Would we be able to set what we
19 think are reasonable attendance costs?

20 MR. SUTHERS: I would concede that you --
21 you probably could. But --

22 CHIEF JUSTICE ROBERTS: Pursuant to what
23 authority?

24 MR. SUTHERS: Your inherent authority over
25 original jurisdiction cases.

1 CHIEF JUSTICE ROBERTS: Well, if we have
2 inherent authority in original jurisdiction cases, where
3 does it -- how come it disappears whenever Congress
4 decides to legislate in the area?

5 MR. SUTHERS: Because Congress is
6 entitled -- you've recognized their right to deal with
7 certain types of issues. I find it very interesting
8 that Kansas cited *Ford v. Georgia*, because that case
9 says Congress has undoubtedly the right to prescribe the
10 process and mode of proceeding in original jurisdiction
11 cases as fully as in other Federal courts, but that the
12 omission to legislate such process does not deprive the
13 Court of its constitutionally conferred jurisdiction.
14 This is something that you have historically --

15 CHIEF JUSTICE ROBERTS: Is the substantive
16 level of fees a mode of proceeding?

17 MR. SUTHERS: Chief Justice, I would argue
18 that the setting of fees is a procedural matter, and it
19 is -- and has to do with the mode of proceeding in a
20 case. That's correct.

21 CHIEF JUSTICE ROBERTS: Is there any -- do
22 you think \$40 a day for an expert is a realistic
23 assessment of what experts charge?

24 MR. SUTHERS: Absolutely not, Chief Justice.
25 And in fact, of course, as I think Justice Breyer

1 pointed out, Einstein does not only get \$40 a day. We
2 pay them a lot of money, but Congress has decided \$40 is
3 what they -- what they get. Congress ought to revisit
4 it. There's no question about it.

5 JUSTICE GINSBURG: Parties pay a lot -- a
6 lot of expenses, and then they may be -- may or not be
7 reimbursed to the prevailing party, but the prevailing
8 party in our system certainly doesn't get anything like
9 the full cost of the litigation.

10 MR. SUTHERS: That's correct, Justice
11 Ginsburg. They certainly do not. Experts in this case
12 were paid lots and lots of money, and they don't even
13 get that when the court has -- it's not -- at least the
14 trial courts --

15 JUSTICE SCALIA: Maybe lawyers get even
16 more.

17 MR. SUTHERS: That's right.

18 JUSTICE SCALIA: And you don't get that back
19 either.

20 MR. SUTHERS: That's exactly right.

21 JUSTICE SOUTER: May I just get clear on
22 your view of inherent power? As I understand it, you're
23 -- when you answered it, in a situation in which the
24 slate is completely clean, we would have inherent power,
25 you're using "inherent power" in effect to be a kind of

1 default power. If Congress hasn't acted, somebody has
2 got to do something. That's got to be us, so -- so we
3 would have the authority. But you are not using the
4 term "inherent power" in the sense of being a power
5 which is sort of essential and infeasible by Congress
6 in any respect. Is that correct?

7 MR. SUTHERS: That's correct, Justice
8 Souter, to the extent that there was nothing applicable
9 to this and it came before you, should expert witnesses
10 get compensated some -- some amount, Congress hasn't
11 spoken on it, I would think, as a matter of default, you
12 could say yes. And -- but --

13 JUSTICE SOUTER: Do you think there is --
14 there is any inherent power in, let's say, this Court --
15 just keep to it simple -- that Congress in effect could
16 not eliminate? For example, if Congress passed a
17 statute saying the Supreme Court of the United States
18 shall not have authority to punish direct contempt,
19 would that statute be constitutional in your view?

20 MR. SUTHERS: No, Justice Souter, it would
21 not be because then it's interfering with your ability
22 to do what courts do as a central matter. You --

23 JUSTICE SOUTER: Isn't that a pretty
24 slippery slope then that you're on? Because if in fact
25 parties are going to be reluctant to -- to hire the kind

1 of experts that are necessary, unless they think that at
2 the end of the day there is going to be some kind of an
3 equitable disposition of the expense, at that point that
4 starts interfering with the conduct of the kind of
5 business that the Court ought to be engaged in.

6 MR. SUTHERS: Justice Souter, it's not
7 telling you how to decide cases. And there is another
8 case before the Court in which Congress reinstated
9 time-barred cases. That's the kind of thing that
10 intrudes on your judicial function. Setting witness
11 fees doesn't come close to doing that.

12 JUSTICE SCALIA: What if Congress -- really
13 you think Congress could set any -- there's not some
14 point at which it is so destructive of the process here?
15 What if Congress provides that the winning -- that the
16 winning party shall pay the costs of the losing party?
17 Can Congress do that?

18 MR. SUTHERS: It's -- I think the question
19 would be, Justice Scalia, is that a fundamental
20 interference with the Court's ability to decide cases?
21 I would suggest it might be to the -- that they do
22 something wholly irrational like that.

23 JUSTICE SOUTER: But that would be a matter
24 of due process, not a matter of inherent power, I take
25 it.

1 MR. SUTHERS: I believe that's correct.
2 That's correct.

3 Members of the Court, Special Master
4 Littleworth spent a lot of time on this case. He has
5 been fair, competent, and conscientious in resolving all
6 the issues before this Court, including this issue of
7 expert witness fees. It was the plain language of the
8 statute and the clear direction of the case law that led
9 him to his conclusion that the expert witnesses' fees
10 were limited by statute in this case. We would ask you
11 to deny Kansas' exception to the final report, and that
12 the Court should enter the proposed judgment and decree.

13 Mr. Chief Justice, if there are no other
14 questions from the Court, I'll conclude my argument.

15 CHIEF JUSTICE ROBERTS: Thank you, General.
16 General Six, you have four minutes
17 remaining.

18 REBUTTAL ARGUMENT OF STEVE SIX
19 ON BEHALF OF THE PLAINTIFF

20 MR. SIX: 1920 didn't appear in 1948
21 magically. It came from the 1853 Fee Act. And the
22 language in the Fee Act was, "A judge shall tax costs."
23 "A judge" -- it says, "Costs shall be taxed by a judge
24 or clerk of the court." I'm sorry. And 1920 says, "A
25 judge or clerk of any court of the United States." In

1 1853, as the Court has discussed in Alyeska Pipeline,
2 the Fee Act applied to the circuit and district courts.
3 It says that in its title. And "judge" in 1853 meant a
4 lower court judge. In 1920, we have exactly the same
5 word -- "a judge" who can tax costs -- and we have a
6 definition that Congress tells us it means exactly the
7 same thing.

8 Under Colorado's reading, "court of the
9 United States" would expand to read "judge" right out of
10 the statute, and it would make the statute apply to
11 "magistrate judge," for example, which is not included
12 in the definition, but they're somebody who wears a robe
13 and presides over a court of the United States, and it
14 would apply to Justices, even though 451 in title 28
15 defines "Justices" as a separate group. So that's not
16 --

17 JUSTICE GINSBURG: But the Constitution uses
18 the word "judge." A "judge of the United States" is a
19 Supreme Court Justice or a judge of an inferior court.

20 MR. SIX: And certainly Congress isn't tied
21 to the way the word is used in the Constitution, no more
22 than the paper I got on my way in here told me not to
23 refer to any of you as "judges."

24 The point, I think, is that the Fee Act was
25 carried forward to 1920, and the language is almost the

1 same. The only thing they have added is a definition of
2 "court of the United States." And if after 168 years,
3 Congress is going to tread on the Court's original
4 jurisdiction, they ought to at least have some express
5 language that they intend to do that -- do so, where the
6 Court could at the very least adopt a clear statement
7 rule that would require Congress to say, "We are going
8 to do this now. We've never done it in our history, but
9 now after 168 years we are."

10 Not only that, Colorado's position relies on
11 the fact that they did this in 1948, and it's gone
12 unnoticed by the Court, any major treatise, or
13 commentary --

14 JUSTICE BREYER: I'm sorry. I got mixed up
15 on my dates. The words "in any court of the United" --
16 what the words are now is "in any court." It says
17 "court of the United States includes" 451 courts. When
18 did that language come in?

19 MR. SIX: In 1948.

20 JUSTICE BREYER: In '48?

21 MR. SIX: Yes.

22 JUSTICE BREYER: So the inclusion wasn't
23 there till then. Now, normally, in the '48 revision,
24 the rule is they intended to make no substantive change.
25 When they did intend to make a substantive change, they

1 said as much. So is there anything in the history of
2 that that suggests they intended to make a substantive
3 change here?

4 MR. SIX: No, there isn't. And they changed
5 --

6 JUSTICE BREYER: Nothing?

7 MR. SIX: They changed --

8 JUSTICE BREYER: So, in other words, the
9 language "in addition to the courts listed in section
10 451 of this title," that -- those words I just said have
11 no appearance in the statutes before 1948? Yes or no.

12 MR. SIX: Yes.

13 JUSTICE BREYER: They do appear before?

14 MR. SIX: No.

15 JUSTICE BREYER: No, they do not.

16 MR. SIX: First time in 1948.

17 JUSTICE BREYER: First time in 1948. So
18 they were put in there by a revisor.

19 MR. SIX: Yes.

20 JUSTICE BREYER: And there is no indication
21 the revisor intended to change the meaning that
22 pre-existed.

23 MR. SIX: Yes.

24 JUSTICE BREYER: Okay. I got the argument.

25 Thank you.

1 MR. SIX: And they did change something
2 else. They changed "shall" to "may," and they gave a
3 reason for that change.

4 Thank you, Mr. Chief Justice.

5 CHIEF JUSTICE ROBERTS: Thank you, General.
6 The case is submitted.

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

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