

69
Supreme Court of the United States

October Term, 1968

In the Matter of:

Docket No. 672

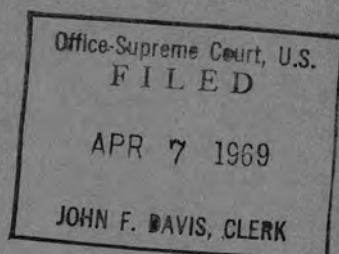
UNITED STATES OF AMERICA,

Petitioner;

vs.

JOHN P. KING,

Respondent.



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Place Washington, D. C.

Date April 2, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

ORAL ARGUMENT OF:

P A G E

William D. Ruckelshaus, Esq. on behalf of
Petitioners

2

Neil B. Kabatchnick, Esq on behalf of
Respondent

21

Rebuttal argument of William D. Ruckelshaus, Esq.

35

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - -X
4 UNITED STATES OF AMERICA, :

5 Petitioner; :

6 vs. :

No. 672

7 JOHN P. KING, :

8 Respondent. :

9 - - - - -X
10 Washington, D. C.

Wednesday, April 2, 1969

11 The above-entitled matter came on for argument at
12 11:55 a.m.

13 BEFORE:

14 EARL WARREN, Chief Justice
15 HUGO L. BLACK, Associate Justice
16 JOHN M. HARLAN, Associate Justice
17 WILLIAM J. BRENNAN, JR., Associate Justice
18 POTTER STEWART, Associate Justice
19 BYRON R. WHITE, Associate Justice
20 ABE FORTAS, Associate Justice
21 THURGOOD MARSHALL, Associate Justice

22 APPEARANCES:

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Counsel for Respondent.

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

2 MR. CHIEF JUSTICE WARREN: No. 672, the United States
3 versus John P. King.

4 Mr. Ruckelshaus?

5 ARGUMENT OF WILLIAM D. RUCKELSHAUS, ESQ.

6 ON BEHALF OF THE PETITIONER

7 MR. RUCKELSHAUS: Mr. Chief Justice, and may it please
8 the Court:

9 This case involves the applicability of the declaratory
10 judgment statute to the Court of Claims. The decision of the
11 Court of Claims was that the declaratory judgment statute, the
12 Federal declaratory judgment statute, was applicable in this
13 case.

14 A statement of the facts of this case, I think, would
15 be in order, in order to set the stage for this decision.

16 Col. King, who was the respondent in this case, on
17 May 14, 1959 was found physically unfit for active duty by the
18 Army Physical Evaluation Board. On June 18, 1959 this decision
19 was reviewed by the Army Physical Review Council, and that body
20 found King fit for duty.

21 The latter decision was upheld by the Army's Physical
22 Disability Appeal Board on July 21, 1959, and King was retired
23 for longevity on July 31, 1959.

24 In August of 1959, King filed an application for cor-
25 rection of military records with the Army Board for Correction

1 of Military Records. A hearing was held in January of 1961, and
2 the application was formally denied by the Under Secretary of
3 the Army on May 19, 1961.

4 That ended King's procedure in the Army appeal boards.
5 On July 26, 1965 respondent King filed a petition in the Court
6 of Claims alleging that the action of the Under Secretary of
7 the Army was arbitrary, capricious, and contrary to law, and
8 demanded judgment in an amount equal to the taxes paid on his
9 retirement since 1959. The difference between retiring for
10 longevity and for disability was that he would have been paid
11 75 percent of his full pay as a Colonel in both instances, ex-
12 cept that if he had been retired for disability, he would not
13 have had to pay any taxes on that retirement pay.

14 Q It is wholly exempt from taxes, is it?

15 A Yes, that is right, Mr. Justice Stewart.

16 Q If it is disability retirement.

17 A Pursuant to the Government's motion to dismiss,
18 and in affirmative defense, the Court of Claims dismissed respon-
19 dent King's petition on the grounds that the petition was basic-
20 ally a claim for a tax refund, and since King had failed to
21 file a refund with the Internal Revenue Service, he was barred
22 from asserting it in this suit pursuant to 26 U.S.C. 7422(a).

23 The court further stated, on its own motion, that the
24 only basis for maintaining this action was under the Declaratory
25 Judgment Act, and gave plaintiff King, respondent King in this

1 case, 30 days to file a brief on the applicability of the
2 Declaratory Judgment Act to the Court of Claims.

3 After briefs were filed, the court ruled on February
4 16, 1968 that the Declaratory Judgment Act did apply to the
5 Court of Claims, and further, the court gave King 30 days to
6 amend his petition and seek a "declaration of his right to be
7 retired for disability and to have his military records changed."

8 It was from this order of the Court of Claims that
9 the Government has sought, and this Court granted certiorari to
10 the court below.

11 Now, this case, in its broadest sense, I think, in-
12 volves the question of whether the power and the authority of
13 the Court of Claims should be appreciably increased with refer-
14 ence to the suits against the United States without any addi-
15 tional grant of power or authority from Congress.

16 I think specifically the question before the Court is
17 whether the Court of Claims in this case, or indeed, in the
18 broader sense, in any case, has the jurisdiction or power to
19 enter declaratory judgments, and I might say that the Court of
20 Claims for the first time is saying that cases which have a
21 money cast, or which are money related, or which are money
22 oriented, confers jurisdiction upon that court to grant declara-
23 tory judgments.

24 I think at the outset, it can be stated that it is
25 agreed on the part of the Government and on the part of respondent

1 and amicus that the declaratory judgment statute itself confers
2 no jurisdiction on the Court of Claims or, indeed, on any court
3 by its own terms. I think the statute speaks of the power of
4 a United States Court to declare a right within its jurisdiction
5 so the jurisdiction for this Court of Claims to enter this de-
6 claratory judgment had to be found somewhere else.

7 MR. CHIEF JUSTICE WARREN: We will recess now.

8 (Whereupon, at 12:00 Noon, the argument in the above-
9 entitled matter recessed until 12:30 p.m. the same day.)
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1 (Argument in the above-entitled matter resumed at
2 12:35 p.m.)

3 MR. CHIEF JUSTICE WARREN: Mr. Ruckelshaus, you may
4 continue with your argument.

5 FURTHER ARGUMENT OF WILLIAM D. RUCKELSHAUS, ESQ.

6 ON BEHALF OF THE PETITIONER

7 MR. RUCKELSHAUS: Mr. Chief Justice, and may it please
8 the Court:

9 When the Court adjourned, the argument had just been
10 put forward that there was no dispute between the petition and
11 the respondent and the amicus, or the court below for that
12 matter, as to whether the declaratory judgment statute itself
13 conferred any jurisdiction on the Court of Claims to hear or
14 to have the application of the declaratory judgment statute
15 apply to that court, because the statute itself says that they
16 only have the power or right to declare rights within its juris-
17 diction, so that phrase "within its jurisdiction" means they
18 must find this jurisdictional grant somewhere other than the
19 declaratory judgment statute itself.

20 Where the respondent and the court below looked to
21 find that jurisdiction is in the Tucker Act. The Tucker Act,
22 by its terms, according to the court below, in the opinion in
23 the appendix on page 32, the court said that Mr. King could seek
24 declaratory relief, even though he was "unable to obtain or re-
25 quest a money judgment."

1 The court then went on to say that the Tucker Act
2 granted judgment in a case of this nature because of the money
3 cast, or money orientation, or money relatedness of the claim.

4 It is the contention of the Government that this flies
5 in the face of the traditional grant of jurisdiction to the
6 Court of Claims. It flies in the face of the years of statutes
7 and years of decisions that have been handed down restricting
8 that jurisdiction to claims in which a money judgment could be
9 awarded.

10 This Court itself, in Glidden versus Zdanok, said that
11 from the beginning, it, meaning the Court of Claims, "From the
12 beginning it has been given jurisdiction only to award damages,
13 not specific relief."

14 I think that the argument of the Court of Claims below
15 seeking to restrict this jurisdictional grant, or broaden this
16 jurisdictional grant into areas where there was a money cast,
17 or money orientation, or money relatedness, again flies in the
18 face of this statement from Glidden versus Zdanok.

19 Now, the court below originally dismissed this action
20 on the grounds that it was a claim for a tax refund, and said
21 that since the plaintiff, the respondent herein, had not filed
22 a tax refund claim pursuant to 26 U.S.C. 7422(a), that the court
23 had no jurisdiction.

24 Then the court invited the plaintiff to file a declara-
25 tory judgment, and the plaintiff filed a declaratory judgment,

1 alleging essentially the same things in -- or filed a brief in
2 favor of filing a declaratory judgment -- and when eventually
3 it amended the petition, the plaintiff asked for essentially
4 the same thing that he had asked for in his original petition,
5 the only difference being that it was phrased in terms of a
6 declaration of his rights.

7 I don't see how the Court of Claims can be said to
8 have expanded its jurisdiction under the Declaratory Judgment
9 Act simply because the claim itself, as filed, or the petition
10 as filed, was stated in a different. Really, the relief that
11 the petitioner was seeking, the plaintiff was seeking herein,
12 was pretty much the same thing that he was seeking under his
13 original claim.

14 I think the question of whether it is a tax question
15 or not, the original petition as filed, really does not concern
16 this Court because if the claim as originally filed was a tax
17 question, if it was a petition to recover tax money, then clearly
18 the court is without jurisdiction to entertain this under the
19 Declaratory Judgment Act, because the Declaratory Judgment Act
20 specifically precludes suits with respect to taxes.

21 Q Didn't Judge Davis say the real question was the
22 Army regulations, and not the Revenue Code?

23 A Yes, Mr. Justice Marshall, he did say that the
24 real question was the Army regulations, but I think he was forced
25 to make that statement because he had already ruled prior to

1 that time that this was essentially a tax refund claim, and so
2 if he said that it had to do with the eventual tax refund, then
3 he would be faced with the same section of 28 U.S.C. 7422 that
4 he had dismissed it on previously.

5 If he then turns around and says, as he did on the
6 last page of his opinion, that the only question before the court
7 below is the question of whether this man was properly retired,
8 then I think he loses the money cast, or money orientation, or
9 money relatedness of this claim which he says is necessary in
10 order to confer jurisdiction on that court.

11 Q And it is your position, therefore, he lost juris-
12 diction.

13 A The minute he said that the sole question before
14 the court had to do with whether the man was properly retired --

15 Q He didn't say "sole". He said "controlling". I
16 have forgotten what his phrase was.

17 A It is the last part of his opinion. He said the
18 question before the court in the declaratory judgment action that
19 was filed, he said on page 40 of the appendix, "The only question
20 he presents or need present relate to his retirement from the
21 Army, and those are the only issues with which this court will
22 treat in its further proceedings in this case."

23 I think once he has said that, he has lost his argu-
24 ment that conferred the jurisdiction in the first place that
25 this case had a money cast to it, or money orientation. I don't

1 think it is enough that you can say somewhere in the future, way
2 down the line, the petitioner herein may be entitled to some
3 money. This, I believe, would include virtually every case filed
4 in any court.

5 Q Why is it that he couldn't have said in the Court
6 of Claims, "The United States made a mistake in retiring me.
7 They put me in the wrong category, and by reason of that mis-
8 take, I am out some money and the United States owes me that
9 money for having caused me to pay it out when I shouldn't have"?
10 What is wrong with that claim?

11 A Mr. Justice White, I think the original reason --

12 Q You think that is just a tax refund claim?

13 A That is what the court below held in its original
14 order to dismiss.

15 Q I know, but if he says, "If I were in the right
16 category, why, if I were retired in the right category, of
17 course I owe those taxes, and as long as that classification
18 stands, I did owe the taxes, but I want to get rid of the classi-
19 fication and I certainly can't do it in a tax refund suit. No-
20 body would even listen to me in a tax refund suit to review the
21 classification question. This is the only place I can go to have
22 this classification reviewed. This is what is costing me the
23 money."

24 Why would that be thrown out as a tax refund claim or
25 as beyond the jurisdiction of the Court of Claims?

1 A I think on the basis of Prince against the United
2 States, Mr. Justice White. The court therein entertained a very
3 similar fact situation herein in which Prince had filed a peti-
4 tion for a tax refund with the Internal Revenue Service before
5 bringing his suit to determine whether he was properly retired,
6 and on the basis of that case, which the Government does not
7 completely accept, by the way, the Court of Claims then went
8 ahead and decided Prince's case.

9 In this instance, King did not file a petition for a
10 tax refund.

11 Q Do you think in a tax refund suit, an ordinary
12 tax refund suit, this officer could have litigated the correct-
13 ness of his retirement?

14 A I don't believe that he could have had the deter-
15 mination made by the Internal Revenue Service as to whether he
16 was properly retired or not.

17 Q Or in that kind of a suit.

18 A Well, in Prince against the United States, Mr.
19 Prince did just that. He had his determination as to whether
20 he was properly retired --

21 Q In the tax refund suit?

22 A In the tax refund suit in the Court of Claims.

23 Q In the Court of Claims, yes, but how about -- the
24 Internal Revenue Service said, "We won't look at that. You just
25 owe the tax." Could he get it adjudicated in a District Court,

1 do you think?

2 A Well, if Prince is a proper holding, and as I say,
3 we have some question about that, I don't see any reason why he
4 couldn't, because District Courts have concurrent jurisdiction
5 in tax refund claims.

6 In addition to that, I think that clearly King could
7 have brought a mandamus action against the Secretary of the Army
8 under 28 U.S.C. 1361 and requested a mandate against the Secretary
9 of the Army to change his records pursuant to an arbitrary and
10 capricious decision made by the Secretary of the Army. I think
11 he could have gotten such a suit in a District Court or could
12 have gotten such relief in a District Court.

13 He did not seek such relief in a District Court.
14 Clearly, he could not get that relief in the Court of Claims be-
15 cause there are cases specifically holding that mandamus does
16 not lie, although I think in this case what the Court of Claims
17 is, in effect, doing is doing indirectly what they can't do
18 directly, that is, by declaring the rights of King, in effect
19 mandating the Secretary of the Army to change his records.

20 Certainly if King then went into a District Court
21 against the Secretary of the Army, the decision as to whether he
22 was proper retired, the doctrine of collateral estoppel would have
23 applied to those issues in the District Court.

24 So I think King had some additional remedies here in
25 the one that he tried, but he chose this method in the Court of

1 Claims at the invitation of the Court of Claims.

2 Q I don't see your Prince case cited in your brief.
3 Is it?

4 A I believe it is, Justice Black.

5 Q I don't see it in the index.

6 A It is cited on page 2 of Justice Davis' opinion,
7 Mr. Justice Black. It is 127 Court of Claims 612.

8 I think the argument that is advanced by the respondent
9 having to do with the legislative history of the Declaratory
10 Judgment Act and of the 1948 recodification of that Act has very
11 little to do with the determination of whether the Court of
12 Claims has jurisdiction over this case in the first instance.

13 I think the most that can be said for their legislative
14 history argument is that you can show from this history that
15 Congress did not even consider the Court of Claims in enacting
16 the declaratory judgment statute, and that I would emphasize to
17 the Court that we are not saying that the declaratory judgment
18 statute specifically excluded the Court of Claims from its opera-
19 tion. I think this is the thrust of the argument of the respon-
20 dent here, that the Government insists that the declaratory judg-
21 ment statute specifically excludes the Court of Claims. We do
22 not insist that.

23 I think that what we do say is that before the United
24 States Government consents to be sued, or before sovereign im-
25 munity is waived, there must be a clear and express statement of

1 that waiver on the part of Congress, and that there is no such
2 clear and express statement either in the declaratory judgment
3 statute or in the Tucker Act, and without such a clear, express
4 statement, the argument that sovereign immunity has been waived
5 in this case simply cannot stand up.

6 Q What language in the Tucker Act operates as a
7 waiver of immunity by the United States to the extent you con-
8 cede the United States waived it?

9 A The Tucker Act states, in its jurisdictional
10 statement, "The Court of Claims shall have jurisdiction to render
11 judgment upon any claim against the United States founded either
12 upon the Constitution or any Act of Congress or any regulation
13 of an Executive department, or upon any express or implied con-
14 tract with the United States, or for liquidated or unliquidated
15 damages in cases not sounding in tort."

16 I think the language that expressly waives it is where
17 the Tucker Act says to "render judgment upon any claim." When
18 the Tucker Act was passed, the reason for the Tucker Act itself
19 was the fact that Congress had been inundated with private bills
20 that took up a good percentage of their time, and they wanted
21 this decision to be made by another court. So traditionally the
22 jurisdiction of that court has been limited to hearing claims
23 for money damages.

24 Q You think then if Congress just amended this
25 statute, the Tucker Act, and said the Court of Claims shall also

1 have jurisdiction to adjudicate declaratory judgment actions
2 related to money claims, that would be a waiver?

3 A I think that would be clear enough, Mr. Justice
4 White.

5 Q What did the Declaratory Judgment Act itself
6 really say the way it is?

7 A The Declaratory Judgment Act simply says that any
8 court of the United States has the right to adjudicate --

9 Q Has jurisdiction.

10 A Within its jurisdiction. It didn't speak in
11 jurisdictional terms. It was a creation of additional remedy.

12 Q Well, it did speak of cases otherwise within its
13 jurisdiction, didn't it?

14 A Within its jurisdiction is what it said; that a
15 court could issue a declaratory judgment in a case or contro-
16 versy within its jurisdiction, and in this, I think that means
17 you must find the jurisdictional grant in some statute other
18 than the declaratory judgment statute. That is why the Court of
19 Claims and the respondent herein is seeking to find that juris-
20 dictional grant in the Tucker Act.

21 Q Before the Declaratory Judgment Act, what was
22 wrong with declaratory judgments?

23 A I think the primary question was one of rightness.
24 Prior to the Declaratory Judgment Act there were many --

25 Q Was it a jurisdictional question?

1 A It had to do with rightness of a claim. There
2 were many purposes, but it was primarily to decide controversies
3 between private individuals that had not reached the degree of
4 rightness in which a suit could normally be brought, and that
5 someone did not need to act at their peril, did not need to
6 avoid acting for fear of the consequences when they could get
7 their right determined in advance of having to act.

8 I think that was the original purpose of the declara-
9 tory judgment statute.

10 Q It is your position that there wasn't a juris-
11 dictional problem about issuing, no case or controversy problems
12 about --

13 A I think that there were problems of rightness and
14 problems of whether the controversy had ripened enough to be
15 determinable by a court or justiciable by a court, and that prior
16 to the enactment of the declaratory judgment statute, many cases
17 were dismissed for being premature, and that many activities on
18 the part of private individuals were inhibited because they
19 could not get their rights determined prior to the time that
20 they acted.

21 Q So you say the Declaratory Judgment Act didn't
22 help the Court of Claims in declaratory judgment situations be-
23 cause that kind of a claim wasn't otherwise within its juris-
24 diction in the first place.

25 A I think that is right.

1 Q Because of the lack of waiver.

2 A Because there has to be a waiver somewhere, a
3 consent to be sued, and all that the Congress has ever consented
4 in this area was that the United States could be sued in the
5 Court of Claims for money damages.

6 Q For ripe claims. The consent goes for money
7 damage suits, but only if the claim is sufficiently ripe. Don't
8 you have to limit this concept?

9 A I think it goes further than that, because if you
10 are to say that the Court of Claims has the power to grant de-
11 claratory judgments in areas where the claim is not ripe, this
12 means that under the general grant of the Tucker Act to deter-
13 mine controversies regarding government regulation, this amounts
14 to a considerable increase in power in the Court of Claims,
15 whether you call that an additional remedy or additional juris-
16 diction that it does not otherwise have.

17 Q As I understand your position, you do not claim
18 that the Declaratory Judgment Act, on its face, in speaking of
19 the courts of the United States, excluded the Court of Claims.

20 A That is right.

21 Q That within the word "courts" is included the
22 Court of Claims, but the Act doesn't give the Court of Claims
23 the privilege of doing something it wasn't doing before because
24 it didn't have jurisdiction to do so, to issue declaratory judg-
25 ments because of lack of consent of the United States.

1 Where does the consent of the United States stop in
2 the Tucker Act?

3 A I think it stops when somebody goes into the
4 Court of Claims and requests something in addition to a money
5 judgment or other than a money judgment.

6 Q You mean asks for a declaration about a money
7 judgment, but the money judgment isn't ripe enough, the money
8 claim isn't ripe enough?

9 A I think the problem is basically one as a problem
10 between jurisdiction and remedy. When we are talking about
11 sovereign immunity, we can get into a semantic argument over
12 whether the Declaratory Judgment Act simply created a new remedy
13 and had nothing to do with jurisdiction, when viewed in light of
14 the Tucker Act, or we can look at the whole situation of the
15 Court of Claims saying they have the power under the Tucker Act,
16 jurisdiction under the Tucker Act, to grant declaratory judgments
17 and see that they are exercising considerably more power than
18 Congress ever intended for them to do.

19 Where a court is exercising considerably more power
20 than they did in the past, under a court decision, as regards
21 the United States, before they do that there has to be a clear
22 consent on the part of the United States to be sued, and in this
23 case there was not such a consent and there was not such a waiver
24 of sovereign immunity.

25 Q Suppose you could spell out a declaratory judgment

1 involving a matter of dollars and cents. Would the Court of
2 Claims --

3 A I think that is exactly what has been done here,
4 Mr. Justice Marshall.

5 Q All right, if it involves a matter of dollars and
6 cents, isn't that the Tucker Act? Didn't it say you are limited
7 to dollars and cents claims?

8 A But in a declaratory judgment, the question of
9 whether any further relief can be granted is reserved, in Judge
10 Davis' opinion, and the petitioner herein asked for a money judg-
11 ment in the form of a declaratory judgment petition. I don't
12 think traditionally declaratory judgments have been used to
13 grant money judgments.

14 Again, in this particular case, if what they are ask-
15 ing for is a money judgment, by the court's own earlier decision
16 it is a tax claim and, as such, specifically not cognizable as
17 a declaratory --

18 Q Haven't you run across declaratory judgments in
19 ordinary actions which end up in sizable money?

20 A I am sorry. I didn't hear your question, Justice
21 Marshall.

22 Q Declaratory judgments, in ordinary courts, District
23 Courts, involving hundreds of thousands of dollars, simply de-
24 claratory judgments.

25 A That is right.

1 Q There is nothing wrong with that?

2 A No, there is nothing wrong except that the --

3 Q Except against the United States.

4 A Except in the Court of Claims against the United
5 States.

6 Q I thought you said in any court.

7 A No, I am not maintaining, Mr. Justice Stewart, in
8 any court, because they have issued some declaratory judgments
9 under the Admiralty Act and under the Federal Tort Claims Act
10 where the jurisdictional grant to sue the United States is con-
11 siderably broader than it is in the Tucker Act.

12 Q Well, I remember those cases in your brief
13 reached the admiralty one, but I thought your basic claim was
14 that absent some special conferral of jurisdiction, that no
15 court, not merely the Court of Claims, but a District Court
16 didn't have power to enter a declaratory judgment against the
17 United States.

18 A Absent some jurisdictional grant, and a clear
19 waiver of sovereign immunity by Congress, yes, they cannot have
20 declaratory judgment acts against the United States. It is our
21 contention that under the Tucker Act there is no such waiver of
22 sovereign immunity.

23 What I think is really happening here is that the
24 Court of Claims is reaching out to pass judgment on a whole con-
25 glomerate of decisions being made by the United States Government

1 and attempting to infuse their jurisdictional power into all
2 areas of governmental problems and government decision making
3 that simply was not contemplated in the Tucker Act and was not
4 contemplated in the jurisdictional grant given to the Court of
5 Claims.

6 Q The District Courts have concurrent jurisdiction
7 up to what amount?

8 A \$10,000.

9 Q And there are several Courts of Appeals --

10 A That have held that if they attempt to found
11 jurisdiction on the Tucker Act, that the declaratory judgment
12 action does not lie.

13 Q Can the Tax Court issue a declaratory judgment?

14 A I can't answer that, Mr. Justice Black. I can't
15 answer whether they can or not. District Courts have from time
16 to time issued declaratory judgments against the United States
17 in specific statutory areas, but I am not aware of any that have
18 been issued in the Tax Court.

19 Q What about the Court of Customs Appeals?

20 A The CCPA? To my knowledge, they cannot either,
21 Mr. Justice Black.

22 MR. CHIEF JUSTICE WARREN: Mr. Kabatchnick?

23 ARGUMENT OF NEIL B. KABATCHNICK, ESQ.

24 ON BEHALF OF THE RESPONDENT

25 MR. KABATCHNICK: Mr. Chief Justice, if it please the

1 Court:

2 It is the respondent's position that the decision be-
3 low holding that the Declaratory Judgment Act does apply to the
4 United States Court of Claims was correct, and that the decision
5 below should be affirmed.

6 The considerations before the Court revealing the
7 correctness of the decision below is readily apparent from an
8 examination of the provisions of 28 U.S.C. 2201, the Declaratory
9 Judgment Act, and 28 U.S.C. 451.

10 As the Court is aware, the Declaratory Judgment Act
11 says in pertinent part that any court of the United States, in
12 an actual controversy within its jurisdiction, may declare the
13 rights and other legal relations of the parties, whether or not
14 further relief is or could be sought.

15 Of course, the key word, from respondent's point of
16 view, is the word "any"; "any" court of the United States. The
17 Court will recall that in the original Declaratory Judgment Act
18 passed in 1934, the language of the Act was "the courts of the
19 United States," and in the recodification in 1948, the language
20 was changed to read "any court of the United States."

21 It would seem that on its face, without going beyond
22 the bounds of Section 2201, an examination of that language, or
23 that phraseology, would readily cause anyone to come to the con-
24 clusion that the Declaratory Judgment Act does apply to the
25 United States Court of Claims.

1 Q What about the Tax Court?

2 A Sir, I find nothing, following my theory, if it
3 is correct, in going to the provisions of Section 451, and the
4 term "court of the United States" as defined there. The Tax
5 Court is not specifically identified within the language of
6 Section 451.

7 Q Does it come under the terms "any court"?

8 A As a court of the United States, I would think
9 that it is, but it is not expressly identified within Section
10 451.

11 Q Well, it is not covered by the definition, is it,
12 because there is a catch-all at the end, "any court created by
13 Act of Congress, the Judges of which are entitled to hold office
14 during good behavior." Tax Court judges serve for a term of
15 years, not during good behavior, so it would not be included.

16 Q What about the Court of Customs Appeals?

17 A Yes, sir; if respondent's theory is correct, it
18 would apply to the Court of Customs Appeals, which is expressly
19 stated in Section 451 as being within the term "court of the
20 United States."

21 As I indicated earlier, if it was believed that we
22 would have to go outside the bounds of Section 2201 to find a
23 definition of the term "court of the United States," as respon-
24 dent has pointed out, we could go to Section 451 of Title 28,
25 which defines "court of the United States," and within that

1 definition, of course, there is the designation of the Court of
2 Claims in express language.

3 I believe it is significant that at the time of the
4 original passage of the Declaratory Judgment Act in 1934, in many
5 of the decisions holding that the Act did not apply to the United
6 States, the express statutory definition of a "court of the United
7 States" was not contained explicitly in the Judicial Code.

8 Therefore, I believe the Court need not go beyond an
9 examination of the terms of Section 2201 and Section 451 to find
10 express language indicating that the Declaratory Judgment Act
11 does apply to the United States Court of Claims.

12 Now, considerable discussion was made of the matter
13 of the waiver of sovereign immunity, which would permit the
14 United States Court of Claims to apply that procedural remedy
15 in proceedings within its jurisdiction. I submit that Section
16 1491, the Tucker Act, is the waiver of sovereign immunity, is
17 the statute which permits the United States Court of Claims to
18 apply the procedural remedy accorded by the Declaratory Judgment
19 Act to proceedings within its jurisdiction.

20 As the Court held in the Aetna Life Insurance Company
21 versus Haworth, at 330 U.S. 227 in 1937, the operation of the
22 Act is procedural only. As the Court in the Skelly Oil case
23 said, "It does not enlarge the range of remedies. It does not
24 expand the jurisdiction of the Court."

25 I think it is quite significant, in assessing the

1 merit of the decision of the court below, that the court, and
2 respondent respectfully invites the Court's attention to the
3 language in the Skelly Oil case, where the Court said that be-
4 fore the Declaratory Judgment Act, a Federal Court would enter-
5 tain a suit on a contract only -- and this was a contract action --
6 if the plaintiff asked for an immediately enforceable remedy,
7 like money damages or an injunction.

8 The Court went on, at pages 671 and 672, to say "The
9 Declaratory Judgment Act allowed relief to be given by way of
10 recognizing the plaintiff's right, even though no immediate en-
11 forcement of it was asked."

12 I think this is the essence of the holding of the
13 court below. I would like to point out, in connection with Mr.
14 Ruckelshaus' argument, that examination of the order entered on,
15 I believe, February 10, 1967, which is set out in the appendix,
16 I believe at page A12, that the Court of Claims did not dismiss
17 the respondent's original petition and did not dismiss it on
18 the grounds that it was a tax refund case.

19 The Court said that so far as it appeared at that time,
20 it appeared that the only possible basis under which the action
21 could be maintained, was under the Declaratory Judgment Act.
22 Leave was given to file briefs and argue the matter and the
23 matter was argued, and ultimately the court rendered the deci-
24 sion below that is before the Court for consideration today, so
25 the court did not dismiss the action below as a tax refund case.

1 I think it is extremely significant here to under-
2 stand, and there are some intricacies, the operation and theory
3 of respondent's case below.

4 Respondent has persistently, as the record in this
5 case shows, and the briefs below, and the briefs here, that this
6 is not a tax refund case. Respondent's claim is a claim for
7 physical disability retired pay, which but for the action of
8 the Secretary of the Army before July 31, 1959, the date of re-
9 tirement, and but for his actions afterward where he sought
10 administrative relief, that the respondent would have been paid
11 physical disability retired pay, the gross amount of which is
12 the same, 75 percent, whether by disability retirement or by
13 longevity. However, if he had been retired for physical dis-
14 ability on July 31, 1959, he would have received 75 percent, the
15 total amount due him, his basic pay provided by statute.

16 If he had been retired, as he was here, for longevity,
17 a portion of that 75 percent was deducted by operation of law
18 as, and it happens here, to be income tax.

19 Now, the respondent went to the Army Board for Cor-
20 rection of Military Records, under 10 U.S.C. 1552, in August of
21 1959, asking that his records be corrected to show that he was
22 retired by reason of physical disability. As pointed out, and
23 I would particularly and respectfully invite the Court's atten-
24 tion to the subject matter of Footnote 4 on page 4 of respon-
25 dent's brief, where the respondent has endeavored to specifically

1 identify what would have happened had his records been corrected.

2 If the respondent's records had been corrected in
3 1961, pursuant to his application, his records, by operation of
4 law, under 10 U.S.C. 1552, would have been corrected to show that
5 he was retired by reason of physical disability. In other words,
6 not for one second would the respondent, by operation of law
7 under 1552, ever have been deemed to have been retired for
8 longevity. His records would have been, and all records of
9 the Department of the Army, would have been corrected to show
10 that for all times, for all purposes, he had been retired by
11 reason of physical disability.

12 As a result of such a correction of the records, as
13 respondent has endeavored to point out in this footnote, the
14 Department of the Army, under 10 U.S.C. 1552(c), by that statute,
15 from current applicable appropriations of that Board, the
16 Department of the Army funds would have been used to pay the
17 full 75 percent, or that amount that would have been due him
18 would have been paid out of Army appropriations.

19 Evidence of this is indicated, of how this operates,
20 in the Darby case, Darby versus the United States, which respon-
21 dent has cited in the footnote below.

22 Q You say the amount in this footnote would coin-
23 cidentally have equaled the amount of taxes withheld.

24 A Yes, sir.

25 Q It is not coincidentally. It is because that is

1 the difference, isn't it?

2 A That is the actual --

3 Q It is not coincidence.

4 A My choice of words might have been poor.

5 Q But you mean it comes out Army appropriations,
6 and not out of whatever source an ordinary tax refund comes from.

7 A Yes, Mr. Justice Stewart. It is on this theory
8 that respondent below filed this action for physical disability
9 retired pay.

10 I might point out also that if this were deemed a tax
11 refund case, it was respondent's position below, and respondent's
12 position here, that going to the tax and making an application
13 for tax refund would be a futile gesture on the part of respon-
14 dent, because the Commissioner of Internal Revenue does not have
15 jurisdiction to assess whether or not this man was physically
16 disabled at the time of his retirement in 1959.

17 Q Well, what if he brought suit in a District Court
18 for a tax refund, which I suppose he could do, couldn't he? He
19 could bring the suit. He might not win it, but he could bring
20 the suit and could he present the claim and have it adjudicated
21 that he had been misclassified upon retirement?

22 A He could have brought an action, Justice White,
23 in the form of a declaratory judgment action, to have his --

24 Q What about a tax refund suit?

25 A He would first have to file his application for

1 a refund, but this is not, and I respectfully submit --

2 Q All right. He files an application for a tax
3 refund and it is rejected. Then he sues in the District Court
4 for a tax refund.

5 A This could possibly be done, and this was --

6 Q And then he would claim that "I am entitled to
7 the tax refund because they put me in the wrong category."

8 A But the court, I don't think, and I don't think
9 the Commissioner of Internal Revenue -- it would be a futile
10 act as far as the Commissioner of Internal Revenue is concerned,
11 because he has no basis for determining --

12 Q No, but I want to know about the court.

13 A I think the court could, if this were a tax refund
14 case, I think that -- well, no; excuse me. He could not seek a
15 declaratory judgment because it would not be accepted under the
16 exceptions in the Declaratory Judgment Act.

17 Q He is asking for return of taxes that he has paid.
18 He says, "The reason I am entitled to it is that I was put in
19 the wrong category and was taxed when I shouldn't have been, so
20 give me my money back, and here is the reason." Now, why can't
21 he have that adjudicated by a judge and why can't the judge say,
22 "Well, the Army did make a mistake when they retired you."

23 A I think a District Court, as a disability retire-
24 ment action, could pass judgment.

25 Q This is in a tax refund suit. When he sues for

1 the return of taxes, couldn't he have adjudicated in that suit
2 that the Army had made a mistake, and once that was adjudicated,
3 have a judgment for the taxes he shouldn't have paid?

4 A I do not think that possibly the court would even
5 reach that question, because there had not been a prior adjudi-
6 cation, or there would be nothing before the court as to the
7 merit or lack of merit of the tax refund. That is why it was
8 respondent's position, Justice White, that going to the Commis-
9 sioner of Internal Revenue would be compelling the respondent
10 here to perform a futile gesture, because it is not taxes that
11 he is seeking. This has been consistently the position.

12 As the Court of Claims said, the taxes here are of no
13 consequences. The interpretation of a tax statute is not in
14 question. It is an action arising out of whether or not the
15 respondent here was unfit for general military service or not
16 unfit.

17 Q Well, do you think you would have said something
18 fatal if you had answered me yes?

19 A Your Honor, I just feel, and maybe counsel has
20 failed to convey this thought to the Court, and I apologize --

21 Q I understand that you say that you really were
22 not interested in a tax refund suit.

23 A Yes, sir; that is correct. This is not a tax re-
24 fund suit.

25 Q So my question is irrelevant. That is a fair

1 comment.

2 A Your Honor, I cannot speak with any expertise as
3 to the general nature of a tax refund suit other than as the
4 general term applies, if you will excuse that phraseology, sir.

5 If it please the Court --

6 Q Did your client go as far as he could administra-
7 tively?

8 A Yes, sir. The only place we could go was to the
9 Army Board for Correction of Military Records. That was after
10 retirement. Prior to retirement there were three stages -- the
11 Physical Evaluation Board proceeding, the Physical Review Council
12 proceeding, and the Disability Appeal Board proceeding. That
13 was prior to retirement.

14 I believe in the petitioner's brief, in their state-
15 ment of the facts, on page 3, they mention subsequently, but I
16 notice that Mr. Ruckelshaus corrected this in his narration of
17 the chronology of what the administrative processes were in the
18 court below.

19 Q And you fully exhausted them.

20 A Yes, sir.

21 Q There is no issue about that between you.

22 A No. All the available remedies have been ex-
23 hausted, and the proceedings of the Army Board for Correction of
24 Military Records are, of course, in the appendix.

25 But I think that basically, getting back, I think, to

1 the basic question here, I think that the language of 2201 and
2 451 are clear that the Act does apply as far as waiver of
3 sovereign immunity; that this is carried forth or shown by 1491.

4 Q I suppose it is your position that if the Govern-
5 ment says that the statute says that sovereign immunity is
6 waived with respect to this category of claims against the
7 United States, then that is a waiver that opens the door to what-
8 ever remedy a court may apply. Is that your position?

9 A Yes, sir.

10 Q Now, on the other hand, I suppose the argument is
11 that the United States waived sovereign immunity, but only for
12 purposes of permitting a judgment for money, and not for pur-
13 poses of obtaining declaratory relief.

14 A That is my understanding.

15 Q And your position is that once the Government has
16 waived sovereign immunity with respect to a particular subject
17 matter, the restriction on the form of action is of no conse-
18 quence.

19 A As to form of action, Justice Fortas, it would be
20 of consequence, but I am thinking of the language describing
21 what a declaratory proceeding is, that it is not a proceeding
22 in equity or at law, but sui generis. It has also been described
23 as a procedural remedy. As a remedy, I think that you, of
24 course, must have the basic consent, in particular statutes such
25 as the Suits in Admiralty Act --

1 Q Well, that is really the issue here, it seems to
2 me. I am not sure that I am helped by talking about it in terms
3 of jurisdiction. But the question may be whether the waiver of
4 sovereign immunity in the statute, which is a consent to be sued
5 for money judgments, also operates as a consent to be sued in a
6 declaratory judgment action.

7 A It would be respondent's position, Justice Fortas,
8 that where you have a consent to sue, such as in the Tucker Act,
9 which gives you the jurisdictional relief to proceed to judicial
10 relief, that this waiver in the Tucker Act does accord the claim-
11 ant the right to seek declaratory relief as the form of action
12 or as an incidental portion of his claim, of his monetary claim,
13 and as was stated in the Pennsylvania Railway Company, as a pro-
14 cedural step to the accomplishment or the achievement of the
15 receipt, or to be put in the position, I believe, was one of the
16 phrases that Judge Davis used below, to be put in the position
17 to have his right to have a judicial statement of his right to
18 the claim or a recognition of his right to a monetary claim.

19 Q In short, a declaratory judgment. Well, I am
20 sure, it would seem to me, you would have to take that position,
21 because it seems to me that involved in this case are two ques-
22 tions: One, does the declaratory judgment statute make avail-
23 able, as a matter of theory, that sort of instrumentality, that
24 sort of remedy, to the Court of Claims. Your argument is that
25 it does.

1 I have listened to that, and read what you have to
2 say in your brief, but the next question is, when the United
3 States consented to be sued in the Court of Claims by way of an
4 action for money judgment, does that consent to be sued also
5 extend to a consent to be sued for a declaratory judgment in the
6 Court of Claims in this type of situation?

7 A I might, in response to the second portion of
8 your question -- of course, the first portion, Justice Fortas,
9 my answer is yes, our position is that the Act does apply.

10 As to whether the consent, as I understand your ques-
11 tion, also gives leave to not only seek monetary relief, but also
12 declaratory relief, my answer to that would also be in the affir-
13 mative for this reason: When the Tucker Act, or when the first
14 act of establishing the Court of Claims in 1855, and the 1863
15 statute, of course, we did not have the concept of declaratory
16 relief, and also, of course, when the Tucker Act was passed in
17 1887 we didn't have that. We didn't have that until 1934.

18 I believe that taking the history of the Declaratory
19 Judgment Act, and the Tucker Act, and of course when the Congress
20 passed the Tucker Act they didn't envision declaratory relief.
21 This is an advent of comparatively recent vintage. I think look-
22 ing in retrospect, especially when it says "any claim," it does
23 not say a claim for present money due --

24 Q Just at the verbal level, the semantic level, it
25 is not true, is it, that the Tucker Act does confine itself to

1 monetary claims. It is in the disjunction. It says "any claim
2 against the United States, founded upon the Constitution or any
3 Act of Congress or any regulation of an Executive department, or
4 upon contract, or for liquidated or unliquidated damages in cases
5 other than tort cases."

6 A That is correct. In fact, in the Jones decision,
7 the United States versus Jones, which reaffirmed the Lear deci-
8 sion, there was a dissent in that decision that said that even
9 under the 1887 Act that it was the intent of the Congress to
10 go beyond merely monetary type of relief in the Court of Claims.

11 Of course, our position is that the utility of the
12 declaratory judgment, as it relates to the Court of Claims, it
13 would be a procedural step and that there is no limitation in
14 the Declaratory Judgment Act, and that a consideration of both
15 2201 and 451 leaves it readily apparent that the decision does
16 apply.

17 Thank you very much.

18 MR. CHIEF JUSTICE WARREN: Mr. Ruckelshaus, do you
19 have something briefly in closing?

20 REBUTTAL ARGUMENT OF WILLIAM D. RUCKELSHAUS, ESQ.

21 ON BEHALF OF THE PETITIONER

22 MR. RUCKELSHAUS: Mr. Chief Justice, and may it please
23 the Court:

24 I would just point out at the outset that as to the
25 court's decision below to dismiss the case originally on the

1 grounds that it was a tax refund, while the dismissal order it-
2 self is somewhat ambiguous, Judge Davis' opinion in the record,
3 on page 13, clearly states the reasons for dismissing the claim.
4 He says:

5 "Before bringing this suit, he" -- meaning King -- "did
6 not, however, file a claim with the Commissioner of Internal
7 Revenue for a refund of the taxes paid on his retirement
8 benefits, and since the Internal Revenue Code of 1954 bars
9 a suit for taxes in the absence of a timely refund claim,
10 we issued an order upholding, in effect, the Government's
11 defense that the petition alleges basically a claim for
12 refund of taxes paid on retirement pay."

13 So the court, I think, in its decision, did say this
14 was the reason that it dismissed the case.

15 As far as the grant, Mr Justice Fortas, under the
16 Tucker Act, of waiver of immunity here, I think so traditionally
17 the term "claim" has meant money claim, and Congress has never
18 overturned that, that this Court and the court below should not
19 have overturned this tradition without a clear Congressional
20 statement on it.

21 (Whereupon, at 1:28 p.m. the argument in the above-
22 entitled matter was concluded.)
23
24
25