In the

ORIGINAL

Supreme Court of the United States

UNITED STATES,	)	
	)	
Petitioner	)	
	)	
v.	)	NO. 80-1594
	)	
ERIKA, INC.	)	

Washington, D. C.

Monday, March 1, 1982

Pages 1 thru 55

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioner,

v. No. 80-1594

ERIKA, INC.

Washington, D. C.

Monday, March 1, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:13 o'clock a.m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

STEPHEN H. OLESKEY, ESQ., Boston, Massachusetts; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in United States against Erika.

Mr. Kneedler, you may proceed whenever you are ready.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KNEEDLER: Thank you, Mr. Chief Justice, and may it please the Court, this case is here on writ of certiorari to the United States Court of Claims. The question presented is whether the court of claims has jurisdiction under the Tucker Act of a suit to recover on a claim for benefits under Part B of the Medicare program.

QUESTION: Tell me, Mr. Kneedler, do we reach this if we affirm the last case? We still reach this issue, do we, even if we affirm the last case?

MR. KNEEDLER: Yes. I think the questions of -- the question of judicial review and administrative review by the Secretary are two quite different questions. The structure and the administration of the Part B program were discussed at some length in the previous argument, and I will not go through all of that now. I would just like to briefly summarize at the outset.

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As Mr. Geller pointed out this morning, the Medicare program is divided into two parts. Part A provides --

QUESTION: Mr. Kneedler, may I ask one --

MR. KNEEDLER: Yes.

QUESTION: May I ask a preliminary question, like Justice Brennan did, the converse of his question? Supposing we reversed here and held there was a remedy for this provider. Would that also mean there would be a remedy for the Part B claimant in the other case in the court of claims?

In other words, if we reversed you, would that mean there would be a judicial remedy in the other case, the one we just had argued?

MR. KNEEDLER: Well, I guess that would depend on the --on the --

QUESTION: I mean, if we affirmed. I am sorry. If we affirmed and held there is a remedy.

MR. KNEEDLER: I guess that would depend on the -- on the scope that the Court found of the court of claims review. As Mr. Sohnen pointed out this morning, if the question of bias goes to the question of whether the facts might be found in a particular way, it is unclear under the court of claims decision in this case how closely it would look into the facts in a particular

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case.

QUESTION: But let me rephrase it. If we found there was a remedy for a provider, would it necessarily follow there would also be a remedy for the insured?

MR. KNEEDLER: Oh, I'm sorry. I misunderstood your question. Yes. Under -- under the Part B program, the individual beneficiary can either submit his claim himself or he can assign it to the doctor or other person who furnished the services, but the procedural rights of the two are the same.

The Act and the implementing regulations make clear that the doctor or other furnishers' procedural rights derive entirely from those of the beneficiary, and in fact the Act provides that when the doctor is paid on a particular claim, that the claim is really on behalf of the beneficiary. So, for purposes of judicial review, as for purposes of the administrative review involved in the earlier case, the rights are the same.

QUESTION: Thank you.

MR. KNEEDLER: As I mentioned, the Part A program provides insurance for hospital and related post-hospital services. Part B, involved in this case, provides insurance for doctor services, medical supplies, ex-rays, laboratory tests. Under Part B, 80

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percent of the reasonable charge for these services is paid by Medicare.

As the court of claims described it in this case, the Medicare Part B program is vast and complex. There are many millions of claims submitted annually by or on behalf of 27 million beneficiaries, and largely for -- because of the scope of the program, Congress provided that the claims would be administered by private insurance carriers.

Now, as I mentioned, claims can be submitted when a person finds or believes that he has received services that are covered by the Act, the claim can be submitted either on his own behalf or by the physician, but as I mentioned, this has no effect on the jurisdictional question in this case, but when the claim is first submitted to the carrier, if the claimant, either the beneficiary or the assignee, is dissatisfied with the carrier's determination of the amount, if any, that should be paid on that particular claim, he can seek the fair hearing by the carrier that was discussed in the previous case.

However, the Act does not provide for judicial review of that benefit amount determination. This is in contrast to the scheme under Part A, the hospital insurance program. Under Part A, Congress has expressly

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provided for a right of judicial review when a request for payment for hospital services is denied, and in that case the review is not in the court of claims, as the court of claims held in this case, but it is pursuant to Section 405(g) of Title 42, which is the standard judicial review provision of the Social Security Act.

This provision is consistent with the fact that the Medicare Act, which is simply Title 18 of the Social Security Act, and Congress incorporated the standard judicial review procedure under Part A for those purposes.

The Respondent in this case is a distributor of medical supplies used by patients who are undergoing kidney maintenance dialysis in their homes. Many of these patients, customers of Respondent, are beneficiaries under the Part B Medicare program. Respondent would mail the medical supplies, often in the forms of kits containing all the necessary supplies for home dialysis, to patients around the country, and when the patients were enrolled under Part B, they would in return assign their right to be reimbursed for 80 percent of the reasonable charge for these supplies back to Respondent.

Respondent would then collect these assigned claims and submit them to the Prudential Insurance

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Company, which is the carrier designated for the processing of the claims received by Respondent.

The period involved in this case in particular is the years -- are the years 1974 through 1976. Respondent became dissatisfied over a period of time with the amount that it was receiving in reimbursement for the supplies that were furnished to the patients, and Respondent requested that Prudential recalculate the reasonable charge on which the reimbursement would be made, and requested that this be done both retroactively for charges that had already been paid and prospectively for the remainder of the particular fiscal year.

Prudential did choose to make a prospective adjustment for one particular product because of exceptional circumstances affecting the price of that product, but for other items, the carrier declined to make an adjustment, principally because of a provision in the Act which limits the amount of reimbursement to the prevailing charge for the particular service in the locality during the preceding calendar year, so the Act has a built-in limit or ceiling on the amount that can be -- that can be paid out.

Prudential's determinations in this regard were sustained after the fair hearing by the carrier, and Respondent then brought this action in the court of

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claims. Again, Respondent alleged that the amount that Prudential had paid on its asssigned claims was insufficient, and it sought to recover from the United States a money judgment equivalent to the amount of these alleged underpayments.

There is no issue in this case of whether the particular supplies were covered by Part B. This is simply a question of the amount that would be paid for those services.

The United States argued in the court of claims that the court was without jurisdiction, because the text and legislative history of the Medicare Act demonstrated that Congress intended to foreclose judicial review of individual benefit determinations under Part B. The government also argued that Section 405(h) of the -- of Title 42 as incorporated into the Medicare Act precluded judicial review of these claims.

The court of claims, however, rejected these arguments. In that's -- in that court's view, judicial review must be available in the court of claims of Medicare claims pursuant to the Tucker Act absent clear and convincing evidence of the Congressional intent to bar judicial review in a Tucker Act suit. The court acknowledged that Congress had expressly provided for judicial review under Part A, but not under Part B, but

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the Court declined to view this omission as a foreclosure of judicial review.

In the court of claims' analysis, the express provision for judicial review under Part A simply demonstrated that Congress wanted those particular provisions followed, but in other cases, such as in Part B, where Congress declined to provide for judicial review, that review would be available under what the court of claims termed general jurisdictional provisions, such as the Tucker Act.

The court also rejected the argument based on Section 405(h) of the Social Security Act, observing that it had previously declined to extend this Court's decision in Weinberger versus Salfi, concerning the meaning of 405(h) to Medicare cases in the court of claims.

On the merits, the court of claims remanded to Prudential for a recomputation of the prevailing charge level in the preceding years, and also remanded for Prudential to reconsider whether to grant a retroactive adjustment for the cost of the particular product that Prudential had granted a prospective adjustment in the reasonable charge for.

The court of claims rejected as insubstantial Respondent's constitutional challenge to the -- to the

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means of reimbursing it subject to a ceiling based on the previous year's prevailing charge limitations. The United States petitioned for certiorari in this Court only on the jurisdictional question. Neither party has requested the Court to review the merits of the court of claims decision.

The position of the United States in this case is that the jurisdictional holding of the court of claims is inconsistent with the decisions of this Court concerning the scope of the court of claims' jurisdiction under the Tucker Act. The decision below is also directly contrary to the text of the Medicare Act itself, and to the clearly expressed Congressional intent, both when the Medicare Act was enacted in 1965 and when it was amended in 1972, to bar judicial review of individual reimbursement disputes on Medicare claims in order to avoid deluging the courts with these sorts of claims.

QUESTION: Well, those are quite different questions, I suppose, aren't they? I mean, you could lose on your second --

MR. KNEEDLER: That's correct. In this --

QUESTION: -- and still win on the first.

MR. KNEEDLER: That's correct. The first -- the first ground concerns the established principles

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governing Tucker Act jurisdiction in the court of claims, and as -- as to that we submit that the court of claims was plainly wrong in concluding that judicial review in the form of a suit under the Tucker Act must be presumed to exist in the court of claims absent clear and convincing evidence to the contrary. In fact, the rule is precisely the opposite, as this Court's recent decisions in Testan and Mitchell make clear.

In those cases, the Court has reiterated the established rule that the United States as the sovereign is immune from suit, except as Congress consents to suit, and that that waiver of sovereign immunity and consent to suit cannot be implied but must be unequivocally expressed. The Tucker Act, to which the court of claims referred, is simply a jurisdictional statute. It confers jurisdiction on the court of claims to consider individuals' suits only when some other statute confers a right to recover a money judgment against the United States.

QUESTION: And waive sovereign immunity?

MR. KNEEDLER: And waive sovereign immunity.

Thus, in this case, Respondent had -- had a cause of action against the United States, and the court of claims therefore had jurisdiction only if the Medicare Act contains the necessary unequivocally

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expressed waiver of sovereign immunity, and a grant of -- or put another way, a grant of a right to recover, substantive right to recover money damages against the United States when the Medicare Act is violated or not followed allegely by a carrier.

QUESTION: Mr. Kneedler, can I interrupt again? Is everyone agreed that the carrier should be treated as though it is an agent of the Secretary for purposes -- and that there could be no private action in a state court, for example, against the carrier?

MR. KNEEDLER: Yes. We cite in our reply brief a number of lower court decisions that have held that. There have been -- It happens not all that infrequently that an individual claimant will sue a carrier, and the standard procedure for the United States is to seek to have the case removed to federal court, and dismissed on -- on the theory that the carrier's immunity is the same as the Secretary's immunity.

QUESTION: And so for purposes of our analysis, it is the government's position that the carrier really is the Secretary within the meaning of all the relevant statutes.

MR. KNEEDLER: That's right, for -- particularly for purposes of Section 405(h). That's

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correct.

Now, returning to the --

QUESTION: Mr. Kneedler?

MR. KNEEDLER: Yes.

QUESTION: Under your view, would -- are there any limitations to control a carrier's discretion? Would -- if the -- if the carrier just fails to fulfill his obligations, what is the injured party to do?

MR. KNEEDLER: Well, the most important protection is the Secretary's oversight of the -- of the carrier's performance. This was discussed at some length in the argument this morning and also in our brief in McClure. There are a number of ways in which the Secretary monitors the carrier's performance under the -- under the contracts, including a review of the hearings that are conducted, and annual contract review.

QUESTION: Is there any right of a beneficiary to take action against the Secretary if the Secretary fails in the duty of oversight?

MR. KNEEDLER: There is no -- There is no provision in the -- in the Act for that to be done as an initial matter. The overall conduct of the contractual relationship between the Secretary and the carrier would be principally a matter between the two parties, I should think, so the -- and there is no indication in

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the record in this case or -- that I am aware of of substantial breakdowns in that sort of -- in that sort of contractual relationship.

Now, as I mentioned, under the Tucker Act, in order for the court of claims to have jurisdiction, it is necessary to find the waiver of sovereign immunity. Respondent concedes that there is nothing on the face of the Medicare Act and nothing in the legislative history indicating specifically that Congress intended to remove the sovereign immunity of the United States in the Medicare Act. Now, this should be dispositive of the case, because of the line of this Court's decisions concerning Tucker Act jurisdiction that I discussed before, but I think this is particularly so when we consider the nature of the Part B Medicare program.

A court should not lightly infer that Congress would have exposed the executive and judicial branches to the possibility of suit without regard even to the amount in controversy every time a carrier is alleged to have made an error in the particular computation of the amount due on a particular claim or the application of a regulation or instruction to a particular claim. These determinations generally involve a relatively small amount of money, often involve the exercise of medical judgment, and in addition, the reimbursible reasonable

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charge for a particular service may vary from locality to locality, and in fact, it was precisely for this reason that Congress chose to rely on the expertise of the carriers who service the particular areas to determine the reasonable charge rates.

But it is not necessary here to rely only on the nature of the Part B program and Respondent's concession that there is nothing specific in the Medicare Act consenting to suit, for in this case the text and the legislative history of Part B demonstrate convincingly that Congress intended to foreclose review of the determination of the amount of benefits due in a particular case. Indeed, it is difficult to conceive how Congress could have expressed its intent any more clearly.

First, the text of the Medicare Act makes clear that Congress did not intend to expose the United States to suit in these circumstances. Of particular significance, we submit, is Section 1395(ff) of Title 42. This is the provision in the Medicare title of the Social Security Act that deals with the circumstances under which an individual beneficiary is entitled to judicial review of matters under the Medicare program.

Section 1395(ff) provides for judicial review under Part A, the hospital program, both with respect to

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the individual's entitlement to participate in the program at all, in other words, his initial enrollment, and in addition, in certain circumstances with respect to individual claims for reimbursement for hospital services, although the Act provides for judicial review only where the amount in controversy is $1,000 or more.

Under Part B of the Medicare program, however, 1395(ff) provides for judicial review at the behest of the beneficiary only with respect to his initial enrollment in the Part B program, whether he is entitled to enroll, and whether there is any factual question about whether he has enrolled. 1395(ff) does not contain a provision for judicial review of benefit determinations, and we regard this as quite significant, because that is the only section that deals with a beneficiary's right to judicial review.

Therefore, the clear import of Congress's provision of judicial review in one circumstance, one-half of the program and not the other, would appear to be that Congress didn't intend for judicial review under Part B.

QUESTION: Well, that point has nothing to do with the court of claims or waiver of sovereign immunity. It is just a question of -- an ordinary question of reviewability of an administrative decision.

MR. KNEEDLER: That's correct, although I --

QUESTION: And isn't -- in that context, isn't the presumption normally in favor of reviewability, if that is all you are talking about?

MR. KNEEDLER: Yes, if this were a standard APA type judicial review of agency action, that would be so, but there is another feature of the Medicare Act which runs up against that presumption, and that is Section 405(h), but while this case specifically concerns the court of claims' Tucker Act jurisdiction, we submit that the provisions that Congress has -- or Congress's failure to provide some other method of judicial review is equally relevant, because again the standard provision for judicial review of determinations under the Social Security Act, whether it is under the old age and survivor portion or under Part B of Medicare, or SSI, is through Section 405(g) of the Social Security Act, standard review in the district court, and an action filed within 60 days after the individual determination by the Secretary that is being challenged.

Now, there is no reason to think that -- and incidentally, I should add that the court of claims has held that it is without jurisdiction over individual social security claims in cases that we have cited in

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our brief, because Congress has established this separate statutory --

QUESTION: Well, if the court of claims is right, why couldn't anyone just, except for soveriegn immunity, you could just get review in the district court, if they are right about reviewability.

MR. KNEEDLER: Well, the -- if there would be review anywhere, it would ordinarily be the district court.

QUESTION: Yes.

MR. KNEEDLER: That's correct, but Congress has separately addressed that problem by barring review there, but the court of claims has inappropriately applied the presumption in favor of judicial review to the -- to the court of claims in which the -- the opposite principles apply that a right of action does not exist unless Congress has affirmatively granted it.

Now, it does, going back for a moment to the fact that Congress has provided for judicial review in other circumstances under the Social Security Act in Section 405(g), there is no reason to think that Congress would have somehow thought that that particular form of review is inappropriate for Part B Medicare claims, and decided that somehow the court of claims would be a better forum for those particular disputes.

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In fact, one would assume that exactly the contrary would be true, because these are relatively small claims for which Congress would more reasonably have wanted to have review in the district courts, not concentrated in the court of claims.

Now, Respondent has suggested that the failure of Congress to provide for judicial review in 1395(ff), which contains the judicial review provisions of the Medicare Act, is not significant because individual reimbursement disputes are handled under another section of the Medicare Act, 1395(u), which is the section dealing with the carriers' obligations. The difficulty with that argument is that Congress didn't provide for judicial review of a carrier's decision under that section, either. So, in the only two sections that Respondent has identified as being relevant, there is an absence of any provision for judicial review, and we think that this is particularly significant again in light of Section 405(h) of the Social Security Act.

The second sentence of Section 405(h) provides that no findings of fact or decision of the Secretary shall be reviewed by any tribunal except as specifically provided in the Act, and as incorporated in the Medicare Act, that would mean except as specifically provided in the Medicare Act, and as I have mentioned, there is no

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such provision.

Now, as Justice Stevens asked, it is our position that the carrier for these purposes and for purposes of Section 405(h) and the manifest Congressional purpose underlying it, that the preclusion of judicial review by any other tribunal, and that would include the court of claims, would apply equally to Part B claims as it would apply to Part A claims.

If there were any doubt lingering after examination of the text of the Medicare Act regarding Congress's intent to foreclose judicial review, we think that that would be dispelled by an examination of the legislative history of both the original 1965 Act and the 1972 amendments to the Act. We have set forth that legislative history at Pages 27 through 30 of our opening brief, and at Pages 7 through 9 of our reply brief.

Of particular significance is the passage in the Senate report which outlines the different means of review of determinations under Part A and Part B. The Senate report points out that there is a right to a hearing by the Secretary and judicial review under Part A where there is at least $1,000 in controversy, but under Part B, the Senate report points out that the carriers would review beneficiary complaints regarding

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the amount of benefits, and "the bill does not provide for judicial review of a determination concerning the amount of benefits under Part B where claims will probably be for substantially smaller amounts than under Part A." Congress had made a legislative judgment that in the generality of cases, the sorts of claims that would arise under Part B were relatively trivial amounts, that it was inappropriate to burden the courts with reviewing that.

But Congress just didn't do this in 1965, it revisited the statute in 1972 and revisited the judicial review provisions because some lower courts -- court decisions had carved out what appeared to be an unintended loophole allowing beneficiaries under Part A and Part B to obtain judicial review of essentially coverage questions as to whether a particular service was covered by the statute, without regard to the amount of controversy under Part A, and without regard to the absence of any judicial review generally under Part B, and this was -- the introduction and passage of this is discussed on Page 30 of our brief.

Senator Bennett, who introduced the revisions to 1395(ff), pointed out that it was the intention of the -- of Congress in 1965 to keep these relatively small claims out of court when it enacted the 1965 Act.

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The conference reported adopted Senator Bennett's language, and the conference report states, the Senate amendment added a new section to the House bill which would make clear "that there is no authorization for an appeal to the Secretary or for judicial review on matters solely involving amounts of benefits under Part B."

Now, as I mentioned earlier, it is difficult to conceive of how Congress could have expressed its intent any more clearly.

QUESTION: Well, it could have --

MR. KNEEDLER: Well, it --

QUESTION: -- made it express in the Act, Mr. Kneedler.

MR. KNEEDLER: I suppose, but it did --

QUESTION: Then you wouldn't be here.

MR. KNEEDLER: It is -- it is expressed in the Act in our view in Section 405(h) of the -- in Section 405(h) of the Social Security Act, the preclusion of judicial review is expressed.

QUESTION: You are just arguing that it can't be implied.

MR. KNEEDLER: Certainly as to Tucker Act jurisdiction, that would be contrary to the established rule and this Court's decisions.

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QUESTION: Do you have to do any more than that, in your view?

MR. KNEEDLER: Not in this case. If there are no further questions at this time, I would like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Mr. Oleskey.

ORAL ARGUMENT OF STEPHEN H. OLESKEY, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. OLESKEY: Mr. Chief Justice, and may it please the Court, I think there is some agreement between the government and Erika on some of the issues that were iiscussed by Mr. Kneedler and also earlier by the Solicitor General in the McClure case.

Those points of agreement, I think, add up to acknowledging Erika's central proposition to this Court today, which is that under these circumstances where, as was earlier conceded, a unique or sui generis system has been evolved to deal with 27 million covered beneficiaries in a voluntary program, where $11 a month, going to $12.20 soon, I understand, is paid in premiums, is delegated fully and finally with no judicial recourse anywhere to a private insurance carrier.

And it is our proposition today that due process, meaning some review by some court, is fundamental in this circumstance, and given the

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particular context in which Erika's claim arose, namely, a claim by assignment in this case in the hundreds of thousands of dollars for Part B benefit claims, money, that the appropriate forum to review at least the constitutional and statutory aspects of that claim is the United States Court of Claims under the Tucker Act.

QUESTION: Well, would you -- would you say it would be unconstitutional for the -- for the law to have precluded review if the system had been wholly -- if the claim system and the review system had been carried out by government officials, by the Secretary's people itself?

MR. OLESKEY: Well --

QUESTION: Would you have to be able to get into court?

MR. OLESKEY: I would say in that case that you would go to the test, Mr. Justice White, that the Court articulated in Mathews and Eldridge, and balance the interest if there was an unequivocal indication that, I think as you asked earlier, there had been no intent to provide any review. The starting point in that analysis has to be the inquiry as to whether the intent has been expressed to wholly deny judicial review.

In this case, we are in -- we are in, in my judgment, at least, a stronger position in insisting

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that due process requires judicial review, because you don't even have an agency of the government which has been presumed at more fairly, at least in many cases, making the review through an ALJ, where you have a private insurance carrier with a built-in bias and interest that was pointed out in McClure making a total and final determination if the government is right.

But the specific answer to your question is, you would have to look at whether Congress had clearly and unequivocally intended to deny any right of review from the administrative decision in the government, and then see on the balancing test under Mathews and Eldridge whether in this Court's judgment that was still an appropriate action for Congress to take.

The only instance that I have been able to locate in the cases that the government cited where there hasn't been a specific provision for such a review would be in the veterans' benefit cases, for example, Johnson and Robison, although that case didn't go off on the review issue at such, which seems to have been recognized by Congress as a special area, because they view pensions as a special area, and there is legislative history in that area which you cited in Johnson and Robison where Senator George in 1940 says, in substance, we just have always seen pensions as

different, and you don't get judicial review because we want a uniform system, which today would be treated again, I think, by this Court on a Mathews and Eldridge balancing test, but the fact is --

QUESTION: Well, how do you get into court in the first place if Congress says there simply is to be no judicial review of these decisions?

MR. OLESKEY: Well, that is the point at which the government and Erika in this case, Mr. Justice Rehnquist, as well as, I think, eight of the nine circuits that have considered the issue disagree. The government refers in its brief and again today to Erika's concession that there is no review provided in the Tucker Act for money claims. That is not the concession in our brief, read carefully and fairly. It is not the concession which we make here today.

QUESTION: I was asking a hypothetical question. I didn't assume that you had conceded the point. What if Congress says in the authorizing statute there is to be no judicial review in any court of the United States?

MR. OLESKEY: Well, I think that is pretty much the question I have tried to answer to Mr. Justice White, and my view would be, if it is clearly and unequivocally expressed and you apply the Mathews and

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Eldridge balancing test of private interest, government interest --

QUESTION: Well, how do you get to Mathews and Eldridge if Congress says there shall be no judicial review?

MR. OLESKEY: Well, this is the question that the circuits have come up against, and every one of them has said --

QUESTION: What is your answer?

MR. OLESKEY: My answer is that where the protective property right, which the government has conceded today again, is involved, you can't take it away without some right of review in a court, at least a property right of this nature, which we say is contractual, unlike the right in Salfi under the Social Security Act --

QUESTION: So you would say that it wouldn't be a suit against the United States at all.

MR. OLESKEY: No.

QUESTION: It would be a suit against an officer who is an ex parte Young officer.

MR. OLESKEY: Well, we would say --

QUESTION: And that you could -- it would be a review -- it would be review of an erroneous official decision.

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MR. OLESKEY: We would say --

QUESTION: Contrary to the law.

MR. OLESKEY: We would say in some cases that the mandamus statute may be properly invoked against the Secretary if his -- if his action is egregious enough and if there is no money claim which can otherwise be presented in the court of claims.

This case, or the implications of this case are surely broader than the issue which is before you here, but it happens that the case is so framed because Erika did have a claim for money, and the court of claims had said, starting in 1976, in the Whitecliff case, that it would take jurisdiction of such cases because it did not feel it was precluded either by Salfi or 405(h) in these limited circumstances from examining constitutional or statutory violations of the Medicare Act in the context of examining or deliberating upon money claims made by the carrier below.

QUESTION: Mr. Oleskey, you emphasize the point that you rely on a contractual claim here, whereas Salfi involve a claim that Congress could revoke. Now, do you claim that the beneficiary here has a contractual claim as well as your having sort of a third party benefit?

MR. OLESKEY: That's right. We say that we

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stand in the beneficiary's shoes.

QUESTION: And why does the beneficiary here have a greater contractual claim than a social security claimant?

MR. OLESKEY: Well, I would say principally, Mr. Justice Stevens, because the beneficiary here, rather than simply having benefitted as someone whose wages were taken involuntarily over the course of his working life under the social security system, has voluntary agreed with the government to make an extra payment monthly, which as I say is now $11, in order to have the benefit of Part B coverage. He has stepped forward and agreed to enter into an undertaking that is different in kind and amount that anybody enters into in any other benefit program, including social security. In return for that, he is entitled to the assurance that the claims will be paid in accordance with the statute and the regulation, and ultimately that comes down to whether or not either the beneficiary or the carrier in this -- the provider who was supplied by assignment is going to be paid in accordance with this reasonable charge language in the statute.

One of the problems here, as the court of claims saw, was that the statute on its face was not being honored by the carrier in the fair hearing. The

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constitutional claim that we raise which was a denial of just compensation under the due process clause, was denied, but the court of claims, as its decision makes clear, found fundamentally that the statute on its face as applied by the carrier had not been honored. There was for Erika here as for other -- as for other suppliers in other instances no other place to go in this circumstance, if the government is right that the court of claims is foreclosed.

Although the government in its brief has attempted to mitigate or downplay the implications of its position, it has argued consistently, to my knowledge, since at least 1976 in every circuit and in the court of claims that Congress intended that there being no review of any type of benefits denial under Part B, no matter how egregious the denial -- the action by the carrier, including the affirmation in the fair hearing.

The answer to the question that was posed earlier, I think, which was that the Secretary himself could be expected to be the final authority who would ensure that in effect due process was done is illusory, and not really accurate. There is no more reason to believe that the Secretary is going to deal ultimately in a due process sense fully and fairly with law

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questions under the statute and certainly under the Constitution, the latter being beyond his authority anyway, than the -- than the hearing officer will, and that is the vice of the system.

The McClure Joint Appendix makes it clear that the hearing officer, and we would say the ALJ if Judge Orrick's decision was going to be sustained, are in exactly the same position, and that Joint Appendix, at 21 and 51 respectively, points out that the authority of the hearing officer is limited to the extent that he must comply with all provisions of Title 18 of the Act, all regulations, all HCFA rulings, general instructions and other guides issued by HCFA or the Medicare Bureau. The hearing officer does not have the prerogative of overruling the provisions of the law or interpreting them in a way different than that of the Medicare Bureau when he is in disagreement with their intent, nor may he use hearing decisions as a vehicle for commenting upon the legality, constitutionality, or otherwise of the provisions of the program. It goes on to say that his authority is definitively restricted by these parameters.

So, if the Secretary, as my brother has argued, is overlapping and fully to be seen, which in fact he is not, since you don't get a review to the

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Secretary under the government's position at all, nor do you get an appeal to the Secretary, but to the extent they find the Secretary in his functions overlapping with the hearing officer, the manual itself, which is before you in the Joint Appendix, makes it clear that in effect whatever the interpretation is that HCFA, the child of HHS, puts on the statute or the regulations is going to be binding both on the hearing officer and on the Secretary in this supposed watchdog function.

In effect the question, I think, becomes the old one of who is watching the watchdog where there is no judicial recourse, when the watchdog is supposed to be watching the carrier, with all the interest that you heard earlier. Well, the government's answer, fairly put, here is, no one is watching their watchdog, the Secretary of HHS, and that is the vice, if they mean their concession today, which I am sure they do, namely, that due process requires some opportunity for a review by a fair tribunal when property is about to be taken, and the government has conceded here and in other cases before this at lower levels that this interest under Part B benefits is a property interest.

To address the second aspect of where we find the waiver of sovereign immunity besides the contractual relationship which we say Erika enjoys both as a third

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party beneficiary and in its own right, that is in a reading of the Medicare statute itself. Now, in Testan, this Court said, and in other cases which the government and we have cited, that sovereign immunity waiver can be found in the Tucker Act by reference to a substantive right, either a contract right, which I argue is present here in several respects, or in a statute fairly read. The government continues to confuse in my view the notion that you have to look to that outside statute with its substantive rights in effect to fill the Tucker Act jurisdictional vessel, as if that statute itself need state explicitly, yes, you may sue the United States. I don't think that is what Testan or any of the other decisions of this Court in fact stand for.

They stand for the proposition, as you said there, that you have to find the substantive right to money damages or compensation in the other statute, not the right to sue. Indeed, were it otherwise, the Tucker Act, which is a general grant to sue the government under various circumstances, as the Court is aware, wouldn't have any meaning, because you would have to go ahead on every statute and say, as the Congress, and, by the way, the Tucker Act may be invoked if things go awry under this statute and you have a money claim against the United States.

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The fact is that the Congress has known when it wanted to very clearly how to limit Tucker Act jurisdiction when it would otherwise be found by reference to some other statute conferring a substantive right, either by contract, as here, or by virtue of the statute itself, as here.

For example, I believe it is 28 United States Code 1500 to 1502, provide three very explicit limitations on the jurisdiction of the court of claims. Those are that you can't sue in the court of claims where you have brought a suit in some other court in substance on the same ground; you can't sue for pension rights -- that same theme that seems to be a special area of the Congress -- and you can't sue for rights arising under treaties with foreign nations.

So that Congress has known very clearly when it wanted to limit Tucker Act jurisdiction, which the court of claims has been asserting here broadly since 1976 how to do it. In addition, there are Acts like --

QUESTION: Well, Testan and Hopkins, and cases like that, where we have held the court of claims overreached itself under the Tucker Act, certainly weren't barred by those three examples that you gave of limitations on court of claims jurisdiction.

MR. OLESKEY: That's correct, but in Testan,

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for example, when you examine the two statutes which the Petitioners had pointed to for the substantive rights, there being no contract claim, unlike this case, you found that neither the Back Pay Act nor the Classification Act conferred a substantive right for money damages for the misclassification that had gone on. By contrast, here, under the Medicare statute, we are looking at a statutory scheme, an insurance policy, as I think you yourself described this, Mr. Justice Rehnquist, in Salfi, which provides for payments in accordance with a policy term, which are the statute and the regulations.

QUESTION: But Salfi, of course, was described as an insurance policy, but clearly there there is no contractual right under Fleming against Nestor.

MR. OLESKEY: That's correct, and I tried to recognize that by addressing the contractual nature of the relationship here, and how I believe it differs from that of a social security beneficiary as discussed in Salfi. In addition, to follow up on the concern, in cases like the veterans' statutes, in Robison, specifically, when you were discussing what Congress had done there, you pointed properly to explicit statutory bars, not silence, which the government insists on reading as a concession here, but explicit statutory bar

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which say, the decision of the administrator shall be final, it shall not be reviewed in any tribunal anywhere under any circumstances.

QUESTION: Well, what about Senator Bennett's statement in connection with the 1972 amendments, where they found some of the lower courts were allowing the thing to be circumvented, which very, very frequently happens?

MR. OLESKEY: Senator Bennett and the other decisions which -- the other language which the government cites in its legislative history record indicates clearly a Congressional concern that the courts not be flooded with administrative -- pure administrative review decisions under Part B, thousands of little decisions. As the government has argued here today, however, the decisions in fact are fairly few in number that are not resolved in some respect or other to the claimant or assignee's benefit ultimately by the time the fair hearing is over.

Of course, the government would also like to have it both ways, because they have argued all the way through in this case that if you allow the court of claims to assert its own jurisdiction as it sees it here, the floodgates are open and that court will be flooded with thousands of claims. Well, the $1,000

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limit that obviously prevails is one answer, and the specialized nature of the court of claims jurisdiction, including the money requirement, the claim against the United States requirement, and the fact there are no jury trials, and the fact that you have to come to Washington, D.C., which is expensive for most claimants, as was established earlier, all answer that argument.

The fact is, to return to my earlier point, when the Congress has wanted to say explicitly no review, even in the risk of the constitutional dilemma which the Court has rightly posed today, it has known how to say it. It is significant in addition that although -- and although it is not cited by the government or by us in our brief, in the Omnibus Reconciliation Budget Acts of the last two years, there have been extensive amendments made to the Medicare and Medicaid legislation. In neither instance was anything done to address this issue either before the court of claims decision, but in the five years after the Whitecliffe decision, or in the face of the Court's decision last year in Whitecliff -- in this case.

QUESTION: Well, if we -- if we construe the Act together with such history as the government contends, then must we, because you present the issue, reach a constitutional issue? Is the constitutional

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issue pressed by you?

MR. OLESKEY: I -- the constitutional issue does not have to be met, because we say --

QUESTION: Well, I know, but suppose we agree with the government that the Act, properly construed, precludes review in the court of claims, that Congress intended not to provide the review. Then, are you -- are you presenting as an appellee the constitutional issue?

MR. OLESKEY: Well, I understand well this Court's concern that you not address constitutional conflict like that if you need not. I think you would have to -- you would have to agree with the government that Congress explicitly and unequivocally intended --

QUESTION: Yes. Suppose we do.

MR. OLESKEY: Then I think you have a constitutional problem, yes.

QUESTION: Well, have you presented it as an appellee?

MR. OLESKEY: Yes, we have. That is at -- that is in the brief, Mr. Justice White, starting at Pages 28 on. 42 USC 405(h) does not preclude court of claims jurisdiction over Part B. The United States position unnecessarily raises serious constitutional questions.

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QUESTION: Is that the most you say about it?

MR. OLESKEY: Well, I made the point earlier, I hope, that where a property right is involved, where there is this concededly unparalleled allegation to a private entity, here, an insurance company, sometimes Blue Cross-Blue Shield, to make final and irrevocable decisions about the disposition of that property, if you buy the -- if you accept the government's position, I think there is a constitutional issue about whether Congress acted properly. I don't think you have to accept their position, for the reasons I have suggested.

The best statement of the dilemma that I could find, I sat yesterday --

QUESTION: So you are saying -- apparently your submission is that even if all the claims machinery was inside -- was in the hands of the Secretary's own people, and he had given them a fair hearing, that unless judicial review is provided, we have a constitutional issue.

MR. OLESKEY: Well, I say, if the Secretary has the mechanism, which he doesn't here, it is all in the carrier, there is no right of appeal to the Secretary, and no judicial review from that point, then you go back and look at your language about the clear and unequivocal intent of Congress to withdraw

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jurisdiction, and if you find that you still have to apply the Mathews and Eldridge three-pronged test balancing those interests, but that is not this case. It isn't even close to this case, because the government has made it clear that there is no right to go to the Secretary --

QUESTION: Yes.

MR. OLESKEY: -- in any respect on a Part B benefit.

QUESTION: Yes, but what if we -- what if we agree with the government in the other case, that that is not a biased procedure or anything of the kind, and it is a full and fair hearing? It is just as good as though it were done by the Secretary himself.

MR. OLESKEY: If you agree with the government in McClure that the district court should be reversed, you still have the problem of decisions as to the constitutionality of the Act or regulations or -- or regulations under the Act which are beyond the power of the Secretary himself to deal with, because he is the Secretary.

That position was -- was summed up in my judgment very eloquently by Justice Brandeis in the St. Joseph Stockyard case, which I discovered yesterday, feeling that someone here would want to know

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penultimately where that due process claim is ultimately bottomed, and just briefly, he said, "When dealing with constitutional rights, as distinguished from privileges accorded by the government" -- of course, we say that a statutory claim here is something less than a constitutional right but something more than a privilege accorded by the government -- "there must be the opportunity of presenting in an appropriate proceeding at some time to some court every question of law raised, whatever the nature of the right invoked or the status of him who claims it."

That is the difference really between an Article III tribunal and the matters which an Article III court like this one or the court of claims may hear and matters which a legislative court, so-called, an Article I court may hear, and typically the Secretary has been held, I think, in repeated decisions of this Court, whether of this department or any other, not to be competent to pass on the constitutionality by definition of his own actions.

The court of claims has said --

QUESTION: Yes, but Mr. Oleskey, those are cases involving regulation rather than contracting, the government as a contracting party. You contend that the Tucker Act was constitutionally mandated, I guess, that

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the United States would be without power to enter into a contract without giving the other side to the bargain judicial review of the government's performance.

MR. OLESKEY: Well, the Tucker Act is an explicit decision by Congress, which is obviously exemplified in other areas, too, that would --

QUESTION: We are just confining ourselves to the constitutional question. Would it be constitutional for Congress to enter into a contract and authorize somebody on behalf of the government to enter into a contract with a private party and say, there shall be no judicial remedy against the United States in the event there is a breach?

MR. OLESKEY: I would say, given the nature of the contractual and statutory rights involved here, if I have fairly defined them, the answer is, no, it wouldn't be constitutional, but you don't have --

QUESTION: What about my case? Just a simple, special statute says, in buying a battleship, you can enter into a contract with the shipbuilding company, there will be no contractual right against the United States on that contract.

MR. OLESKEY: Well, I see a difference there, because in buying a battleship there is some --

QUESTION: Well, whether there is a difference

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or not, do you doubt the constitutionality of such a statute?

MR. OLESKEY: Well, I can't answer the question fairly, Mr. Justice Stevens, as posed that way, but I think there is a freedom of contract involved in dealing in that situation which may be held by this Court not to be capable of being vindicated by any court, but here, you have beneficiaries who have agreed to pay their premiums monthly in order to receive payment or compensation from the government determined by a reasonable charge mechanism, which is defined in the statute. That is a very different economic and legal relationship, in my judgment, than that which is suggested --

QUESTION: Why? Why? Why is it different from my case?

MR. OLESKEY: Because there is more volition or voluntariness involved in the dealing in that case. You don't have to go ahead and deal with the government to buy the battleship.

QUESTION: But I thought you stressed the fact that this was voluntary as opposed to social security.

MR. OLESKEY: It is voluntary, Mr. Justice Rehnquist, but in the final analysis, as everyone recognizes, for the medical protection that is involved,

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and given the objective of Congress, which was to assure starting in 1965 insurance against catastrophic medical expenses, there is no option available for most people other than the very wealthy.

QUESTION: Well, so you say then it is voluntary or it is not voluntary?

MR. OLESKEY: I say it is a voluntary act, but it has to be seen against the goals of Congress and the need which is being met, which -- which makes it in a practical sense mixed, a mixture of actions, but --

QUESTION: As far as Erika was concerned, though, it presumably knew that the carrier would determine what reasonable charges are, and in that sense it got exactly what it expected the statute would get.

MR. OLESKEY: No, it didn't, because what it bargained for in its relationship through its assignors was a reasonable charge determination in accordance with the statute. What the court of claims has determined was that by taking Erika's catalogues, which gave one price for one point in time from 12 to 24 months earlier than the period for which compensation or reimbursement was being made, Prudential had fundamentally violated the statute. We wouldn't have a complaint, I quite agree with you, as Erika if the reimbursement had been made wholly in accordance with the statute, but it

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wasn't.

QUESTION: Well, I am aware of the claim, but it just seems to me that Erika realized when it undertook to enter into the relationship that these questions were going to be answered by the carrier, and took that risk.

MR. OLESKEY: Well, it took a risk if the questions weren't -- if the claims weren't paid accurately that some day a court might decide there was no recourse --

QUESTION: That's right.

MR. OLESKEY: -- but you have to read the statutes with hindsight to Erika as mandating no recourse rather than merely as being silent in terms of judicial review through the district courts for good reason to come up with that conclusion. I don't think it's fair in hindsight to say that Erika was totally on warning in dealing with the government that some day the argument would be made here and accepted by this Court --

QUESTION: Well, Mr. Oleskey, what about the -- what about the language on Page 27 and 28 of the government's brief on the legislative history? Shouldn't that have put you on notice?

MR. OLESKEY: It puts -- it puts you on notice, Mr. Justice Stevens, that you are not going to

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get review in the district court as Part A beneficiaries for both entitlement and benefits and Part B beneficiaries are entitled. It doesn't tell you that when you have been able to reduce the issue to the discrete one of an amount of money being claimed, that there is no way you can go, given the existence of the Tucker Act, and what we say is the fair import of the Medicare legislation, to provide reasonable charge compensation either to the beneficiary or to the carrier or supplier as the case may be under assignment.

So, it did put you on notice particularly with the government's position consistently that you couldn't go to the district court --

QUESTION: Just one word, counsel.

MR. OLESKEY: Yes, sir.

QUESTION: Do you still say this is a contract case?

MR. OLESKEY: I say that it is enough of a contract case --

QUESTION: Well, is it a contract case?

MR. OLESKEY: Yes, it is, Mr. Justice Marshall.

QUESTION: You still say that.

QUESTION: Counsel, there are a number of Acts, and one comes to mind particularly, the International Claims Act, which affirmatively and

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explicitly provides that the decision of the International Claims Commission will be final, binding, and there would be no judicial review, so that eliminated the first question you have here. Do you suggest that that kind of an Act proposes a constitutional question of the right of Congress to deny judicial review?

MR. OLESKEY: No, because if I understand your question, there was there either apparently an Article I tribunal at least which is available to adjudicate the rights of the parties. Here there is not even an Article I tribunal available, if the government is right.

QUESTION: Offhand, I don't know whether the International Claims Commission and that type of commission is an Article I, and they dealt with claims in the post-war period running into millions if not billions of dollars.

MR. OLESKEY: Well, that -- the --

QUESTION: But no review was allowed.

QUESTION: The Congress appears to have been particularly concerned about rights in that instance, because I noted in looking at the United States Code that they had withdrawn explicitly Tucker Act jurisdiction from the court of claims over such claims. Again, that wasn't done here.

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QUESTION: Why isn't Justice Stevens absolutely correct in suggesting that any time you have a contract with the United States, and you have performed, and you have what anybody would say is a -- is a justifiable contract claim which you can say is a property right, there certainly is an expectation of being paid, why wouldn't you say that it would be unconstitutional for the United States to claim sovereign immunity in those cases?

MR. OLESKEY: I don't think I can better answer the question than by pointing to the nature of the bargaining relationship which I think exists in that hypothetical on the one hand and between the 27 million --

QUESTION: Well, the United States promises to pay upon performance.

MR. OLESKEY: Yes.

QUESTION: And the contractor has performed, he says.

MR. OLESKEY: Well, typically, of course, that would be the type of case which would lie within the court of claims jurisdiction under the Tucker Act.

QUESTION: Yes, only the United States just happens to say that in this line of contracts, there will be no Tucker Act jurisdiction. We are asserting

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our sovereign immunity. Now, why -- wouldn't that be unconstitutional?

MR. OLESKEY: Well, if on the balancing test you found that the property interest was not substantial enough in the party contracting with Congress --

QUESTION: Well, you are saying then that you would have to apply some kind of a due process test to see whether sovereign immunity was constitutional or not.

MR. OLESKEY: Well, sovereign immunity is the sovereign's inherent right to limit its suit. All we are saying is that where, as here, it is fairly inferred either from the statute or from a contractual relationshp or both that there is some recourse for this limited claim, that you need not reach a constitutional issue of the magnitude that the Court has been posing to me. We don't think that is this case. Thank you.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Kneedler?

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. KNEEDLER: Yes, Mr. Chief Justice. If I could add a few things, first, with respect to the contract claim, I would like to point out that Respondent did not assert a contract with the United States as the basis of Tucker Act jurisdiction in this

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case. The jurisdictional provision of the petition in the court of claims referred to --

QUESTION: But Mr. Kneedler, isn't the qute right that there is a difference between this claim, where there is a voluntary decision by the beneficiary, and a Social Security Act claim, whereas this would be contractual and the other would not?

MR. KNEEDLER: I think not, Mr. Justice Stevens, for several reasons. First of all, about 70 percent of the benefits paid out under the Part B program are paid out -- are contributions from the federal treasury. Only about 30 percent are paid by teh individual.

QUESTION: Well, but what about the 30 percent?

MR. KNEEDLER: Well, but there is no reason to think that Congress expected when it was enacting the Part B program with large -- in large measure funded by -- out of the general treasury that somehow Part B claims took on a different character than other sorts of social security benefits.

QUESTION: Is he right that the beneficiary has to make a decision as to whether or not to participate, which is not true of social security?

MR. KNEEDLER: No, but I think -- I think whether --

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QUESTION: That is right? I am just --

MR. KNEEDLER: Oh, that's true. No, that is -- that is true, but all that means is that Congress has simply made a person's eligibility to participate in the program voluntary, and in fact under the Social Security Act the payment of taxes may be --

QUESTION: Well, would you contend that Fleming against Nestor would apply, that Congress, after collecting the money, could constitutionaly say, we have decided not to -- we just decided to welsh?

MR. KNEEDLER: Well, I --

QUESTION: We just call the program off. Would you say that -- At least the Nestor case doesn't hold that, does it? It would not apply to these --

MR. KNEEDLER: I'm not -- I'm not so sure that it wouldn't, because Congress did not -- as I say, there is nothing on the face of this to suggest that Congress believed it was entering into a contractual relationship. It simply means that the payment is voluntary. The receipt of social security benefits is voluntary in the sense that a person doesn't have to file an application for them, and it seems to me that whether or not a person voluntarily participates is not the point.

But I think the more central point here is

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that even assuming that there is a contract, one provision of that contract, as Respondent characterizes it, derives from the Act itself. Congress offers an insurance program, the beneficiary accepts it. Well, one of the provisions of that contract would necessarily be the preclusion of review that is contained in the very same statute that Respondent says creates a contract.

So that the contract argument here simply does not advance their argument.

QUESTION: But you, in order to win, you don't have to take the extreme position that the government could simply just say, we are not going to pay the --

MR. KNEEDLER: No, that is not -- that is not involved in this --

QUESTION: But your position is that they have an adequate mechanism for determining whether or not there is any obligation in a particular case.

MR. KNEEDLER: Yes.

QUESTION: And you have also -- you say that he has also notified him in advance that --

MR. KNEEDLER: Yes, absolutely, it is on the face of the Act.

QUESTION: -- that, by the way, friend, we are not waiving sovereign immunity.

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MR. KNEEDLER: Yes, and also the acceptance of assignments by Respondent was entirely voluntary here. Respondent could have instead allowed the patients to submit their Part B claims to the carrier.

The other point I wanted to mention with respect to the constitutional question that Respondent suggests is involved here, the only constitutional question this Court has suggested might arise in a case involving judicial review is if there is preclusion of judicial review of a constitutional question, and even then the Court hasn't said that that would be unconstitutional, but simply that it would raise a constitutional question.

Well, that issue simply isn't involved here. The court of claims rejected Respondent's constitutional objections to the method of reimbursement in this case. Respondent has not sought review of that decision, and it is simply not involved here. All that is involved is Respondent's objection to the manner in which the carrier calculated the claims as a matter of administrative procedure, and this Court has never suggested that that would be unconstitutional, and in fact the veterans' program, for example, that involved in Johnson v. Robison, there is no -- it is quite plain, and it was an assumption of this Court's decision in

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Johnson v. Robison that the ordinary benefits claim under the Veterans Act is not subject to judicial review, and that is all that -- that is the only issue that is involved in this case. Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:15 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

UNITED STATES vs. ERIKA, INC. #80-1594

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BY Sharon Ryan Connelly

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