OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-56

TITLE MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner v. COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., ET AL.

PLACE **Washington, D. C.**

DATE February 27, 1984

PAGES 1 thru 48

(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

- x

MARGARET M. HECKLER, SECRETARY OF :

HEALTH AND HUMAN SERVICES, :

Petitioner :

v. : No. 83-56

COMMUNITY HEALTH SERVICES OF :

CRAWFORD COUNTY, INC., ET AL. :

:

- x

Washington, D.C.

Monday, February 27, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

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

RAYMOND G. HASLEY, ESQ., Pittsburgh, Pa.; on behalf of Respondents.

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Heckler against Community Health Services.

Mr. Geller, you may proceed whenever you're ready.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF PETITIONER

MR. GELLER: Thank you, Mr. Chief Justice, and may it please the Court:

This case involves a dispute over the appropriate amount of federal financial reimbursement due a provider of medical services under the Medicare program. The Secretary of Health and Human Services and the district court concluded that reimbursement of the amount at issue was clearly precluded by the Medicare Act and the governing regulations.

The Court of Appeals, on the other hand, held that the Government was estopped from relying on those statutes and regulations and must instead provide reimbursement contary to law. We have sought certiorari because the Court of Appeals' decision is inconsistent with the repeated holdings of this Court that the Government may not be equitably estopped from enforcing the law.

Respondent Community Health Services is a provider of health care under Part A of the Medicare program. Under Part A, the Federal Government, acting through private insurance companies, called fiscal intermediaries, reimburses providers for the reasonable costs of providing necessary medical services to Medicare beneficiaries.

Congress set up a system under Medicare in which intermediaries make interim payments to providers on a monthly basis for the estimated cost of furnishing services, and then the providers' annual cost reports are audited later to determine the actual costs incurred and corrective adjustments are then made to account for overpayments or underpayments.

In 1975 CHS began to receive grant funds from the Federal Government under the Comprehensive Employment and Training Act, or CETA, and the purpose of these grants was to provide job training and employment opportunities for unemployed workers. During the next several years, CHS hired a number of CETA workers and used the federal CETA grant funds to pay their salaries and fringe benefits.

In addition, when CHS filled out its Medicare cost reports for the years in question it included the salaries it paid to the CETA workers as a reasonable

cost attributable to the Medicare program. CHS did not, however, offset against those costs the amount of the federal CETA funds it received to pay those salaries. The obvious result of this bookkeeping was that CHS got reimbursed twice by the Federal Government for a single group of expenses, once by CETA and then again by Medicare.

Not surprisingly, this double reimbursement was plainly contrary to Medicare regulations, which prohibit the inclusion in a provider's cost reports of expenses covered by so-called restricted grant funds, such as CETA. In fact, the published regulations expressly state that if restricted grant funds such as CETA funds were not offset from a provider's expenses, the provider would receive reimbursement for the same expenses twice, and that of course is precisely what happened here.

Now, CHS included the salaries of the CETA workers in its cost reports, but did not deduct the corresponding CETA grant in part because the representative of its fiscal intermediary, Travelers Insurance Company, orally informed CHS on several occasions that the CETA grant did not have to be offset. Travelers appears to have given CHS this erroneous advice by misreading the Secretary's so-called

"seed money exception", which carves out a limited exception from the general rule governing restricted grants in the case of certain public health service grants, which of course the CETA grant was not.

In 1977, after CHS again asked Travelers if the CETA grants fell within the seed money exception, Travelers decided to ask the Department of Health and Human Services for its advice on the matter. A month later HHS advised Travelers that the CETA grants did not fall within the seed money exception and that the grants therefore should have been offset on CHS' cost reports for the years in question.

Travelers then reopened CHS' cost reports for 1975 to 1977, as the statute required it to do, and determined that CHS had received overpayments in the amount of some 63,000. Community Health Service sought administrative and judicial review of the intermediary's determination, and after an evidentiary hearing both the Provider Reimbursement Review Board, which is the expert administrative agency, and the district court agreed with the Secretary that the amount spent on the salaries of CETA workers was plainly not reimburseable under the Medicare Act because CHS had already recovered those expenses from its CETA grant.

The district court also rejected CHS' argument

that the Secretary should be estopped from recovering the erroneous overpayments. The district court found that CHS had not acted reasonably in relying on the intermediary's advice and that there was no evidence that the intermediary or the Secretary had been guilty of any misconduct.

As I mentioned a moment ago, a divided panel of the Court of Appeals reversed the district court's judgment. The Court of Appeals did not find that the payments CHS had received for the CETA workers were in fact reimbursable under the Medicare Act. Instead, the court held that the Government should be estopped from enforcing the governing Medicare statutes and regulations to recover the misspend funds because of what it termed the affirmative misconduct of the intermediary in giving CHS erroneous legal advice.

Now, the decision of the Court of Appeals in this case is impossible to square with the repeated pronouncements of this Court on the issue of estoppel. The Court has consistently held, from the earliest days of the nation to as recently as two terms ago in Schweiker versus Hansen and last term in INS versus Miranda, that the Federal Government cannot be equitably estopped by the actions of its employees from enforcing public laws.

And this rule has always been applied with particular force in the context of suits for public funds. The Court has said time and again that the lower courts must observe the conditions imposed by Congress for charging the public treasury.

QUESTION: Mr. Geller, can I ask you a question right there. Supposing, instead of having an intermediary like Travelers as we have in this case, the query had been to somebody in the Department itself, perhaps to the General Counsel, and the General Counsel had given the answer that Travelers gave, and then later the General Counsel was replaced and a new General Counsel came in and said, my predecessor made a mistake. Would the case be any different?

MR. GELLER: The case would be no different, for reasons that I will get to in a little while, Justice Stevens. The case would be exactly the same.

QUESTION: Mr. Geller, do you see room in any case for a so-called "affirmative misconduct" kind of an exception for application of this rule?

MR. GELLER: We have argued in our brief that there is no exception, because it's inconsistent with the whole analytical framework of the rule that the Government cannot be estopped. The Court has alluded to it in the past, although it's never applied it, it's

alluded to it, though never in the context of a case involving public funds.

The notion seems to have arisen in suits to deprive people of citizenship, and there may well be some due process notions that lurk in cases of that sort, but not in cases of this sort involving suits for public benefits where there is no statutory entitlement.

In any event, here the Court of Appeals, by invoking the doctrine of estoppel based on the alleged misconduct of Travelers Insurance Company, has prevented the Secretary from recovering amounts from CHS that are not authorized by the statute and as to which CHS has absolutely no statutory entitlement.

QUESTION: Assuming, Mr. Geller, there is a statutory entitlement if someone had followed the correct procedure, but there was a representation by the General Counsel that this is the way to go about it and then it turns out it really wasn't?

MR. GELLER: That would be very much like Schweiker versus Hansen, where there arguably was a statutory entitlement, but the procedures were not followed, and this Court said that the procedures are a part of the statutory entitlement. Congress has required that the particular procedures be followed. So

the case I think would be no --

QUESTION: Would be the same?

MR. GELLER: Would be the same. I think Schweiker versus Hansen holds as much.

QUESTION: Would it be correct to say that CHS was no worse off so far as what it was entitled to get from the Government after it had followed the intermediary's advice than before?

MR. GELLER: Well, I think that's correct. It got the CETA funds in any event. It just didn't get double.

QUESTION: Now it has to pay them back, and it's because it wasn't entitled to them.

MR. GELLER: Yes, that's correct.

Now, Respondents understandably have made little effort to defend the Court of Appeals decision, in light of this Court's precedents. Instead, they have candidly urged the Court simply to abandon its long settled holdings in the estoppel area, calling them outmoded and socially unacceptable. And the Court of Appeals for its part, while terming this Court's estoppel decisions archaic, found in some of the decisions what it took to be an affirmative misconduct exception that it applied in this case.

We have explained at some length in our brief

why both of these assertions are incorrect. As to Respondents' contentions, there simply are a number of significant constitutional and policy reasons why it would be wholly inappropriate to prohibit the Government from enforcing a law concerning public benefits because of the erroneous statements of its employees. If this Court were to adopt such a rule, it would really have the effect of raising employees of the Federal Government to the status of legislators, because it would give to their actions and words the force of law, even though those actions and words were inconsistent with the actions and words of Congress.

Here, for example, the Medicare Act and the regulations governing it clearly provide that the expenses covered by the CETA program are not reimbursable as reasonable costs. Yet Travelers would in effect be allowed to repeal this portion of the Act and overrule the judgments of Congress simply by giving its providers advice to the contrary.

And needless to say, such a rule would create tremendous administrative burdens, opportunities for abuse and evasion of statutory mandates, especially in the context of massive social welfare providers like those under the Social Security Act. The Court noted these very considerations only recently in adhering to

its estoppel rulings in the Hansen case.

Let me give the Court some notion of the extent, the magnitude, of the Medicare program. There are some 16,000 providers. In the last fiscal year more than $38 billion was expended.

Intermediaries and providers are constantly having discussions, most of it oral, about how particular costs should be handled. If every time an intermediary orally gave a provider advice about how costs should be handled, if the Secretary were bound by that even though that advice was contrary to the Medicare statute the system would break down.

And of course, providers could frequently claim that they received oral advice even if they never got it. That was, of course, one of the concerns that prompted this Court's decision in Schweiker versus Hansen.

But even if this Court were otherwise disposed to reconsider its estoppel decisions, as Respondents urge, or to imply an affirmative misconduct exception, as the Court of Appeals suggested, we think this would be a wholly inappropriate case in which to do, and we think that for two reasons.

First, we submit that CHS failed even to meet the requirements for estoppel under the law applicable

to private persons. And second, the actions of Travelers fell far short of any showing of affirmative misconduct as that term has been construed in this Court's prior decisions. I'd like to discuss each of these points in turn.

First, whatever the proper rules are for applying estoppel against the Government, it seems obvious that those rules should be at least as strict, at least as strict as the rules that would apply in private litigation. In other words, at a minimum the party seeking to estop the Government should have to meet the traditional requirements for estoppel in non-Government cases.

One of those requirements has always been that the party asserting estoppel show that it reasonably relied on the other party's erroneous advice, and it's clear from the very framework of the Medicare Act that a provider such as CHS could never reasonably rely on the advice of an intermediary as being the final definitive word on legal questions that may arise under the Act.

Now, Congress, as I mentioned earlier, chose to fund providers under the Medicare program on an interim reimbursement basis, making it clear that the final determinations would be made later on and there would be retroactive adjustments to take account of

overpayments or underpayments. And perhaps more to the point, the Secretary under this express statutory mandate has promulgated regulations making it clear beyond any doubt that determinations by an intermediary on the treatment of costs are subject to reopening and revision by the Secretary within a three-year period.

Now, the relevant regulation that covers this situation is reprinted at page 4 of our brief. It's 42 U.S.C. 405.1885, and it bears careful scrutiny in light of CHS' estoppel claims in this case, because this regulation specifically informs providers that an intermediary's determinations "shall be reopened" -- the language is mandatory -- "shall be reopened" if the Secretary of HHS within a three-year period notifies the intermediary that its determinations were "inconsistent with the applicable law, regulations or general instructions by the Secretary".

And this language, we submit, could not be clearer. It unambiguously notifies all providers, such as CHS, that the Secretary and the courts and not intermediaries have the final word on what payments are permissible and what payments are not permissible under the Medicare provider.

This statute and this regulation unambiguously notify all providers such as CHS that an intermediary

simply doesn't have the authority to make any final determinations concerning the interpretation of statutes or regulations or otherwise to bind the Secretary to erroneous advice.

The Respondents have never suggested how they could have reasonably relied on the intermediary's advice in this case in light of this regulation, which expressly states that every piece of advice, every determination that an intermediary makes in determining cost bases is subject to reopening by the Secretary within a three-year period.

And this regulation even allows the Secretary, Justice Stevens, to reopen her own prior determinations. So that it is clear under the Medicare programm, the way Congress has set it up, that all determinations are subject to reopening within a three-year period if the Secretary determines that the preliminary determinations were contrary to law.

Now, the Court of Appeals did not address this reasonable reliance point. It simply assumed that CHS had satisfied the traditional estoppel requirements and then it went on to discuss this more cosmic question of whether the Government can ever be estopped.

As I mentioned earlier, the Court of Appeals held that this Court had given what it called tacit

recognition to the theory that the Government could be estopped in the instances where there was affirmative Government misconduct. And the Court of Appeals reached this conclusion by attempting to distinguish away five of this Court's decisions and by reading the language of the Court, negative implications in the language of the Court in several of those decisions.

On a number of recent occasions this Court in fact has alluded to the possible existence of an affirmative misconduct exception to the rule against estopping the Government. But the important thing is that in each of those cases the Court found it unnecessary to resolve the question because the conduct at issue did not constitute affirmative misconduct. Nonetheless, the lower courts have seized on the dictum in this Court's decisions and have branded as affirmative misconduct a number of actions that aren't really misconduct at all, such as in INS versus Miranda, much less affirmative misconduct.

Here, for example, the Court of Appeals concluded that Travelers' actions in erroneously advising CHS in good faith about some legal question that arose under the Medicare Act is affirmative misconduct. But it's baffling how this sort of good faith error of judgment, giving advice of this sort,

could be considered affirmative misconduct within the meaning of this Court's prior decisions.

The conduct of Travelers here doesn't seem appreciably different from the Government agent's conduct in the Merrill case, where a Government agent told someone erroneously that his wheat crop would be covered by Government insurance; or in Montana versus Kennedy, where a Government agent told some woman that she needed a passport to return to the United States even though she didn't; or more recently in Schweiker versus Hansen, where a Government social security representative told a claimant that she was not entitled to social security benefits, even though she was, and told her not to even apply for them, which was in fact contrary to an internal manual.

In each of those cases the Court found not merely that the Government's actions did not constitute affirmative misconduct, but they fell far short of constituting affirmative misconduct. And we think the Court's decisions in this consistent line of cases compel the conclusion that the intermediary's actions in this case also fell far short of the sort of conduct that might conceivably estop the Government if there was an affirmative misconduct exception.

I'd like to turn to just one more point,

because the Court of Appeals' decision -- there are a couple of errors that seem to pervade the Court of Appeals' decision. I'd just like to discuss them briefly.

One is this notion that CHS did everything it could here to get the right answer to its problem and therefore it acted reasonably; and second is this notion that the intermediary violated some mandatory duty in not seeking advice from HHS.

As to this first point, CHS was getting double reimbursement for a single expense from two parts of the Federal Government. The district court said that should have raised a red flag. It should have proceeded with extreme caution since that's so unusual, to get double reimbursement for one set of expenses.

If CHS had looked at the governing regulations and the statute, it would have had substantial doubts that what it was being told by the intermediary was correct.

QUESTION: Well, why wouldn't the intermediary have the same substantial doubts?

MR. GELLER: Well, this case arises because the intermediary was negligent in construing these statutes. The point, though, is was CHS reasonable in relying on this advice to the point where the Government

may be estopped as a result, even though the statute --

QUESTION: You don't think there's any room at all for argument on the fact that this might have been seed money?

MR. GELLER: Well, I think it's --

QUESTION: It's perfectly clear it was not seed money?

MR. GELLER: Well, I think we can look at the following. As soon as Travelers asked HHS for its opinion, HHS immediately wrote back and said, this is not seed money. The district court -- the Provider Reimbursement Review Board had no trouble concluding in this case and in previous cases that CETA grants were not seed money.

The district court said that no tortured construction of these regulations could lead one to conclude that this was seed money.

QUESTION: Perhaps Travelers is just plain incompetent?

MR. GELLER: Well, the person -- we don't know, for example, what CHS --

QUESTION: The Secretary did hire Travelers to do this job.

MR. GELLER: The Secretary hired Travelers, although the particular person who gave this advice I'm

told was not a lawyer. And we don't know, for example, what CBS told Travelers in an effort to get this opinion.

QUESTION: Well, there's no claim that they misrepresented the facts. I understood Travelers understood the whole theory.

MR. GELLER: Well, one of the problems in this area -- we don't make that claim. We have no proof that there was any misrepresentation. Of course, one of the problems in this area, Justice Stevens, is that all these communications were oral. So if the Court were to allow the Third Circuit's decision to stand --

QUESTION: I thought they had a written financial report that was filed each year or something like that; wasn't there?

MR. GELLER: But the requests to Travelers for advice on whether the CETA grants were reimbursable was all done orally, and that's one of the points here. The Third Circuit --

QUESTION: But you'd surely take the same position if everything was in writing, I think.

MR. GELLER: We would, but my point is that if the Court of Appeals is correct in this case that even these sorts of informal oral conversations, as to which there's no record of what was said by any party, would

be sufficient to estop the Government. Then you can imagine --

QUESTION: And also no dispute as to what was said, as I understand it.

MR. GELLER: Well, but in many cases there will be disputes, and the rule can't be that estoppel occurs only when there's no dispute. Presumably, if the Government can be estopped here there'll have to be evidentiary hearings to determine what was said, and providers will be able to claim in a number of cases that they sought informal advice and relied on the basis of it, because there are constantly conversations going back and forth between providers and intermediaries about how particular costs should be handled.

QUESTION: But you seem to be arguing that the answer was plain, but I think your argument would cover a situation in which Travelers' construction was a perfectly reasonable one which most of us might have adopted the first time we looked at it.

MR. GELLER: It would, it would. But I'm trying to answer the Third Circuit's decision in this case.

QUESTION: Oh, I see. I'm sorry, you're right.

MR. GELLER: The Third Circuit's opinion

suggests that CHS acted completely reasonably and did everything it could do. One of my first points was that if CHS had read these regulations they would have had substantial doubts that they were getting correct advice.

CHS made every inquiry orally. It never made a request in writing. It never asked Travelers to correspond and give it the advice in writing. CHS never asked Travelers, as far as we know, to pass along its inquiry to HHS. And we know that CHS never itself tried to get an answer out of HHS.

So this notion that CHS did everything it could do and therefore it should not have to pay back the money that it was not entitled to under the statute simply is not borne out by this record.

If there are no further questions, I'd like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Very well.

Mr. Hasley.

ORAL ARGUMENT OF RAYMOND G. HASLEY, ESQ.

ON BEHALF OF RESPONDENTS

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

While the facts here are not in dispute, the emphasis placed on the facts is far different from the

standpoint of CHS. If we turn the clock back to 1975 and a little bit earlier, we find that the Federal Government had a task force for the comprehensive health planning program in the United States and a local task force in western Pennsylvania.

Crawford County had been designated as an underserved community medically and at this point in time the only agency that provided any Medicare services to any of the residents -- these are home health services -- was Community Health Services, and they provided them only in a small part of the community.

Now, the Medicare Act provides, I believe, seven different types of services that might be rendered by a home health agency. At the point we begin the story CHS was only into one aspect of it, this nurse, visiting nurse thing. The other areas were not being covered for Medicare beneficiaries.

Under the definition of a home health service, it has to be not only a non-profit organization; it also has to be qualified as a charitable organization. Now, under Medicare when an agency such as CHS renders a service to which Medicare beneficiaries are entitled they must also render the same service to everyone in the community. So in effect, they now have to offer charitable services identical to those which they offer

to the Medicare beneficiaries.

Now, faced with this situation in 1975, being unable to serve the community -- and parenthetically, it is interesting to note that perhaps the Secretary of Health and Human Services had an obligation under the Public Health Act to provide the employees to do this.

But at any rate, there was money available from the Department of Labor in the CETA program, and while this does provide -- one part of it provides for training. Other parts provide for the expansion of public services. And it is under this aspect, the expansion of public services and particularly health services that many of the CETA people worked.

Now, it also must be noted here that CHS not only was involved in providing services to Medicare beneficiaries; they were involved in providing services to non-Medicare beneficiaries. So that in the testimony it's pointed out that only about 50 percent of the CHS services were for Medicare beneficiaries. Their other services were directed to other people that did not involve Medicare.

Now, how does this become important? When Mr. Wallach approaches Mr. Reeves about this problem -- he has the opportunity from the grants from the Department of Labor; he needs to expand services to Medicare

beneficiaries; he can see, however, the opportunities, that if you have this seed money concept applying you're going to generate additional income which you can then use in the seed money concept of the expansion of your services to fill these needs.

At the time Mr. Wallach visited with Mr. Reeves, CHS didn't even have a Medicare manual. They had no bookkeeping set up. So it wasn't just a question of seed money. He was with Mr. Reeves on setting up the entire bookkeeping system for CHS so that they could account for everything in a proper manner.

QUESTION: I'm not sure I got your point on the fact that they did not possess the manual. Who publishes the manual that you're speaking of?

MR. HASLEY: It's a Government manual and it would --

QUESTION: Are you suggesting --

MR. HASLEY: Pardon me?

QUESTION: Are you suggesting there's some obligation on the Government to see that everyone has a copy of it.

MR. HASLEY: Well, whether it's their obligation or the party's obligation to obtain it, they did obtain it from Mr. Reeves, Mr. Reeves at the time of the meeting, and the problem was after that. But my

point is that it was not just a simple question about the seed money situation, it was concerned with setting up a whole bookkeeping program so that everything would be done in a proper fashion.

But one thing that has not been analyzed here, but it's this hypothetical question: If at the time Mr. Wallach went to Mr. Reeves for the answer the answer had been to offset, at that point CHS had the opportunity to use the CETA employees for services in the community not at all involved with Medicare.

In other words, one of the services that the CHS made available in the community is a homemaker service. Now, the cost for homemaking service is not covered by Medicare. Medicare covers nursing, a nurse's aid type thing which is a little different.

QUESTION: Mr. Hasley, though, that was true in Schweiker against Hansen, too, that had the person made the application the way the Government regulations provided, rather than the way she was advised to by the Government official, she probably would have been better off.

MR. HASLEY: But in the question of detrimental reliance, I believe Mr. Geller said that CHS was not disadvantaged, that they would nonetheless had the CETA employees. They would not have had the CETA

employees in this bookkeeping problem.

QUESTION: Well, perhaps you're right in thinking there was some disadvantage along the line of your analysis. But I think if there is it is no different than the detrimental reliance in Schweiker against Hansen, which was disallowed as estopping the Government.

MR. HASLEY: Well, this is one, this is of course just one aspect of what happened. I mean, this is the hypothetical as to what would have occurred, the ability to use the employees on the Department of Labor grants in a non-conflicting way.

But at any rate, as to this question of whether this was proper, could this be interpreted as seed money grant, it was in fact interpreted as a seed money grant and acted out as a seed money grant.

Seed money grants were not new. Back in the sixties in the mental health, mental retardation program, the Secretary had this rule about not deducting restricted funds. The funds for mental health and mental retardation were restricted funds and the Secretary nonetheless said that, because this was for the expansion of services, that they would not offset the mental health, mental retardation staffing grants. And so that's the history of the interpretation by the

Secretary in other factual circumstances.

But in this case there was certainly an arguable basis that these were seed money grants according to an interpretation of them, although people may argue about the interpretation.

In any event, it was in fact treated as seed money. It was treated as seed money and used that way, and it would not have been except for this inducement to do it this way.

As a consequence of what happened on this instruction of Mr. Reeves -- it was repeated and repeated and repeated for nearly three years -- other employees were hired, CETA people provided services to Medicare patients, which they didn't otherwise have to do, and they developed a program to try to solve the health community problem for the entire community. Now, you can't unscramble the situation three years later and go back and retroactively put CHS in the position it was.

Now, there's much that's suggested in the brief that there was some excess of funds and it makes it out as if CHS was a profiteer. Far from that, as a charitable institution every time they expanded and offered a new service to help the Medicare beneficiaries they had to take in people on a charitable basis that

were not eligible Medicare beneficiares.

Now, who paid that? Every year CHS ended up in a deficit situation because it was trying to do all these things for so many people.

QUESTION: Mr. Hasley, it seems to me your arguing as if the standards which would estop the Government were very much the same as are held in state law to estop private individuals: detrimental reliance, reasonable assertions, and that sort of thing. But we've said at the very least it would take affirmative misconduct on the part of the Government. How is the Travelers' representative's statement to your client any more than negligence at the most?

MR. HASLEY: Well, as the Court of Appeals noted, in accordance with his duties -- he was under a duty to communicate -- any communications from CHS were to be communicated to the Secretary. Were we not entitled to a binding answer at some point in time?

QUESTION: Well, that's just a mistake. That's negligence. That certainly isn't affirmative misconduct.

MR. HASLEY: Well, I don't know what affirmative misconduct would be, then. If you have a duty, if Travelers has a duty to give us a binding answer and they don't give us a binding answer, haven't

they breached a duty to us?

QUESTION: Yes, and breach of duty is ordinarily negligence.

Have you considered an action against Travelers?

MR. HASLEY: The Government says they're immune. We've raised the issue that if this is the negligence that Justice Rehnquist seeks -- and I don't -- first, I think when you look at the contract between Travelers and the Secretary, it seems that on the face of the contract the intermediary has expressed authority to do what he did, to set out the procedures.

And if I may just briefly read, in the functions and duties to be performed by an intermediary, he's to make determination as to coverage of services, of the amounts of payments, and make payment to providers of services and eligible individuals. He's to assist providers of services in the development of procedures relating to utilization practice, and so forth, and to make studies.

He's supposed to do all these things, and if this doesn't put him in a position where he has to do something that is binding, not as opposed to something that's not binding -- on this question about reopening, you see, there is never any new fact that comes into

light three years later. The facts are always the same.

You're not talking about going back and adjusting estimated payments that were made. In the course of the year, the intermediary comes in and does a desk audit of everything that's gone on and makes a resolution of the correct figures.

QUESTION: But the regulation doesn't require any mistake of fact to reopen, does it? It says the Secretary can reopen if the decision is inconsistent with applicable law.

MR. HASLEY: Well, when you look back at Medicare there is no law in Medicare as Congress enacted it that said you had to offset any grants. There's nothing in Medicare that says this.

This whole offsetting problem goes back to once upon a time when hospitals were charitable and people -- the money that came into them came for restricted purposes. The ladies guild or something would raise the money for an X-ray machine or a new wing or so many new beds. And Blue Cross in its history, in order to minimize the cost to its subscribers and with a position of leverage over hospitals, was able to make that arrangement so they got the benefit of restricted money that went into charitable institutions.

And when Medicare was set up, the Congressional part of it puts the responsibility on the Secretary to determine reasonable costs. There's no suggestion in this reasonable cost matter that a provider has to give free services.

And what you have here is the Department of Labor's money for its purposes, its budget purposes, and then you have the Medicare funds. If the Secretary's correct, what you're doing is siphoning money from the budget of the Department of Labor over into the benefit of Medicare beneficiaries, to some of them. You're siphoning money over into something that was never budgeted.

In fact, interestingly enough, in one aspect of cost reimbursement relating to hospitals --

QUESTION: But it's still my money, isn't it?

MR. HASLEY: It's not the same money.

QUESTION: I mean my tax money.

MR. HASLEY: Well, the money that's in the Department of Labor is everybody's tax money, the corporations' and everybody's tax money.

QUESTION: That's what I'm talking about.

MR. HASLEY: But the money in the Medicare are the specific beneficiaries. You know, it's earmarked for the individuals.

QUESTION: Well, what we're interested in here is my money?

MR. HASLEY: Well, I think --

QUESTION: We're interested in the tax money, aren't we.

MR. HASLEY: Yes, we are. We all are. But all that tax money -- all that tax money was put to use in furthering the purposes for which it was intended. There isn't any suggestion here, Justice Marshall --

QUESTION: What's the magic of the phrase "seed money"?

MR. HASLEY: If we go back into the --

QUESTION: Is it that you can just do whatever you want with it?

MR. HASLEY: Pardon me?

QUESTION: That you can just do whatever you want with it?

MR. HASLEY: No, no, no, no, no, no, no, no.

If we go back into the 1960's, when the effort was to examine the problem of the state of mental health, mental retardation, and the care of those people in the sixties -- and late President Kennedy was a strong advocate for legislation in that area -- it was apparent that new ideas in health care had to be instituted, but there was no way -- they wanted them to

be self-sufficient, but there was no way to get them started.

And so the concept of the seed money evolved on the basis that, yes, you are getting a little more money right now, but you are going to take that money and you are going to develop new services that we want developed. So this is the seed. We are planting the seeds for growth.

And in this case, that's exactly what happened to the money. It went to provide new services to Medicare beneficiaries. So in terms of any raid on the Treasury, it could hardly be said to be a raid on the Treasury when the money was used to generate the services that Medicare wanted and that Congress dictated.

One of the unfortunate things, Justice Marshall, is that at this period in time Medicare did not advance any money, so that there was a delay of maybe four months between when services would be rendered and when any money could come back.

QUESTION: Don't be misled that I don't know what seed money means.

MR. HASLEY: Pardon me?

QUESTION: Don't be misled by thinking I don't know what seed money -- I just wanted to know what you

say it means.

MR. HASLEY: Well, I hope that our views are consistent.

QUESTION: Oh, not necessarily.

MR. HASLEY: It was in fact treated as seed money by Community Health Services in the expansion of services for the community and for the Medicare beneficiaries. And it did serve the purposes of CETA, too, because as the testimony shows new jobs were created, people were put into permanent jobs. So all these purposes were accomplished.

QUESTION: Mr. Hasley, in the colloquy I think you may have overlooked that there was a question about whether Travelers is immune, and if so why are they immune.

MR. HASLEY: Yes. Well, we raised this question. Initially we said, now, if Travelers isn't authorized to bind you, then they surely must be negligent for all this problem and under any common law principles we'd have been entitled to indemnity in this situation.

And the Government says: Well, no, they have the same immunity that we do. So they're perfectly protected and you can recover nothing from them. So we were caught between a rock and a hard place.

QUESTION: Have you accepted that or do you go ahead on your own?

MR. HASLEY: We have raised that issue in this case, but Third Circuit did not reach these issues of Travelers because of the disposition on an estoppel grounds.

Justice Blackmun, you see, if you view Travelers as having this breach of duty to us and if you want to call it negligence, call it negligence only, then weren't we entitled to take a federal tort claim type concept of negligence which would give us a right against Travelers to get back this money if we had to pay it to the Federal Government?

QUESTION: Have you instituted suit against Travelers and the answer was no?

MR. HASLEY: That's part of this, that's part of this case.

QUESTION: You have?

MR. HASLEY: Yes. Travelers is a defendant in the case. We have the two different lawsuits and Travelers is a defendant, and we raised this issue. The lower court, the lower court said that Travelers enjoyed the same immunity, they were the agent of the Government and enjoyed the immunity, and this issue then was never reached in the Court of Appeals.

I want to make it clear that we raised many issues in the Court of Appeals, any one of which would have turned this case in favor of CHS, including this issue on Travelers. But the Court of Appeals didn't reach the issue. And if you do not agree with the Court of Appeals' and our position on the estoppel in this case, we certainly would like to go back and argue that matter about Travelers.

I've tried to just touch the estoppel, confine myself to the estoppel, but historically in the context of the case all these things were going on. There perhaps have been 200 or more cases in the country in the district courts and the Courts of Appeals dealing with this subject of estoppel and when might the Government be estopped, and the consensus in all the circuits and all the district courts is the Government should be estopped in some circumstances, but the issue has been raised by the district court and by the appellate courts, what are those circumstances.

QUESTION: Well, what's the consensus in this Court?

MR. HASLEY: Well, as I read it would be estoppel may -- in the affirmative misconduct situation.

But if you look at the broad spectrum of cases

that have been litigated in the country about Government misconduct, I would suggest that to the extent that there is some overwhelming need to protect the Federal Government in some way, that that ought to be the Federal Government's burden to show why the ordinary rules of estoppel should not apply to them. They can be protected if they bring in the evidence to justify the position. It's a question of shifting burdens.

QUESTION: None of our cases, Mr. Hasley, suggests that the ordinary rules of estoppel do apply to the Government. From Federal Crop Insurance against Merrill on, we have said the ordinary rules of estoppel do not bind the Government.

MR. HASLEY: Well, I guess this is a case where the issue will be addressed further as to whether it would be no estoppel against the Government in any circumstances, in which event the Government can literally destroy people like CHS, who have in good faith relied on it, and wipe them out.

QUESTION: I suppose you would agree, Mr. Hasley, that the meaning of a statute or a regulation is ultimately and finally for this Court, would you not?

MR. HASLEY: Yes, yes.

QUESTION: In the meantime, does your position not amount to saying that some clerk in some Government

agency can reach a contrary conclusion and that that's binding until we set it aside?

MR. HASLEY: It would amount to that, Justice Burger. But bear in mind today that the Federal Government is larger in its activities than the Fortune 500 list of industrial companies.

QUESTION: That's one of the problems, the millions of employees who can make decisions from day to day.

MR. HASLEY: Yes. But can you really interface, can Government really interface with the private segment on a basis of nothing but uncertainties in the way in which they conduct business?

QUESTION: It's certainly a heavy burden in individuals, on citizens. But the old rule of thumb is that every person is presumed to know the law, which puts them in a pretty difficult position, of course.

MR. HASLEY: But we as lawyers know that's not a practical rule in today's society.

QUESTION: But it's still the rule, is it not, of the law?

MR. HASLEY: Yes, Your Honor. But when we're dealing with an equitable concept, we're going for equity, and estoppel is a rule of law, too. It's older than our Constitution. It's inherent in the American

jurisprudence system that --

QUESTION: Except as applied to the Government, generally.

MR. HASLEY: Well, I can argue no more than that every circuit court in this country has looked at this issue in different factual contexts and, while they recognize the position of the sovereign and these distinctions and have acted with restraint, as this Court has on the problem, nonetheless could you really have an effective Constitution that did not guarantee the private sector the right of estoppel in some circumstances in some circumstances?

Otherwise, as you see here, when this case started the Federal Government was actually recouping the matter through self-help. Since they don't pay their bills for three or four months, or at least they didn't at that time, they simply went to deduct the money that they claimed they were entitled to.

So the situation was at that point that CHS couldn't meet a payroll and its doors were going closed. And you know, if those aren't circumstances where equity comes into play even against the Federal Government, even against the Federal Government -- this is not a case where there's been any profiteering. It's not a case of fraud or misrepresentation.

QUESTION: Do you believe that a Government officer can violate a rule on equitable principles?

MR. HASLEY: I think in some circumstances. But here you have a question -- you had a question --

QUESTION: No, no. Let's answer that question.

MR. HASLEY: I think that he could do something that was inequitable and that the Government should be estopped from doing otherwise.

QUESTION: Well, you talk a lot about equity. Would the Government have squeaky-clean hands?

MR. HASLEY: Does the Government have clean hands? In this case they have dirty hands.

QUESTION: In your case does if it has dirty hands is it equity?

MR. HASLEY: We contend that we have clean hands. It's the Government that has dirty hands.

QUESTION: I mean, in your case you just said that where he's going to give this equitable relief to this person he knew better.

MR. HASLEY: Maybe I misunderstood.

QUESTION: Well, if he deliberately violated a rule to do what he thought was right, would that excuse him and the Government?

MR. HASLEY: Not if the other person was not

privy or knowledgeable, if the other party would be totally innocent, and yes, I would bind the Federal Government in that case.

But this would be a factual question as to evidence.

QUESTION: How low down would that go in the governmental offices? Would that be a person that's sitting behind a desk? In other words, he could give you $20 and give me $5 and give somebody else $2?

MR. HASLEY: No, no. He'd have to be in a managerial, I would say at the managerial level, Justice Marshall. I don't -- I mean, I think you would reach, just as in any corporation, you reach the realm of ridiculousness as to whether the janitor binds the corporation because he happens to be present in the circumstances. You have to deal with --

QUESTION: What rule gives --

MR. HASLEY: -- you know, reasonable scope of authority.

QUESTION: What rule gives a federal employee that right to violate the rules? I guess he could also violate a statute, couldn't he, on equitable principles?

MR. HASLEY: I guess that's the argument, as to whether in this case he did or did not.

QUESTION: You think he could?

MR. HASLEY: Our position -- we've had alternative positions. Our position was that he was authorized and did make the interpretation and bound the Government. Then -- that's the first position.

Alternatively, he was duty-bound to give us a binding answer to the inquiry. His negligence, if it is negligence -- and it could be -- is in his failure to follow the lines of communications to the Secretary, et cetera, and come back. On the other hand, he may contend, well, it was the Secretary's duty to publish all this information and put it out and to have a policy, and in the absence of any policy what was I to do?

I might note here that one of our contentions below was that in 1975 when Mr. Reeves made the decision, he has testified that there was no policy by the Secretary, and he had searched high and low and there was none. When he testified later before the Provider Benefit Review Board, he said he still wasn't aware of any that had ever existed back at that period of time. So this is --

QUESTION: Then he was making the policy himself.

MR. HASLEY: So he in effect did what he

thought was right.

QUESTION: He made the policy.

MR. HASLEY: Right, he made the -- well, I think the policy had already been made on seed money grants in the administration of the mental health, mental staffing grants as to what seed money was and its application.

QUESTION: Suppose -- in this case you emphasize that this is a nonprofit corporation, the Respondent, doing very worthy services. But if the rule you advocate were adopted, wouldn't that apply to Dupont and General Motors and Guaranty Trust of New York?

MR. HASLEY: Well, to be a worthwhile rule it would have to be a general rule. But I'm looking for an affirmance of the Third Circuit in this case, and I'm happy to go with the affirmative misconduct rule.

But as you read all these cases and you see all the problems that have come up over the country, you do have to wonder, isn't there a solution in terms of this policy? Shouldn't there be -- should our system of jurisprudence today be brought up to the point where, if the Government has a serious contention that someone's raiding the Treasury -- and I don't mean for the money here -- that they would prove that, that they would prove why a court would not grant equitable relief.

That's my contention, that if you use the ordinary principles of estoppel -- that is, full knowledge of the facts to the other party, detrimental reliance, change of position, et cetera, et cetera -- where is the Government harmed by that if they have the opportunity to show that a court of equity under the circumstances that they contend exist should not give equitable relief?

QUESTION: The red light's on.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Geller?

REBUTTAL ARGUMENT OF KENNETH S. GELLER, ESQ.

ON BEHALF OF PETITIONER

MR. GELLER: I'd just like, if I could, to clear up a few points made in Mr. Hasley's argument.

The first, as I understand it the Respondent claims that the affirmative misconduct here was Travelers' violation of this mandatory duty it apparently had to communicate with HHS about this question it had gotten. There's nothing in the statute or the Medicare regulations or in the contract that intermediaries sign with HHS that in any way imposes a mandatory duty to communicate every question they get from the provider.

Obviously, an intermediary can't consult HHS

on everything or else the whole system would break down. There'd be no reason to have intermediaries if every time an intermediary got a question it had to pass it along to HHS. Obviously, an intermediary has to use some discretion, and perhaps here bad judgment was exercised, but it was not a violation of a mandatory duty.

And I might add that some perhaps some duty would arise to pass along to HHS a question when the provider specifically asks the intermediary to do so. But once again, I repeat here, there's no evidence that CHS ever asked Travelers to get an interpretation from HHS.

QUESTION: Mr. Geller, if the intermediary is negligent in some way, is it your thought that it could be held liable?

MR. GELLER: Now, there the Government has taken the position that intermediaries are agents of the Government and therefore they have no independent liability. There is in fact a regulation, 42 CFR 421.5, which explains that the Administrator of the Health Care Financing Administration is the real party in interest in any suit arising under the Medicare Act.

As Mr. Hasley mentions, however, they have sued Travelers in this case and that is an issue that

the Third Circuit has not yet adjudicated.

But Respondents claims here time and again that it has an entitlement to a binding answer of any question it has under the Medicare program. That's what it perceives as the affirmative misconduct here, a violation of this entitlement to a binding answer.

But there obviously can't be under the Medicare Act, where there are only interim payments and subsequent adjustments, a binding answer. And the regulation that I read earlier, 405.1885, is conclusive that an intermediary can't give a binding answer and that an answer that even the Secretary gives can be reopened within a three-year period.

It is, once again, quite instructive that the Respondent has not yet explained what that regulation means or how it could have reasonably relied on the intermediary's advice in the face of it.

The Respondent says it all boils down to the scope of authority of an agent, and as this Court has said on many occasions, employees of the Executive Branch, it is not within their authority to amend Acts of Congress; they are subject to Acts of Congress.

Thank you.

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

[Whereupon, at 10:58 a.m., argument in the above-entitled case 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:

#83-56-MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner

v. COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., ET AL.

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

BY _____

(REPORTER)