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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-521

TITLE OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES ET AL., Appellants V. PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.

PLACE Washington, D. C.

DATE April 28, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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OTIS R. BOWEN, SECRETARY OF :
HEALTH AND HUMAN SERVICES,
ET AL., :
Appellants :
v. : No. 85-521
PUBLIC AGENCIES OPPOSED TO SOCIAL :
SECURITY ENTRAPMENT, ET AL. :

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Washington, D.C.

Monday, April 28, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:47 o'clock a.m.

APPEARANCES:

RICHARD K. WILLARD, ESQ., Asistant Attorney General, Civil Division, Department of Justice, Washington, D.C.; on behalf of Appellants.

ANDREW D. HURWITZ, ESQ., Phoenix, Arizona; on behalf of Appellees.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Willard, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF RICHARD K. WILLARD, ESQ.

ON BEHALF OF APPELLANTS

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

From 1950 until 1983, Social Security coverage for state and local government employees was essentially voluntary. Under the statute as it them existed, the states could opt into the Social Security system for groups of their employees and then, complying with certain conditions, opt those coverage groups of employees back out of the system.

By 1983, with the legislation at issue today in this case, it was enacted by Congress, more than nine million of about 13 million state and local government employees were in the Social Security system.

QUESTION: Does your position, your argument, assume that Congress could have put all of them under Social Security in the first instance?

MR. WILLARD: It certainly does, Mr. Chief Justice, and in fact the District Court assumed arguendo that was the case, and appellees in this case do not argue to the contrary either. And that really presents

the question of what the District Court's holding means, because if the Court's holding meant that the nine million employees now in Social Security coverage had a perpetual right of withdrawal at the instance of their states, it would be quite a sweeping holding that these nine million employees now in Social Security could be pulled out indefinitely whenever their states wanted to pull them out.

But, as the Chief Justice's question pointed out, that is not the basis for the holding of the District Court. The Court assumes that Congress could pass a law mandating coverage for all Social Security -- for all state and local employees, or presumably a rationally defined subset.

And so, the question is, what is this case about, and it -- the answer seems to me, it is about legislative draftsmanship. That is, the advice we are told is that Congress chose a drafting technique in the statute to make the Section 418 agreements non-terminable.

If Congress had simply ignored the Section 418 agreement, provided for coverage for these employees outside of the pre-existing agreements, then there would be no problem with the arrangement. And this quibble about legislative drafting really cannot possibly rise

to the level of a constitutional violation, as this Court held in Usery against Turner Elkhorn Mining Company, that the choice of statutory language cannot invalidate this kind of statute when its operation and effect are permissible.

Indeed, the option that the appellees would prefer in this case would be more destructive, not less destructive, of vested contract rights because under the mandatory coverage option the Section 418 agreements in their entirety would go out the window, not just one provision, one strand out of the bundle of sticks which has been affected by the 1983 amendments.

If you look at the effect of the 1983 amendments, it is not harsh and oppressive. The states and their employees retain the primary benefit that caused them to opt into coverage of the Social Security system; that is, coverage in a comprehensive scheme of death, disability and retirement benefits for their employees.

Now, much is made of the financial impact on the state and local governments by requiring their employees to stay in Social Security. But let's be blunt about it. The financial savings to the states from withdrawing their employees from Social Security coverage is brought about because either they provide no

benefits to replace the benefits that are lost, or because they provide cheaper benefits to replace the benefits that are lost.

The legislative history of 1983 amendments, and I would refer the Court specifically to the 1982 House Ways and Means Committee print, documents that Congress was very concerned about the harm to employees from their employers' terminating Social Security coverage, and the inadequacy of benefits that would be provided, if at all, to the employees who withdraw.

As the statute -- the Section 418 agreements previously, which permitted withdrawal of coverage, did not require a referendum or vote of the employees before their coverage was terminated. It did not require the states to provide a comparable level of benefits to replace those that were being terminated.

Basically, what it permitted, what the appellees in this case argue, is that whenever the local governments feel they need to save money, and they want to save money by ending Social Security coverage for their employees, then it's okay for them to do it.

Now, it's not true that all employees are necessarily harmed by the termination of coverage. Some employees, particularly the older ones, can receive a windfall benefit to the extent their Social Security

benefits are rather largely vested by the time coverage is withdrawn, when they can take the money they were putting into Social Security, invest it in some kind of alternative savings or retirement scheme, and then when they get to retirement age they can be double dippers.

They can get Social Security benefits which they haven't paid for, once their coverage is withdrawn, and they can get benefits from this alternative program they may have invested into. But this is also a problem Congress could take into account, and was motivated by this 1983 amendment, that is, a desire to prevent windfall benefits to some employees as a result of having been in the system for a while and then opting back out of the system, and putting their money somewhere else.

These purposes, that is, the purpose of protecting employees from the disadvantages of having coverage withdrawn, and the goal of preventing windfall benefits to other employees whose coverage was terminated, are the very typical kinds of legislative motives which Congress can use to base economic and social legislation, in which this Court routinely [inaudible] with very minimal scrutiny.

QUESTION: Mr. Willard, are there any other public assistance programs subject to agreements like

the 418 Agreement?

MR. WILLARD: There are programs that are implemented in a similar way, Justice Brennan. For example, the mini-coverage such as AFDC and so forth are cooperative programs and the states are not required to participate in the programs if they don't want to, and those programs involve similar kinds of conditions, as we argued in our brief.

Now, it is true that this program is somewhat unique in that in 1950 when it was adopted Congress was concerned that there might be a constitutional problem if they mandated coverage of state employees and Social Security.

That problem is one which is no longer considered to be a serious problem, but at the time they did envision a --

QUESTION: Was that because of the Tenth Amendment jurisprudence?

MR. WILLARD: That was presumably the problem, Justice O'Connor, that concerned them. Now, we don't think under this Court's Tenth Amendment jurisprudence that that would have been a serious problem, even prior to the Garcia decision, because Social Security involves the tax on spending power and not the [inaudible], but in any event there was enough uncertainty that this was

to some extent a unique program because of that constitutional problem.

But in substance, in effect, it is similar to many other kinds of cooperative state-federal programs in that they give -- they are based on statutes and the agreements are simply a means of implementing the statutory scheme and not something that has a life of its own.

And therefore, when Congress changes the economic and social judgment that motivated the scheme, as it did in 1983, this is the kind of change which is not normally brought to destroy some vested rights but instead is an exercise of the kind of judgment which Congress routinely exercises and which this Court routinely defers to Congress on.

So, the question is really, it seems, how did the district court go so far wrong in this kind of a text, and I think the answer is, it was only by exalting form over substance by applying a very formalistic analysis to the transaction here, that the District Court was able to hold that it was unconstitutional.

It created in effect a house of cards, and there are a number of defects in its analysis, any one of which serves to unravel the construction of the District Court. In the first place, even on the most

literal terms, the Section 418 agreements were authorized by the statute and had reference to the statutory scheme.

The right to withdraw or terminate coverage on two years' notice was based on the statute. It was not something that was negotiated or bargained for in the contractual process. It was -- the agreement simply tracked the statutory language.

California could not have negotiated a different provision even if it had wanted to. This is simple boilerplate language. It was taken out of the statute and put into the agreements.

The statute also, in Section 1304 --

QUESTION: That isn't to say it was negotiable or not from the statement that I -- part of it might certainly true, that without that statutory provision they never would have entered into this.

MR. WILLARD: That is certainly possible, Justice White, but it was distinctly a minor --

QUESTION: -- for the foundation to be probable, you really don't know, do you?

MR. WILLARD: There is no evidence about what the state of mind was of the State when it entered into the agreements.

QUESTION: Well, why do you think Congress

wrote it in, just as a --

MR. WILLARD: The reason, Justice White, appears to be, and the 1982 legislative history corroborates this, is that they thought it was simply a necessary incident of having a voluntary program.

If you think that the Constitution means that you can only have voluntary coverage, then they put an opt-out provision as reflective of that, not as an inducement of the states to enter, but as a reflection of what they thought the Constitution might be thought to have required at the time.

QUESTION: You rejected that idea, that it was bait for the states?

MR. WILLARD: Most categorically, Mr. Chief Justice, and there is no evidence in the record that it had been -- in that sense it's much like the --

QUESTION: There is no evidence to the contrary, is there?

MR. WILLARD: No, there isn't, Mr. Justice White, but if I could refer to El Paso against Simmons, a case where the Court held that the perpetual right of redemption of interest defaulters in Texas was not the key inducement of the contract, and in that case the Court didn't go back and consider evidence about the state of mind of purchasers under that contract. It

analyzed the contract and found that the perpetual right of redemption was a very minor strand in the bundle of contract rights that were obtained.

Here too, the major benefit of the states was enrolling --

QUESTION: Well, how many states wanted to withdraw at the time that that was an amendment?

MR. WILLARD: I don't have the exact number.

QUESTION: There were quite a few, I suppose.

MR. WILLARD: There were. There were several hundred thousand employees, I think covered, out of nine million. So, there was a noticeable amount.

QUESTION: But the fact is, it would appear that the withdrawal was a rather important item?

MR. WILLARD: That is not necessarily evidence of the importance of that in 1950, Justice White. In fact, the legislative history shows that for many years it was never -- it was not --

QUESTION: It certainly looks more in that direction than in yours.

MR. WILLARD: It may provide an evidence about the intent of the states today, but with all respect, I think that as to their intent in 1950, and the legislative history indicates -- this was Congress's view, this was a very minor provision of the contract.

It was not the primary --

QUESTION: Let's assume that some state that had never been in the program was thinking about getting into it now. Wouldn't you think in light of what's going on that the right to withdraw would be a very important matter?

MR. WILLARD: If that were the state's understanding now, then that could have an impact. The question, though, is not what is the understanding of states now, but what was it in 1951 when the states opted into this coverage, and there is no evidence on the record that California subjectively viewed this as being particularly important.

In fact, the legislative history -- again, I would refer especially to the 1982 committee print, indicates Congress felt that this was not a major inducement to entering into the agreements.

QUESTION: Then I'd have to say it was superfluous.

MR. WILLARD: No, Mr. Chief Justice, I'm not saying it's superfluous. It was one small strand of the rather large bundle of rights and responsibilities of the contractual relationship that was entered into. It's not our position it was a worthless provision. It obviously had some meaning.

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But, in comparison with the overall package of benefits that were created under the Act, this was a fairly minor provision. And in fact, during the first 20 years that this provision was in effect, it was very rarely used. It's only in recent years that it's come to be called into greater use which would indicate that when it was originally entered into it was not a major motivating cause of the contract.

CHIEF JUSTICE BURGER: We'll resume at 1:00 o'clock, Mr. Willard.

[Whereupon, at 12:00 noon, the Court recessed, to reconvene at 1:00 p.m. this same day.]

AFTERNOON SESSION

[1:10 p.m.]

CHIEF JUSTICE BURGER: Mr. Willard, you may resume.

ORAL ARGUMENT OF RICHARD K. WILLARD, ESQ.

ON BEHALF OF THE APPELLANTS -- Resumed

MR. WILLARD: Mr. Chief Justice, and may it please the Court, I have just been referring to Section 1304 of the Act which provides express notice of Congress's reservation of the right to amend, repeal or alter the Social Security Act, and this was part of the Act at the time the Section 418 agreements were entered into in 1951, and certainly provided notice that the statutory pattern was subject to change.

I'd like to turn now, though, to the question about, even if there was abrogation of a vested contract right, which was important to the parties when it was entered into, whether this constitutes a taking within the meaning of the Just Compensation Clause under this Court's analysis, and I think it is fairly clear that it does not.

The factors that are used by the Court vary. They were most recently restated this term, in Connolly versus Pension Benefit Guaranty Corporation, which reiterated some of the factors, the character of the

government action, the economic impact and the interference with reasonable investment-backed expectation.

In all of these cases, I think when you look at the totality of the Social Security program and the impact of participation in that program by the states, the termination of the right to withdraw is not at such a level as to constitute a taking under this Court's teachings.

QUESTION: Mr. Willard, do you take the position that -- at least indirectly, that the United States is not bound by a provision which it makes in one of its own contracts, and if it could have made the contract without that provision?

MR. WILLARD: That is not our position, Mr. Chief Justice. The United States is never bound by provision in its contracts.

Our position is that the contract here was part of a statutory scheme. It was authorized only to the extent that it was consistent with the statutory scheme, and where there was an expressed reservation in the statute of the right to alter and amend the statute, that the parties understood the contract was subject to further modification as part of modification of the statutory scheme.

And so, in that sense it's not like a debt contract where you would say the United States would not be authorized to simply repudiate it without regard to the consequences. But each --

QUESTION: I suppose that's bottomed on your early premise that you mentioned before lunch, that the government, without consulting any of the states or the local governments, could have made all of their employees subject to Social Security from the outset?

MR. WILLARD: Well, that is certainly our position in this case, Mr. Chief Justice, and it is not a position that the district court or any of the appellees have seriously disagreed with. They have assumed that that was the case, where it could happen.

And in that light as well, I think that the takings analysis shows that there is not a serious interference with a vested right.

QUESTION: But if that were not so, if the government could not have exercised that authority, then would you say they would be bound by the contract provision?

MR. WILLARD: It would certainly place the case in a different light, Mr. Chief Justice. If the government could only impose this kind of obligation by contract, then for the government to unilaterally change

the terms of the contract in a way of this nature would present a more serious argument.

QUESTION: Well, doesn't it make a lot of difference whether the government is acting without the authorization of Congress, and who do we mean when we are saying the government here, whether the government is acting at the express authorization of Congress or whether it's just -- the Executive branch is deciding to break a contract, about which perhaps Congress has said nothing?

MR. WILLARD: Well, certainly, Justice Rehnquist, we do not argue here that the Executive has a right to break contracts at all. This revision of the contracts is done pursuant to the Congress in the 1983 amendments. It would be quite another case for the Executive on its own to try to disown the contract.

What we are talking about is the power of Congress to legislate an achieve a legislative end, which everyone has assumed is permissible, that is, mandating that Social Security coverage remain for government -- state and local government employees to have that coverage.

And so, it's not a situation where the Executive is saying, we want to unilaterally alter a contract, or to ignore a contract. It is a situation

where Congress is exercising its authority to change the scope of coverage in the social interest.

QUESTION: But Congress is unilaterally altering the contract.

MR. WILLARD: Well, the question that everyone is assuming, and I think the case law is clear, that Congress could do that if it chose to do so, in effect and that the -- that Congress -- that the nine million state and local government employees covered by Social Security don't have a perpetual right of withdrawal as a result of the Section 418 agreements entered into.

If they were to acquire that, that would have been a contract which would have bargained away governmental authority to come out and bargain. The basis of the district court's holding in this case, and the essence of the claim by appellees, is the takings claim; that is, there was a vested contract right here that was taken away, and this was an uncompensated taking.

And yet, the purposes of the takings clause are quite different. As the Court referred to this term in Connolly for the purpose of forbidding uncompensated takings of private property for public use, is to bar the government from forcing some people around to bear public burdens which in all fairness and justice could

be borne by the people as a whole.

And actually, that's what the 1983 amendments did. They are spreading the burdens and benefits of participating in the social welfare scheme to a broad class of employees that otherwise would be given a right to withdraw, and so in that sense what Congress did here is the antithesis of what the takings clause was designed to protect against, in that it spreads a benefit and a burden among a large group of public, rather than causing a small group of people to bear --

QUESTION: But disallowing withdrawal costs the states some money, doesn't it?

MR. WILLARD: It certainly does.

QUESTION: Quite a bit, otherwise you wouldn't have been interested in abrogating this contract?

MR. WILLARD: Well, I think the legislative history --

QUESTION: Well, it does cost them some money, an so why isn't the taking, the taking of the money, not contract right -- they're forcing the state to pay some money.

MR. WILLARD: The states and their employees are of course forced to bear an economic burden, but they are also receiving benefits for it. They're receiving Social Security coverage for death, for

disability and retirement.

QUESTION: Well, I know. The state says that, you're taking our money that we'd like to spend on some other way of taking care of our employees.

MR. WILLARD: Well, Justice White, as I indicated they're not required to spend that money on taking care of their employees.

QUESTION: That's right. That's right. But, they are -- but the State is now being required to spend some money that it thought it had the right to refuse to spend?

MR. WILLARD: That is certainly the effect of this legislation.

QUESTION: And that the government promised that they wouldn't have to spend?

MR. WILLARD: That's -- the government did not promise that, specifically, in our view, because the statute --

QUESTION: -- specifically, nonspecifically, or unspecifically?

MR. WILLARD: Section 1304 of the statute gave notice that the scheme was subject to alteration, repeal and amendment. In that case it's a lot like the sinking fund cases.

QUESTION: Do you think that provision means

that although you -- that means that we can amend this contract to eliminate the withdrawal right?

MR. WILLARD: That's our position.

QUESTION: Don't you have to persuade the Court -- Mr. Willard, doesn't the government have to persuade the Court that given the right which you have asserted, that Congress could have put this on every employee of every one of the governmental subdivisions in the first place, that authority could not be contracted away by the provision which is in question here?

MR. WILLARD: That is our position, Mr. Chief Justice, and it's a position which no one has disagreed with, not the district court, not the appellees. Everyone has been willing to assume that Congress could not contract away the authority to make these people subject to Social Security, and it is our position, in fact they did not do it.

But, whether they did or didn't, it's -- the bottom line of this analysis is that Congress has to maintain a reserve power to tax and spend for the general welfare in this method.

QUESTION: Mr. Willard, could that have been the first instance that caused this burden on the emplyees of California and no other state, for example?

Because as I understand it, the states that got out in time are out, aren't they?

MR. WILLARD: Well, a small number of them did. But, we believe there is a rational distinction, Justice Stevens, between keeping people in the system who are already in, and not covering people who are out.

Most people --

QUESTION: Yes, but to the extent that you rely on the fact that we might have written the statute that accomplishes this result, my question is, could you have written a statute that applied to 45 states but not 50?

MR. WILLARD: Well, that would depend on what the rationale was, Justice Stevens.

QUESTION: Well, if they had made it known early enough that they didn't want to be part of it, that's all.

MR. WILLARD: That's not the way that this statute operates. It doesn't distinguish among states arbitrarily. It basically says, people who are in the system now have to stay in the system, and there is good reason for that.

People who opt in and out of the system can receive this kind of a windfall benefit because their rights may have vested, for many of these employees, and

then when they withdraw they got the windfall of keeping Social Security coverage and not having to pay for it, as opposed to many of the employees, the 4 million employees who are not covered. Most of those have never been covered by Social Security and therefore you don't have the same kind of inequity that you do when people opt in and opt out.

It was the movement in and out of the system that the legislative history shows Congress was particularly concerned about, and I think that creates more than enough of a rational basis for the distinction they drew here, in effect.

Now, I think that concludes what I prepared for my argument, unless there are further questions of the Court at this time.

CHIEF JUSTICE BURGER: Very well, Mr. Willard.

Mr. Hurwitz.

ORAL ARGUMENT OF ANDREW D. HURWITZ, ESQ.

ON BEHALF OF APPELLEES

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

This is a case, in our view, about whether the government needs to keep its promises to the states. It is a case about fundamental fairness in state-federal relationships.

In 1951, when this agreement was signed, California was not required to participate in the Social Security system. It could have chosen, as other states did, simply to remain without the system.

In order to induce it to participate in the system, the United States made California a good offer. The offer was this: participate in the system, remain for at least five years, and then you can leave on proper notice if you want to.

Caliifornia accepted the offer, and they signed a contract with the United States. That contract is a 1951 agreement. California lived by its word for 35 years.

Now, when California calls on the United States to uphold its end of the bargain, it is told the promises are no longer binding. We think that is bad federalism, but more important, we think that's bad law, and is not required in this case.

The starting point --

QUESTION: Well, then you say that the contract is binding and that the federal sovereign authority could make a waiver of a sovereign right which it had?

MR HURWITZ: Mr. Chief Justice, this is not a case where the federal government has given up any

sovereign right. This is a case where the federal government has simply given in the contract to California the right to terminate the agreement.

Once having terminated the agreement, California has no special rights vis-a-vis any other state. It can thereafter, if it is legal --

QUESTION: Then, could the federal government assert its sovereign right to put everybody under, as they could have in the first place?

MR HURWITZ: We will assume that for purposes of this case, Mr. Chief Justice.

QUESTION: If that's true, then what are we spending all the time on?

MR HURWITZ: We're spending all the time on this for two reasons. First, the contract at issue gave California the right to withdraw from the system. Once outside the system, assuming that mandatory coverage is allowed, that might be imposed on California.

The history of mandatory coverage in this country, the history of the Social Security Act, is that Congress has never in either 1935, not in 1950, not in 1983, decided to impose mandatory coverage. It is possible that Congress may at some time in the future decide to do that. But until it does, until it makes that decision, the contract right that California gained

in the Statute 51 agreement is quite good.

I think I can illustrate --

QUESTION: Do you think that Congress could have mandated coverage of only the state and local employees who were already covered? Could it have done that, by legislation?

MR HURWITZ: I think not, Justice O'Connor, and let me tell you why. The contract right that we gained in this circumstance was the right to leave the system, was the right to terminate the agreement, no better, no worse.

Once we got out of the system, once we got out of the agreement, California could be treated like any other state, no better, no worse. But it seems to me it would be every bit as direct an abrogation of the contract to pass a law that only those states that exercised their contract rights would be subject to mandatory coverage.

That would be, in the words of the government, exacting form over substance.

QUESTION: Well, Mr. Hurwitz, if -- you don't concede, but I gather you assume that Congress could have forced the states into the Social Security system?

MR HURWITZ: We do assume that, Justice Brennan.

QUESTION: Well, I'd like to say what's the difference, if it now prohibits states from withdrawing?

MR HURWITZ: Justice Brennan, what it has done in this case is not prohibit every state from withdrawing from the system. Rather, what it has not done in this case is impose the system on every state.

What the United States has done in this case is to say only to those states who trusted it, only to those states who took its word, only to those states who contracted with it, you must remain in the system. Those of you who never contracted with us, you may not, you may not if you want to. Those of you who terminated before today, you may remain out.

It strikes us that that's a direct abrogation of the contract's expectations, when the state entered into the contract, when it gained the termination right, it felt that once terminated, it would not be discriminated against for having entered into the contract.

QUESTION: Does that suggest, Mr. Hurwitz, that this is really just a contract --

MR HURWITZ: Mr. Justice Brennan, in essence it is. What we rely on today are rights that we gained through the contract.

Had there been no contract, had there been no

agreement between the states --

QUESTION: Well, if it's just a contract action, why do you need to rely on the takings clause?

MR HURWITZ: We rely on the takings clause in addition to making our contract claims, Justice Brennan, because contract rights are property rights as this Court has pointed out. We would be perfectly content to win as a contract action or a due process action.

QUESTION: In what case have we said a contract right was a property right?

MR HURWITZ: This Court said it most recently in the Monsanto case, in the case dealing with trade secrets. It said it a long time ago in Lynch, and it has reiterated that point ever since.

QUESTION: How could you have sued the United States on a contract?

MR HURWITZ: Well, that would have been rather difficult.

QUESTION: I would think it would. You want some waiver of sovereign immunity, don't you?

MR HURWITZ: Well, I suppose we could have proceeded in the claims court under the Tucker Act and sought compensation, but what we were really claiming here was that this was a taking, and violating our constitutional rights.

QUESTION: Inverse [inaudible].

MR HURWITZ: Sir?

QUESTION: That's -- do you want an injunction?

MR HURWITZ: We don't want -- we asked for an injunction but what we really wanted was a declaration. We wanted a declaration of what Congress and the United States has done -- have done to the 1983 amendment to the Social Security Act, was taken. That was what the claim below was.

QUESTION: Mr. Hurwitz, Section -- I think 1304 presented the right to the Congress to amend or repeal any section of the Social Security Act, as I understood it.

MR HURWITZ: That's correct, Justice Powell.

QUESTION: What is your comment or response with respect to the effect of where it repealed, in that section of the Act, in light of what the Congress did in 1983 when it did in fact repeal the statute you rely on?

MR HURWITZ: Justice Powell, Section 1304 allowed Congress to amend a repeal to the Act. Section 1304 did not present to Congress the right to amend or repeal contracts entered into by the Government under the Act. Indeed, I think one could argue that this reserved right to change the Act is one of the motivating causes for the states in 1951 and earlier to

sign up these agreements when they were available.

It may well have been that in future years the Congress could have decided that termination rights could not be given in agreements, but in 1951 they were. It is the right not to change the agreement that is at issue here, not the right to change the Act.

We understood the benefit levels might change. We understood that coverage might change. We understood that many things in the Act might change. We also understood that we had the contractual right, if those changes occur, to terminate our voluntary consent and then be treated as if we had never contracted.

QUESTION: They did have the right to repeal 1418, didn't they?

MR HURWITZ: They certainly did, Justice Powell.

QUESTION: And isn't that the statute you rely on?

MR HURWITZ: No, we're not, Justice Powell.

QUESTION: You relied on the original there, didn't you?

MR HURWITZ: We relied originally not only on Section 418, but moved on the written contract which we were given by the United States, which California signed.

QUESTION: Contract, though, only possible

because of 418, at the time?

MR HURWITZ: That is correct, Justice Powell. The contract reflected the law as it stood at the time, as all contracts do.

QUESTION: Suppose the government in its sovereign authority tomorrow decides to acknowledge the right of the states to terminate but also hits them under Social Security beginning at midnight on the same time as the termination. Where are you then?

MR HURWITZ: If it does that with respect to all the states, Mr. Chief Justice, then we'll go back to the district court, litigate our claims about whether mandatory coverage is permissible. But if it does that with respect to --

QUESTION: Wait a minute. I thought you had conceded that the government had this sovereign power to put everybody under it.

MR HURWITZ: Mr. Chief Justice, we have assumed that for purposes of this case. The district court did not reach that issue because it did not have before it a case where the government exercised that sovereign power. But if that were to occur, it seems to us our claim would not be on the contract.

The contract gave us, in Mr. Willard's words, a perpetual right to withdraw. It did not give us,

however, a perpetual right to remain without the system. We had the right only to withdraw, and thereafter to be treated the same as any other state.

If all states were treated the same, then we'd have a claim of whether or not Congress exceeded its power on that treatment, but that's not the claim presented by this case.

I want to, before I go on, by the way, to respond to the question that Justice Brennan asked earlier. We are aware, and the government points to none in its brief, of any other federal program where the right to terminate the state's participation is included in the agreement.

This is a rather unique arrangement, and we think that's one of the things that points out why this is the contract. In 1950, when Congress enables the United States to enter into the agreements, they were circumventing not only the political and legal problems that it perceived in mandatory coverage, it gained something.

It gained the promise from the state that it would remain in the system for five years, and thereafter terminate its participation only after two years' notice. A typical federal grant program, a typical cooperative federal-state program, allows the

state to decide every year whether it wants to remain or leave.

This is a unique contract and I have not heard from the government in any stage of this litigation a suggestion to the contrary.

QUESTION: But the fact it's unique, Mr. Hurwitz, doesn't mean it's unconstitutional.

MR HURWITZ: No, quite to the contrary, Justice Rehnquist. We think the contract is quite constitutional. We think the contract was drawn pursuant to the powers that the federal government had at the time, and we think that the federal government is required as a matter of constitutional law to adhere to this contract.

QUESTION: Not by the contracts clause, but by the takings clause?

MR HURWITZ: That's correct, the contracts clause is not applicable to the federal government, although we do think that there's an analog in the due process clause that would require the federal government also to live up to its contracts.

QUESTION: Well, what sort of an analog is that?

MR HURWITZ: This case -- this Court in the Thorpe case indicated that for practical purposes the

due process clause could be viewed as the federal equivalent of the contracts clause. With respect to the appellees who are not in the State of California, the state and local subdivisions, we think their due process rights, their rights to have the federal government obey a contract, have also been violated in this case.

QUESTION: Was Thorpe a holding to that effect?

MR HURWITZ: Thorpe was not a holding to that effect, but the language in Thorpe on that point, I think, is quite clear.

Nonetheless, Justice Rehnquist, we think we can prevail without resort to the due process clause. We think it is the takings clause which should govern in this case.

QUESTION: Mr. Hurwitz, can I ask you a question about that? We have talked a little bit about the hypothetical of not all states being subject -- I mean, all states weren't in the -- had the contract right. But for purposes of analyzing the takings issue, would it not be precisely the same issue if all 50 states were in exactly the same position?

MR HURWITZ: I think, Your Honor -- let me tell you why, by way of an example. This Court held a long time ago in the Stone versus Mississippi case that a state could, if it wanted to, pass a law outlawing

lotteries, even if it had given a lottery contract to an individual.

I would not think that anyone would today contend that the lottery contract with the state is worthless, because the state in the exercise of its sovereign power might someday decide to set up a different system.

In this case we've got a contract right. Congress might conceivably in the exercise of its sovereign power someday render that right worth less than it is today, but Congress has not chosen to do so. Congress has expressly, on at least three occasions, considered the issue of mandatory coverage and decided that was not something it wanted to do.

We are willing to take our risks within the congressional system. It seems to me that is what Garcia is about. It allows the states through the exercise of their representation in the Congress, through the exercise of their political representation, to face the risks that anyone might face, of general legislation. But it doesn't mean that our contract right is worthless because someday, in a hypothetical case, Congress might decide to do something different.

We have been accused in this case of arguing form over substance. I want to make plain that we are

not arguing form over substance. As I indicated to an earlier question, we think that any Act which did what this Act did, and only what this Act did, would appropriate our contract rights, would constitute a takeover.

And, we think that it doesn't make any difference if Congress could have in some other way had the same effect on us, because Congress has not chosen to do so.

QUESTION: Mr. Hurwitz, you speak of "we." Are you representing the State here?

MR HURWITZ: I am, Your Honor, and I am also representing the other appellees.

QUESTION: Because your name appears on down in the amicus brief.

MR HURWITZ: Your Honor, I was fortunate enough to be asked by the parties to appear today, and I am grateful for that opportunity.

QUESTION: Would you say the State of California -- is the State really a party?

MR HURWITZ: The State is a party, Your Honor. It was a plaintiff in the court below.

QUESTION: Mr. Hurwitz, there were some cases decided during the '30s, Dodge being one of them, where the Depression came and contract rights of teachers and

other public employees were cut back on by states, and the states generally won those cases.

I suppose if they had had the foresight to think of the takings clause rather than the contracts clause, they may have -- maybe they would have lost.

MR HURWITZ: I hope not, Your Honor. I would have thought that under thoe circumstances the principle would have been exactly the same, which is that when a contract is entered into -- in the Dodge case, for example, as I read this Court's holding, it was that one simply did not read a statutory scheme as a contract.

The sovereign, the state government, the federal government always has the ability through eminent domain to take contract rights and to pay for them.

In the Dodge case what we had was an adjustment of rights between third parties, not between the state, not between the contracting party, not between the federal government and the party that had relied on its word. So, I think those cases would come out the same way under any sort of argument.

QUESTION: Well, wasn't Dodge between the state agency or -- otherwise you wouldn't get into it at all, you wouldn't get into the prohibition against impairment of [inaudible] if you simply had a private

party.

MR HURWITZ: Dodge was a case, as I recall, Justice Rehnquist, between an employee and the Board of Education. The state had passed a law which readjusted the rights between employees and the Board of Education because it dealt with retirement benefits and other benefits.

QUESTION: Well, do you think the case would have come out differently if the Act had been passed by the county board of supervisors rather than by the state?

MR HURWITZ: Oh, no, quite to the contrary. What I am saying is that there is a more compelling case for holding the government to its bargain when the government is a contracting party. In that case the issue is whether a general act by the state legislature, which had an incidental effect on a contract to which a governmental agency also happened to be a party, violated the contract clause.

QUESTION: But isn't the governmental agency and the state the same for constitutional purposes in that situation?

MR HURWITZ: They are, Justice Rehnquist, but in that case the challenge was to the Act. The challenge was not to a breach of contract by the Board of Education. This is a case where the breach, it seems

to me, is much more direct. The breach is by the Congress, by the United States, as a contracting party.

The government's chief allegation in this case seems to be that even if this is a contract, even if we did gain a contract right, it doesn't matter because the United States is a sovereign. We know of no decision of this Court which indicates that the right to breach of contract is an attribute of sovereignty. Indeed, the decisions of this Court are quite to the contrary.

But more important, that argument just doesn't hold water when analyzed. It was the government who chose to put the contract clause in this contract.

QUESTION: What if the government makes a contract which it is not legally authorized to make?

MR HURWITZ: It may well be under those circumstances, Mr. Chief Justice, that the contract would be invalid ab initio.

QUESTION: The entire contract, or just the particular unlawful clause?

MR HURWITZ: I would think under these circumstances, Mr. Chief Justice, you would have to strike the whole contract. California entered into this agreement understanding that it got various benefits thereby. It not only got Social Security coverage for its employees, but it also got the right to terminate.

But the United States is now saying, well, we only meant to offer half of those benefits. We didn't mean to offer you everything you thought you got in that contract, and California ought to have the opportunity to say, well, maybe we didn't mean to enter into it.

The important point, I think, is this. It was the United States which chose to use the vehicle of contracting. It was the United States which thought there were benefits from using the contract.

The United States need not use contracts in the future if it feels that it is bound somehow by them to a result that it doesn't want to go to. The United States may, if it wants to, and wants to pay just compensation, use the takings power, use the eminent domain power to appropriate contract rights for its benefit.

But, what the United States may not do, what the Lynch case teaches, what the Perry case teaches, even the sinking fund case teaches, the United States may not simply walk away from its contract obligation because that happens to be a circumstance that is particularly beneficial to it in a situation.

QUESTION: Do you disagree, then, with the government's reading of Perry against United States that was based solely on the monetary clause?

MR HURWITZ: I do, Your Honor, and it seems to me that when one looks at Lynch, which is a circumstance where the government was acting again under the taxing and spending power, as it is in this case, and one looks at the Darlington case, particularly Justice Harland's dissent, the message seems to be clear that the government is bound by its agreements.

In that particular circumstance the agreement it was bound by dealt with the spending power. It dealt with the power to raise money. But that's -- I don't think the principle is limited to those circumstances. I think the principle extends to any circumstance where the government enters into a contract.

QUESTION: Even though Congress has expressly authorized the government to break the contract?

MR HURWITZ: I think that's right, Justice Rehnquist. Congress can have no power greater, it seems to me, than the Executive to abrogate a contract.

QUESTION: Therefore, any breach of contract that Congress authorizes is automatically a violation of the takings clause? That's your position?

MR. HURWITZ: Justice Rehnquist, we in our brief -- and I would argue today that Congress is entitled under certain circumstances, under certain limited circumstances, to abrogate contracts. It seems

to us that is the message of the U.S. Trust case. But it may do so only --

QUESTION: The U.S. Trust was an impairment of contracts clause case.

MR HURWITZ: That's correct, Your Honor.

QUESTION: Which you agree has no application to the federal government?

MR HURWITZ: That's correct. And one might argue, the broadest possible argument is that the federal government simply has no power whatsoever to abrogate contracts. But because it has the power to give just compensation, because it has the power of eminent domain, that it must abide by its contracts like everyone else.

But it seems to us that the least standard that you can hold sthe government to is the standard of the U.S. Trust case which is what we have held the states to. When they have breached their own contracts, when they breach a contract --

QUESTION: But that's a specific clause of the constitution, that is involved here, that doesn't apply to the federal government.

MR HURWITZ: I agree, Justice Rehnquist.

QUESTION: So, why do you derive so much comfort from that case?

MR HURWITZ: Justice Rehnquist, I think that that case indicates that's the least standard that the federal government can be held to. I'm aware of no case in this Court --

QUESTION: But the clause on which that case depended, which interpreted it, applies to the states but not to the United States?

MR HURWITZ: I absolutely agree, Justice Rehnquist. And what we are arguing by analogy is that if the states are allowed to withdraw from their own contracts, only on what this Court essentially called compelling circumstances, that there should be no less --

QUESTION: Well, that argument by analogy should have been made at the Constitutional Convention. Perhaps the framers would have bought it, that you want to hold the United States to at least as high a standard as the States. But apparently, it was never made to them.

MR HURWITZ: Justice Rehnquist, I assume that's correct. On the other hand there is nothing in the Constitution which apparently allows the United States government, once having entered into a contract, to walk away from it.

QUESTION: Therefore, you would require an affirmative authorization in the Constitution to allow

the United States to disavow one of its contracts rather than vice versa?

MR HURWITZ: No, I think there is a prohibition, Justice Rehnquist, in the Constitution of the United States walking away from its contract, and that prohibition is in the takins clause because this Court has recognized time and again that contractual rights and other intangibles are property rights.

QUESTION: Well, Mr. Hurwitz, it seems to me the weakness of the argument is in not recognizing the possibility that the contract itself reserved the right to the federal government to withdraw by virtue of its reference to the federal law, which it made applicable, and the federal law said provided for the right of Congress to repeal or amend, reject. And you really -- Justice Powell brought this to your attention but it seems to me you really haven't satisfactorily answered that.

MR HURWITZ: Justice O'Connor, let me take another shot at it and see if I can -- the contract contained the clause, an explicit clause allowing the state to withdraw from the [inaudible] every contract, not only this one but every contract ever made to by any party, incorporates in it the law that was existing at the time.

There is no need for the United States in this contract to mention the right to terminate the agreement, if in fact that right was solely dependent on whatever law existed at the time.

The United States did something more. It not only told us that there was a statute that allowed withdrawal, but it put it in writing. It told us at the time that if we wanted to withdraw, sign up the agreement and we'll gain that right.

It seems to me that the right to change the statute without eventually changing the statutory scheme does not mean -- and the sinking fund cases I think expressly go to this point -- does not mean that the government can retroactively change a contract that it has entered into under that statute. That contract is [inaudible].

Going back to the Chief Justice's point, it seems to me appropriate that there was another way for the government to go. The government could have, we're assuming for purposes of this case, imposed mandatory coverage on all the states. It could have included everybody within the system.

It didn't choose to do so for good legal and perhaps political reasons. Not having chosen to do so, it seems to me, it cannot go back to the contract now

and say, well, we could have changed the contract in any event.

I don't think the right to change the contract was reserved, and the United States could have, in drawing up the contract, put that into the contract. It could have said, you'll have no termination right. It could have said, your termination right will be changed, perhaps without notice.

QUESTION: Well, in effect I think perhaps it did.

MR HURWITZ: Justice O'Connor, I think that's a view of the case we just simply don't share. The contract is separate from the statute, and in this case the contract was not changed. It was the statute that was changed.

I think it's important also to view this case a little bit in the light of federalism. There are, as Justice Brennan pointed out earlier, any number of cooperative programs between the state and federal government.

This state has in the context of grant programs, entitled grant programs, applied general contract principles to those contracts. It has said the federal government is bound by its word and the states are bound by their words.

QUESTION: Weren't those cases, Mr. Hurwitz, in which Congress had not specifically provided to the contrary?

MR HURWITZ: That's correct, Justice Rehnquist, because those were cases in which the contract was in effect defined by the statute. We have a case here where the contract is defined by the 1951 agreement.

QUESTION: Yes, but then Congress comes along in 1983 and says, we now wish this contract repudiated.

MR HURWITZ: Once having entered into that contract, Justice Rehnquist, we think Congress has no greater ability to repudiate the contract than the Executive would have had.

The Constitution in the takings clause, the Constitution to the extent the due process clause is applicable, would seem to us to apply equally to legislative takings as to administrative takings, and in this case what we have is a legislative taking.

With respect to the issue of cooperative federalism, the important point, I think, is this: that under all these programs, under all the programs with which the Court is familiar, it is important that the states be able to take the federal government at its word.

It is important that the states be allowed to trust the federal government, and the federal government in return must be able to rely on the states entering into these agreements to administer programs.

If the Court today holds that the federal government is not bound by its word, or that the states are, the effect on the system of cooperative federalism, we think, would be devastating.

As I said at the outset, we think that would be bad federalism. More important, we think it would be bad law. It would be bad constitutional law and it would be a repudiation of this Court's prior decisions that this Court is bound by its undertakings.

For that reason, we think that this Court should affirm the judgment below. Thank you.

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

MR. WILLARD: Yes, Mr. Chief Justice.

ORAL ARGUMENT OF RICHARD K. WILLARD, ESQ.

ON BEHALF OF THE APPELLEES -- REBUTTAL

MR. WILLARD: If I could mention briefly, first, this Court noted in its recent opinion in Pension and Benefit Guaranty Corporation against R. A. Gray and Company that the framers specifically rejected a proposed amendment to the Constitution that would have

subjected the federal government to the contract clause.

So, far from simply omitting it, it is something that was considered and rejected by the framers, as this Court's unanimous opinion in R. A. Gray noted.

In comparing the contract situation with the constraints on the federal government's repudiation on debt as brought about in the Lynch case, I think we can see some real comparisons. In Lynch we had a situation where we had a contractual scheme that was repudiated outright by the government by simply repealing the authorizing statute, thus in effect repudiating the debt totally and leaving nothing in its place.

And in fact, the Solicitor General in the Lynch case refused to offer any kind of police power or public welfare justification for the repudiation. Now, the only reason the government did it was, they wanted to save money. They owed money. They wanted to save money. They repudiated the debt.

Now, in this case, however, we have a situation where --

QUESTION: Under that case, I take it, it wouldn't have made any difference if the government had reserved in its initial contract the power to amend the statute?

MR. WILLARD: That would have kind of made a difference.

QUESTION: Well, like saying, we've now decided to amend this by not paying you at all?

MR. WILLARD: Justice White, I think if the contract -- if the statute had included that reserved right expressly --

QUESTION: You mean, just generally, we have the power to amend?

MR. WILLARD: If that's what it said --

QUESTION: If a person said it -- it just includes a general power to amend, and so it could amend and say, we know you've performed an awful lot of work for us but we're not going to pay you now?

MR. WILLARD: If that's what it provided.

QUESTION: Well, it isn't what the contract provided expressly. It just said, we have the power to amend.

MR. WILLARD: In this case it did. But it's quite different because, for example, suppose that Congress had repealed Section 418 outright. No one would claim that the states would have a right to insist on participating in Social Security if Section 418 were repealed, and the Social Security program were terminated in its entirety.

That would have rendered those agreements totally worthless, and yet they could have been repealed outright and there wouldn't have been a problem.

The fact here is that Congress did something milder, much less of a violence to the contract, because they simply repealed -- one provision was rendered moot, not the entire contractual scheme. And so, here the reservation of right to do this is much less inclusive than what Congress could have done, and which the appellees in this case don't really disagree with.

The important thing to keep in mind, though, is that it's not simply repudiation of debt. Congress made a judgment there was a public welfare purpose to be served for the benefit of the employees of state and local governments, of keeping them in Social Security coverage, that if your employers wanted to save money by terminating your Social Security coverage, that that was a bad thing, that for the benefit of the welfare of the employees as well as for the integrity of the Social Security system.

And so, this isn't a case where Congress said, we want to save some money for the federal government so we're going to repudiate our debts. This is a situation, and the legislative history abundantly documents it, where Congress was concerned about --

QUESTION: May I ask, would the constitutional issue be any different if Congress did no more than accept this over the system?

MR. WILLARD: That would present a case -- well, that would present a case that would be closer to the Lynch situation. I think still, given Section 1304, Congress reserved the right to do that in setting up the original statutory scheme. But here, the legislative history carefully documents that Congress had additional motives, not simply to save money for the system.

You have to keep in mind that the Social Security coverage is a two-way street. While it's true that the states and their employees pay money into the system, they also receive benefits. And so, by keeping coverage for these employees, Congress is not simply saying, we want to keep getting money and giving noithing in return.

The employees are receiving something in return, that is, the death, disability and retirement benefits.

QUESTION: Yes, but I think you would make the same argument, they could get a better bargain elsewhere?

MR. WILLARD: Well, I don't think that's necessarily true, Justice Stevens, and the legislative history carefully documents it, that in most of these

cases Congress found that the employees were not getting a better bargain elsewhere. They were receiving coverage that was less comprehensive than Social Security coverage.

For example, it is not portable. Social Security coverage goes with you from job to job, whereas coverage in a state or local pension plan may not go with you if you moved outside of coverage, and the legislative history shows that Congress was concerned about the lack of portability of benefits, especially for younger employees who would be very seriously disadvantaged if they didn't have Social Security coverage.

That, after all, is the rationale for having a nearly universal social insurance scheme, because it provides a level of benefits to people, whether they move from one job to another or not. And that's the kind of judgment Congress made here, and which they --

QUESTION: Mr. Willard, a few states now have withdrawn. What happened to the employees in those states who were under Social Security?

MR. WILLARD: Well, the legislative history has some information about it in general, although it doesn't document what happened in each case. It says that most of the cases, that the states did try to

provide alternative coverage, but Congress found the alternative coverage provided was not as good as Social Security coverage.

In other words, it wasn't as comprehensive and it certainly didn't provide the portability feature, that is, the fact that the coverage would move with the employee from one job to another.

QUESTION: Some coverage was provided?

MR. WILLARD: It said in most of the cases, but there's no legal requirement, Justice Powell, that they provide it. In other words, under the statute, and they are in the position of the appellees here, if they just wanted to save the money by providing nothing in return for cancelling Social Security, they could do it. And that is the right we are insisting on being able to use.

QUESTION: Mr. Willard, suppose Congress said -- they passed a law putting all the states under -- purporting to put all the states under this Social Security system. Wouldn't the -- why would the contract claim be any different?

California says, well, look, you may have passed the statute, but remember we have a contract which we should be able to be in or out of, is Social Security.

MR. WILLARD: Apparently they're not willing to assert that kind of a claim because they're not that sure of themselves.

QUESTION: Well, I know, but I just wondered what difference it would make.

MR. WILLARD: Well, that's the essence of our position, Justice White, is that since it wouldn't make a difference those vested contract rights such as they are couldn't be worth very much if they wouldn't stand up in the face of that kind of legislative enactment.

QUESTION: And that issue, whether Congress has the power to put them all in or not, isn't in this case, is it?

MR. WILLARD: No one has disagreed with that, according to the appellees. They are willing to assume it. And of course, we argue in our brief that Congress has the power to do that.

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

[Whereupon, at 1:36 o'clock p.m., the case in the above-entitled matter was submitted.]

CERTIFICATION

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

#85-521 - OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Appellants V. PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.

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

BY Paul A. Richardson

(REPORTER)