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SUPREME COURT OF THE UNITED STATES

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OTIS R. BOWEN, SECRETARY OF HEALTH    :
AND HUMAN SERVICES, ET AL.,
                                      :
          Petitioners,
                                      :
        v.                                  No. 87-712
                                      :
MASSACHUSETTS;
                                      :
and                                   :

MASSACHUSETTS,                        :

          Petitioner,                 :

        v.                            :     No. 87-929

OTIS R. BOWEN, SECRETARY OF HEALTH    :
AND HUMAN SERVICES, ET AL.,
                                      :
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PAGES: 1 through 46

PLACE: Washington, D.C.

DATE: April 20, 1988

HERITAGE REPORTING CORPORATION

Official Reporters

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Washington, D.C. 20005

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 OTIS R. BOWEN, SECRETARY OF HEALTH :
AND HUMAN SERVICES, ET AL.,

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Petitioners,

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v. No. 87-712

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7 :

8 and :

9 MASSACHUSETTS, :

10 Petitioner, :

11 v. : No. 87-929

12 OTIS R. BOWEN, SECRETARY OF HEALTH :
AND HUMAN SERVICES, ET AL.,

13 :

14 ----------------------------------x

15 Washington, D.C.

16 Wednesday, April 20, 1988

17 The above-entitled matter came on for oral argument

18 before the Supreme Court of the United States at 11:09 a.m.

19 APPEARANCES:

20 ROY T. ENGLERT, ESQ., Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; on behalf

21 of the Federal Petitioners/Respondents.

22 THOMAS A. BARNICO, ESQ., Assistant Attorney General of
Massachusetts, Boston, Massachusetts; on behalf

23 of State Respondent/Petitioner.

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

2 CHIEF JUSTICE REHNQUIST: Mr. Englert, you may
3 proceed whenever you are ready.

4 ORAL ARGUMENT OF ROY T. ENGLERT, JR., ESQ.
5 ON BEHALF OF FEDERAL PETITIONERS/RESPONDENTS

6 MR. ENGLERT: Thank you, Mr. Chief Justice, and may
7 it please the Court:
8 This case presents jurisdictional questions. The
9 Grant Appeals Board of the Department of Health and Human
10 Services disallowed $11.3 million in federal financial
11 participation under the Medicaid program to the Commonwealth of
12 Massachusetts. The Commonwealth challenged that disallowance
13 in the United States District Court for the Commonwealth of
14 Massachusetts claiming that that court has jurisdiction. Our
15 position is that the United States Claims Court has
16 jurisdiction.
17 The Court of Appeals agreed with each side in part.
18 We petitioned this Court to review the Court's partial
19 assertion of jurisdiction, and the Commonwealth
20 cross-petitioned to review the Court's partial refusal to
21 exercise jurisdiction. The petition and cross-petition were
22 both granted.
23 By way of background, this case arises from two
24 audits covering the years 1978 to 1982 of Massachusetts
25 expenditures at intermediate care facilities for the mentally

1 retarded.

2 Applying a longstanding HHS regulation, the auditors
3 determined that Massachusetts had improperly claimed Medicaid
4 reimbursement for certain educational services that the State
5 Department of Education was required to pay for. $11.3 million
6 in federal financial participation was disallowed, and that is
7 a small fraction of the total federal financial participation
8 for Massachusetts at these facilities in the years in question.

9 As was its right, Massachusetts challenged that
10 disallowance in the Grant Appeals Board, an entity created by
11 regulation in 1973 to review disallowances on behalf of the
12 Secretary. The Grant Appeals Board upheld the disallowances.
13 The money has since been recouped by reducing certain Medicaid
14 grants to Massachusetts in subsequent years.

15 In response to the GAB decisions, Massachusetts filed
16 complaints for judicial review in the District Court. The
17 Commonwealth recognized that there is no statute providing
18 specifically for judicial review of disallowance decisions.

19 The complaints did assert that 5 U.S.C 702, part of
20 the Administrative Procedure Act, waives the sovereign immunity
21 of the United States, and permits this kind of action to
22 proceed in District Court.

23 The District Court said that it had jurisdiction.
24 The District Court disagreed with the Grant Appeals Board
25 decisions in their entirety, and said that the Commonwealth was

1 entitled to federal financial participation for all of these
2 services, and entered a judgment reversing the Grant Appeals
3 Board.
4 We appealed, and argued among other things that the
5 District Court had entered a money judgment against the United
6 States without any applicable waiver of sovereign immunity that
7 permitted such a judgment.
8 The problem with using 5 U.S.C. 702 as the applicable
9 waiver of sovereign immunity is that that statute applies only
10 to actions "seeking relief other than money damages". We
11 contend that the $11.3 million at issue here is money damages.
12 Now it is important to understand that we were not
13 arguing that the Grant Appeals Board decisions were
14 unreviewable. Rather our position was that the Tucker Act
15 which does waive sovereign immunity for money judgments
16 permitted an action in the United States Claims Court.
17 QUESTION: Now Mr. Englert, there is a split of
18 authority, is there not, in Courts of Appeal about whether
19 money damages means compensatory damages or whether it refers
20 to the Tucker Act, any money relief question?
21 MR. ENGLERT: There is a split in the circuits, yes.
22 QUESTION: And the Court of Appeals for the District
23 of Columbia takes the view that money damages does not mean
24 what you say it means in that statute?
25 MR. ENGLERT: That is correct. That court actually

1 stands along among the Courts of Appeal.

2 QUESTION: So that is really the crux of what we need

3 to focus on, I suppose, in this case.

4 MR. ENGLERT: That is correct. That is the crux of

5 the issue presented by the Commonwealth's cross-petition, and

6 we think that it is really the crux of the issue presented by

7 our petition, too.

8 That question is addressed rather squarely in the

9 legislative history of the 1976 amendments to the APA. When

10 Congress used the phrase money damages, it meant monetary

11 relief as opposed to declaratory injunctive mandamus relief.

12 QUESTION: Why do you suppose that Congress did not

13 use language like is used in the Tucker Act if they intended it

14 to mean the same thing?

15 MR. ENGLERT: Well, there actually is no language in

16 the Tucker Act that refers to money damages. The Tucker Act is

17 a very old statute. And the limitations on the powers of the

18 Claims Court under the Tucker Act have been inferred from the

19 surrounding context, and not directly from the language of that

20 statute. It is a very broadly written statute.

21 In any event, I think that Congress took a proposal

22 that was given to it by the Administrative Conference, a

23 proposal that is backed up by numerous memoranda that often

24 refer to all forms of monetary relief being excluded from the

25 proposal.

1 The Administrative Conference happened to use the
2 words money damages, words that are not unnatural to use to
3 describe all forms of monetary relief, and those are the words
4 that Congress enacted.
5 QUESTION: Well, I guess that Judge Bork in his
6 opinion for the CADC found some legislative history the other
7 way.
8 MR. ENGLERT: Very little, Your Honor. He relied
9 almost entirely on a single reference to grant-in-aid programs
10 in the House report and the Senate report. That reference is a
11 part of a long list of actions in which sovereign immunity had
12 been asserted in the past and might not be asserted in the
13 future under the APA amendments. Not every grant-in-aid
14 lawsuit has to be an action seeking the payment of money by the
15 federal government.
16 QUESTION: Well, let me ask you on that point.
17 Does a state in the position of Massachusetts have
18 any ability to prevent recoupment by the government during the
19 appeals process, so that they would not be in the position of
20 needing to ask for the money back?
21 MR. ENGLERT: Some states have succeeded in
22 preventing recoupment, albeit under an assertion of
23 jurisdiction that we think is invalid. We think that they have
24 no proper means to prevent recoupment.
25 QUESTION: So in your view as a practical matter, a

1 state will always be in the position of having to seek money
2 damages in effect, and always be channeled to the Court of
3 Claims in any of these grant programs. So that when they want
4 an interpretation of the statutory language, in the
5 government's view, they are always going to be channeled to the
6 Court of Claims.
7 MR. ENGLERT: No, Your Honor. Suppose the Secretary
8 promulgated a new regulation. And before that ever took
9 effect, if it were to take effect January 1, 1989, and on
10 April 20, 1988, the state brought a prospective challenge to
11 that regulation. Say the Secretary did something outrageous
12 like promulgating a regulation saying that there will be no
13 further reimbursement for intermediate care facilities for the
14 mentally retarded period.
15 There is no accrued monetary claim in that case, and
16 there is not going to be an accrued monetary claim during the
17 initial pendency of the lawsuit. And we have no problems
18 letting the District Courts address that and grant a
19 declaratory relief.
20 QUESTION: Would you have trouble with just a
21 declaratory judgment that says here is the situation, we are in
22 disagreement with the government on this issue, we do not ask
23 for an injunction now, or any money, or anything else, we just
24 want a judgment, and we think that the Secretary will live up
25 to the judgment?

1 MR. ENGLERT: If they do not want money.

2 QUESTION: Well, they do not ask for it. But if
3 there is a judgment, they are probably then going to go to the
4 Court of Claims, and the legal issue will have been settled.

5 MR. ENGLERT: But the ordinary rules of
6 res adjudicata, as we understand them, preclude that kind of
7 claims splitting, first getting your judgment in one court, and
8 then bringing a separate claim in another court.

9 QUESTION: I am just asking you, would you object
10 just to declaratory judgment?

11 MR. ENGLERT: Standing alone, we would not. Although
12 we would object if they were then successful in transforming
13 that into a money judgment for past due money in the Claims
14 Court, yes.

15 QUESTION: What is the District Court who gets
16 something like that supposed to do, I recall confronting this
17 on the D.C. Circuit, are you supposed to deem that to include a
18 claim for monetary relief or not.

19 You know, the usual rule, what court you are in is to
20 be adjudged on the basis of the complaint, right, and a
21 complaint is deemed to be amended to show that you get all of
22 the relief that the proof entitles you to.

23 And when you are asking for a declaratory judgment in
24 a matter where it is clear that the effect of that declaratory
25 judgment will entitle you to money, I assume that without any

1 amendment of the complaint at all that the court that enters
2 the declaratory judgment ought to enter an order for the money
3 relief as well, should it not?
4 MR. ENGLERT: I think that is right.
5 QUESTION: So really what you say is that the state
6 can bring the action if they specifically disclaim any desire
7 for monetary relief. Not just bring it purely for a
8 declaratory judgment, but say we are asking for a declaratory
9 judgment, and we waive all right for monetary relief.
10 MR. ENGLERT: We do think that that is the better
11 view. And alternative view would be to say that the state may
12 bring the claim, but is foreclosed from later seeking money.
13 But we think that the view that you just stated is the better
14 approach.
15 QUESTION: But there is a way to do it?
16 MR. ENGLERT: There is a way to do it, yes.
17 QUESTION: So you think that the government, if there
18 was a declaratory judgment which you did not object to, you
19 think that the government would then still refuse to refund the
20 money, if it had been adjudged finally in a court that the
21 Secretary had been wrong all the way?
22 MR. ENGLERT: If we thought that the state had
23 brought the action in District Court to secure District Court
24 jurisdiction over an action that should have been in the Claims
25 Court if the state wanted money, I think that we might very

1 well take that position.

2 QUESTION: Well, the state did not ask for money. It

3 even disclaims. It did not want any money.

4 MR. ENGLERT: Well, if they say that they do not want

5 any money, we are not going to give them any money.

6 QUESTION: Even though you had been unlawful all the

7 way?

8 MR. ENGLERT: Again if the state said that it did not

9 want it and secured jurisdiction in that manner, we would not

10 see any reason.

11 QUESTION: Well, Mr. Englert, there is some

12 legislative history, as you have acknowledged, that indicates

13 that Congress did expect these grant-in-aid programs to be

14 decided in the District Courts and the Courts of Appeal.

15 MR. ENGLERT: Well, as I say, there is a single

16 reference to grant-in-aid programs in both committee reports.

17 Justice O'Connor, not all changes to administration

18 of grant-in-aid programs involve seeking money from the federal

19 government. A good example is Bowen v. Kendrick, which this

20 Court heard just last month. That certainly is a challenge to

21 the federal government's administration of the grant-in-aid

22 program. There is a contention that the statute under which

23 that program is administered violates the establishment clause.

24 QUESTION: Oh, yes. But most of these issues come up

25 and involve money. That is why the states are worried about

1 it, and that is why the grantees are worried. And there is
2 certainly some indication that Congress thought that these
3 issues were better resolved in the crucible of the Federal
4 District Courts and the Courts of Appeal where they can give a
5 considered judgment to these questions. And to channel all of
6 that stuff to the Claims Court just seems to me to be a very
7 troublesome view of the matter.

8 MR. ENGLERT: I must respectfully disagree with you
9 in several respects. Certainly, the Claims Court and the
10 Federal Circuit can give considered judgment to these things.

11 QUESTION: Mr. Englert, would you speak up just a
12 little bit. I am having trouble hearing.

13 MR. ENGLERT: I am sorry. Certainly, the Claims
14 Court and its Appellate Court, the Federal Circuit, can give
15 considered judgment to these matters. There is nothing less
16 competent about the Claims Court and the Federal Circuit than
17 about the District Courts and the regional Courts of Appeal.

18 QUESTION: No, but it is often very helpful, of
19 course, to have different Circuit Courts of Appeal focusing in
20 on some very tough issues that we get.

21 MR. ENGLERT: That is correct, of course, Your Honor.
22 But also, the whole purpose of the Claims Court and the Federal
23 Circuit is to centralize certain matters.

24 QUESTION: That can happen under the Tucker Act, too,
25 do not forget that. Below $10,000, even if it is under the

1 Tucker Act, it will arise in the District Courts.

2 MR. ENGLERT: But then will go to the Federal

3 Circuit.

4 QUESTION: Will go to the Federal Circuit. But you

5 will have District Courts other than the Claims Court.

6 QUESTION: But pursuing Justice O'Connor's point a

7 little bit. This case involves a problem really peculiar to

8 Massachusetts, because they have a difference between the

9 Department of Education and the Department of Mental Health and

10 how they handle certain things.

11 Is this not one of those kinds of cases where there

12 is perhaps some benefit in having the regional circuits which

13 perhaps have a better understanding of the various states

14 within their circuits handling governmental matters such as

15 this, having them. I understand that you want to have the

16 statute interpreted according to the intent of Congress.

17 But from a practical standpoint, does it not make a

18 lot of sense to have this kind of case in the regional circuit

19 rather than in the Court of Claims?

20 MR. ENGLERT: Well, there are policy arguments that

21 can be made to some of these cases in various places. There

22 are also policy arguments that can be made in favor of

23 centralizing all large money claims against the United States

24 in one court. And that is what we think that the Tucker Act

25 and the APA dovetail to do. The APA waiver specifically

1 excludes actions for money damages.

2 QUESTION: Well, it is not all that clear. It

3 applies to all actions seeking relief other than money damages.

4 And I am not sure if one reads that language literally and you

5 have an action which seeks a declaratory judgment which is

6 relief other than money damages and also seeks money damages,

7 that a literal reading of the language would not necessarily

8 foreclose jurisdiction.

9 MR. ENGLERT: A literal reading of that language

10 would not necessarily by itself foreclose jurisdiction.

11 QUESTION: That is right.

12 MR. ENGLERT: But there are two other things that

13 work here. One is the overall intent of Congress, which we do

14 think is to put money cases in one place and non-money cases in

15 the other. And the other is Section 704, which allows a

16 non-statutory review which is what we have here only when there

17 is no other adequate remedy in a court. And a money action in

18 the Claims Court certainly is an adequate remedy in the

19 circumstances of this case.

20 The Court of Appeals, which did not address

21 Section 704, thought that it was appropriate to entertain the

22 so-called declaratory aspects of this case. It affirmed what

23 it called a declaratory judgment, merely because the Grant

24 Appeals Board decisions are precedents.

25 That is the only significant prospective effect, as

1 the Court called it, that there was that justified the
2 splitting of the claim into two courts. But all judicial
3 decisions are precedents. The Claims Court decision on the
4 money claim would be a precedent. And if the Claims Court
5 agreed with Massachusetts, the Grant Appeals Board decision
6 would be reversed just as effectively as it was by the District
7 Court.
8 The remedy that exists in the Claims Court is
9 perfectly adequate. And it is for that reason that on the
10 issue in our petition, the claim splitting issue, that we think
11 that it is quite clear.
12 QUESTION: Now you rely primarily on 704 rather than
13 702.
14 MR. ENGLERT: On that issue, that is correct. And
15 also, our overall perception of the intent of Congress, which
16 has one statute which has been on the books since 1887 that
17 allows money actions to be brought against the federal
18 government, and another statute that excludes money damages
19 with a lot of legislative history backing it up.
20 QUESTION: But is it not true as a matter of history
21 that in some of these cases that the government did not take
22 the position that you are taking now, that they allowed some of
23 these cases to go forward in the District Courts outside of the
24 Court of Claims?
25 MR. ENGLERT: That is correct, the issue was not

1 addressed.

2 QUESTION: It was not as obvious as it is now.

3 QUESTION: Did the government raise this argument at

4 the District Court level in this case?

5 MR. ENGLERT: Yes, but.

6 QUESTION: Yes, but what?

7 MR. ENGLERT: The Secretary has decided as a matter

8 of policy not to pursue objections to jurisdiction in this

9 case. Of course, that is not something that we could not bind

10 the court to accept jurisdiction by making that unfortunate

11 statement, and it was resolved on the merits by the District

12 Court.

13 QUESTION: Mr. Englert, let me also ask you whether

14 you think that the 704 adequate remedy question or

15 determination should be made case by case or on the basis of

16 categories of things?

17 MR. ENGLERT: I do not think that it can be made in

18 an absolute sense for any and all cases for all times.

19 Certainly, there are categories of cases. And we think that

20 grant disallowance cases involving crude monetary claims are a

21 category of cases in which that Claims Court remedy will in all

22 cases, we would think, be adequate.

23 QUESTION: Even though prospective relief is sought?

24 MR. ENGLERT: Even though prospective relief is

25 sought.

1 QUESTION: And even though you might have changing
2 administrations, and new administrators, and different policies
3 in the future. And you just think that people ought to be
4 foreclosed from getting that prospective relief order.
5 MR. ENGLERT: Yes. Because it is not the
6 government's position that matters, but it is the court's
7 position that matters. And when the Claims Court in
8 adjudicating the money claim decides an issue of law, that is
9 binding upon the federal government in all future dealings with
10 the same party.
11 The Claims Court is a perfectly competent court to
12 address these issues, as it has in Medicare cases, and in other
13 kinds of judicial review actions in the past.
14 QUESTION: Where is the legislative history referring
15 to grant-in-aid cases that you were discussing with
16 Justice O'Connor earlier, that came up in what context?
17 MR. ENGLERT: Page eight of the Senate report, and
18 also page nine of the virtually identical House report. The
19 sentence is, "The doctrine has been invoked in hundreds of
20 cases each year concerning," the doctrine meaning the doctrine
21 of sovereign immunity, "has been invoked in hundreds of cases
22 each year concerning agricultural regulations, governmental
23 employment, tax investigations, postal rate matters,
24 administration of labor legislation, control of subversive
25 activities, food and drug regulation, and administration of

1 federal grant-in-aid programs."

2 QUESTION: But that assuredly was not invoked in

3 money claims under grant-in-aid programs. I mean it is

4 impossible to interpret it to be referring to any invocation

5 when there had been a money claim. Money claims in

6 grant-in-aid programs would have come under the Tucker Act,

7 even before this amendment to the APA, right?

8 MR. ENGLERT: That would have been our position, yes.

9 QUESTION: So I do not see how it gives you any

10 problem at all. You see to acknowledge that it gives you some

11 problem.

12 MR. ENGLERT: Well, we have acknowledged that

13 Judge Bork rested his entire analysis on that snippet of

14 legislative history. And we acknowledge that many

15 grant-in-aid cases would involve money claims.

16 But our position is, Justice Scalia, is that the

17 Tucker Act would have been the appropriate vehicle for money

18 claims in grant-in-aid cases before and after the amendment.

19 QUESTION: And this reference must mean pre-issuance

20 challenge to regulations, which is how a lot of grant-in-aid

21 claims come up, of course. But then when the regulations are

22 proposed and finally adopted, someone takes them up to

23 challenge them or tries to.

24 MR. ENGLERT: I think that is a proper construction.

25 In candor, I have to say that you can trace that reference back

1 to two cases cited in Professor Cramton's memorandum for the
2 Administrative Conference. And those were not preenforcement
3 challenges to regulations. They were, as we read them,
4 challenges to deferral of action on grant applications by the
5 Department of Health, Education and Welfare. That is how we
6 read them. Our opponents read them differently.
7 QUESTION: Yes, I recall that the briefs seem to
8 disagree on that point.
9 Did the claim for the money relief here precisely
10 track the claim for injunctive and prospective relief? It
11 would seem to me that sometimes in the grant-in-aid programs
12 that the state would be objecting to an overall interpretation
13 of a regulation and see prospective relief. And then there
14 would some discrete instances where they would want money back.
15 And it would seem to me that the two might not track each
16 other.
17 MR. ENGLERT: I am not sure that such cases would
18 arise, but that would be a different case from this one. This
19 one is a case, Justice Kennedy, in which the only prospective
20 effect that the Court of Appeals identified was that the Grant
21 Appeals Board stood as precedence. And the only prospective
22 relief that any court granted is what the Court of Appeals
23 called so much of the judgment below as constitutes a
24 declaratory judgment that the Secretary's blanket special
25 education exclusion is in excess of statutory authority.

1 In other words, that was the underlying issue that
2 the Claims Court would have resolved, and the District Court
3 did resolve, but the Claims Court would have resolved if this
4 money case had been brought there in the first place.
5 QUESTION: The First Circuit said that in the Claims
6 Court that its judgment would be collateral estoppel.
7 Do you accept that proposition, can the government be
8 collaterally estopped?
9 MR. ENGLERT: Well, the government can be
10 collaterally estopped under the Stauffer Chemical and Montana
11 cases.
12 QUESTION: So if the First Circuit is correct, then
13 there is estoppel in the Claims Court, you concede that?
14 MR. ENGLERT: No. We think that the usual rule is
15 that when an action is brought in one court, and then a
16 separate claim is split from that and brought in a separate
17 court, that the Plaintiff loses all right to proceed on that
18 separate claim. It is complicated here, because the
19 Plaintiff --
20 QUESTION: No. I am saying that let us assume for
21 the moment that we affirm the First Circuit and its reasoning.
22 Would you then concede that you are collaterally
23 estopped in the Claims Court?
24 MR. ENGLERT: No.
25 QUESTION: I did not think so.

1 MR. ENGLERT: I doubt that we would have a lot of
2 luck in the Claims Court, that we would not concede the point.
3 QUESTION: Well, res adjudicata certainly would not
4 apply if the Court did not have jurisdiction to enter the money
5 judgment.
6 MR. ENGLERT: Well, of course. But the premise of
7 Justice Kennedy's question was that this Court affirmed the
8 First Circuit in its reasoning.
9 QUESTION: Well, it set aside the money judgment, did
10 it not?
11 MR. ENGLERT: The Court did set aside the money
12 judgment.
13 QUESTION: On the grounds that?
14 MR. ENGLERT: On the grounds that our analysis of the
15 legislative history of the Administrative Procedure Act is
16 correct. That the court to enter money judgments against the
17 United States is the Claims Court. And that the other than the
18 money damages provision of the APA excludes this action from
19 District Court jurisdiction.
20 QUESTION: May I ask you a question. Maybe it is a
21 little out of line. But supposing we granted cert to review
22 the merits of the issue as well as the jurisdictional
23 questions. And we had decided that (a) that the Court of
24 Appeals did have jurisdiction to decide the legal issue and
25 that they were right on that issue, and then we said nothing

1 about the money.

2 Would not the government pay the money to the state,

3 or would they take this position that there is a legal defense,

4 and we will not pay even though the state was entitled to it?

5 MR. ENGLERT: Well, the problem would not be

6 collateral estoppel.

7 QUESTION: It is not just collateral estoppel. It is

8 really how one thinks that the government should operate when

9 the Supreme Court of the United States has held that they

10 violated the law. Often, we used to have cases where we would

11 not enjoin the state. We entered declaratory judgments on the

12 assumption that the state would accept the rule of law.

13 But the government, you are telling me, if I

14 understand you correctly, that the executive department says,

15 well, they do not have a legal right to get it, even though we

16 have no legal right to retain it, so we are going to make them

17 litigate for it?

18 MR. ENGLERT: Justice Stevens, I said in the context

19 of a question whose underlying premise was the state brought an

20 action in which it disclaimed the right to monetary relief. It

21 was so important to the state to get into the District Court

22 rather than the Claims Court, that the state was willing to

23 forego.

24 QUESTION: My hypothesis was this very case, and we

25 only decided the issue that they decided. And your position is

1 that the government would still keep the money, if I understand
2 you.
3 In this case, the Court of Appeals has held that the
4 regulatory decision made by the Secretary was erroneous and
5 violated the statute. And if we had affirmed that on the
6 merits and did not say anything about money, you are suggesting
7 to me that the Secretary would not pay the state the money.
8 MR. ENGLERT: In the context of this case in which
9 the state has never made any secret of the fact that it wants
10 the money, and this Court accepted jurisdiction and held
11 against us; no, of course, we would pay the money.
12 QUESTION: You would. You would not then make the
13 collateral estoppel. You would not say, well, they would split
14 their cause of action, even though they go to Court of Claims.
15 I thought that you were saying that we would make the defense
16 that this cause of action is split, and they cannot get relief.
17 MR. ENGLERT: The point, Justice Stevens, is that we
18 might make the collateral estoppel argument, but we would be
19 foolish to reargue the merits in the Claims Court, which of
20 course would be bound by this Court's disposition of the
21 merits.
22 QUESTION: But my point is that if you are wrong on
23 the merits regardless of the technicalities of whether there is
24 collateral estoppel or not. I mean we are talking about
25 government decisions. We are not talking about private

1 litigation between private parties. The executive department
2 says that they still want to keep the money, as I understand
3 it.
4 MR. ENGLERT: Justice Stevens, my answer to the
5 questions about collateral estoppel is that we would argue
6 against collateral estoppel, so that we could relitigate in the
7 Claims Court.
8 QUESTION: That is why I asked you if we had decided,
9 whether you would still do that. So there would be nothing
10 more to relitigate on the merits.
11 MR. ENGLERT: Right, and we would pay.
12 QUESTION: You would?
13 MR. ENGLERT: Yes. I would like, if I may, reserve
14 the balance of my time.
15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Englert.
16 We will hear now from you, Mr. Barnico.
17 ORAL ARGUMENT BY THOMAS A. BARNICO, ESQ.
18 ON BEHALF OF STATE RESPONDENT/PETITIONER
19 MR. BARNICO: Mr. Chief Justice, and may it please
20 the Court:
21 The importance of Circuit Court review that was
22 discussed earlier in the argument is not as Mr. Englert
23 suggests just a question of a policy preference. In fact, as
24 one of the Justices has pointed out and one of the amicus
25 briefs has addressed, there is a certain familiarity that

1 Circuit Courts develop with a given state's Medicaid plan and
2 disputes that might arise either between states or between the
3 Secretary and the state in this case.
4 But the more important point that I wish to address
5 on that score is that Congress has provided evidence that it
6 believes that the Circuit Court's role is important in these
7 cases.
8 And that is, and it cannot be disputed here, is that
9 when Congress addressed the question of judicial review of
10 disputes between the Secretary and the states under the
11 Medicaid program, that it expressly authorized states to bring
12 petitions to the Circuits Courts to review instances in which
13 the Secretary has found that states, or their plans, or their
14 amendments to their state plans are not in compliance with the
15 Medicaid Act.
16 QUESTION: Now what provision of the statute is that
17 that you are relying on?
18 MR. BARNICO: Mr. Chief Justice, that is
19 42 U.S.C. 1316(a)(3).
20 QUESTION: And where is that in your brief?
21 MR. BARNICO: That appears in the appendix of the
22 brief, the statutory appendix to the brief, Your Honor.
23 QUESTION: XII.
24 MR. BARNICO: That is correct, Your Honor.
25 And the point that we wish to make is that for

1 jurisdictional purposes, that as we try to determine
2 congressional intent over these actions. There is no
3 significant difference between the action of the Secretary
4 involved here and the kind of action that arises when the
5 Secretary finds that the state or an amendment to a plan does
6 not comply with the Medicaid Act.
7 QUESTION: But that is often true of the cases that
8 go to the Claims Court and to the Federal Circuit under the
9 Tucker Act. The jurisdiction is not based on subject matter.
10 It is based on whether there is a monetary claim. They have a
11 wide diversity of subject matters. They get into every kind of
12 issue that you can imagine.
13 So I do not see what this proves. It just proves
14 that this litigation like all other litigation can arise in
15 either of those courts.
16 MR. BARNICO: But, Your Honor, it proves more than
17 that. Because here, as the Secretary points out, there is a
18 lack of a specific statute providing for review of
19 disallowances. We turn to the statutory context to determine
20 under what statute that a state can bring an action, and under
21 what statute that Congress has waived sovereign immunity.
22 And that judgment is formed partially by the statute
23 that governs the waiver in this Section 702, but it is also
24 governed by the overall statutory context.
25 Because if the Secretary is correct, it means that

1 Congress somehow chose to divert cases such as ours, the
2 disallowance cases, from the local courts, the District Courts
3 and the Circuit Courts, and send them to a more specialized
4 centralized forum like the Claims Court and like the Federal
5 Circuit. And we think that is a reading of the statutory
6 context that cannot be supported.
7 QUESTION: Of course, 41 U.S.C 1316 sends you to the
8 Court of Appeals.
9 MR. BARNICO: That is right.
10 QUESTION: You did not go to the Court of Appeals.
11 You went to the District Court. You are going to the District
12 Court anyway. I mean that is just a statutory provision
13 dealing with quite different situations.
14 MR. BARNICO: There is a reason why we went to the
15 District Court.
16 MR. BARNICO: Because you had to. Because this is a
17 special statute. The APA reads that where there is a special
18 statute, that you go to the court that the special statute
19 proscribes. And in the absence of a special statute, you go to
20 District Court. It was not a strategic determination on your
21 part.
22 You had to go there, did you not?
23 MR. BARNICO: Not entirely, Your Honor. In this
24 case, we went to the District Court. Because as I said, it was
25 the result of earlier litigation with the Secretary over the

1 question of whether a given dispute between the states and the
2 Secretary was a compliance matter or a disallowance matter.
3 In those cases that were litigated all over the
4 country, Circuit Courts roughly determined that certain
5 questions that arose under the program were indeed compliance
6 matters. But in those cases, the Secretary represented to the
7 various Circuit Courts of Appeal around the country that he
8 would not contest District Court jurisdiction over the same
9 cases.
10 So it was not surprising that in this case that not
11 only did we identify 702 as the source of the waiver, but that
12 we proceeded in the District Courts. It was upon the
13 Secretary's representation to the First Circuit that he would
14 not contest District Court jurisdiction over the same case.
15 QUESTION: Insofar as 1316 is concerned, it seems to
16 me that it hurts you more than it helps you. It is a statement
17 by the Congress that you can go directly to the Circuit Courts
18 if you have a question of interpretation at the outset. You
19 begin your argument with 1316, and it seems to me that that is
20 not a very strong point.
21 MR. BARNICO: Well, Your Honor, it is. Because it is
22 not simply a question at the outset. Compliance matters could
23 be as close to this case as the following example. That is if
24 we had not provided these services to the mentally retarded in
25 the past and we proposed to amend our Medicaid plan to include

1 these services and made it the basis for a specific amendment,
2 and the Secretary denied the amendment on the same ground that
3 he invoked here, that is that when we train people to eat that
4 that is education in nature and outside of the scope of the
5 Act.

6 Now in that event, we would have had an appeal to the
7 Circuit Court on the same record testing the question of
8 whether the Secretary had erroneously read the Medicaid Act to
9 exclude those services.

10 And furthermore, Your Honor, those cases could also
11 implicate money as well. Because under the Secretary's
12 regulations, if you are successful through the administrative
13 process and we presume through the judicial process in
14 successfully overturning the denial of an amendment, you are
15 entitled to a lump sum covering the services back to the time
16 that the amendment was submitted.

17 So with all respect, Your Honor, it does not merely
18 address situations where the state wishes to identify a legal
19 issue at the threshold and litigate that question before any
20 injury occurs.

21 QUESTION: You are entitled to a lump sum under 1316?

22 MR. BARNICO: No, Your Honor.

23 QUESTION: Where do you get the lump sum?

24 MR. BARNICO: The lump sum, Your Honor, is mentioned
25 in 45 CFR 201.3.

1 QUESTION: That is a regulation.

2 MR. BARNICO: It is a regulation. But you know, this
3 also implicates the previous response of my brother to the
4 question of a District Court action which merely tests the
5 validity of a regulation.

6 By way of background, one of the reasons why these
7 disallowance cases are growing is that the Secretary chooses to
8 implement policy judgments through the disallowance mechanism
9 rather than to specifically state through regulations what
10 services are covered and which are not.

11 And so when the Court considered the case a few terms
12 ago of Connecticut, a similar Connecticut state agency against
13 the Secretary, Connecticut cited the same sort of broad
14 disallowance that carried a prospective effect and implications
15 for further services given by that state.

16 So it may be well for Mr. Englert to say that in the
17 abstract that certain cases can still proceed when states
18 challenge regulations under a particular grant-in-aid program,
19 but it is very much part of this record that the disallowance
20 procedure is used for far different purposes than a technical
21 audit or the adjustment of an accounting error.

22 It is used, as both of the lower courts found, to
23 make prospective coercive judgments about the scope of the
24 Medicaid Act. The states are forced at that point to decide
25 that once they receive that first disallowance and while they

1 are still in the administrative process before the Grant
2 Appeals Board, the states are forced to make a judgment about
3 whether they should continue to provide those services knowing
4 that they have an exposure, that the millions of dollars that
5 they spent could well be disallowed at some indeterminate time
6 in the future.

7 And faced with that kind of situation and that kind
8 of relationship, it is important that we be able to go to the
9 District Courts to secure declaratory and injunctive relief
10 that would bind the parties in our future relationship.

11 The Court of Appeals, if I might just read one
12 excerpt from the decision, said that the Commonwealth's
13 requested injunction is not specific to the retrospective
14 1978-1982 reimbursement disallowed by the Secretary. Rather,
15 it stretches into the future as does the legal relationship
16 between the parties. And that is the relief that we sought,
17 and that is the relief that our complaint sets out.

18 QUESTION: Do you think that the government would not
19 have been bound with respect to its future action on the same
20 matter had you gotten your judgment from the Federal Circuit
21 under the Tucker Act instead from the Court of Appeals here?

22 MR. BARNICO: I would not expect to act as if they
23 were bound in the same way. I think that Your Honor is
24 suggesting that --

25 QUESTION: The same issue involving the same party

1 with the case?

2 MR. BARNICO: Your Honor, I think the point is

3 whether the effect of stare decisis alone in such a context

4 would be enough. And I do not think that their past conduct

5 gives us that kind of assurance. And as a matter of law, I

6 think that it is different as well.

7 As a matter of record before this Court, the

8 Secretary has in disallowances that have followed the

9 Massachusetts disallowance, and have followed the opinion of

10 the First Circuit in this case, simply disagreed with the First

11 Circuit and disallowed reimbursement to I believe it is Utah

12 and Tennessee.

13 QUESTION: But in a system when you go to regional

14 Courts of Appeals, that is understandable. I think that

15 Justice Scalia's hypothesis was if you go to the Federal

16 Circuit, that presumably all of these kinds of cases are going

17 to the Federal Circuit. So the government would not be

18 entitled to say, well, that may be the rule in Massachusetts,

19 but it is not in Utah. If the Federal Circuit says that it

20 handles these cases, that is going to be the rule for the whole

21 United States.

22 MR. BARNICO: Well, I would still distinguish that

23 from that binding order. And it may well be the difference

24 between relief that we consider essential and what the

25 Secretary deems as adequate. The point about the

1 Federal Circuit --

2 QUESTION: It is not the Secretary, it is the

3 statute. The statute says that you can get into the District

4 Court only if there is no other adequate remedy.

5 MR. BARNICO: That is correct.

6 QUESTION: It is not his judgment about what is

7 adequate, but rather it is the Congress' and ultimately the

8 courts, I suppose.

9 MR. BARNICO: That is right. At the threshold, there

10 is a disagreement between some of the circuits and the

11 Secretary's interpretation of Section 704. But I understand

12 that there is a statutory basis for that point.

13 The points addressed in the briefs though thoroughly,

14 I believe, is that in many respects that the Claims Court will

15 not be able to provide the declaratory and injunctive relief

16 that the beneficiaries and states believe would be necessary to

17 govern the relationship in such programs.

18 QUESTION: Well, Mr. Barnico, in this case now, the

19 District Court did not issue an injunction, is that right?

20 MR. BARNICO: The District Court entered a judgment

21 that said that the decision of the Secretary was reversed.

22 QUESTION: It did not enter an injunction, did it?

23 MR. BARNICO: No.

24 QUESTION: And you take the position that to be

25 adequate that the relief requires an injunction, and that is

1 why it does not meet the standards of 704 and should not go to
2 the Court of Claims, right?
3 MR. BARNICO: Yes, Your Honor.
4 QUESTION: And yet you ask us at the same time to
5 reinstate the judgment of the District Court which did not
6 issue an injunction.
7 So how in this case do you find that it was not
8 adequate?
9 MR. BARNICO: In this case, we do not necessarily say
10 that the relief would be inadequate. To the extent that in
11 such cases that our first position will always be that we will
12 expect the Secretary to abide by a judgment of reversal, and
13 whatever declaration of law accompanies the reversal.
14 QUESTION: So in this case, the relief in the Court
15 of Claims might well be adequate and the Court of Appeals for
16 the Federal Circuit?
17 MR. BARNICO: Well, not necessarily, Your Honor.
18 Because the Court of Appeals entered relief is much more in the
19 nature of an injunction than the District Court.
20 But my second point would be that in this case that
21 we were content with the judgment of reversal, but we asked for
22 more. And there was no indication from any court that we were
23 not entitled to more. But as we tried to respectfully tried to
24 suggest in the brief, upon such a reversal, we judged that to
25 be adequate in the absence of some action by the Secretary that

1 he will not abide.

2 Now as one of our briefs at the petition stage

3 suggested, it is going to be the District Court that we will

4 want to go to for a coercive order in the event that the

5 Secretary does not abide by the reversal and by the declaration

6 of law that accompanies the reversal.

7 QUESTION: No one in your client's position is going

8 to ask in the District Court for money damages. And there will

9 just be requests for a declaratory judgment and prospective

10 relief, and no request for money damages. And there is no

11 other forum. There is not a forum in the Court of Claims just

12 to go get declaratory judgments.

13 MR. BARNICO: No. The Claims Court would throw out,

14 I imagine, a case that sought only declaratory relief.

15 QUESTION: Exactly.

16 MR. BARNICO: Now the discussion -- excuse me.

17 QUESTION: Well, we are sort of confronted with how

18 to interpret that Tucker Act. Not in just this context, but

19 elsewhere.

20 What is the line that you are drawing as to what does

21 not constitute monetary relief, is it just in this narrow area

22 of benefits denied by the government, or is it whenever you

23 come to District Court in any case and do not ask for money,

24 but just ask for a declaratory judgment or an injunction? I

25 mean that would be disastrous.

1 MR. BARNICO: In the latter case, you could not go to
2 the District Court for declaratory and injunctive relief that
3 is prohibited by some other statute. That is one of the other
4 limitations that the Secretary identifies.
5 QUESTION: It is not prohibited anywhere else. It is
6 just that you have a claim for money damages. And you would
7 chose instead to apply for a declaratory judgment that the
8 Secretary owes you money.
9 Would you allow that?
10 MR. BARNICO: Well, it would depend on the context,
11 Your Honor. In the grant-in-aid context, I think that you are
12 referring to really a rule that the First Circuit set out, in
13 the sense that they would measure the amount of prospective
14 relief.
15 Now we do not happen to agree with that approach.
16 But in the grant-in-aid context, at least the District Court
17 would be able to rely on the legislative history of the APA
18 that identified the grant-in-aid programs as one example of the
19 kind of case that they wished to have brought in the District
20 Courts.
21 QUESTION: But they are surely just an example. I
22 mean the government's proposal has the advantage of being a
23 clear line. I am not sure what your line is, except that
24 grant-in-aid things are covered. But you cannot draw the line
25 there.

1 Is what you are saying that as long as you do not ask
2 for money, that you do not have to go to the Claims Court or
3 what, what is the line that you want us to adopt?
4 MR. BARNICO: Well, the line relies on a couple of
5 factors. I cannot draw it as clearly as what I consider to be
6 the simplistic line of any case that happens to involve money
7 belongs in the Claims Court. But on the other hand, there are
8 identifiable factors.
9 QUESTION: These are jurisdictional questions. The
10 worst thing in the world to waste time litigating is whether
11 you should have been in the Claims Court or in the District
12 Court. And it does not just arise at the District level, but
13 then you have to decide which of the two Courts of Appeal that
14 you should have gone to. It is very complicated.
15 MR. BARNICO: Your Honor, I could not agree more
16 about the waste of time. And it is only complicated by changes
17 of position by the government, I might add.
18 But in any event, I suggest that the Court has
19 already identified at least one of the factors in its own
20 consideration of the Tucker Act. I am thinking of the case of
21 the U.S. v. Mottaz, where the Court made a fairly strong
22 statement that the complaint is an important aspect of a
23 judgment of a court about jurisdiction. So at least the Court
24 would consider what kind of cases made by the Plaintiff and
25 what relief is requested.

1 QUESTION: Well, Mr. Barnico, I take it that you do
2 not urge the adoption of the line drawn by the Court of Appeals
3 in the District of Columbia Circuit, that money damages refers
4 to a sum of money used as compensatory relief, you are not
5 urging that line?
6 MR. BARNICO: No, we are not, but we are urging
7 something similar. The brief refers to what we call
8 non-monetary relief. And there is no dispute that the District
9 Court is available for such relief.
10 I do not think that the District of Columbia Circuit
11 had anything different in mind when it said that when a court
12 makes a judgment that an administrator has violated the law
13 that it is making a specific remedy when it orders or its
14 judgment requires that administrator to turn over the money.
15 I think that the kind of relief and the line that we
16 suggest is in the same nature and produces the same result.
17 But I think that the decision of the District of Columbia
18 Circuit had more to do with prying a certain kind of monetary
19 relief away from the term money damages.
20 QUESTION: Can your test be stated in one sentence?
21 MR. BARNICO: Cases brought for injunctive and
22 declaratory relief against adjudicatory decisions under
23 grant-in-aid programs are within the jurisdiction of the
24 District Courts under the waiver of sovereign immunity
25 contained in Section 702.

1 QUESTION: And what if they include a prayer for
2 money judgment against the government?
3 MR. BARNICO: Then the rule takes more than one
4 sentence, I am afraid. And it is that when the Court considers
5 that complaint in its entirety against the overall statutory
6 context of the subject matter, that it makes a determination
7 that the District Court is the court that will hear such a
8 case.
9 QUESTION: Well, why should not the District Court
10 just say do you want to stay in this court or not; and if you
11 do, you better withdraw your claim for money damages?
12 MR. BARNICO: Well, that is similar. That would
13 depend, Your Honor, on whether it is merely --
14 QUESTION: That just really raises the question of
15 whether the Court of Appeals was correct.
16 MR. BARNICO: And it raises the question of whether
17 the state is going to be required to make a binding waiver of
18 any monetary recovery.
19 QUESTION: It does not have to have a binding waiver.
20 The District Court just says I am going to entertain this claim
21 for money damages, I do not have jurisdiction to do that.
22 MR. BARNICO: And it may require that litigant
23 to simply drop whatever prayer that suggests the money
24 judgment.
25 QUESTION: What kind of prayer suggests that, by the

1 way. You know, there is the boilerplate at the end of every
2 complaint which says as such other relief as may be
3 appropriate.
4 What is money damages are appropriate, is that a
5 prayer for money damages?
6 MR. BARNICO: I do not think that it would be a
7 prayer enough to defeat the jurisdiction of the District Court,
8 no.
9 QUESTION: Do you think that everybody would think
10 that, to adopt a rule like that or something, can we train
11 pleaders to put in or not put in that provision?
12 MR. BARNICO: No. And pleaders are often faced with
13 different kinds of pressures. And in this case, the complaint
14 was written before we knew that the Tucker Act even applied to
15 or could be argued that it could be applied to such a case.
16 Now the last point that I would like to make today
17 has to do with the relationship between the Federal Circuits
18 on the one hand and the Circuit Courts of Appeal on the
19 other.
20 Congress intended that the Federal Circuit and the
21 Claims Court have a specialized subject matter. The Federal
22 Courts Improvement Act that was enacted by Congress in 1982
23 demonstrates that Congress has always sought to preserve the
24 Circuit Courts of Appeals as courts of general jurisdiction in
25 terms of subject matter.

1 The legislative history of that Act, we think, is
2 very important to the case, and provides a further statutory
3 context to decide our case. There was no indication in the
4 legislative history of the Federal Courts Improvement Act that
5 suggests that Congress ever believed that the Federal Circuit
6 would become a national forum for resolution of questions under
7 the Social Security Act.
8 QUESTION: But Congress could have just as easily,
9 and I think that the government argues here, have allocated
10 jurisdiction on the basis that we want all claims for money
11 judgment against the government to be tried in the Claims Court
12 and go to the Federal Circuit.
13 Now that means that the Federal Circuit will be
14 expounding on lots of different areas of the law, but that the
15 unifying factor would be the money judgment against the
16 government.
17 MR. BARNICO: That is his competing argument on
18 intent. And it is there that there is authority for the
19 proposition that Congress intended to centralize some cases or
20 cases involving money according to the Solicitor, and that we
21 happen to fall in those cases.
22 My point is that that rubs right up against Congress'
23 express intent to keep the Circuit Courts of Appeal available
24 for the kind of general questions of important social policy
25 like the Social Security Act.

1 QUESTION: Of course, your position means that the
2 government can go around every Circuit relitigating the same
3 issue.
4 MR. BARNICO: And apparently, they are doing it in
5 this very case.
6 QUESTION: Well, I know that. In a way, it is
7 strange that the government wants to be able to litigate it
8 only once.
9 MR. BARNICO: Well, they must have their reasons.
10 But I think that their result is inconsistent with judgments
11 that Congress has made about the subject matters of the cases
12 that will arise and be heard by the courts that were created in
13 1982.
14 Finally, I should make the point that the Court has
15 previously identified at least one consequence of litigating in
16 the Claims Court. And that is that when you litigate in the
17 Claims Court, that ordinarily you litigate in Washington.
18 And for the Court to adopt the view of the Solicitor
19 in this case is to impute to Congress the intent that
20 beneficiaries or states who have disputes with the Secretary
21 that involve money under the Medicaid Act will be litigating
22 their cases in Washington. And we do not think that that is
23 an intent that is supported by any of the legislative
24 history.
25 QUESTION: Does Massachusetts has an office here in

1 Washington?

2 MR. BARNICO: I believe that the Governor has a small

3 office.

4 QUESTION: I think that most states do. I do not

5 think that that would be so horrible.

6 MR. BARNICO: I think that the point is much more

7 important as to the beneficiaries, Your Honor. And it is made

8 by an amicus brief in that respect.

9 QUESTION: If it is under $10,000, they can bring the

10 suit in District Court.

11 MR. BARNICO: The little Tucker Act applies. But

12 many of the class actions that are brought by legal service

13 organizations on behalf of those beneficiaries, some of which

14 happen to involve the states as Defendants, would ordinarily

15 involve more money than that.

16 In conclusion, Congress waived sovereign immunity for

17 these cases, and there is no question about that. But Congress

18 did not intend to centralize cases such, and courts created in

19 1982 have no expertise in this particular area. Congress

20 intended that we could bring these cases in our local District

21 Courts, and this Court should so hold.

22 Thank you very much.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Barnico.

24 Mr. Englert, you have three minutes remaining.

25

1 ORAL ARGUMENT BY ROY T. ENGLERT, JR. ESQ.

2 ON BEHALF OF FEDERAL PETITIONERS/RESPONDENTS - REBUTTAL

3 MR. ENGLERT: Thank you, Mr. Chief Justice.

4 If a District Court said to the Plaintiff, drop your

5 monetary claims so that you can stay here, with the intent that

6 the Plaintiff would recover money at the end of the day, we

7 think that is a vast conscious evasion of the jurisdictional

8 scheme that Congress has created. We also think that it is

9 precluded by Section 704. Because the person who wants that

10 money can pursue his action for that money in the Claims Court.

11 The Claims Court and Federal Circuit are not and

12 never have been specialized subject matter courts. The Tucker

13 Act is not subject matter specific. There are limitations on

14 what actions can brought under the Tucker Act, but they depend

15 on the form of the relief sought and whether there exists a

16 money mandating statute, not on general subject matter. The

17 Tucker Act like the APA cuts across all subject matters.

18 Finally, I do not think that it is relevant to any

19 issue before this Court whether the states have to come to

20 Washington to litigate or not. But for what it is worth.

21 28 U.S.C. 44 allows the Federal Circuit to sit anywhere that

22 any Court of Appeals can sit. 28 U.S.C. 173 allows the Claims

23 Court to sit anywhere in the nation.

24 Thank you.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Englert.

1 The case is submitted.

2 (Whereupon, at 12:05 p.m., the case in the

3 above-entitled matter was submitted.)

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1 REPORTERS' CERTIFICATE

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3 DOCKET NUMBER: 87-712/87-929

4 CASE TITLE: OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., v. MASSACHUSETTS and MASSACHUSETTS v. OTIS R. BOWEN, SECRETARY OF

5 HEALTH AND HUMAN SERVICES, ET AL.

HEARING DATE: April 20, 1988

6 LOCATION: Washington, D.C.

7

I hereby certify that the proceedings and evidence

8

are contained fully and accurately on the tapes and notes

9

reported by me at the hearing in the above case before the

10

United States Supreme Court,

11

and that this is a true and accurate transcript of the case.

12

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Date: April 20. 1988

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16

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