

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: UNITED STATES, ET AL., Petitioners v.  
TEXAS, ET AL.

CASE NO: 91-1729

PLACE: Washington, D.C.

DATE: Monday, March 1, 1993

PAGES: 1 - 50

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   UNITED STATES, ET AL.,                   :

4                   Petitioners                   :

5                   v.                   :   No. 91-1729

6   TEXAS, ET AL.                   :

7   - - - - - x

8                                   Washington, D.C.

9                                   Monday, March 1, 1993

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   10:02 a.m.

13   APPEARANCES:

14   THOMAS G. HUNGAR, ESQ., Assistant to the Solicitor  
15                   General, Department of Justice, Washington, D.C.; on  
16                   behalf of the Petitioners.

17   JAMES C. TODD, ESQ., Assistant Attorney General of Texas,  
18                   Austin, Texas; on behalf of the Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	THOMAS G. HUNGAR, ESQ.	
4	On behalf of the Petitioners	3
5	JAMES C. TODD, ESQ.	
6	On behalf of the Respondents	28
7	REBUTTAL ARGUMENT OF	
8	THOMAS G. HUNGAR, ESQ.	
9	On behalf of the Petitioners	49
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in No. 91-1729, United States v. Texas.

5 Mr. Hungar.

6 ORAL ARGUMENT OF THOMAS G. HUNGAR

7 ON BEHALF OF THE PETITIONERS

8 MR. HUNGAR: Thank you, Mr. Chief Justice, and  
9 may it please the Court:

10 This case involves the question whether the  
11 United States retains its long-standing common law right  
12 to collect prejudgment interest on debts owed by state and  
13 local governments. The case arises in the context of the  
14 Federal Food Stamp Program. Under that program the United  
15 States distributes food stamps to participating states for  
16 issuance to eligible individuals. States like Texas that  
17 choose to distribute food stamps through the mail are  
18 contractually liable to the United States for a portion of  
19 the value of the food stamps that are lost or stolen in  
20 the mail.

21 In 1986 and 1987 the United States asserted  
22 claims against Texas amounting to over \$400,000 for losses  
23 arising out of the State's issuance of food stamps in the  
24 mail. Both the district court and the court of appeals  
25 upheld the validity of those claims, but the court of

1 appeals also held that the United States was not entitled  
2 to collect prejudgment interest on the State's debts. We  
3 submit that the court of appeals erred in reaching that  
4 conclusion.

5 As this Court has repeatedly indicated, an award  
6 of prejudgment interest is in keeping with fundamental  
7 principles of fairness and equity and serves to insure  
8 that neither party to a dispute benefits or suffers from a  
9 delay in payment. For those reasons the right of the  
10 United States to collect prejudgment interest from the  
11 states and from local governments has long been recognized  
12 as a matter of Federal common law.

13 Respondents argue that Congress intentionally  
14 abrogated that long-standing common law right when it  
15 enacted the Debt Collection Act of 1982, but the language  
16 and purpose of that act and traditional canons of  
17 statutory construction require rejection of respondents'  
18 argument. The language of the Debt Collection Act does  
19 not address the question at issue in this case. The act  
20 says only that states are not persons for purposes of the  
21 mandatory prejudgment interest and delinquency penalty  
22 provisions of 31 U.S.C. section 3717.

23 Standing alone, that exclusion from the scope of  
24 section 3717 does not suggest that Congress intended to go  
25 further and to abrogate the existing common law remedy.

1 The common law remedy is discretionary and flexible and  
2 allows courts to weigh the interests of the state better  
3 in determining whether and to what extent to award  
4 prejudgment interest.

5 QUESTION: If the state had just refused to pay,  
6 Mr. Hungar, and the United States had sued the state,  
7 which was not the case here, would it have had a choice to  
8 proceed under the Federal common law or under the Debt  
9 Collection Act, or does the Debt Collection Act not  
10 provide some substantial cause of action?

11 MR. HUNGAR: In this case the United States  
12 would not have had the choice to proceed under the Debt  
13 Collection Act because the Debt Collection Act's  
14 prejudgment interest remedy expressly excludes the states.

15 QUESTION: I mean for the substantive amount  
16 owed, for the principal amount owed.

17 MR. HUNGAR: Well, the Debt Collection Act  
18 doesn't create a cause of action. It just, it sets forth  
19 certain remedies and certain specific contexts for the  
20 Federal Government's debt collection efforts. It's not  
21 even a comprehensive scheme in that respect.

22 QUESTION: All right, so there's no substantive  
23 liability under -- substantive cause of action created  
24 under the Debt Collection Act?

25 MR. HUNGAR: Well, where the -- that's correct.

1 QUESTION: For the principal sum.

2 MR. HUNGAR: That's correct, Your Honor. The  
3 substantive cause of action comes from the Food Stamp Act.

4 QUESTION: Would the -- and is that the common  
5 law cause of action that the United States would proceed  
6 under in this hypothetical case where the United States is  
7 initiating the suit? Would the United States then have a  
8 choice to say well, we'll proceed under the statutory  
9 cause of action or under the Federal common law, or are  
10 they the same thing?

11 MR. HUNGAR: Well, if we're referring to the  
12 Federal common, the Federal cause of action, which is a  
13 different question than the remedy for prejudgment  
14 interest in our view, the cause of action -- I am sure the  
15 United States would have a cause of action that could  
16 either be viewed as an implied right of action under the  
17 Food Stamp Act or as the more general Federal cause of  
18 action for money had and received, which is at issue in  
19 the United States against California case.

20 But in either event we would submit that  
21 prejudgment interest would be available under the separate  
22 remedial rule that this Court has repeatedly affirmed,  
23 which is that where a sum of money is owing to the United  
24 States prejudgment interest is generally available,  
25 depending on the equities of the particular situation.

1 QUESTION: So if in the hypothetical case you  
2 had proceeded under the statutory authority to collect the  
3 money, the Debt Collection Act is still not applicable  
4 insofar as prejudgment interest is concerned?

5 MR. HUNGAR: In this context, yes, Your Honor,  
6 because this would be an action against a state and states  
7 are excluded from the scope of section 3717.

8 QUESTION: Mr. Hungar, in cases in which the  
9 common law remedy is applied, when does the interest run  
10 from? Is it the date of the complaint?

11 MR. HUNGAR: Again, Your Honor, because the  
12 common law remedy is flexible and discretionary, that is  
13 up to the court.

14 QUESTION: Could the court assess it as of a  
15 date earlier than the date of the complaint?

16 MR. HUNGAR: We believe it could, Your Honor,  
17 but it might, depending on the equities of the particular  
18 situation, if there had been some undue delay perhaps then  
19 it would be inequitable to impose liability prior to that  
20 date. The court could determine that the date of the  
21 complaint would be the first date from which interest  
22 would accrue. I would think the general rule, though,  
23 would be that interest begins accruing once the debt is  
24 liquidated and owing.

25 QUESTION: Now, there's no discretion under the

1 act, I take it?

2 MR. HUNGAR: That's correct, Your Honor.  
3 There's no discretion in the court. Agencies have some  
4 limited discretion, assuming they have promulgated  
5 regulations to that effect.

6 QUESTION: So that the State of Texas I take it  
7 then in your view is wrong in what it said in its brief  
8 on, I think it was on page 12, that what the Government is  
9 asking for here in fact is the same interest remedy that  
10 it would have had under the act. It's not the same kind  
11 of remedy, I take it.

12 MR. HUNGAR: That's exactly right, Your Honor.  
13 The common law remedy is quite distinct and different from  
14 the statutory remedy. The statutory remedy is mandatory.  
15 It requires courts to impose prejudgment interest at a  
16 specified mandatory minimum statutory rate, which is not  
17 true of the common law. It requires collection of  
18 processing fees and delinquency penalties in appropriate  
19 cases, which is not true of the common law. It applies to  
20 more debts or more obligations than does the common law  
21 remedy. And the biggest distinction is the fact of course  
22 that the statute is mandatory on the courts, the common  
23 law has discretion.

24 QUESTION: Do you see the common law remedy as  
25 essentially a discretionary judicial remedy as distinct

1 from something which is implicit in a contractual  
2 relationship? I assume the answer is yes, it's a judicial  
3 remedy. There's nothing contractual about it.

4 MR. HUNGAR: That's correct, Your Honor, and I  
5 think prejudgment, although this case doesn't present that  
6 question, I think that prejudgment interest could be  
7 available under the common law even beyond a purely  
8 contractual relationship if it were appropriate.

9 QUESTION: Mr. Hungar -- I'm sorry.

10 QUESTION: If you're correct, Mr. Hungar, and  
11 there still exists this common law right to recover  
12 prejudgment interest, are any of the State's other  
13 arguments open for consideration on remand?

14 MR. HUNGAR: Well, the State has argued in this  
15 Court that the plain statement rule announced by this  
16 Court in Pennhurst would bar application of prejudgment  
17 interest.

18 QUESTION: Well, I think they have also made  
19 arguments that go to, that are equitable in nature, I  
20 suppose, the fact that the Government's own agent stole  
21 food stamps and things of that sort.

22 MR. HUNGAR: That's correct, Your Honor. To the  
23 extent the State is arguing that even if prejudgment  
24 interest is appropriate an award of prejudgment interest  
25 should not be awarded in this case, and it's not clear to

1     what extent the State is making that argument, but  
2     certainly to the extent the State is making that argument  
3     that would be a valid consideration on remand in  
4     determining whether prejudgment interest is available.

5             The legislative history of the act --

6             QUESTION: Mr. Hungar, before you get to the  
7     legislative history --

8             (Laughter.)

9             QUESTION: -- I suppose the best argument for  
10    the other side, it's really a sort of *inclusio unius est*  
11    *exclusio alterius* argument, and why doesn't it make a lot  
12    of sense? Why, can you explain to us why it would, why  
13    the Government would want to establish these new rules  
14    that are apparently fairer and more efficient for all  
15    other interests but somehow not for interests owing by the  
16    states? It seems to me much more likely that they were  
17    simply saying no interest from the states, you just don't  
18    get it, and where you get interest these are the fair and  
19    efficient rules for getting it.

20            MR. HUNGAR: Well, I'm sure that the private  
21    debtors who have now been subjected to section 3717 would  
22    disagree with your characterization that section 3717 is  
23    fairer than the common law. Under the common law their  
24    equitable defenses could be considered. Under section  
25    3717 they cannot. The courts must impose prejudgment

1 interest at, according to the legislative history, at  
2 rates typically higher than were imposed under the common  
3 law.

4 QUESTION: Well, they think that's fair to the  
5 Government.

6 MR. HUNGAR: That's correct, but the  
7 Government --

8 QUESTION: You don't mean Congress passed this  
9 not thinking it was fair?

10 MR. HUNGAR: Congress was attempting to enhance  
11 the Federal Government's abilities to collect debts as  
12 against those entities covered by the act, but Congress  
13 could well have determined that it would be inappropriate,  
14 for example, to impose on state and local governments the  
15 delinquency penalties and the processing fees that are  
16 mandated by section 3717 in addition to the statutory  
17 minimum rate of interest.

18 Congress could also well have determined that it  
19 would be appropriate to leave state and local governments  
20 subject to the flexible common law remedy under which the  
21 courts are permitted to weigh the interests of the state  
22 debtor in determining whether in the particular case an  
23 award of interest is appropriate. None of that is  
24 possible under the statute, so it's entirely conceivable  
25 that Congress wanted to leave the states subject to the

1 common law rather than imposing the stricter and harsher  
2 provisions of section 3717.

3 And that's the most natural, in our view that's  
4 the most natural reading of the language. It's sort of an  
5 odd and round about way to achieve a formal, an  
6 affirmative abrogation of the existing law simply to  
7 exclude state and local governments from the scope of a  
8 non-comprehensive limited statute, which is what the Debt  
9 Collection Act was.

10 The Debt Collection Act was not a comprehensive  
11 scheme designed to answer all questions that might arise  
12 with respect to the Government's debt collection efforts.  
13 It addresses a few discrete areas in an attempt, as the  
14 statute itself says, to enhance the Federal Government's  
15 debt collection efforts.

16 QUESTION: And specifically doesn't address  
17 whether a cause of action exists.

18 MR. HUNGAR: That's -- it does not, that's  
19 correct, Your Honor. The cause of action, the Debt  
20 Collection Act assumes that some other statute or some  
21 other --

22 QUESTION: No, I mean for prejudgment interest.

23 MR. HUNGAR: As against the states, that's  
24 correct.

25 QUESTION: As against anybody. It doesn't

1 address the --

2 MR. HUNGAR: Well, I'm not sure whether it would  
3 be denominated to cause of action, but it certainly  
4 mandates that a prejudgment interest remedy in the context  
5 of private debtors but does not address the question of  
6 the existence or non-existence of a prejudgment interest  
7 remedy in the context of state debtors. But at the very  
8 least the statutory language is equally susceptible to  
9 interpretation. Even if it's equally reasonable, which we  
10 think it's not, to read the statute in the way that the  
11 State does, it's certainly reasonable to read it in the  
12 way we do.

13 If Congress had in fact intended to leave the  
14 law with respect to the states alone, a perfectly  
15 reasonable and rational way of achieving that result is to  
16 say this statute doesn't apply to the states, because the  
17 general presumption in all areas is, and specifically when  
18 we're talking about the common law, is that when Congress  
19 doesn't legislate with respect to that particular question  
20 it leaves the state of the law as it was. And that's all  
21 we're saying happened in this case.

22 The legislative history of the act provides no  
23 support for a contrary conclusion. In fact, as I have  
24 noted, that Congress expressly stated in its statutory  
25 preamble that the purpose of the act was to provide

1 additional remedies to assist the Federal Government in  
2 collecting its debts. It would be extremely odd to  
3 construe a statute intended to assist the Federal  
4 Government and enhance its debt collection efforts in a  
5 manner that would cut back on existing remedies against a  
6 certain class of debtors.

7 QUESTION: What is the meaning in 4 C.F.R.  
8 102.13 subparagraph (2) on debts which are not subject to  
9 31 U.S.C. 3717? It says however agencies are authorized  
10 to assess interest and related charges on debts which are  
11 not subject to 31 U.S.C. 3717. Is that a way of saying  
12 debts owed by state or local governments, or is that --

13 MR. HUNGAR: Yes, Your Honor.

14 QUESTION: Is that all it includes?

15 MR. HUNGAR: The section 3701(c) exempts state  
16 and local governments and Federal agencies. I believe a  
17 separate provision of the C.F.R. exempts Federal agencies  
18 from the entire Federal claims collection standard, so in  
19 effect I think that's correct. There may be other  
20 exemptions -- I'm sorry, let me amend that. There are --

21 QUESTION: That's the regulation at 4a of your  
22 brief, and I'm just not sure what debts are included in  
23 the phrase debts which are not subject to 3717.

24 MR. HUNGAR: Your Honor, let me amend my  
25 previous answer. They omitted from that, that excerpt

1 that we have reproduced there because it isn't at issue,  
2 directly at issue in this case, other provisions, other  
3 exemptions from section 3717. In particular 4 C.F.R.  
4 102.13(i) states that the provisions of 31 U.S.C. 3717 do  
5 not apply to debts owed by state and local governments, to  
6 debts arising under contracts entered into before the Debt  
7 Collection Act was created, to debts arising under certain  
8 specific statutes such as the Internal Revenue Code, and  
9 so forth. So there are, in addition to state and local  
10 government debts there are other debts that are not  
11 subject to the Debt Collection Act.

12 QUESTION: Well, it says they are just not  
13 subject to 3717.

14 MR. HUNGAR: That's correct. That's correct.  
15 In our view states and local governments are not subject  
16 to any of the provisions of the Debt Collection Act,  
17 although of course they are subject to other provisions of  
18 Federal law having to do with debt collection. But the  
19 Debt Collection Act was merely a sort of haphazard  
20 collection of a few additional remedies that Congress  
21 wanted to give the Federal Government. The only remedies  
22 that would have had any application to the states were  
23 administrative offset and prejudgment interest, and  
24 Congress excluded the states from those sections. None of  
25 the other provisions of the act have any, appear to have

1 any application to the states at all.

2 Respondents in their brief cite 31 U.S.C.  
3 section 3714, which provides an administrative offset  
4 against the states in limited contexts, but that is not  
5 part of the Debt Collection Act. That was enacted as part  
6 of the act of March 25, 1870 and has been on the books for  
7 over 100 years and has nothing whatsoever to do with the  
8 Debt Collection Act. As Respondents themselves say in  
9 their brief, Congress was not trying to deal with the  
10 problem of state and local government debtors in enacting  
11 the Debt Collection Act, it was focused on a different  
12 problem. So it would be particularly unlikely that even  
13 though it was focused on a different set of problems it  
14 nonetheless went out of its way and intended to abrogate  
15 the common law in the context that it was not even  
16 addressing.

17 QUESTION: Mr. Hungar, when you call our  
18 attention to the regulation, wouldn't it have been natural  
19 for Congress if they meant what you say to have done  
20 exactly what the author of the regulations did, at the end  
21 of subsection (c) to say however, agencies are authorized  
22 to continue to apply the common law rule?

23 MR. HUNGAR: No, Your Honor, because Congress is  
24 understood to legislate against the backdrop of  
25 traditional canons of statutory construction, and one of

1 those traditional canons is that Congress will not be  
2 deemed to have changed the law and in particular will not  
3 be deemed to have abrogated existing and long-standing  
4 common law rules.

5 QUESTION: You must admit though it would have  
6 been rather clearer had they done that.

7 MR. HUNGAR: Certainly. We would not be here if  
8 they had done that, but the point is the rules of  
9 statutory construction consistently followed by this Court  
10 show that Congress doesn't have to do that. The rule cuts  
11 the other way. Congress has to give some express  
12 indication, not necessarily in the text, but somewhere, of  
13 its intention to achieve the opposite result or it will be  
14 deemed to have left the law as it was.

15 QUESTION: Is there a case like this one where  
16 your rule applied to preserving a common law rule when a  
17 new statute has been, replace the general scheme of  
18 things?

19 MR. HUNGAR: Mobil Oil against Higginbotham is  
20 perhaps an analogous statute. In that case, that case  
21 involved the Death on the High Seas Act. And in the  
22 context, in cases where the Death on the High Seas Act  
23 applied the Court held in Mobil Oil that it abrogated the  
24 common law. You couldn't have a different remedy --

25 QUESTION: But it didn't create a new remedy is

1     what that did. That didn't abrogate any remedy, the  
2     statute there, any preexisting remedy.

3             MR. HUNGAR: Well, with respect, Your Honor, the  
4     Federal common law does, it did not originally but I  
5     believe in 1970 in the marine case, or perhaps earlier,  
6     but in any event at some point the Court did determine  
7     that the Federal maritime law did create a cause of action  
8     for wrongful death.

9             QUESTION: But that's your strongest case, is  
10    it?

11            MR. HUNGAR: Well, if I may explain, Justice  
12    Stevens, the Death on the High Seas Act contains an  
13    express exception for cases arising in state territorial  
14    waters, but it applies on the high seas. And in the Mobil  
15    Oil case the Court said where the act applies, where it  
16    creates a remedy and a legal standard that applies, the  
17    common law remedy does not apply. You can't have a  
18    different result under the common law than you would under  
19    the statute. But where the act does not apply, that is in  
20    state territorial waters, you can have a Federal common  
21    law cause of action. Because the act doesn't apply there,  
22    therefore Congress has not abrogated the common law.

23            We think that's exactly what has happened in  
24    this case. The act applies to private parties, and in  
25    that context therefore Congress has spoken and the Federal

1 common law does not exist. But the act does not apply to  
2 the states and therefore the state, the common law  
3 continues to exist in that context.

4 And respondents have pointed to no case in which  
5 the only evidence of congressional intent to abrogate the  
6 common law was the fact that Congress had chosen not to  
7 apply the statute in that context. There is no case from  
8 this Court that stands for that proposition, and it would  
9 be quite an extension for this Court to say that merely by  
10 declining, merely by deciding not to legislate in a  
11 particular area Congress has thereby determined to  
12 abrogate the existing law in that area. And we submit  
13 that would, that that is not an appropriate way to resolve  
14 this case.

15 QUESTION: Mr. Hungar, does the regulation that  
16 we have just been discussing have a mistake in it in its  
17 statement that agencies are authorized to assess interest  
18 as they would have been able to do with the common law?  
19 Because I thought you told me that that was a judicial  
20 remedy, so that the agencies wouldn't be assessing it,  
21 they would simply be asking a court for it if they won  
22 their legal actions for collection. And yet this seems,  
23 this definitely says that the agencies can assess. Is  
24 that a mistake?

25 MR. HUNGAR: Well, it's certainly correct that

1 agencies do not have the authority under the common law to  
2 require states to pay a particular rate of interest in a  
3 particular case. That decision is up to the courts. The  
4 agencies can --

5 QUESTION: Well, that means they have to go to  
6 courts for enforcement just as they have to go to courts  
7 to enforce the underlying debt in the first place.

8 MR. HUNGAR: That's correct.

9 QUESTION: But the regulation seems to say that,  
10 subject to whatever enforcement discretion a court may  
11 have, the agency has the common law authority to create an  
12 obligation, and I didn't think that's what you were saying  
13 before.

14 MR. HUNGAR: We would not read the regulation in  
15 that way, Your Honor, and if it were read in that way it  
16 would be incorrect. Federal agencies can, as the Federal  
17 agency did in this case, inform the state that they intend  
18 to seek prejudgment interest and even, as they did in this  
19 case, specify the rate at which they want prejudgment  
20 interest to accrue. And if the case never gets to court,  
21 if it's settled and the state agrees to pay that  
22 obligation, well, that's the end of the matter. But if  
23 the case does get to court obviously it's up to the  
24 district court to select the appropriate rate of interest  
25 and indeed to determine whether interest is available.

1                   QUESTION: That leads into a question that I  
2   had, Mr. Hungar. You argue in your brief, and I suppose  
3   you were about to argue it here before you got  
4   interrupted, that we should defer to the agency's  
5   interpretation of the statute. But if we're talking here  
6   about a cause of action, a judicially created cause of  
7   action as you have just said for the interest, do we  
8   listen to the agencies as to whether, for example, whether  
9   there's a cause of action under the securities law? We  
10   don't listen to the agencies as to whether there's a  
11   judicial cause of action, so what difference does it make  
12   what the agencies think here? We're talking about where  
13   there's a cause of action in the courts. Isn't that our  
14   business?

15                  MR. HUNGAR: Well, in the first place, Your  
16   Honor, we would not, I would not view the remedy, the  
17   prejudgment interest remedy as a cause of action. It's  
18   more of a remedy tacked onto an existing cause of action.  
19   If -- here the Food Stamp Act creates the liability and  
20   the right of the United States to recover, and the  
21   prejudgment interest remedy merely insures that that  
22   liability is in fact paid.

23                  QUESTION: Well, I don't care what you want to  
24   call it, it's judicially created. That's the point, isn't  
25   it?

1 MR. HUNGAR: Yes.

2 QUESTION: I mean, you have said that. That has  
3 been your argument here.

4 MR. HUNGAR: That's correct, Your Honor. In any  
5 event, deference to the administrative construction of the  
6 statute is appropriate because the question here is not  
7 whether prejudgment interest is appropriate in this case  
8 or whether the common law prejudgment interest remedy  
9 exists. Those are questions for the court. The question  
10 here is whether Congress, in enacting the Debt Collection  
11 Act of 1982, evidenced a congressional intent to abrogate  
12 the existing common law remedy. And that is the issue  
13 that the administrative agency has determined in our  
14 favor, and we believe that is what is due deference.

15 QUESTION: So what if an agency under the  
16 regulation says we think prejudgment interest should occur  
17 at the rate of 8 percent from the time they got notice of  
18 the debt? Does the district court, assuming that it says  
19 we're going to follow the common law, does it have to  
20 defer to the agency's recommendation as to the rate of  
21 interest or the time?

22 MR. HUNGAR: No, Your Honor, because the  
23 agency's authority to construe the Debt Collection Act is  
24 limited once the agency has determined, as the agencies  
25 have determined in this case, that the Debt Collection Act

1 does not abrogate the common law. When proceeding against  
2 a state, a Federal agency is by definition proceeding  
3 under the common law and under the common law of the  
4 courts, not the agency determining whether interest is  
5 appropriate and the rate of interest that is appropriate.

6 So the only, we're only asking for deference to  
7 the administrative determination that the act that the  
8 administrative agencies are charged to implement does not  
9 abrogate the common law, because that's not what Congress  
10 intended to achieve. We submit that that is an entirely  
11 appropriate arena for --

12 QUESTION: But do they implement the act or do  
13 the courts implement the act? You just told us that the  
14 courts implement the act.

15 MR. HUNGAR: No, Your Honor, the courts  
16 implement the common law. The agencies are charged with  
17 authority to construe the Debt Collection Act, and in the  
18 exercise of that congressionally delegated authority the  
19 agencies have determined the scope of the Debt Collection  
20 Act, and in their view the Debt Collection Act does not  
21 abrogate the common law. That's the end of the agencies,'  
22 of the scope of the agencies' deference. But that  
23 determination, which is the determination at issue in this  
24 case, is entitled to deference.

25 QUESTION: May I go back again to the text of

1 the regulation that Justice Souter called your attention  
2 to, that they are authorized to assess interest on debts  
3 not subject to 3717 to the extent authorized under the  
4 common law. I would have read that to mean to the extent  
5 that agencies are authorized under the common law.

6 MR. HUNGAR: Well, any ambiguity that there may  
7 be in the regulation is quite clearly resolved by the  
8 explanatory statement in the notice of rule making that  
9 accompanied the promulgation of that regulation in 1984,  
10 which we have discussed that in our opening brief. The  
11 agencies, the General Accounting Office and the Department  
12 of Justice, addressed the precise question whether the  
13 Debt Collection Act abrogated the Federal common law and  
14 concluded that it did not, and that the Federal common law  
15 right of prejudgment interest continued to exist in the  
16 case of state and local government debtors.

17 QUESTION: But if we do read it literally, just  
18 looking at this text, to the extent authorized under  
19 common law would mean not authorized at all, ergo the  
20 regulation would forbid interest.

21 MR. HUNGAR: Well, I'm not sure that it would  
22 mean that. It would mean that the regulation is --

23 QUESTION: One would have to know what the  
24 agencies were authorized to do under common law to answer  
25 it.

1 MR. HUNGAR: That's correct.

2 QUESTION: We now know under common law agencies  
3 have no power just to assess interest willy-nilly, don't  
4 we?

5 MR. HUNGAR: Well, in any event, Your Honor,  
6 deference is due not merely to agency regulations but in  
7 general to agency interpretations --

8 QUESTION: But deference is due if we think  
9 Congress delegated to the agency the decision as to  
10 whether or not which way to go, and you think there's  
11 something in the statute that suggests Congress wanted the  
12 agencies to decide whether the common law rule should  
13 survive or not. It's rather a strange kind of delegation  
14 of decision making.

15 MR. HUNGAR: Your Honor, the State has not  
16 disputed that the agencies possess the authority to  
17 implement the provisions of the Debt Collection Act. 31  
18 U.S.C. 3711(e)(2) provides that authority. The General  
19 Accounting Office and the Department of Justice are  
20 authorized to promulgate standards --

21 QUESTION: But are they authorized to make  
22 decisions as to whether the common law rule survives the  
23 amendment of the statute or not?

24 MR. HUNGAR: Agencies routinely in the exercise  
25 of delegated power judge and determine the scope of

1 Federal statutes.

2 QUESTION: What is your closest case of agency  
3 delegation to this one? Surely it's a mile away from  
4 Chevron, 100 miles away from Chevron.

5 MR. HUNGAR: With respect, Your Honor, we have  
6 cited a number of cases in the brief, the K Mart case, the  
7 Rust against Sullivan, the National Railroad Passenger  
8 Corporation case. In all of those cases the agencies were  
9 determining the scope of the statute. In the K Mart case,  
10 for example, the court was, the agency was determining  
11 whether the statute allowed or did not allow, that is  
12 applied or did not apply to particular importations of  
13 gray market goods, and the regulations said that in some  
14 cases the statute does apply and forbid it, and in other  
15 cases it doesn't, the statute does not apply. And the  
16 court deferred to that interpretation.

17 That's all we're asking here. The agencies have  
18 determined that the Debt Collection Act does not apply,  
19 that Congress did not intend to, in enacting the Debt  
20 Collection Act, abrogate the common law, and therefore the  
21 scope of the act does not extend to the states. And  
22 that's the end of the question.

23 QUESTION: But in these other cases that you  
24 refer to, if the act does apply the agency has some  
25 responsibilities, as an agency, as an administrative

1 agency.

2 MR. HUNGAR: True.

3 QUESTION: In this case if the act does apply  
4 the only consequence is that the court shall pronounce a  
5 judgment of a certain sort. Doesn't that make a  
6 difference? I mean, this is court's business, it seems to  
7 me, not agencies' business.

8 MR. HUNGAR: With respect, Your Honor, in the K  
9 Mart case, by finding that the act did not apply, it did  
10 not forbid the importation of the particular gray market  
11 goods at issue, that was the end of the matter. The goods  
12 could be imported. The statute did not forbid it, and  
13 therefore the agency's duty to exclude it did not exist.  
14 The same is here in the sense that the act does not apply,  
15 so -- if the agencies had, if the Department of Justice  
16 and the General Accounting Office had reached the opposite  
17 conclusion and had determined that the act did abrogate  
18 the common law, it would have been their duty in  
19 implementing the act to instruct Federal agencies not to  
20 seek prejudgment interest from the states. But they  
21 reached the opposite conclusion. Our submission is that  
22 that conclusion was reasonable.

23 I'd like to reserve the remainder of my time for  
24 rebuttal.

25 QUESTION: Very well, Mr. Hungar.

1 Mr. Todd, we'll hear from you.

2 ORAL ARGUMENT OF JAMES C. TODD

3 ON BEHALF OF THE RESPONDENTS

4 MR. TODD: Mr. Chief Justice, and may it please  
5 the Court:

6 The resolution of this dispute has to begin and  
7 return to the observation that the Debt Collection Act  
8 unambiguously excludes states from the category of persons  
9 from whom a Federal agency may seek to collect a debt.  
10 That's important for a number of reasons. First of all,  
11 the act does apply to states. It's only two sections that  
12 are taken out and removed as not applying to states.  
13 3701(c) says that for purposes of sections 3716 and 3717  
14 the state is not a person, obviously leaving the state a  
15 person for every other section. So it's not a case in  
16 which Congress has simply chosen not to address the states  
17 at all.

18 Secondly, the Debt Collection Act  
19 comprehensively addresses the question of prelitigation  
20 debt collection. In fact what the Debt --

21 QUESTION: Mr. Todd, excuse me, before you go  
22 further. How many of those sections that you referred to  
23 that the state wasn't excluded from, how many of those  
24 sections are part of the Debt Collection Act? How many  
25 sections other than 3716 and 3717?

1 MR. TODD: Well, all of the others. An agency  
2 still is mandated to seek to collect a debt which the  
3 state owes the Federal Government. There is no doubt  
4 about that, and all these other sections deal with the  
5 procedures, the safeguards, and so forth. Now --

6 QUESTION: And they were all enacted at the same  
7 time?

8 MR. TODD: Yes -- not all. Before 1982 there  
9 was what was called the Federal Claims Collection Act of  
10 1966, and some of these provisions, some parts of 3701 and  
11 3702, and as Mr. Hungar just mentioned, 3714, were in that  
12 preexisting. What the Debt Collection Act did was greatly  
13 expand the scope and really limit the discretion. One of  
14 the most important things it did was to reduce the  
15 discretion of Federal agencies as to whether to seek debt,  
16 as to when to seek debt, as to how to seek debt  
17 collection, and from whom.

18 Now, it happens that in 3701(c) as to  
19 administrative offsets and charging interest, Congress  
20 removed discretion altogether from the Federal agencies.  
21 But the -- as has been brought out by questioning  
22 previously, we have a confusion here of two different  
23 points at which interest may be sought. The Debt  
24 Collection Act deals with prelitigation debt collection.  
25 In fact the original caption back in the Federal Claims

1 Collection Act said in order to avoid unnecessary  
2 litigation the following procedures are enacted. In  
3 prelitigation assessing interest, asking the state to pay  
4 interest, that's what the states have been removed from.

5 Now it's interesting to look at this case and  
6 see how this putative common law authority was exercised.  
7 You'll see in the Joint Appendix, starting around page 6,  
8 the notice letters which the Secretary of Agriculture  
9 sent, really making a demand on the state. It calculates  
10 a very precise interest, 7.625 percent, and it says that  
11 that's based on regulation 102.11. 102.11 then refers to  
12 102.13, which is the one Mr. Hungar was discussing. That  
13 102.13 incorporates almost verbatim the provisions of  
14 3717.

15 What happened in this case was the Secretary of  
16 Agriculture treated the Texas Department of Human Services  
17 exactly the way the state would have been treated if 3717  
18 had been made by Congress to apply to the states. So the  
19 effect of allowing this putative common law right is to  
20 read right back into the prelitigation debt collection  
21 process exactly the coverage of the state, local, and  
22 Federal government which Congress excluded. There is  
23 nothing --

24 QUESTION: When you say Congress excluded --

25 MR. TODD: Yes, Your Honor.

1 QUESTION: Congress excluded the states from the  
2 application of 3716 and 3717.

3 MR. TODD: Yes, Your Honor.

4 QUESTION: And the position of the Government is  
5 that leaves the common law remedies in existence as they  
6 were before the statute.

7 MR. TODD: Right.

8 QUESTION: And you say there's something  
9 inconsistent with the Government's position?

10 MR. TODD: Yes, Your Honor.

11 QUESTION: What is it?

12 MR. TODD: Okay. In that -- I don't know about  
13 in, the Government's position is internally consistent.  
14 I'm saying it's inconsistent with the scheme that Congress  
15 has created. The common law right, to the extent it  
16 attaches, would be first of all if the state refused to  
17 pay its obligation at all. That triggers a, in this case  
18 since this is dealing with the Food Stamp Act that would  
19 trigger the enforcement provision of the Food Stamp Act  
20 which is like just about every other spending clause  
21 Federal funds in return for compliance statute.

22 That is if the Secretary finds that the state is  
23 out of compliance with any provision, then the Secretary  
24 can do two things, cut off Federal funds or, two, refer it  
25 to the Justice Department for an enforcement action. Now,

1 in that enforcement action the Justice Department retains  
2 the right to seek remedies from a Federal court. But  
3 we're not at that stage --

4 QUESTION: You haven't yet gotten to the  
5 inconsistency, have you?

6 MR. TODD: Well, the inconsistency is in  
7 using -- the inconsistency I'm talking about is an  
8 inconsistency with the exclusion of states from the  
9 prelitigation debt collection activity. In other words  
10 now the Debt Collection Act is the consistent uniform set  
11 of rules for how every, and it says every agency of the  
12 United States Government is to go about prelitigation,  
13 making, assessing interest, making a claim, seeking --

14 QUESTION: You said prelitigation, but certainly  
15 it has application considerably beyond prelitigation. It  
16 specifies rates of interest that may be recovered by the  
17 Government if it goes to trial.

18 MR. TODD: Right. Right. If, let's say as to a  
19 debtor, an obligor, that the Debt Collection Act  
20 authorizes a Federal agency to seek repayment from, let's  
21 say a student loan, a student won't repay a loan, then the  
22 agency may assess the interest. And there is a formula  
23 for how they assess it, it has to do with Treasury rates,  
24 rates on Treasury notes. And then if they have to turn it  
25 over to the Justice Department and the Justice Department

1 goes to court then they recover not only the interest but  
2 there are some other penalties that go along with losing  
3 litigation.

4 What Congress has exempted the states from is  
5 this authority to assess interest and to seek to collect,  
6 to seek to collect interest as part of the debt  
7 collection. Agencies are, let me repeat, agencies are  
8 still, Federal agencies under the statute are still  
9 obligated to seek to collect any debt that the State of  
10 Texas owes the Federal Government. So states are not out  
11 of this statute altogether.

12 QUESTION: Well, if the state had refused to pay  
13 and the Government instituted suit, would the Government  
14 have a choice to say we're proceeding under the common law  
15 or we're proceeding under the statute? And if so would  
16 the choice make any difference so far as the Debt  
17 Collection Act?

18 MR. TODD: The answer to the first question is I  
19 don't think that the Federal Government's choice would be  
20 to proceed under common law. I think it would be bound to  
21 proceed under the specific enforcement provision of the  
22 statute, and for the reasons that I want to discuss in  
23 detail as to how a statute displaces common law. Once the  
24 Justice Department is in court on behalf of the Federal  
25 Government in litigation with the State, it has available

1 under its authority an arsenal of remedies or tools that  
2 it can use which hasn't really been a subject of this  
3 litigation thus far.

4 I think the City of Milwaukee v. Illinois case  
5 in '81, and it sort of was a companion case to  
6 Northwestern Airlines v. National Transport Union, are two  
7 cases which really clarify and remind litigants of the  
8 proper scope of Federal common law when there has been a  
9 particular statute. And I think that's a good starting  
10 point for analysis to then take a look and see what the  
11 Debt Collection Act has done.

12 That case reminded litigants that Federal common  
13 law is not like the common law, the body of common law  
14 that the state courts by and large have developed. It's  
15 called common law because judges use a common law type of  
16 decision making process, but it's a limited stop gap  
17 measure. It only arises in the situation where the  
18 Federal court needs to make a decision on a question,  
19 there is no Federal statute to guide it, and it's not  
20 appropriate to look to state common law. In those limited  
21 instances then the Federal courts can fashion a sort of  
22 common law.

23 But as City of Milwaukee said, as soon as  
24 Congress has directly addressed the question covered by  
25 the common law, then the need for the common law

1 disappears. So that begs the question what does it take  
2 for Congress to directly address a question. The decision  
3 goes on again, this is really a reminder of what had been  
4 the law all along. It doesn't have to say expressly by  
5 this statute we intend to displace Federal common law. In  
6 fact in none of the briefs in this case, in none of the  
7 circuit decisions, there are about 6 circuits that have  
8 addressed the question that we're here talking about  
9 today, has anybody cited an example of a statute where  
10 Congress has expressly said by this statute Congress  
11 hereby abrogates common law.

12 Now Congress does have to do that sort of thing  
13 in other contexts, like for example to abrogate a state's  
14 Eleventh Amendment immunity when it creates a private  
15 right of action. It has to say, and this Court has told  
16 Congress it has to say this abrogates Eleventh Amendment  
17 immunity. But it doesn't have to do that, according to  
18 City of Milwaukee and cases since then, when it's  
19 displacing common law. It doesn't owe Federal common law  
20 the same deference it owes state common law, and it  
21 doesn't take as much as it does to preempt state law under  
22 the Interstate Commerce Clause, and yet a number of  
23 statutes can preempt state law without saying so.

24 To look and see whether it has directly  
25 addressed the question, this City of Milwaukee, and

1 another helpful case is United States v. Fausto, said you  
2 look at the, not only the purpose of the statute but its  
3 scope and the structure of its remedial scheme.

4 Now as to the purpose, obviously 3701(c) is an  
5 exception. It is an exception, so in a sense you can say  
6 any time a statute makes an exception, having made a broad  
7 across the board rule, any time it comes back and says but  
8 we except, we exclude these categories, you can say that's  
9 contrary to the purpose, but it isn't really in this case.  
10 It's not at all unusual for Congress to choose to treat  
11 one class of debtors differently, governmental parties  
12 differently from others. And what Congress has done in  
13 3701(c) is consciously choose to treat governmental  
14 debtors differently from other debtors.

15 For example, under this Food Stamps Act, if  
16 grocer submits food stamps to the Federal Government for  
17 reimbursement at face value and the Federal Government  
18 delays in repaying, it doesn't have to pay interest. It's  
19 very common to find that governments don't have to pay  
20 interest. What you have as a countervailing incentive,  
21 disincentive to the state to unreasonably delay is a  
22 unique sort of relationship which state agencies have with  
23 their Federal funding agencies that the ordinary debtor  
24 doesn't have to a creditor.

25 The Texas Department of Human Resources,

1 Services, excuse me, receives Federal funding from  
2 Agriculture and Health and Human Services. Under those  
3 funding statutes the Secretary has broad discretion to  
4 determine that the state is out of compliance and cut off  
5 funds. No state agency wants to engender ill will with  
6 the Federal funding agency, so you have some assurance  
7 that states are not simply going to default.

8 The only incentive --

9 QUESTION: Your position, then, Mr. Todd, is  
10 that the correct reading of the Debt Collection Act is  
11 that the Federal Government is not entitled to claim any  
12 interest against the states?

13 MR. TODD: That's right, in this -- they are not  
14 entitled to do what the Secretary did here, which is  
15 present a demand to the state for interest.

16 QUESTION: That's quite a remarkable result,  
17 isn't it? I mean, is there any other situation in which a  
18 debtor is not, a creditor is not entitled to any sort of  
19 interest?

20 MR. TODD: Yes, and it's typically in a  
21 governmental context. The debt we're talking about here  
22 is a delayed payment, but the obligation --

23 QUESTION: Well, that's true of lots of debts.

24 MR. TODD: Right. Well, typically the Federal  
25 Government doesn't owe interest when it is late in paying

1 funds that it owes, and actually most of the traffic of  
2 money is from Federal Government to the states rather than  
3 vice-versa, and usually --

4 QUESTION: Well, but when the Federal Government  
5 is a grantor and doesn't pay the grant on time, that's not  
6 quite the same thing as a debt or someone who is the  
7 recipient of an overpayment who is obligated to repay it.  
8 I'm asking you for an analogous situation where someone  
9 who is clearly a debtor, as one understands that situation  
10 from law school, not having to pay any sort of interest on  
11 the debt.

12 MR. TODD: It's rare or non-existent in the  
13 usual debtor-creditor, outside the governmental context.

14 QUESTION: In the governmental context where  
15 does it exist?

16 MR. TODD: The -- I'm not sure of all the  
17 situations outside the social service area where the  
18 Federal Government might be a debtor to the states, but I  
19 don't know of -- I think that this is, I think this is the  
20 situation that has been created. I can't give you an  
21 exact amount --

22 QUESTION: How about tax refunds, Mr. Todd? I  
23 don't get interest from the Government on my tax refunds.  
24 I suppose that's a debt the Government owes me, isn't it,  
25 when I have overpaid my taxes?

1 MR. TODD: Yes, sir. Right.

2 QUESTION: I get the money back. I don't get  
3 interest on it, do I?

4 MR. TODD: I would agree that that's an instance  
5 in which a governmental entity does not pay interest and  
6 whereas another, someone else who has an obligation to pay  
7 somebody back in which there has been an overpayment. And  
8 this is sort of that sort of situation. Under the Food  
9 Stamps Act what the Government is saying is that money has  
10 been paid which the Government should not have had to pay,  
11 and therefore the State of Texas should refund or  
12 reimburse the Federal Government a portion of that money  
13 which the Federal Government should not have had to pay.  
14 And so it's a similar sort of situation.

15 Congress has chosen, has made a very obvious  
16 policy choice that governmental debtors, including -- and  
17 by the way that 3701(c) includes the United States  
18 Government as well, and subchapter 3 of the Debt  
19 Collection Act are claims against the United States. So  
20 it runs both ways.

21 As to the deference that would be due to the  
22 interpretation by these Federal agencies, I think that the  
23 case which answers the question that took place in the  
24 dialogue earlier is Securities and Exchange Commission v.  
25 the Chenery Corporation, which I think both parties have

1 cited in their briefs. In that case the SEC wanted to  
2 penalize the managers during reorganization of a  
3 corporation for having purchased preferred stock in the  
4 reorganized corporation. They relied for that ruling not  
5 on their specialized expertise that had been delegated to  
6 them by Congress of stock transaction, but the SEC's  
7 understanding of general principles of equity.

8 What the court said was fine, in the usual  
9 situation where an agency's ruling or decision or  
10 interpretation is in an area of law delegated to it by  
11 Congress and in which it has specialized expertise we  
12 defer, but when the agency is purporting to rely on  
13 judicial doctrines, then a court can and should substitute  
14 its judgment for the agency.

15 It's very clear in this case, in fact the best  
16 indication of it is in the Government's brief. I think  
17 around page 21 they discuss, the comptroller specifically  
18 considered whether common law applied and decided that the  
19 common laws in force. Now they're relying not on  
20 something that's within the specialized expertise of the  
21 comptroller general, now what the Government is doing is  
22 giving its understanding of when common law retains  
23 viability in the face of an explicit statute, and that of  
24 course is a matter of judicial doctrine and I think that  
25 the same deference would not be due.

1                   If the Government's reasoning --

2                   QUESTION: Excuse me. It's a matter -- I don't  
3 understand your point. Your point is if it's a matter of  
4 law it can't be, we don't owe any deference to agencies?

5                   MR. TODD: Well, not just any law. If it's a  
6 matter of that portion of law which are judicial  
7 doctrines, such as principles of equity, such as the  
8 general principle of when common law retains its viability.  
9 This is not, for example, like -- let's say if Congress  
10 passes a statute controlling the manufacture and  
11 distribution of pesticides and the Environmental  
12 Protection Agency says this is what we think the statute  
13 means as to what is a pesticide, that is obviously within  
14 EPA's expertise. If --

15                   QUESTION: What about whether the statute is  
16 retroactive?

17                   MR. TODD: That's closer.

18                   QUESTION: It's not close at all. We would  
19 defer to EPA. Of course we would.

20                   MR. TODD: The EEOC, for example, a number of  
21 circuits have deferred to EEOC -- when the statute is  
22 dealing with that -- there you're talking about whether  
23 the agency is asked to give an opinion on whether or not  
24 in this specialized area Congress, the remedial purpose of  
25 the statute --

1                   QUESTION: The Government says in this  
2 specialized area of debt collection, read 3717. The head  
3 of an executive or legislative agency shall charge a  
4 minimum rate of interest, blah, blah, blah. I mean, the  
5 agency heads have to know how to operate. Are they  
6 supposed to charge rates pursuant to the Debt Collection  
7 Act or are they supposed to charge rates pursuant to the  
8 old common law?

9                   MR. TODD: The statute has already told them  
10 very expressly that when they get to reading 3717 any  
11 place that it says person it doesn't include state, so  
12 their mandate to seek to collect debts owed by the states  
13 are covered by the rest of the statute, but they don't --  
14 that doesn't take, that part doesn't take constructing the  
15 statute, because the statute has already said don't look  
16 inside the statute for interest against states. So you  
17 have to go totally outside the statute to common law.

18                   Now, common law, the Federal common law is a  
19 species of law fashioned by the judiciary on what SEC v.  
20 Chenery called established judicial doctrines. And so the  
21 agency really in effect is not interpreting the statute,  
22 it's interpreting common law.

23                   QUESTION: Mr. Todd, what if the agency, we're  
24 talking the Department of Justice, had decided that the  
25 Debt Collection Act does not, cancelled out any liability

1 of the states to pay interest, that it just did away with  
2 the common law remedy? Would you think we should owe some  
3 deference to their construction there? I would suppose  
4 you would hope we would.

5 MR. TODD: Well, I would say that -- what I  
6 would say is this. I would think the Court would wind up  
7 agreeing with the Department of Justice, not because when  
8 in that instance the Department of Justice is dealing with  
9 something within its specialized expertise but because  
10 they got it right if they had come out --

11 QUESTION: So your answer to my question is no,  
12 no deference.

13 MR. TODD: Not as a -- right. My answer to your  
14 question is you would not reach the result of concurring  
15 as a result of deference. You would reach the result of  
16 concurring because their conclusion --

17 QUESTION: But what if we said it's a toss up,  
18 it's 50-50. Here's the agency, thinks the common law has  
19 been repealed. Would we, should we then give the nod to  
20 the agency or not?

21 MR. TODD: If you conclude, and I'll try to  
22 again answer this question --

23 QUESTION: I would think you would just say no.  
24 We do it de novo. We do it --

25 MR. TODD: On matters of common law and

1 established judicial doctrine, the Court is a much  
2 greater --

3 QUESTION: We're construing a statute.

4 MR. TODD: Well, but that's what, the  
5 construction of a statute I think stops with 3701(c). The  
6 states are out of it. And the Government itself doesn't,  
7 is not in here today saying we have authority under the  
8 Debt Collection Act to charge this interest. So they're  
9 not construing the statute. They're here to say we have  
10 authority under preexisting common law to seek this  
11 interest. So the conclusion that results in this  
12 regulation 102.13 results from their understanding of the  
13 judicially fashioned Federal common law, and particularly  
14 since the Federal common law --

15 QUESTION: But an agency would not, is not  
16 entitled to opine as to whether the Debt Collection Act  
17 left that common law intact?

18 MR. TODD: They are entitled to opine, and I  
19 think, and I'll go so far as to agree with Mr. Hungar that  
20 they have some duty here to make a call because they have  
21 to give guidance to their clients as to what they should  
22 do, but the conclusion of that opining is not due the same  
23 deference that it would be if, as in the example I gave,  
24 the EPA saying what is a pesticide.

25 QUESTION: Is it due any deference?

1 MR. TODD: I think it is due -- well, is it due  
2 any? I think the answer to that is yes, it's due some,  
3 and I don't know how to calibrate it so I can say how you  
4 measure weight.

5 QUESTION: Well, if it's give any deference, in  
6 my 50-50 case we give the nod to the agency.

7 MR. TODD: If you conclude, Your Honor, if the  
8 Court concludes that this is a very, very close call and  
9 it's extremely unclear, and furthermore that this is an  
10 agency which has traditionally exercised this common law  
11 right, then the deference is greater than what I am  
12 suggesting is actually the situation where the statute has  
13 been, first where the statute has -- first of all  
14 comprehensively addressed the situation of prelitigation  
15 debt collection, seeking to collect debt.

16 And it's, I think it's all encompassing in that  
17 regard, as the Court found the Federal Water Pollution Act  
18 to be with regard to discharges. It applies to every  
19 Federal agency. It sets the, it makes every Federal  
20 agency have the same policy and the same procedure and  
21 give the same priority to seeking to collect debts owed to  
22 the United States as every other agency, which was not the  
23 situation previously. So it's pretty comprehensive in  
24 that sphere.

25 Having occupied that sphere, Congress made a

1 judgment -- now, the legislative history won't tell you  
2 the articulated reasons because this was added on the  
3 floor of the Senate after the bill came there. All we  
4 have is the post-enactment statement, so we have to -- but  
5 you can see by the mechanics of the statute they had to,  
6 this had to have been deliberate to say, to add a  
7 subsection to the definitions section to say that persons  
8 in 3716 and 3717 doesn't include states. That had to be  
9 very conscious.

10 As to the utility of leaving in place the,  
11 quote, discretionary and flexible type of common law  
12 interest as some sort of a supplement to the act while  
13 removing states from the mandatory provisions, I'll just  
14 return to the point that as a practical matter the agency  
15 has applied its putative common law authority to the State  
16 of Texas exactly the way 3717 would have been applied.  
17 They have sent the same kind of notice, they have started  
18 the interest accruing at the same point, 30 days, and they  
19 have used exactly the same formula to compute the rate.  
20 So from our standpoint it's the same. It winds up having  
21 the same --

22 QUESTION: Well, the court doesn't have to agree  
23 with that.

24 MR. TODD: That's right.

25 QUESTION: And the Government has to know

1 something. I mean, the Government has to bill you  
2 something if there is interest owing, right, because it  
3 wouldn't know whether the debt has been fulfilled or not?

4 MR. TODD: That would be the way it would, if  
5 they have to have, if they have to charge interest I would  
6 say that, as I was saying earlier, the one thing that  
7 distinguishes the relationship of the Federal recipient  
8 agency with the Federal funding agency from other types of  
9 creditor-debtor relations is this ongoing relationship  
10 that they have and the need that they have to maintain  
11 good relations with the -- the states are simply not  
12 defaulting on their debts, and this is clear from the  
13 Senate report 97-378 which both parties have cited.

14 When you look at what Congress found as to who  
15 is deficient and who is not, they're really not talking  
16 about a big problem with states. States are obviously  
17 some part of the problem, but they're not a big problem.  
18 So Congress could very well decide let's remove discretion  
19 with regard to the states and focus the Federal agencies  
20 on going in a more aggressive manner after the debt which  
21 the others have owed.

22 I believe this discussion covers the really  
23 major points and major cases. I would reemphasize --

24 QUESTION: May I ask you just one background  
25 question I should know, but --

1 MR. TODD: Yes, Your Honor.

2 QUESTION: Prior to West Virginia against the  
3 United States had we ever held that a state is liable to  
4 the Federal Government for interest?

5 MR. TODD: Not explicitly. From United States  
6 v. West Virginia you have to go all the way back to 1939,  
7 Board of Commissioners v. the United States. That was  
8 really a suit against a county, and although the United  
9 States brought it, the United States through the Bureau of  
10 Indian Affairs was really bringing it on behalf of a  
11 native American, and really the outcome of that case was  
12 based on the fact that really the United States  
13 Government's position there was equivalent to any other  
14 individual who was due a tax refund.

15 So the United States, although it's implicit if  
16 the Federal Government can sue a county, and although they  
17 didn't get interest in Board of Commissioners it  
18 apparently was one of their remedies, you might say it's  
19 implicit, but really West Virginia v. United States in  
20 1987 is the first time it was said expressly.

21 QUESTION: And that was after the Debt  
22 Collection Act was passed.

23 MR. TODD: Right. It was on, the very last  
24 footnote of that decision, 42, says the debt that was  
25 being sued upon, the obligation that was being sued upon

1     arose before October 1982 and therefore it just was  
2     included.

3             Thank you very much.

4             QUESTION: Thank you, Mr. Todd.

5             Mr. Hungar, you have 1 minute remaining.

6             REBUTTAL ARGUMENT OF THOMAS G. HUNGAR

7             ON BEHALF OF THE PETITIONERS

8             MR. HUNGAR: The State's burden in this case is  
9     to show that a statute expressly intended to enhance the  
10    Federal Government's debt collection efforts. In fact it  
11    had the effect of creating an unprecedented disincentive  
12    for an important class of debtors to pay --

13            QUESTION: May I ask you if there was a case  
14    other than the one that your opponent mentioned before  
15    West Virginia which squarely recognized the common law  
16    rule that you rely on?

17            MR. HUNGAR: No, Your Honor, West Virginia was  
18    the first such case. Board of Commissioners said, treated  
19    state and local governments in the same breath, but that  
20    case involved a local government.

21            QUESTION: What had the practice been? Do you  
22    know what the practice had been? I mean, surely there  
23    have been debts owing from the states to the Federal  
24    Government in various contexts from day one.

25            MR. HUNGAR: Well, the West Virginia case itself

1     arose in the mid 1970's. It didn't reach the Supreme  
2     Court until 1987, but at least in that context the Federal  
3     Government had been seeking prejudgment interest from the  
4     states prior to the enactment of the Debt Collection Act  
5     and prior to the West Virginia case. That's how the case  
6     came up.

7             The State argues that the City of Milwaukee case  
8     is the most relevant here, but the City of Milwaukee case  
9     is entirely distinct from the situation here. The statute  
10    at issue in the City of Milwaukee case provided an express  
11    answer to the very question at issue in that case, the  
12    effluent limitations that should be imposed on the source  
13    of pollution.

14            Thank you.

15            CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hungar.

16            The case is submitted.

17            (Whereupon, at 11:02 a.m., the case in the  
18    above-entitled matter was submitted.)

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## CERTIFICATION

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The United States in the Matter of:

United States ✓

Texas

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BY Ann Marie Federico

(REPORTER)