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PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

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SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

CAPTION: GOOD SAMARITAN HOSPITAL, ET AL., Petitioners  
v. DONNA E. SHALALA, SECRETARY OF HEALTH  
& HUMAN SERVICES

CASE NO: 91-2079

PLACE: Washington, D.C.

DATE: Monday, March 22, 1993

PAGES: 1 - 47

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GOOD SAMARITAN HOSPITAL, :

4 ET AL., :

5 Petitioners :

6 v. : No. 91-2079

7 DONNA E. SHALALA, SECRETARY OF :

8 HEALTH & HUMAN SERVICES :

9 - - - - -X

10 Washington, D.C.

11 Monday, March 22, 1993

12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 11:03 a.m.

15 APPEARANCES:

16 CAREL T. HEDLUND, ESQ., Baltimore, Maryland; on behalf of  
17 the Petitioners.

18 EDWARD C. DuMONT, ESQ., Assistant to the Solicitor  
19 General, Department of Justice, Washington, D.C.; on  
20 behalf of the Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	CAREL T. HEDLUND, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	EDWARD C. DuMONT, ESQ.	
7	On behalf of the Respondent	19
8	REBUTTAL ARGUMENT OF	
9	CAREL T. HEDLUND, ESQ.	
10	On behalf of the Petitioners	41
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 PROCEEDINGS

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 91-2079, Good Samaritan Hospital v. Donna  
5 E. Shalala.

6 Ms. Hedlund, you may proceed whenever you're  
7 ready.

8 ORAL ARGUMENT OF CAREL T. HEDLUND

9 ON BEHALF OF THE PETITIONERS

10 MS. HEDLUND: Mr. Chief Justice and may it  
11 please the Court:

12 This case involves the reasonable cost  
13 methodology under the Medicare program. Under that  
14 provision, the Secretary is to reimburse providers for  
15 their reasonable cost of providing services to Medicare  
16 beneficiaries.

17 The statute defines "reasonable costs" as those  
18 costs actually incurred, excluding therefrom any part of  
19 incurred costs found to be unnecessary in the efficient  
20 delivery of needed health services.

21 The statute requires the Secretary to do two  
22 things. The first is, it authorizes the Secretary to use  
23 a variety of methods to determine a provider's reasonable  
24 costs in the first instance, and then in clause 2 of the  
25 same section, it requires the Secretary to make suitable

1 retroactive, corrective adjustments for individual  
2 providers when the methods produce inaccurate results.

3 The issue in this case is what kind of  
4 individual retroactive corrective adjustments does clause  
5 2 require?

6 Are they adjustments to bring an individual  
7 provider's reimbursement into line with reasonable cost as  
8 it's defined in the statute -- that is, actual costs  
9 excluding those due to unnecessary services or to  
10 inefficiency? That is the position the hospital contends  
11 that clause 2 requires -- or is it simply an adjustment to  
12 reconcile the interim payments the provider receives  
13 during the year with the amount that the methods say that  
14 you get, with the Secretary's regulatory method?

15 In this case, the petitioners are six rural  
16 Nebraska hospitals. Prior to the cost years under appeal,  
17 their costs were always under the Medicare cost limit.  
18 Beginning with the years under appeal, however, their  
19 costs exceeded the Medicare cost limits for the first  
20 time.

21 The hospitals still had the same necessary costs  
22 that they had in prior years. The record shows there were  
23 no findings that the hospitals operated inefficiently.

24 The Secretary admitted in his answer to the  
25 complaint that the cost limits for areas that have a high

1 percentage of part-time employment is artificially low, it  
2 is set artificially low, and yet the cost limits were  
3 applied in this case to disallow a substantial portion of  
4 the hospitals' necessary operating costs.

5 The Secretary applies the Medicare cost limits  
6 in a conclusive fashion. That means a provider cannot be  
7 reimbursed for costs in excess of the cost limits even if  
8 the provider can demonstrate that the costs are reasonable  
9 and necessary unless the provider's costs fall within one  
10 of a very few narrow exceptions that the Secretary has  
11 provided for, and in this case both parties agree there  
12 were no regulatory exceptions applicable to these  
13 providers.

14 In this Court, we are not challenging the  
15 validity of the routine cost-limit methodology as a  
16 general rule. We are saying that for these particular  
17 providers the reimbursement produced by the Secretary's  
18 methods was inadequate under the statutory standard. That  
19 is, it failed to reimburse the provider's actual,  
20 necessary costs, excluding those costs due to inefficiency  
21 or unnecessary services, and what the hospitals are  
22 seeking is the opportunity to show that their costs in  
23 excess limits of the cost limits were reasonable.

24 QUESTION: And you think the statute expressly  
25 provides it in that final provision.

1 MS. HEDLUND: I believe Clause (ii) provides  
2 that. The words of Clause (ii) are obviously central to  
3 this case, and they say that the Secretary shall provide  
4 for the making of a suitable retroactive corrective  
5 adjustment where for a provider of services for any fiscal  
6 period the aggregate reimbursement produced by the methods  
7 of determining costs proves to be inadequate or excessive.

8 QUESTION: And you assert that the Georgetown  
9 opinion supports you.

10 MS. HEDLUND: Yes.

11 QUESTION: And your opponent --

12 MS. HEDLUND: And they say it doesn't.

13 QUESTION: They say it doesn't, yes.

14 MS. HEDLUND: Right.

15 QUESTION: And they say it supports them.

16 MS. HEDLUND: Yes. Well, if you look at this  
17 Court's reading of the plain language of Clause (ii), at  
18 the beginning of the Georgetown decision this Court said  
19 repeatedly --

20 QUESTION: Do you have a page number in the  
21 Georgetown case that you think supports you --

22 MS. HEDLUND: Yes.

23 QUESTION: Squarely?

24 MS. HEDLUND: On page 472 in the Supreme Court  
25 Reporter the -- it says, "We agree with the court of



1 appeals that Clause (ii) directs the Secretary to  
2 establish a procedure for making case-by-case adjustments  
3 to reimbursement payments where the regulations  
4 prescribing computation methods do not reach the correct  
5 result in individual cases." That's one place.

6 QUESTION: That's on page 472.

7 MS. HEDLUND: 47 -- I have the Supreme Court  
8 copy of that. I'm sorry. 109 Supreme --

9 QUESTION: 109 Supreme Court --

10 MS. HEDLUND: 472. It goes on to say later, on  
11 that same page, "These adjustments are required when for a  
12 provider the aggregate reimbursement produced by the  
13 methods of determining costs is too high or too low."

14 The Court goes on to say, again on that page,  
15 that "This distinction" -- it's making a distinction  
16 between the earlier part of the statute and Clause (ii) --

17 QUESTION: This, incidentally, is at page 210 of  
18 the U.S. Reports.

19 MS. HEDLUND: Thank you very much.

20 It says that Clause (ii), rather than permitting  
21 modification to the cost method rules and their general  
22 formulation, is intended to authorize case-by-case inquiry  
23 into the accuracy of reimbursement determinations for  
24 individual providers.

25 QUESTION: But when the Court spoke of accuracy,

1 wasn't it talking about something just in the normal  
2 meaning of those terms different from the methodology, and  
3 isn't the suggestion given there the same suggestion that  
4 is given by the three final words in the statute itself  
5 which refers to the result being either inadequate or  
6 excessive?

7 That isn't language which seems to call into  
8 question the methodology. It seems to be language that  
9 assumes that there is a comparatively easy way of finding  
10 out whether a particular resolve, a particular total, if  
11 you will, is right or wrong, and if that is so, that of  
12 course supports the Government's position.

13 MS. HEDLUND: Well, I think the term inadequate  
14 or excessive in the statute referred back to the first  
15 sentence --

16 QUESTION: Well then, why didn't it refer to  
17 unreasonably high or unreasonably low, because the statute  
18 doesn't talk about adequacy or excessiveness, it talks  
19 about reasonable cost.

20 MS. HEDLUND: But it discusses the -- when a  
21 provider's -- when the reimbursement methods do not fully  
22 take into account the provider's actual, reasonable cost,  
23 I think it may be helpful in this regard to go back to  
24 some of the legislative history.

25 When the Medicare statute was created in 1965,

1 Congress said that the reasonable cost methodology was  
2 intended to reimburse the actual costs of providers,  
3 however widely they vary from institution to institution,  
4 except where they're substantially out of line with  
5 comparable institutions, and it gave the Secretary in the  
6 first part of the statute --

7 QUESTION: It seems to say two different things,  
8 but I won't stop there.

9 MS. HEDLUND: It gave the Secretary the  
10 flexibility to use a variety of methods, including the  
11 cost-limit methods, to try to get as close as possible to  
12 reimbursing what a provider's actual costs were, but then  
13 all the methods are subject to the overriding mandate of  
14 Clause (ii) that there be an individual retroactive  
15 adjustment when those methods do not satisfy the statutory  
16 standard of what at that point was actual cost.

17 In 1972, Congress amended the statute with the  
18 cost limits. It put into the definition of reasonable  
19 costs those costs actually incurred excluding those  
20 attributable to inefficiency or unnecessary services, and  
21 when it added the cost-limit authority into the statute,  
22 it inserted that in the third sentence of this statute,  
23 and the third sentence is what lays out all the variety of  
24 methods the Secretary could use.

25 All of those methods remain subject to

1 Clause (ii), which is an individual adjustment.

2 QUESTION: Well, but that's the issue in the  
3 case, isn't it? Is it the methodology which is subject to  
4 Clause (ii), or is the computation of results under the  
5 methodology?

6 MS. HEDLUND: If the methodology --

7 QUESTION: I mean, simply to say that the  
8 methodology is subject to Clause (ii) it seems to me is in  
9 effect to assume the conclusion that you've got to reach.

10 MS. HEDLUND: What we're saying, the test is  
11 whether the individual provider's reimbursement -- not the  
12 method, but the actual money that goes to the providers is  
13 excessive or inadequate to meet the statutory standard.

14 QUESTION: Right, and the question is whether  
15 that adequacy or inadequacy is to be reviewed in such a  
16 way that would allow a departure from the methodology, or  
17 whether it is to be reviewed in such a way as to provide,  
18 in effect, a final year-end computation that would correct  
19 any cumulative errors from the monthly instalment  
20 reimbursement.

21 MS. HEDLUND: When Congress enacted the cost  
22 limit in 1972, it very clearly says in the legislative  
23 history that the cost limits were to be presumptive, and  
24 that costs that could not be justified by providers would  
25 not be reimbursed.

1           The reason the cost limits were put into place,  
2 Congress said, is it recognized that intermediaries were  
3 having a very difficult time identifying which costs of a  
4 given provider were too high and explaining why they were  
5 too high, and Congress decided to shift the burden of  
6 proof.

7           It gave the Secretary the authority to establish  
8 cost limits that were going to be presumptive measures of  
9 reasonableness, and then every provider if it felt it  
10 could justify the reasonableness of its costs over the  
11 limits would be able to do so.

12           QUESTION: Now, is there any administrative  
13 procedure for doing that in addition to or apart from  
14 subsection -- the regulations that are mandated by  
15 subsection (ii)?

16           MS. HEDLUND: The Secretary has -- I think there  
17 are mechanisms available, regulatory mechanisms available.  
18 The Secretary has not implemented them to do so.

19           QUESTION: If that is so, that undercuts your  
20 argument that that is the object of subsection (2), that  
21 an opportunity to litigate the inappropriateness of the  
22 presumption is the object of subsection (2).

23           MS. HEDLUND: I think actually the language of  
24 the book-balancing regulations that were cited in the  
25 Georgetown decision, the actual language of the

1 regulations, is broad enough to encompass the kind of  
2 adjustment that we seek. On -- it's on page 473 of my  
3 copy of the decision, the language of the book-balancing  
4 regulation that's quoted there says that it's supposed  
5 to -- the retroactive adjustment will represent the  
6 difference between the amount received by the provider  
7 during the year for covered services and the amount  
8 determined in accordance with a method of cost  
9 apportionment to be the actual cost of services rendered  
10 to beneficiaries during the year.

11 Cost apportionment is just a mechanism for  
12 dividing costs between Medicare patients and non-Medicare  
13 patients. It's not a method of determining what the pot  
14 of costs is that you're talking about, and the wording of  
15 this regulation is broad enough to encompass the  
16 Clause (ii) adjustment that we seek. It has not been  
17 implemented that way by the Secretary.

18 One of the other book-balancing regulations that  
19 the Secretary cites in their brief on page 21 -- it's the  
20 regulation at 405.405(c) -- talks about the retroactive  
21 adjustments. It says, "The retroactive payments will take  
22 fully into account the costs that were actually incurred."

23 That language is broad enough to encompass the  
24 kind of adjustment that we're seeking under Clause (ii),  
25 but they have not been implemented in that fashion by the

1 Secretary.

2 QUESTION: Ms. Hedlund, even if you're correct  
3 that Clause (ii) requires more than book-balancing and is  
4 some kind of escape valve for the hospitals, even so,  
5 doesn't that leave HHS with some discretion as to how to  
6 implement that provision in Clause (ii)?

7 And the Secretary has promulgated regulations  
8 providing for a scheme of exceptions to the cost-limit  
9 rules and has spelled out the circumstances where the  
10 Secretary is going to allow adjustments. Why isn't that a  
11 valid exercise of any duty that HHS may have here?

12 MS. HEDLUND: I don't think that the  
13 exhaustion -- excuse me, the exception regulations comply  
14 with the language of the statute, because the statute says  
15 there shall be a retroactive adjustment for a provider for  
16 any fiscal period. It doesn't say, for some providers.  
17 It doesn't say, those providers that the Secretary may  
18 choose to have --

19 QUESTION: Well, do you take the position, then,  
20 that HHS can't meet any requirement that may exist there  
21 by the adoption of reasonable rules and regulations,  
22 rather than dealing with it as you propose here?

23 MS. HEDLUND: If the exception's regulations  
24 perhaps had had another provision in it that it would  
25 allow providers to appeal to demonstrate that their costs

1 over the cost limits were reasonable, for whatever reason,  
2 that would do it, but they haven't done that.

3 QUESTION: But you don't think the Secretary can  
4 say, here are the reasons that we are going to take  
5 account of?

6 MS. HEDLUND: I don't think that satisfies the  
7 plain language of the statute, which is for a provider for  
8 any fiscal period. I think any provider needs to be given  
9 that opportunity to demonstrate that its costs are  
10 reasonable under the statutory standard.

11 QUESTION: Ms. Hedlund, you would give the  
12 Secretary this much, wouldn't you, you would say that if  
13 you come up with an accounting methodology, a cost  
14 accounting methodology that shows you have been  
15 inadequately reimbursed but the Secretary, using another  
16 cost accounting methodology which is also reasonable,  
17 finds that you haven't been reimbursed, and both  
18 methodologies are perfectly respectable ones, you lose?  
19 You won't even give him that much?

20 MS. HEDLUND: I'm not sure I fully understand --

21 QUESTION: Well, I mean, there are a lot of ways  
22 to skin the cat, and economists have developed a lot of  
23 different methodologies, and very often either one is a  
24 reasonable methodology.

25 If the Secretary is using a reasonable



1 methodology, the mere fact that you come up with another  
2 methodology, which is also reasonable, that shows you've  
3 been inadequately reimbursed, that would not entitle you  
4 to compensation, would it?

5 That's not involved in this case, but --

6 MS. HEDLUND: It's not.

7 QUESTION: I'm just trying to see how far you're  
8 trying to roll over the Secretary here.

9 (Laughter.)

10 MS. HEDLUND: I think that the statute -- we're  
11 not challenging the methodology, so -- the statute says  
12 when any methodology, when the aggregate reimbursement  
13 produced by all the methodologies is inadequate under that  
14 statutory standard --

15 QUESTION: How are you going to prove that  
16 you've been inadequately compensated without going through  
17 some system of proof?

18 MS. HEDLUND: We need to go through a system of  
19 proof. That's what we would like to do, and --

20 QUESTION: And then it might be quite  
21 reasonable, but the Secretary's is, too, as Justice Scalia  
22 suggests.

23 MS. HEDLUND: The test of reasonableness is one  
24 that's been used a very long time in Medicare. It derives  
25 from the 1965 legislative history that I said before,

1 which is that it's to reimburse costs however widely they  
2 vary, except where they are substantially out of line with  
3 costs of comparable providers.

4 And the Provider Reimbursement Review Board  
5 right now hears cases all the time where the issue is, was  
6 a particular cost of a provider reasonable, and the level  
7 of proof the provider has to meet is to show that its  
8 costs were comparable, or substantially in line with costs  
9 of comparable providers, and that kind of exercise goes on  
10 all the time at the Provider Reimbursement Review Board,  
11 so we're not seeking some kind of new methodology by which  
12 to prove that the costs are reasonable.

13 With respect to the Secretary's book-balancing  
14 interpretation, if you step back and look at the structure  
15 of the statute, it seems to me there are two kinds of  
16 retroactive adjustment required. One is required for  
17 every provider, every year, and that is the kind of  
18 reconciliation the Secretary does, and we contend that  
19 that reconciliation is governed by section 1395(g).

20 1395(g) is the section that provides for interim  
21 payments to providers throughout the year, and then it  
22 requires that there be necessary adjustments on account of  
23 overpayments or underpayments, and that those adjustments  
24 should be made prior to settlement of the cost report.

25 That final adjustment that takes place prior to

1 settlement of the cost report is exactly what the  
2 Secretary's book-balancing interpretation does in this  
3 case. That's all that the Secretary says they should do,  
4 and we contend that that is entirely covered under section  
5 1395(g).

6 If you look at Clause (ii), the language of  
7 Clause (ii) says it requires an adjustment for a provider,  
8 for any fiscal period. It doesn't say, every provider for  
9 every period. That language in Clause (ii) does not  
10 contemplate an adjustment for every provider every year.  
11 It's not the book-balancing that's governed by  
12 section 1395g.

13 QUESTION: It's in a section entitled  
14 "Reasonable Costs."

15 MS. HEDLUND: That's correct, as opposed to the  
16 other reconciliation method --

17 QUESTION: Determination of amount.

18 MS. HEDLUND: Determination of payment amount.

19 QUESTION: Well, isn't 1395g what guides the  
20 Government in determining how much to pay out at the  
21 outset?

22 MS. HEDLUND: 1395g --

23 QUESTION: Rather than being a retroactive  
24 adjustment.

25 MS. HEDLUND: I think there's retroactive --

1 QUESTION: Doesn't 1395g tell the Secretary what  
2 it has to pay out on an ongoing basis --

3 MS. HEDLUND: It says --

4 QUESTION: Prospectively and with the right to  
5 make adjustments, and section -- Clause (ii) that we're  
6 concerned with is a retroactive adjustment, or am I  
7 incorrect?

8 MS. HEDLUND: My reading of section 1395g is  
9 that when it says, with necessary adjustments on account  
10 of previously made overpayments or underpayments, that's  
11 sort of a retroactive settling up. A provider gets  
12 interim payments throughout the year.

13 QUESTION: In calculating the ongoing payments  
14 that the Secretary makes to the hospital, or to the  
15 provider.

16 MS. HEDLUND: But it's also on a year-to-year  
17 basis, because those necessary adjustments also are made  
18 prior to settlement. This section says its made prior to  
19 settlement of the cost report.

20 So there are interim payments made throughout  
21 the year. When a provider files its cost report there is  
22 often what's called a tentative settlement that's made --  
23 that's the preliminary reconciliation -- and then when the  
24 cost report is finally settled, there's the final  
25 reconciliation, and I think this language on account of

1 previously made underpayments or overpayments is taken  
2 into account in that final settlement process.

3 Thank you. I'd like to reserve the rest of my  
4 time for rebuttal.

5 QUESTION: Very well, Ms. Hedlund. Mr. Dumont,  
6 we'll hear from you.

7 ORAL ARGUMENT OF EDWARD C. DuMONT

8 ON BEHALF OF THE RESPONDENT

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

11 Petitioners in this case were subject to exactly  
12 the same regulatory cost limits that applied to all  
13 similar Medicare providers during the years at issue.  
14 Their costs exceeded those limits, and they concede that  
15 they did not qualify for any of the exemptions or  
16 exceptions provided in the Secretary's regulations.

17 In the courts below, petitioners challenged the  
18 validity of the regulatory cost limits, saying that they  
19 were arbitrary and irrational. They lost that challenge,  
20 and in this Court they concede that the regulatory cost  
21 limits are generally valid. Nevertheless, they assert a  
22 right to some sort of individualized proceeding in which  
23 to seek exactly the same relief on the ground that those  
24 limits, although generally valid, should not apply to  
25 them.

1 QUESTION: Mr. DuMont, you refer to the cost  
2 limits. The statute does not refer to the cost limits,  
3 does it? It says "the reasonable cost of any services  
4 shall be the cost actually incurred." These are cost  
5 estimates, rather than cost limits, aren't they?

6 You're referring to this as though it's a price  
7 regulation scheme, but it isn't, is it? I thought it was  
8 just -- "the reasonable cost of any services shall be the  
9 cost actually incurred" is how the provision begins.

10 MR. DuMONT: That's how the provision begins,  
11 and that's how the provision stood in 1965 when it was  
12 enacted, but in 1972, Congress explicitly enacted  
13 authority later on in the same section of the statute for  
14 the Secretary to provide for the establishment of limits  
15 on the direct or indirect overall incurred costs to be  
16 recognized as reasonable for purposes of Medicare  
17 reimbursement, and we submit that that language is  
18 essentially conclusive of the issue presented in this  
19 case.

20 In fact, there are three principal reasons --

21 QUESTION: Where are you -- okay.

22 MR. DuMONT: I'm sorry, I'm reading -- I'm in  
23 section 1395x(v) (1) (A) about in the middle of the --

24 QUESTION: I see.

25 QUESTION: Now, would you be more specific where

1 you are in 1395x(v) (1) (A)?

2 MR. DuMONT: Using the copy of the statute  
3 that's at the beginning of the petitioners' brief, it's  
4 almost at the bottom of page 2 of the petitioners' brief.

5 QUESTION: Thank you.

6 MR. DuMONT: In fact, we would assert that there  
7 are three principal reasons why this Court should not --

8 QUESTION: Before you leave that section, would  
9 you just -- I'm a little slow in following this rather  
10 complicated statute. What in that sentence is it that's  
11 so critical and disposes of the whole case, which I think  
12 you said that sentence did? You better tell me which  
13 language does it.

14 MR. DuMONT: Well, Your Honor, we think that the  
15 language -- first of all, section 1861 provides the  
16 definition of reasonable cost, which is the key to  
17 Medicare reimbursement entirely. It provides that that  
18 reasonable cost means necessary cost incurred, and so  
19 on --

20 QUESTION: Right.

21 MR. DuMONT: And is to be determined by  
22 regulations promulgated by the Secretary specifying the  
23 methods to be used in calculating reasonable cost.

24 QUESTION: Right.

25 MR. DuMONT: The -- in 1972, Congress enacted a

1 specific authorization for a particular method. That is,  
2 the cost limits that are at issue in this case.

3 QUESTION: Now, is that the sentence that  
4 begins, "Such regulations may provide," that was added in  
5 '72?

6 MR. DuMONT: That entire sentence was not added,  
7 but the authorization that it may provide for  
8 establishment of limits was added in 1972.

9 QUESTION: What about Clause (ii)? Was that in  
10 there originally, or was that also added?

11 MR. DuMONT: Clause (ii) has been there since  
12 the beginning of the statute.

13 QUESTION: In that particular language.

14 MR. DuMONT: Yes. The language of Clause (ii)  
15 has not changed except to change B to (ii) when they  
16 reordered the numbering in the statute.

17 We would -- we think the petitioners focus on  
18 Clause (ii), which defines reasonable cost, but as I've  
19 been saying, the immediately preceding sentence of the  
20 same section explicitly authorizes the Secretary first of  
21 all to make estimates of the costs necessary in the  
22 efficient delivery of needed health services, which is the  
23 language which Ms. Hedlund refers to, and then, on the  
24 basis of those estimates, to promulgate limits on the  
25 costs to be recognized as reasonable.



1           If there's a key point in this case, it is that  
2 when the Secretary prescribes a valid cost limit, which is  
3 to be recognized as reasonable, that, as a matter of  
4 statutory authority, pretermits any further inquiry into  
5 whether a the valid application of those methods produces  
6 a result which is reasonable or not.

7           QUESTION: Well, I -- the concern, though, is  
8 that here the statute spells out how the Secretary is  
9 going to determine the calculation of reasonable costs,  
10 but then subsection (ii), the clause on which petitioners  
11 rely, says that where the aggregate reimbursement made by  
12 these methods of determining reasonable cost proves to be  
13 either inadequate or excessive, that some adjustment will  
14 be made, and that suggests at least that it's more than  
15 just going through the reasonable cost analysis. I mean,  
16 the language would suggest that.

17           MR. DuMONT: Well, Your Honor, I think the  
18 language suggests -- you know, mandates that there must be  
19 some adjustment and there's going to be some comparison of  
20 aggregate amounts. We would submit that the language,  
21 "inadequate or excessive" at the end of the statute begs  
22 the immediate question, inadequate or excessive compared  
23 to what?

24           Now, compared to what has to be reasonable cost,  
25 as defined in the statute, but reasonable cost is not

1 self-defining in the statute.

2 QUESTION: Well, there's another statutory  
3 provision, I think that requires the book-balancing, so  
4 Clause (ii) must mean something else. I mean, there's  
5 another statute, I think --

6 QUESTION: 1395g.

7 QUESTION: 1395g, that says you're going to do  
8 the book-balancing, so I think probably it's reasonable to  
9 read subsection (ii) as requiring something more.

10 I get bogged down in what the something more  
11 might be and how the Secretary could do it. I mean, maybe  
12 the Secretary can do the something more in the very way  
13 the Secretary has, by providing exceptions here and there.  
14 They have regulations that deal with many of these things.

15 MR. DuMONT: Well, I certainly agree that if  
16 Clause (ii) requires anything more than we say it does,  
17 which is to say, year-end reconciliation, then whatever  
18 obligation it imposes on the Secretary is first of all  
19 qualified by the words "suitable retroactive corrective  
20 adjustments" which implies a certain range of discretion,  
21 and second is fully accounted for by the exceptions and  
22 exemptions that the Secretary has in fact built into the  
23 cost limits.

24 Now, I should be clear that we do not think  
25 those exemptions or exceptions were promulgated under the

1 authority of Clause (ii) because we don't think that is  
2 what Clause (ii) is about.

3 Now, with respect to section 1395g, with respect  
4 I think the two statutory provisions really look at  
5 different phases of the process in two ways. First of  
6 all, section 1395g is a payment mechanism, and if you look  
7 at the beginning of section 1395g, which I believe is  
8 quoted on page 20 of petitioners' brief in note 17, the  
9 beginning of that section is, "The Secretary shall  
10 periodically determine the amount which should be paid  
11 under part A to each provider of services," and so on.

12 Now that refers to something obviously as  
13 outside of section 1395g itself as to the substantive  
14 determination of how much is to be paid, and we submit  
15 that what it refers to is the Secretary's cost  
16 determination methods which are in fact specified in  
17 section 1395x(v).

18 QUESTION: Could I ask you, the Secretary has  
19 determined the compensation for this provider under his  
20 prescribed methodology --

21 MR. DuMONT: Yes, Your Honor.

22 QUESTION: I take it. Now, Clause (ii)  
23 provides -- speaks not only of inadequacy but of  
24 excessiveness.

25 MR. DuMONT: That's correct.

1 QUESTION: Now, how would the Secretary ever go  
2 about saying that what we have paid is excessive, even  
3 though our methodology says that's supposed to reflect  
4 cost?

5 MR. DuMONT: Well, I think that's a very  
6 interesting question, Your Honor, and in fact --

7 QUESTION: It would be almost impossible,  
8 wouldn't it, for the Secretary to confound his own  
9 methodology?

10 MR. DuMONT: Well, no, Your Honor, in fact I'm  
11 not sure that it would be.

12 QUESTION: Well, I'm just suggesting to you that  
13 maybe excessiveness could only really mean book-balancing.

14 MR. DuMONT: First of all, I think that is by  
15 far the most natural interpretation of the statute, is  
16 that that language refers to the same kind of accounting  
17 comparison that we submit, the comparison of an aggregate  
18 reimbursement produced by estimated methods with a total  
19 final audited reimbursement produced by the same methods  
20 but applied to final numbers.

21 Now, Your Honor does raise an interesting point,  
22 however, which is that in the context of this particular  
23 clause, what's sauce for the goose has to be sauce for the  
24 gander, so that if in fact Clause 2 provides for some kind  
25 of retroactive change in the methods which are applied,

1 then there's no reason why the Secretary couldn't come in  
2 and say -- because as Justice Scalia said, there's a  
3 variety of reasonable methods that could be applied to  
4 determining costs.

5           There's no reason the Secretary couldn't come in  
6 at some point and say well, you know, I know I promulgated  
7 these regulations that said that X was reasonable, but now  
8 I really think that it should have been X minus 10 and I'm  
9 going to apply that on a case-by-case adjudication to  
10 every provider in the Medicare program with an open year,  
11 and provided that those -- both X and X minus 10 are  
12 reasonable within some broad unstructured definition, I  
13 assume the Secretary gets away with that. I mean, that  
14 seems to me to directly undercut this Court's holding in  
15 *Bowen v. Georgetown University Hospital*.

16           QUESTION: Mr. DuMont, what about a third  
17 possibility, besides the two represented by the  
18 Government's position and the petitioners' position here?

19           Clause (ii) says, "provide for suitable  
20 retroactive corrective adjustments where the aggregate  
21 reimbursement provided by the methods of determining  
22 costs" -- methods of determining costs -- "prove  
23 inadequate or excessive," and if you go back earlier,  
24 you'll see that it gives the -- the provision gives the  
25 Secretary authority to do various things, one of which is

1 to provide for the determination of costs.

2 Then it continues, "He may also provide for the  
3 establishment of limits." Why can't they -- isn't it  
4 possible that this provision allows them to question the  
5 determination of cost, the methodology used to determine  
6 cost, but not to determine limits that have been  
7 established? They are different provisions.

8 MR. DuMONT: That's correct, Your Honor, and we  
9 would agree with you that even if Clause (ii) had  
10 originally allowed for some kind of originalized challenge  
11 to the determination of costs under the original statutory  
12 scheme, that once Congress came in in 1972 and spoke very  
13 specifically to the concept of imposing costs --

14 QUESTION: Of established limits. Can you  
15 separate out the two? Is it possible to decide which  
16 portion of the Secretary's action constitutes determining  
17 costs and which constitutes establishing limits?

18 Well, doesn't the limit itself refer to costs,  
19 though? I don't think -- it says limits on costs.

20 MR. DuMONT: Well, we would submit that the cost  
21 limits are, in fact, one of the methods of determining  
22 costs. I mean, that is our position.

23 I think it is possible technically to separate  
24 them in the sense that in order to calculate -- the  
25 provider comes forward with a report of what it's costs

1 were, and these limits are actually implemented through a  
2 per diem schedule, depending where a hospital fits in  
3 terms of size and location and so on.

4 QUESTION: Well, suppose -- he's imposed a limit  
5 of -- imposed limits on costs of specific items or  
6 services or groups of items or services. Clause (ii)  
7 couldn't possibly provide for reimbursement beyond those  
8 cost limits, could they?

9 MR. DuMONT: We would submit that no, it could  
10 not, because after all, Clause (ii) only authorizes an  
11 adjustment in accordance with the methods prescribed by  
12 the Secretary, and cost limits are one of those methods,  
13 so once you have a validly promulgated applicable limit,  
14 we think that ends the question as to those costs.

15 QUESTION: It's not clear to be why you can't  
16 reach the result you want to reach in making these  
17 adjustments under 1395g. Why is 1395g inadequate to  
18 accomplish the book-balancing function that you wish to  
19 accomplish under subpart (ii)?

20 MR. DuMONT: First of all, because, as I said  
21 the -- we think 1395g refers only to a payment mechanism  
22 and that the first sentence of 1395g requires an external  
23 determination of what amounts are in fact due under --

24 QUESTION: What kind of determination? I didn't  
25 hear you.

1 MR. DuMONT: External, I'm sorry.

2 QUESTION: External.

3 MR. DuMONT: External to the standards put forth  
4 in 1395g itself.

5 Secondly, because as a matter of interpretation,  
6 if you look at how both 1395g and Clause (ii) were  
7 implemented in the initial regulations promulgated by the  
8 Secretary, it's quite clear that Clause (ii), as this  
9 Court said in footnote 2, I believe, of the Georgetown  
10 opinion, the language of Clause (ii) is tracked quite  
11 directly by the year-end reconciliation language in the  
12 initial regulations.

13 And we would submit that those regulations  
14 being -- having been drafted by people who were intimately  
15 involved in putting together the statute and having been  
16 really discussed with the enacting Congress before they  
17 were promulgated, so it was an excellent guide to the  
18 original understanding of the terms of the statute were.

19 So if those regulations implement Clause (ii) in  
20 a substantive provision providing for retroactive  
21 reconciliation and book-balancing at the end of the year,  
22 then we think that's very good evidence that that's what  
23 that clause was intended to do.

24 QUESTION: Mr. DuMont, this -- my question may  
25 have been already raised by someone else while I was



1 reading the statute, and I apologize if it's repetitive,  
2 but let me ask you this: the aggregate reimbursement  
3 which is either inadequate or excessive is described as an  
4 aggregate reimbursement produced by the methods of  
5 determining costs -- not by the methods of deciding how  
6 interim reimbursement will be made, not by the methods for  
7 determining payment, but by the methods of determining  
8 costs.

9 Doesn't that necessarily mean that the  
10 inadequacy must be an inadequacy which implies that there  
11 is something wrong with the method itself?

12 MR. DuMONT: No, Your Honor, for the following  
13 reason. The language methods of determining costs in  
14 Clause (ii) is fully broad enough to include the  
15 application of those methods in making the estimates that  
16 are made in order to make interim payments as directed by  
17 section 1395g. It's really the same --

18 QUESTION: Why? I mean, explain that to me.

19 MR. DuMONT: Well, you need to have some basis  
20 on which to make estimated payments, since the statute  
21 directs that you make them at least monthly.

22 Now, the regulatory direction is to make those  
23 estimates as close as possible to what the final result is  
24 going to be. Therefore, what you're really doing is  
25 taking estimated data but running them through the same

1 methods that you're eventually going to run the final data  
2 through in order to get a result.

3 QUESTION: But why are those methods for  
4 determining costs, which I thought meant costs in the  
5 allowable sense used by this section, which is kind of  
6 your ultimate determination, or ultimate criterion of what  
7 is allowable?

8 MR. DuMONT: Well, that's quite right, but you  
9 pay on an estimated basis your best estimate of what those  
10 allowable costs are going to be. Then you're going to  
11 inevitably make some mistakes that will be --

12 QUESTION: Sure, but if that -- and in a way, I  
13 guess that's my point. The statute doesn't speak of  
14 determining adequacy -- inadequacy or excessiveness by  
15 reference to estimated payments. It's inadequacy or  
16 excessiveness by methods of determining costs, which seems  
17 to me the ultimate criterion rather than simply the  
18 procedure for making interim payments.

19 MR. DuMONT: With respect, it's inadequacy or  
20 excessiveness of an aggregate reimbursement produced by  
21 the methods of determining costs, and we would say that  
22 aggregate reimbursement is most naturally interpreted to  
23 be a reference to the total bottom-line number you get at  
24 the end of the year once you've made a bunch of estimated  
25 payments.

1           QUESTION: If aggregate reimbursement were not  
2 there, would you agree that the other side would have a  
3 pretty open-and-shut case?

4           MR. DuMONT: No, I don't think so, Your Honor,  
5 because still --

6           QUESTION: Boy, you won't give up anything.

7           (Laughter.)

8           MR. DuMONT: We're trained that way.

9           QUESTION: They ought to have you figuring the  
10 reimbursements.

11          (Laughter.)

12          QUESTION: But if you didn't have that phrase,  
13 "the aggregate reimbursement," then you would simply have  
14 the inadequacy or excessiveness -- let's take -- leave out  
15 the word "aggregate." You'd just have inadequacy or  
16 excessiveness or reimbursement produced by methods. I  
17 admit, when you get the word, "aggregate" in there, maybe  
18 you introduce an ambiguity.

19          MR. DuMONT: I think that's true, but I think  
20 even without the word "aggregate," you are talking about a  
21 reimbursement produced by applying the Secretary's  
22 methods, and those methods are -- the same methods are  
23 applied in determining the estimated payments made during  
24 the course of the year.

25          QUESTION: But of course, aggregate is readily

1 explicable on the other theory as well. That is, if a  
2 method of determining certain of your costs inflate your  
3 costs, but a method of determining other ones deflate your  
4 costs, you shouldn't be able to claim reimbursement. You  
5 can offset one excess against the other deficiency. It  
6 makes sense on that basis, too.

7 MR. DuMONT: Well, the word is susceptible to a  
8 variety of interpretations, but actually I would urge that  
9 ours is the more natural, for this reason: that because  
10 you're going to have -- you know you're going to have a  
11 number of interim payments which are frankly estimates,  
12 and you know they're going to be somewhat inaccurate, some  
13 may be high, some may be low, you're going to get to the  
14 end of the year and you're going to have an aggregate  
15 number you've actually paid.

16 Whereas on their theory, it seems to me what  
17 they're really saying is that they're really attacking the  
18 method in the sense that they're saying that the cost  
19 limits as we've promulgated them are unfair to them as we  
20 have placed them on a matrix of possible places you could  
21 be on the cost-limit curve, and these are per diem limits,  
22 so their argument applies exactly the same way to every  
23 patient day of care during the entire year.

24 It gives you a determinate amount, and all you  
25 have to do to aggregate anything there is to add up the

1 total number of patient days and multiply, and I think  
2 it's a much less substantial reading of the word  
3 "aggregate," actually, than ours.

4 QUESTION: By the time you get to this  
5 provision -- g comes before x, am I correct about that?

6 MR. DuMONT: That's correct.

7 QUESTION: So at least, even though interim  
8 payments isn't mentioned in this section, at least the  
9 person who sat down of an evening to read through this  
10 statute --

11 (Laughter.)

12 QUESTION: Has already read about interim  
13 payments by the time he gets to this provision, right?

14 MR. DuMONT: That's correct.

15 QUESTION: May I follow up with one other  
16 question? Supposing Congress repealed Clause (ii), would  
17 you say that there would no longer be any statutory  
18 authority for book-balancing pursuant to subsection g?

19 MR. DuMONT: We think that if Clause (ii) did  
20 not exist, it's likely or at least possible that the  
21 authority to form some kind of year-end book-balancing  
22 could be inferred under the general statutory --

23 QUESTION: It's rather clear they would be  
24 able -- if they found they paid \$10,000 too much just  
25 because they overestimated, it's pretty clear they could

1 have balanced just at the end of the year, couldn't they,  
2 without Clause (ii)?

3 MR. DuMONT: I suspect that we would argue that  
4 the Secretary would have that power.

5 QUESTION: Yes.

6 MR. DuMONT: To return for a moment to  
7 Mr. Justice Souter's question, I think it's important to  
8 realize that there is a tautology involved, we think, in  
9 Clause (ii), which is to say that the costs you're going  
10 to compare have to be costs that are determined by the  
11 Secretary's methods, and you're going to compare them to  
12 some standard of reasonableness, but as we also say, the  
13 standard of reasonableness is the standard that is  
14 produced by the Secretary's methods.

15 Now, our interpretation accommodates that  
16 tautology, because we're not talking about changing the  
17 methods, we are only talking about changing the data,  
18 because the data when you originally make payments are  
19 estimated and provisional, and the data when you  
20 eventually make final settlement are audited and correct.

21 Now, petitioners' interpretation, on the other  
22 hand, really destroys that tautology because they have to  
23 be in a position of saying, well, what you compare this to  
24 is some general and rather amorphous statutory standard of  
25 reasonableness, which first of all we think is

1 inconsistent with the statutory language --

2 QUESTION: Well, is there some problem about the  
3 provider proving what their actual -- what its actual  
4 costs were for the year?

5 MR. DuMONT: There's a factual question when  
6 they prove their actual costs.

7 QUESTION: Yes.

8 MR. DuMONT: There's a much more complicated  
9 question when they prove their reasonable costs.

10 QUESTION: Well, I understand that, but there's  
11 no problem they can prove what they paid out -- I mean,  
12 what it actually cost them.

13 MR. DuMONT: Presumably, yes.

14 QUESTION: Well, presumably -- I would suppose  
15 they could.

16 And I thought, maybe (ii) says you compare what  
17 they got under the program with what it cost them and try  
18 to determine whether what they got is inadequate. That's  
19 what (ii) says -- inadequate or excessive.

20 MR. DuMONT: That's correct, but again, the  
21 question --

22 QUESTION: And then -- and in order to show they  
23 were inadequate, you would have to show that the  
24 compensation was unreasonably low.

25 MR. DuMONT: I believe on their theory you would

1 have to show that it was unreasonably low compared to some  
2 statutory standard of reasonableness.

3 Now, Ms. Hedlund has tried to reimport into that  
4 analysis the original regulatory standard, which was  
5 substantially out of line with the costs of other similar  
6 providers, but frankly I don't know why she would make  
7 that concession, because once she's outside of the  
8 Secretary's methods, one of which is cost limits and  
9 another one of which is the substantially-out-of-line  
10 standard, you're really back to a completely unbounded  
11 statutory question of whether a particular reimbursement  
12 is reasonable within only the statutory definition.

13 QUESTION: The referent of subsection (ii) that  
14 we've been talking about is such regulations, is it not?

15 MR. DuMONT: That's correct, Your Honor.

16 QUESTION: It doesn't give any independent right  
17 to simply come in and challenge the inadequacy of -- it  
18 directs the Secretary to come up with regulations dealing  
19 with the subject.

20 MR. DuMONT: That's absolutely correct, Your  
21 Honor, and first of all we believe that Clause (ii) has  
22 been implemented by regulations which date back to the  
23 initiation of the program in the limited way in which we  
24 interpret it, and second, even if Clause (ii) means  
25 something else from what we think it means, presumably the



1 only appropriate remedy is to remand to the Secretary for  
2 promulgation of some kind of regulations to implement that  
3 standard with suitable adjustments and suitable  
4 limitations.

5 QUESTION: Is this a fair summary of what you  
6 say it means: "Provided that where, at the end of the  
7 year, the provider has received either more or less than  
8 the regulations authorize, there shall be a corrective  
9 adjustment"?

10 MR. DuMONT: That's correct, Your Honor.

11 Just to recap for a moment. Petitioners  
12 challenge the reasonableness and validity of the  
13 regulations --

14 QUESTION: Just suppose -- suppose there were  
15 two regulations, one on reimbursing for use of facilities,  
16 the other for the payment of nurses, and each of those  
17 methods was properly applied and the proper payments were  
18 made, but the aggregate of the two was -- well, let's say  
19 that the aggregate of the two was excessive because nurses  
20 were paid too much, they were double-paid because their  
21 costs were factored into the facilities somehow. Would  
22 you then have a right to recoup?

23 I.e., you then have two methods, both of which  
24 are being used for different things, one's facilities, the  
25 other's nurses, but you think that there's -- because of

1 this particular hospital, there's a double counting, so  
2 you want money back.

3 Aren't you entitled under this regulation to say  
4 that the aggregate is excessive?

5 MR. DuMONT: Under Clause (ii), assuming that  
6 the regulations have been properly applied, no, we would  
7 not be entitled that under Clause (ii).

8 Now, there might very well be some general  
9 common law recoupment power if we had double-paid for a  
10 particular cost. But under Clause (ii), no. Clause (ii)  
11 does not speak to that issue.

12 QUESTION: Under Ms. Hedlund's view it would.

13 MR. DuMONT: I assume it would, yes.

14 We believe the result the petitioners seek would  
15 contravene the statutory language enacted in 1972  
16 specifically authorizing cost limits, undermine the whole  
17 concept of cost limits, and a sensible and generally  
18 applicable scheme in favor of case-by-case adjudication,  
19 essentially without standards, undercut the results of  
20 this Court's decision in Georgetown, and impose an  
21 unacceptable burden on the Secretary and ultimately on the  
22 courts.

23 Thank you, Your Honor.

24 QUESTION: Thank you, Mr. DuMont.

25 Ms. Hedlund, you have 8 minutes remaining.

1 REBUTTAL ARGUMENT OF CAREL T. HEDLUND

2 ON BEHALF OF THE PETITIONERS

3 QUESTION: Ms. Hedlund, as part of your  
4 presentation at any point, it seems to me that under your  
5 interpretation the word "aggregate" is simply superfluous.

6 MS. HEDLUND: I don't think it's superfluous,  
7 because it -- you have to wait till all the regulations  
8 are applied at the end of the year before Clause (ii)  
9 kicks in. It's a retroactive adjustment, and you look at  
10 all the reimbursement produced by all the Secretary's  
11 methods.

12 QUESTION: But you could reach the result your  
13 clients reached, and you could reach the results of  
14 reimbursement without use of that word.

15 MS. HEDLUND: Yes, I believe that's correct.

16 The Secretary indicated that his book-balancing  
17 regulations should be entitled to deference because they  
18 were the original regulations developed at the beginning  
19 of the Medicare program, but I'd like to go back to the  
20 point I made earlier, which is the language in those  
21 regulations talks about an adjustment that brings  
22 reimbursement into line with actual cost.

23 That's not what the Secretary has done in our  
24 case, but that's what the language of the regulation said.  
25 Congress probably understood those words to encompass the

1 kind of adjustment that we're seeking, but they've simply  
2 not been applied by the Secretary in that fashion.

3 QUESTION: Which regulations are these,  
4 Ms. Hedlund?

5 MS. HEDLUND: The one cited in footnote 2 of the  
6 Georgetown decision. Both of them are actually cited on  
7 page 21 of the Government's brief, 405.405(c), which talks  
8 about the retroactive payments will take fully into  
9 account the costs that were actually incurred, and  
10 405.451(b)(1).

11 QUESTION: Ms. Hedlund, what about the -- what  
12 is your response to the question that I asked Mr. DuMont?  
13 Suppose -- why isn't it the case that Clause (ii) only  
14 refers to adjustment with respect to methods of  
15 determining costs, and that is separate in the statute  
16 from the establishment of limits on direct or indirect  
17 costs.

18 Would it suffice for your purposes if you had  
19 the power to challenge the method of determining costs but  
20 not the power to challenge the establishment of limits on  
21 the direct or indirect overall incurred costs?

22 MS. HEDLUND: We did challenge the validity of  
23 the cost-limits methods, and we lost on that challenge,  
24 and we're saying Clause (ii) assumes or recognizes that  
25 valid methods can produce inaccurate reimbursement in

1 individual circumstances, so we -- it's not sufficient for  
2 our purpose to be able to challenge the cost-limit method.

3 QUESTION: I'm not sure I understand your  
4 response. Are you challenging the limits in this suit, or  
5 are you challenging just the methods, or both?

6 MS. HEDLUND: The limits are a method. We're  
7 challenging the amount of reimbursement that we were paid  
8 under the limits.

9 QUESTION: So you have to challenge both, the  
10 limits and the methods, you're saying.

11 QUESTION: I thought you were challenging  
12 neither.

13 MS. HEDLUND: In this case, we're -- I'm  
14 confused by the question --

15 QUESTION: Well, when I say challenging --

16 MS. HEDLUND: Because the cost limits are one of  
17 the methods --

18 QUESTION: When I say challenging, I mean,  
19 you're saying that both the limits and the methods require  
20 an exception in your case. You require an exception from  
21 both the limits and the methods in order to get reasonable  
22 costs.

23 MS. HEDLUND: Yes. I think the limits are one  
24 of the methods, and that's the way this Court construed it  
25 in Georgetown.

1           With respect to the question about, how would  
2 the Secretary recapture excessive reimbursement, because  
3 Clause (ii) is definitely a two-way street, I would just  
4 note that in the past the Secretary has cited Clause (ii)  
5 to promulgate regulations to go back and take depreciation  
6 from providers in the depreciation recapture cases -- it's  
7 the Springdale Convalescent Center case out of the Fifth  
8 Circuit -- when the Secretary has invoked Clause (ii) for  
9 a variety of reasons over the years.

10           QUESTION: If I understand you correctly, the  
11 Secretary could invoke Clause (ii), saying to recapture a  
12 lot of depreciation he thought was excessive, without  
13 promulgating a regulation -- just say, we just realized  
14 there's this method, that one of the consequences of our  
15 regulations is that these hospitals have been able to make  
16 all sorts of money because they've overestimated or  
17 overaccounted for depreciation, something like that.  
18 Isn't it an open-ended, ad hoc thing? You just made too  
19 much money, ergo it was excessive, ergo we can on a case-  
20 by-case method recover some money from you.

21           MS. HEDLUND: If the Secretary could prove that  
22 they had paid more than the actual cost to a provider,  
23 they could do that under Clause (ii).

24           QUESTION: Without a special regulation on  
25 depreciating, just doing an accurate accounting job by --

1 MS. HEDLUND: Not just -- well, not just -- I  
2 think that's different, if it's an accounting question as  
3 to whether they didn't properly --

4 QUESTION: They just --

5 MS. HEDLUND: The costs were properly  
6 recorded --

7 QUESTION: There are all sorts of cost  
8 accountants who can figure costs a million different  
9 ways --

10 MS. HEDLUND: I'm sure of that.

11 QUESTION: As we all know, and they just now  
12 have got a new cost accounting expert who figured they've  
13 been -- your hospitals have been overcharging depreciation  
14 for years, so we're going to take a second look at your  
15 costs on an ad hoc, case-by-case basis. Why can't they do  
16 that under Clause (ii)?

17 MS. HEDLUND: Clause (ii) works two ways.

18 QUESTION: I just wonder who wins this lawsuit  
19 if you prevail.

20 QUESTION: Well, they have --

21 (Laughter.)

22 MS. HEDLUND: It is a two-edged sword. It  
23 definitely is a two-edged sword.

24 QUESTION: Well, they'd have the burden, I  
25 assume, wouldn't they?

1 MS. HEDLUND: They would have the burden of  
2 showing --

3 QUESTION: They would have the burden of showing  
4 that their own regulation is bad.

5 MS. HEDLUND: That's correct, or that it  
6 resulted in over-reimbursement, or that the provider's  
7 costs were unreasonable.

8 QUESTION: In a particular case.

9 MS. HEDLUND: In a particular case.

10 QUESTION: The regulators generally find that  
11 where you've go a place in Nebraska where a lot of people  
12 work part-time and not full-time you've got this strange  
13 result. We can recover it without any special regulation.

14 MS. HEDLUND: Yes.

15 With respect to the Secretary's assertion that  
16 remand for rulemaking might be an appropriate remedy, we  
17 don't think that that's the case. As I said, the actual  
18 language of the book-balancing regulations -- not the way  
19 they've been implemented, but the language is broad enough  
20 to encompass the kind of adjustment we're seeking, and --

21 QUESTION: Do you mean the language of g is  
22 broad enough, or the language of x is broad --

23 MS. HEDLUND: Of the regulations, the book-  
24 balancing regulations, where it talks about a  
25 reconciliation to actual cost, that that -- Clause (ii)



1 does require regulation. That regulation -- the book-  
2 balancing regulation, the actual language is broad enough  
3 and in addition --

4 QUESTION: So you say the Secretary has just  
5 misinterpreted his own regulation.

6 MS. HEDLUND: They've been applying them --  
7 they've not allowed us to show -- to get reimbursement for  
8 our actual costs. They have always construed that  
9 regulation far more narrowly than the language in that  
10 regulation.

11 QUESTION: So you say that this is a case in  
12 which the Secretary has misconstrued his regulation.

13 MS. HEDLUND: Misapplied it, I believe.

14 CHIEF JUSTICE REHNQUIST: Very well. Thank you,  
15 Ms. Hedlund. The case is submitted.

16 (Whereupon, at 12:01 p.m., the case in the  
17 above-entitled matter was submitted.)

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CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: No. 91-2079*

*Good Samaritan Hospital, et al., Petitioners v.*  
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*Donna E. Shalala, Secretary of Health and Human Services*  
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*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Lona M. May*-----

(REPORTER)