

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DEPARTMENT OF THE ARMY, Petitioner v. BLUE
FOX, INC.

CASE NO: 97-1642 *1.2*

PLACE: Washington, D.C.

DATE: Tuesday, December 1, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X
3 DEPARTMENT OF THE ARMY, :
4 Petitioner :
5 v. : No. 97-1642
6 BLUE FOX, INC. :
7 - - - - -X

8 Washington, D.C.

9 Tuesday, December 1, 1998

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:58 a.m.

13 APPEARANCES:

14 JEFFREY A. LAMKEN, ESQ., Assistant to the Solicitor
15 General, Department of Justice, Washington, D.C.; on
16 behalf of the Petitioner.

17 THOMAS F. SPAULDING, ESQ., Portland, Oregon; on behalf of
18 the Respondent.

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1 PROCEEDINGS

2 (10:58 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in 97-1642, the Department of the Army v. Blue Fox,
5 Inc.

6 We'll wait just a minute, Mr. Lamken.

7 Mr. Lamken.

8 ORAL ARGUMENT OF JEFFREY A. LAMKEN

9 ON BEHALF OF THE PETITIONER

10 MR. LAMKEN: Mr. Chief Justice, and may it
11 please the Court:

12 For well over a century, it has been settled law
13 that no plaintiff may obtain money from the United States
14 Treasury absent an act of Congress entitling the plaintiff
15 to the money or creating the -- or authorizing the
16 creation of a right to that money. That rule has been
17 repeatedly recognized in this Court's cases, including
18 Buchanan v. Alexander, United States v. Nordic Village,
19 United States v. Testan, OPM v. Richmond, and Republic
20 National Bank.

21 Probably nowhere has that rule been more often
22 repeated than in the context of subcontractor efforts to
23 obtain payment from the United States under an equitable
24 lien theory when the prime contractor that should have
25 paid this prime contract -- the subcontractor does not.

1 QUESTION: Mr. Lamken, I note you're getting
2 down to this specific case, but for the broad, sweeping
3 proposition you announced originally, I'm thinking of
4 cases like Westcott v. Califano where Congress said
5 benefits go to fathers not mothers, and this Court said
6 that such a statute -- its constitutionality could be
7 saved by including mothers for benefits, for unemployment
8 compensation benefits. How does that fit with your theory
9 that unless there's a specific act that covers this, no
10 money will be paid from the Treasury?

11 MR. LAMKEN: Well, Your Honor, I would say that
12 in that case the Court was construing the statute in a
13 manner to save its constitutionality consistent with
14 Congress' purpose. If Congress' express purpose was to
15 exclude somebody that the Court thought was
16 constitutionally included -- constitutionally had to be
17 included in the category, then the answer would be that
18 the statute could not be enforced at all. The Court could
19 not blue pencil in against Congress' intent a category of
20 people or an entitlement to money that Congress did not
21 want to be entitled. So, that would have to be
22 categorized as a case where the Court construed the
23 statute in order to make it constitutional and therefore
24 it read the statute as providing for a payment to those
25 individuals.

1 QUESTION: That's something maybe a lawyer could
2 follow, but the statute said unemployed father and the
3 Court said unemployed mothers will be paid under this
4 statute as well.

5 MR. LAMKEN: Yes. It's possible, Your Honor,
6 that the Court stretched quite a bit to save the
7 constitutionality of that statute. But that does not
8 change the underlying principle that absent a statute,
9 nobody may obtain money from the -- from the public
10 Treasury, and the courts are not entitled under principles
11 of common law or equity to create entitlements.

12 The other difference --

13 QUESTION: But you could have that kind of loose
14 interpretation of a statute that would accommodate the
15 kind of case I just described.

16 MR. LAMKEN: I'm sorry. Could you repeat the
17 question?

18 QUESTION: You could -- you said absent a
19 statute, but you just described a statute that on its face
20 doesn't cover something, but will be construed by a court
21 to cover something and that fits within your theory.

22 MR. LAMKEN: I think it would, but there's
23 another point to it, which is when we say that absent a
24 statute, we include in statutes all positive sources of
25 law that are above common law and court-made law and we

1 would include the Constitution. So, if the Constitution
2 required a payment from the United States Treasury -- and
3 I think it would be rare that it would. If the
4 Constitution required a payment from the United States
5 Treasury, then the Court might have it within its power to
6 order that payment be made.

7 QUESTION: No such problem is raised -- involved
8 here, is it?

9 MR. LAMKEN: No, I don't believe that there is
10 any constitutional question in this case.

11 QUESTION: In this -- in this case before the
12 Army paid Verdan in 1994, could it have said, you know, we
13 have \$86,000 we're going to pay Verdan, but we have notice
14 that Blue Fox hasn't been paid? We're going to put this
15 money into a -- a court escrow account and -- and allow
16 Blue Fox to make its claim in court. Could you have done
17 that?

18 MR. LAMKEN: The -- the Army could not have done
19 that without declaring the prime contractor in default.
20 So long as the contract was in force, it was contractually
21 obligated to pay the prime contractor. If it had decided
22 that the prime contractor was in default because it had
23 failed to pay Blue Fox, then it could proceed with the
24 contract. It would hire a replacement prime contractor,
25 and if at the end of the day there was money left over on

1 the contract that was owed to the prime contractor, it
2 could satisfy the contractual obligation to pay the
3 original prime contractor for the work it did by filing
4 interpleader.

5 QUESTION: But couldn't they have said the
6 contractor was in default because it didn't post a bond?

7 MR. LAMKEN: Pardon?

8 QUESTION: Could not the contractor have been in
9 default for failure to post a bond under the Miller Act?

10 MR. LAMKEN: That's an interesting theory.
11 Because the contract itself did not require a Miller Act
12 bond -- in fact, the requirement of a bond had been
13 deleted -- it would have been I think another stretch to
14 suggest that the contractor had breached a condition of
15 the contract --

16 QUESTION: Not as much as the stretch as that
17 case was, though.

18 (Laughter.)

19 MR. LAMKEN: I -- I think --

20 QUESTION: Because it's clear they -- oh, you
21 did dispute at one time whether there was a bond
22 obligation, didn't you?

23 MR. LAMKEN: The district court specifically
24 found that there was no bond required. However, in the
25 Ninth Circuit, and I think for purposes of this court

1 decision, it's fair to assume that there was a bond
2 requirement and that it was improper to have deleted it.

3 QUESTION: Well, wasn't Verdan in default for
4 not having paid Blue Fox?

5 MR. LAMKEN: That is a possibility that Verdan
6 was in default for the -- of the contract conditions by
7 not paying by -- Blue Fox in a timely fashion.

8 QUESTION: But, I mean, it all depends on
9 whether you declare there's a default?

10 MR. LAMKEN: That's correct. The contract --
11 the Government has the -- the ability and oftentimes the
12 duty to overlook minor defaults in the contract to make
13 sure that the contract is completed in a timely fashion.
14 So, it has the option sometimes of declaring a default,
15 replacing the prime contractor, oftentimes at greater
16 expense, or it may overlook minor defaults, complete the
17 contract to the best of its ability.

18 QUESTION: Well, if you -- if you have the --
19 the discretion -- let's assume there were facts here that
20 would have allowed you to declare a default -- to pay the
21 money into -- into a fund where interpleader is allowed,
22 which is ultimately going to allow Blue Fox to -- to
23 obtain the money, then there's no really appropriations
24 problem, is there?

25 MR. LAMKEN: No, I don't believe that the United

1 States has discretion.

2 QUESTION: So, you -- could you have paid Blue
3 Fox directly?

4 MR. LAMKEN: No. The United States could not
5 have paid Blue Fox.

6 QUESTION: Simply because you need a court
7 order? There's a difference in your doing it voluntarily
8 and having a court order?

9 MR. LAMKEN: No. The difference is that the
10 only way the United States could pay out money would be if
11 it were contractually obligated to do so. So long as it's
12 contractually obligated to pay the prime contractor --

13 QUESTION: But I thought you just said it could
14 be paid into an interpleader fund if you declared default.

15 MR. LAMKEN: Under one condition and that
16 condition is that the money is actually still owed to the
17 prime contractor. If it's owed to the prime contractor
18 --

19 QUESTION: Well, that was true here. You paid
20 Verdan twice, \$86,000 once and \$84,000 later.

21 MR. LAMKEN: \$86,000 in total in two payments,
22 and I think there's another one for \$1,000 --

23 QUESTION: Yes.

24 MR. LAMKEN: But the -- the contract had not yet
25 been completed. At that point in time, at the time Verdan

1 potentially defaulted by failing to pay Blue Fox on time,
2 the contract had not been completed. So, the United
3 States was under an obligation to use that money to
4 complete the contract, to hire a replacement contractor
5 and to complete it, which is what it did. At the end of
6 the day, there was no money left over. So, there was no
7 money owed to the prime contractor Verdan. Accordingly,
8 it couldn't pay that money out. It wasn't owed under
9 contract.

10 I think even under equitable lien principles,
11 the requirement is that before a subcontractor can claim
12 money, that money has to be owed to the prime contractor
13 for which it worked. And even the GAO would not allow the
14 Army to pay out money to a subcontractor unless that money
15 was actually earned and owed to the prime contractor for
16 which it worked.

17 I should also point out that in -- we -- in our
18 view the position of the GAO in the Federal circuit which
19 have suggested the United States may voluntarily pay out
20 that money is incorrect. The United States is under an
21 obligation to pay the money to the prime contractor that
22 earned it. If it's not earned under the contract, it may
23 not be paid out.

24 Does that answer your question? I'm sorry.

25 QUESTION: Yes.

1 MR. LAMKEN: Okay.

2 Because respondent seeks a payment of money from
3 the United States Treasury, respondent has the obligation
4 of pointing to a statute that entitles it to recover that
5 money from the United States or authorizes the --

6 QUESTION: What's the nature of a recovery in a
7 suit to enforce an equitable lien?

8 MR. LAMKEN: Your Honor --

9 QUESTION: Is it specific relief or -- or what?

10 MR. LAMKEN: In our view it would be an action
11 for money damages. It would not constitute specific
12 relief. We believe that there's three reasons for that.

13 The first and the most simple, in the facts of
14 this case, the actual res, the actual fund to which the
15 lien supposedly attached, has been dissipated. It's gone.
16 It no longer exists. Even at common law it was recognized
17 that once the funds to which the lien allegedly attached,
18 what was left to the complainant was not a claim for
19 specific relief, but a claim for damages, a claim -- a
20 general claim against the assets of the debtor.

21 QUESTION: Even if you had notice before you
22 disbursed the fund?

23 MR. LAMKEN: Even if you had notice before you
24 disbursed the fund. What was left was a general claim.
25 You would lose -- for example, you would lose your

1 priority over other creditors. All that was left was a
2 claim for damages.

3 QUESTION: If that is correct, that would be a
4 simple basis for deciding the case. So, you don't have to
5 get into all this Appropriations Clause business, do you?

6 MR. LAMKEN: That is correct. It would be a
7 very simple and very narrow case for deciding this
8 particular case. But the lower courts are currently
9 struggling with very broad issues that come out of the
10 Court's decision in Bowen and section 702.

11 QUESTION: Which you'd like us to decide even if
12 not necessary to dispose of this case.

13 MR. LAMKEN: Pardon?

14 QUESTION: Which you would like us to decide
15 even though not necessary to dispose of this case if
16 you're right on the point you just made.

17 MR. LAMKEN: Yes, Your Honor. I think that the
18 reason we asked the Court to take the case was not because
19 of the specific narrow problem with the decision below.

20 QUESTION: That was the question presented in
21 the petition for certiorari, the more general one, was it
22 not?

23 MR. LAMKEN: Whether or not that -- yes, whether
24 or not anyone could recover --

25 QUESTION: -- respondents to bring an action in

1 Federal district court for an equitable -- is Bowen the
2 only authority for an equitable lien against the
3 Government?

4 MR. LAMKEN: I -- Bowen itself wasn't an
5 equitable lien case, and I don't believe that there are
6 any cases from this Court --

7 QUESTION: Are there any cases from this Court
8 authorizing an equitable lien against the Government?

9 MR. LAMKEN: Not that I know of, no. Not -- not
10 against property in the possession of the Government that
11 the Government itself owned in advance.

12 The only possible cases I could think of that
13 would be contrary are cases where the United States
14 acquired property after a lien had been imposed on it, and
15 the question was, did the United States acquire greater
16 rights than the transferor that transferred the property
17 to it. And the Court in a case *Armstrong v. Georgia*, I
18 believe it was -- the name was *Armstrong* -- held that the
19 United States cannot get greater rights than the
20 transferor itself had.

21 But in no case has this Court ever held that a
22 plaintiff may obtain a lien on United States funds held by
23 the Treasury. In fact, in case after case it has held
24 that the United States' property and funds are not subject
25 to liens and are not subject to the imposition of money

1 payment obligations --

2 QUESTION: But Bowen did say, didn't it,
3 although it wasn't dealing specifically with equitable
4 liens, that the -- that the time had come to stop
5 recognizing sovereign immunity with respect to -- to
6 equitable claims? I mean, that's in Bowen, isn't it?
7 Whether -- whether it was too broad a statement, we can
8 argue about, but isn't that what the Court said?

9 MR. LAMKEN: No, I think Bowen is actually quite
10 a narrow decision. Bowen --

11 QUESTION: I'm talking about what the Court
12 said. Didn't the Court say something in substance like
13 what I -- I just said to you?

14 MR. LAMKEN: I do not recall a statement from
15 the Court indicating that any cause of action, no matter
16 what basis, was now viable against the United States so
17 long as it could be enforced by specific means.

18 We believe that was the basic mistake the Ninth
19 Circuit made below. It read the 1976 amendment to the APA
20 as in effect saying that any cause of action or the courts
21 could impose payment obligations on the Treasury so long
22 as, at the end of the day, the mechanism for enforcing
23 that payment obligation would be specific relief rather
24 than money damages.

25 This Court has made clear that any plaintiff

1 that seeks to obtain money from the Government must
2 overcome two inherent aspects of sovereignty. One is the
3 immunity of the United States to suit, due to the fact
4 that the United States cannot be called into court without
5 its consent. And the second is the immunity of the United
6 States' property and funds to seizure, liens, and
7 encumbrances without Congress' express consent.

8 QUESTION: Well, in this case what's the
9 difference between a recovery of damages and a recovery of
10 the kind of specific relief that the Ninth Circuit said
11 you could recover?

12 MR. LAMKEN: We don't believe that there is a
13 difference.

14 QUESTION: There isn't much, is there?

15 MR. LAMKEN: And in fact, it's -- if this very
16 claim had been brought -- for example, if Verdan had asked
17 for this money from the United States under its contract,
18 that claim itself would clearly have been one for money
19 damages under the contract. If respondent had sought the
20 money from Verdan under its contract, again it would have
21 been money damages.

22 QUESTION: Suppose a surety had paid the
23 subcontractor and then tried to get the money.

24 MR. LAMKEN: We believe that that claim also
25 would not be viable against the United States, that it too

1 would have been a claim for money damages.

2 QUESTION: Would that position be surprising to
3 the surety companies?

4 MR. LAMKEN: It would be surprising to surety
5 companies. Under a -- under the Federal -- well, under
6 the APA they would not -- we don't believe they'd be able
7 to -- they would not be able to prevail.

8 In the Federal circuit, in cases that we believe
9 are mistaken, the Federal circuit has described that
10 action that the surety brings as a contract action and
11 therefore within the scope of the waiver of immunity of
12 the Tucker Act.

13 QUESTION: But isn't -- doesn't our Pearlman
14 case establish that the sureties can recover?

15 MR. LAMKEN: Excuse me?

16 QUESTION: The Pearlman case that came from this
17 Court, Justice Black's decision?

18 MR. LAMKEN: Not against the United States.
19 Pearlman was a suit between a surety and a trustee of the
20 contractor, and the United States had already parted with
21 the funds. Nowhere in Pearlman does it state that the --
22 that the surety has a right of action against the United
23 States.

24 As a matter of fact, I think it's very
25 important, if you look very closely at the Court's

1 opinion, the basis on which the surety is able to prevail
2 over the contractor is that it is asserting the rights of
3 the United States. It is, through the doctrine of
4 subrogation, stepping into the shoes of the United States
5 and asserting the right to the funds that the United
6 States would have been able to assert against the
7 contractor.

8 QUESTION: Why isn't that an implied contract?
9 When it says implied contract in the Tucker Act, does that
10 include restitution of contracts implied by law?

11 MR. LAMKEN: No, it does not. It specifically
12 excludes contracts implied in law. Only contracts implied
13 in fact may be brought under the Tucker Act. In fact,
14 that this Court's decision I think --

15 QUESTION: So, that's actually what you're after
16 in this case. Your -- your theory in this case is there
17 is no -- there is -- you cannot assert a claim, an
18 equitable claim, against some money. Nobody can without a
19 statute specifically saying it. You can't do it under
20 restitution law, and therefore sureties simply can't
21 recover against the United States unless Congress takes
22 some action.

23 MR. LAMKEN: I think that is correct. That is
24 our position. Now, the --

25 QUESTION: That's pretty --

1 MR. LAMKEN: The Court actually does not have to
2 go that far.

3 QUESTION: No, no. But I mean, the next thing,
4 as soon as we decide this, you'll go back to the Court of
5 Claims and say their court -- their cases are wrong and
6 get that up here, and that's part two and then it's over.
7 Is that --

8 MR. LAMKEN: Potentially but I think that
9 the -- this particular theory that the Court of Federal
10 Claims has proceeded on is not implicated in this case.
11 The Court of Federal Claims has said that the surety steps
12 into the shoes of the prime contractor and can assert the
13 prime contractor's contract rights against the United
14 States. Since the Tucker Act does express the United --
15 waive the United States immunity to suit and allow for
16 damages for breach of contract, those decisions wouldn't
17 necessarily be called into question by this Court's
18 decision. We believe that they are incorrect. As a
19 matter of surety law, they're upside down, but they are
20 not necessarily implicated by what the Court would do
21 today.

22 QUESTION: Well, following Justice Breyer's
23 question, going back to my earlier colloquy with you, what
24 I was trying to get at and not remembering very precisely
25 was this. I've got Bowen in front of me. At -- at 899,

1 Justice Stevens quoted from Judge Bork in the court of
2 appeals there in -- in characterizing the legislative
3 history. The quotation includes this. Both reports go on
4 to say that the time has now come to eliminate the
5 sovereign immunity defense in all equitable actions for
6 specific performance against a Federal agency or officer
7 acting in an official capacity. And this Court then, at
8 the end of -- of that quotation and -- and much more, said
9 thus the combined effect of the 1970 hearing and the 1976
10 legislative material is to demonstrate conclusively that
11 the exception for an action seeking money damages should
12 not be broadened beyond the meaning of the plain language.

13 If we follow that rationale, it seems to me that
14 we would have difficulty in accepting your -- your very
15 starchy position that if there is otherwise an accepted
16 equitable basis for going after the res, that would still
17 be impossible under this statute. It seems to me if we
18 accept that rationale, it -- it would be perfectly
19 possible, in fact, the only thing that we could do. You
20 might still win, by the way, because the res was gone.
21 I'm not saying -- casting any doubt on that point. But on
22 the legal theory or the equitable theory, it seems to me
23 you -- you would have a tough row to hoe if we accept what
24 -- what we wrote in Bowen.

25 MR. LAMKEN: I think that that -- the

1 legislative history quoted there can't be taken literally
2 because the statute itself is directly to the contrary.
3 For example, the statute goes on and says, nothing herein
4 affects other limitations on judicial review or the power
5 or duty of the court to dismiss or deny relief on any
6 other appropriate legal ground or confers authority, so
7 that --

8 QUESTION: Well, that's -- that's -- that's
9 right, but -- but that leaves open the question what
10 grounds would be considered binding or legitimate after
11 this -- this act is -- is passed. And it seems to me that
12 in -- in Bowen at least, this Court thought that the kind
13 of equitable claim that is being made here, leaving aside
14 the problem of exhaustion of the res, would be a claim
15 that was no longer precluded.

16 MR. LAMKEN: I -- I would disagree with that,
17 Justice Souter, for two reasons.

18 The first is in Bowen the Court had no reason to
19 consider whether or not section 702, in effect, licensed
20 courts to create rights to money from the Treasury under
21 common law or equitable principles because in that case
22 there was a statute that entitled the plaintiff to the
23 money. And it's clear that Congress has the authority to
24 create that right to the money.

25 The question and what the Ninth Circuit read

1 section 702 as doing is creating an implied authorization
2 for the courts under common law or under equitable
3 principles to create a right to the money where Congress
4 had not using equitable principles.

5 QUESTION: Well, of course, that's -- that's
6 very true, but the -- the fact is that the only language
7 that -- that Congress used in -- in -- in the section 702
8 amendment was the money damages language, and the money
9 damages language, if it is read in a straightforward and
10 plain fashion, would certainly authorize what the court
11 was doing here, assuming there was anything for equity to
12 attach.

13 MR. LAMKEN: Justice Souter, no, I don't think
14 so. I think that it's improper given the fact that
15 waivers of immunity are strictly construed and especially
16 those that are a claim to create money payment obligations
17 against the United States, I think it's improper to
18 read --

19 QUESTION: Then the court should simply -- then
20 the Congress should simply have said money.

21 MR. LAMKEN: No, no.

22 QUESTION: It said money damages.

23 MR. LAMKEN: That's correct, but what -- I think
24 what your question implies is that the exclusion of money
25 damages implies in the courts the power to create, as a

1 substantive matter, new rights to money so long as in --
2 in the end you can collect the money without it being
3 money damages. And that is a leap that you cannot make.
4 And I think, for example, United States v. Testan is a
5 very good example of that.

6 In Testan, the statute specifically stated that
7 the Court of Claims would have jurisdiction to enter
8 judgments on claims against the United States based on,
9 among other things, statutes. This Court held that as a
10 matter of sovereign immunity, the Government's immunity to
11 suit, the ability to haul the United States into court,
12 had been waived, but if the statute did not take the
13 further step of creating a right to money from the United
14 States based on any particular statute. And so, based on
15 -- if there was a simple statutory violation, the Court of
16 Federal Claims could not give damages for that -- the
17 violation of the statute. It could only give money for
18 the violation of the statute if the statute itself
19 provided that right.

20 The same thing happened again in Nordic Village.
21 The statute waived immunity, saying that the judgments of
22 the courts would bind the United States, but since the
23 statute itself did not expressly state that the court
24 could create new money payment obligations against the
25 United States, this Court held that it applied only to

1 non-monetary relief.

2 In other words, what the courts cannot do is
3 create substantive new rights to money. Section 702 is
4 not a license for them to step out and say, well, this
5 previous right, equitable liens, was not enforceable. It
6 never applied to the United States. It now applies as a
7 substantive matter.

8 QUESTION: 702 can't do --

9 QUESTION: Just -- just one last question. Is
10 it your position that -- that under the 702 language as
11 amended, no equitable right could be recognized which is
12 not otherwise authorized by statute or only an equitable
13 right which would require the payment of money?

14 MR. LAMKEN: I think, Your Honor, that section
15 702 does not authorize the courts to create any
16 substantive rights at all.

17 QUESTION: So, the answer would be no equitable
18 right could be recognized regardless of traditional equity
19 principles.

20 MR. LAMKEN: That's correct. Traditional equity
21 principles do not operate against the United States, and
22 section 702 does not make them operate against the United
23 States. What it simply says is where you have a right to
24 relief under a statute or some other force of law -- or
25 some other source of law that applies to the United

1 States, you may get that relief so long as the relief
2 doesn't constitute money damages. If it does constitute
3 money damages, you should go to the Tucker -- go to the
4 Court of Claims under the Tucker Act.

5 And therefore -- so, that -- that is the very
6 mistake we believe the Ninth Circuit made. It read
7 section 702 as an implied authorization, and it doesn't
8 have any language that would suggest it's an implied
9 authorization to create new substantive rights to money.
10 It stands in contrast to example -- to the Federal Tort
11 Claims Act which has express language both waiving the
12 United States immunity to suit and authorizing courts to
13 create new substantive rights to money.

14 QUESTION: Now, that's -- that's going to be a
15 hard theory, isn't it? The -- I take it that here there
16 is an ongoing right, whether mistaken or not, for the
17 surety of an unpaid sub to assert a claim against a fund
18 held by the United States insofar as that fund represents
19 money earned by but not yet paid to the general
20 contractor.

21 MR. LAMKEN: There is -- under a Federal
22 circuit --

23 QUESTION: Yes, all right.

24 MR. LAMKEN: -- the contract right --

25 QUESTION: There is that kind of right. So, it

1 isn't 702 that anyone says created that right. It's there
2 in the law, and it wouldn't -- I mean, the Court of Claims
3 says there is such a right.

4 MR. LAMKEN: The Court of Claims says that
5 contracts create that right.

6 QUESTION: Fine.

7 MR. LAMKEN: That's correct.

8 QUESTION: So -- so, now how could we say,
9 unless -- we'd either have to say although the surety has
10 that right, the principal doesn't, or we'd have to decide
11 whether that right really exists or not before we could
12 say that you haven't created one out of 702 because, you
13 see, there is one out there independently of 702.

14 MR. LAMKEN: I don't think you need to get into
15 a metaphysical debate as to whether or not the right is
16 somehow out there but not enforceable. We all have to
17 just -- the only thing that has to be accepted is absent
18 the express statement of Congress that equitable rights
19 should be applying to the United States, as a matter of
20 law they don't.

21 Section -- the Tucker Act -- under the Tucker
22 Act, the Court of Federal Claims has basically read the
23 ability to enforce contract claims as making certain
24 rights enforceable, one of them being the right to assert
25 the rights of the United States against the United States

1 in subrogation. And they have read the Tucker Act as
2 making that right enforceable.

3 The question is whether 702 actually also
4 reaches out and takes --

5 QUESTION: No. You would say the question under
6 702 is whether this right, which the Court of Claims says
7 exists in respect to sureties -- and let's imagine exists
8 there in respect to subs -- can be enforced in a Federal
9 district court because to enforce it in a Federal district
10 court is not to assert a claim for money damages, but is
11 rather to assert a claim for the thing itself, namely the
12 payment out of the pre-existing fund. I mean, that --
13 that would be the logic of it, wouldn't it? Nobody is
14 saying 702 creates the substantive right. 702 permits you
15 to enforce in a district court that right which has been
16 -- that -- well, I don't --

17 MR. LAMKEN: Well, no, I understand the
18 argument, but I don't think that 702 says that substantive
19 rights to money that are otherwise not enforceable against
20 the United States become enforceable simply because that
21 nature of that right would be specific relief. The -- the
22 only thing it says is that the suit shall not be dismissed
23 on the grounds that it's against the United States. It
24 overcomes the United States' immunity to suit, but it does
25 not take the further and necessary step of making the

1 United States substantively liable for the payment of
2 money.

3 I think I wanted to turn very --

4 QUESTION: One thing. I thought you disagreed
5 with the -- in this Court you would disagree that the
6 surety would have a right against a fund that the
7 Government is holding and has not paid to the prime
8 contractor.

9 MR. LAMKEN: Absolutely, Your Honor. We would
10 disagree with that emphatically, and we believe that the
11 Court's cases, including Martin Surety and Pearlman,
12 support our view that the --

13 QUESTION: How does the -- if that view
14 prevails, how does the surety protect itself as a
15 practical matter against just what happened here?

16 MR. LAMKEN: The usual rule is what the surety
17 does is when it sees a breach, it goes to the United
18 States and enters into what's called a takeover agreement.

19 QUESTION: In other words, it just has to audit
20 performance on a constant basis.

21 MR. LAMKEN: Pardon?

22 QUESTION: It has to audit performance on a
23 constant basis.

24 MR. LAMKEN: Well, even under surety law,
25 the -- it cannot assert a right to subrogation unless it

1 notifies the United States that there has been a breach.

2 That -- that obligation exists no matter what.

3 QUESTION: I know there was no Miller Act bond.
4 Was there a performance bond?

5 MR. LAMKEN: There was no performance bond in
6 this case either. The United States took a loss on this
7 contract.

8 To quick -- to turn quickly, the last point. We
9 believe that because this is a lump sum payment of money
10 for the remedy of retroactive past harms, it is by
11 definition money damages. Bowen is very different because
12 the judgment in that case was going to cover ongoing
13 relationships between the State and the Federal
14 Government. When the payment is a simple, naked money
15 judgment covering past wrongs, we believe it was by
16 definition money -- a money judgment --

17 QUESTION: That was Judge --

18 MR. LAMKEN: -- excuse me -- money damages.

19 QUESTION: -- Judge Rymer's position, wasn't it,
20 that this is a -- this is a claim for money damages? It's
21 been artfully pled.

22 MR. LAMKEN: That was her position, and
23 she's -- and her specific statement was there's no duty
24 here which may be specifically enforced. In other words,
25 the United States has no duty to pay the subcontractor

1 which may be specifically enforced. And what they've
2 attempted to do is plead around the claim which was
3 basically based -- and if you look at the complaint,
4 paragraph 19 -- on the United States' failure to post a
5 Miller Act bond.

6 If there are no further questions at this time,
7 I'll reserve the remainder of my time for rebuttal.

8 QUESTION: Very well, Mr. Lamken.

9 Mr. Spaulding, we'll hear from you.

10 ORAL ARGUMENT OF THOMAS F. SPAULDING

11 ON BEHALF OF THE RESPONDENT

12 MR. SPAULDING: Mr. Chief Justice, and may it
13 please the Court:

14 My client was in a dilemma. It was under
15 contract to continue to perform the work. It had no
16 choice but to keep working. On the other hand, Verdan
17 wasn't paying it. It had -- it did the only thing it
18 could do which was write to the Government and say, please
19 either pay us or withhold or suspend the payments to
20 Verdan.

21 I think it's important to recognize here that
22 the Government's position mixes the merits and the
23 jurisdiction up. The -- for purposes of the
24 jurisdictional issue, we should look at the funds' still
25 being there as of the date Blue Fox wrote the letter

1 because --

2 QUESTION: Which -- which funds are we talking
3 about? The first payment? Because there was a takeover
4 contractor that the funds were paid to in the end.

5 MR. SPAULDING: Yes, Your Honor.

6 QUESTION: So, which -- which money are we
7 talking about?

8 MR. SPAULDING: We're talking about the first
9 one. If none of these \$86,000 had gone to Verdan, if it
10 was -- if that money was all still there, assume it had
11 been enjoined or the Government had stopped -- the
12 Government would be making the same argument here, that
13 what we're asking for is money damages. So, I don't
14 really think it's the -- it's the point that, well, the
15 money is all gone now, and so therefore, you know, getting
16 money from a different source would be money damages.

17 QUESTION: They would be making the same
18 argument, but -- but in these circumstances, they don't
19 have to. They -- they have an additional argument, which
20 is that there just ain't no fund there. There might have
21 been a fund when you wrote the initial letter, but by the
22 time you brought the lawsuit, what was the fund that you
23 were seeking to -- to obtain?

24 MR. SPAULDING: Well, I -- I would disagree,
25 Your Honor. The -- the money is -- is there until the

1 Comptroller General balances the books, and they have 5
2 years within which to do that, to -- for example, the
3 reason -- the Government says the fund is depleted, but it
4 paid out well over \$100,000 to Verdun for the construction
5 part of this contract. Those were unauthorized payments,
6 but yet it relies on those, bootstraps its argument on
7 those unauthorized payments --

8 QUESTION: Where does this fund exist? I mean,
9 it -- it didn't exist in the -- all the authorized money
10 had been spent.

11 MR. SPAULDING: Well --

12 QUESTION: Where -- where is this fund other
13 than in the general treasury? I mean, is the whole
14 general treasury is an equitable fund for your attachment?

15 MR. SPAULDING: No, Your Honor. It's --
16 Congress appropriates money for these -- obviously for
17 these projects after passing an authorizing statute. So,
18 the money is there. It's -- it's -- it's been --

19 QUESTION: It had been spent. All of the
20 authorized money had been spent, hadn't it?

21 MR. SPAULDING: Your Honor, the money here is a
22 form of bookkeeping entries in terms of -- the monies --
23 the money --

24 QUESTION: No, it is not. It's -- I mean, no.

25 QUESTION: Your -- your lien theory is that

1 there is an object to which your lien attaches, and that
2 object was gone when the money was paid out. It seems to
3 me you're making two arguments. You're saying there was
4 an equitable lien against the res, the money, and there
5 was also an equitable obligation on the part of the
6 Government not to do -- not to dispose of that thing the
7 minute we put the Government on notice. It seems to me
8 you're making two separate claims, aren't you? And -- and
9 your -- your -- they're independent claims.

10 You may well be right on -- on the lien theory.
11 I don't see the basis on which you are necessarily right
12 against the Government prior to getting a court order to
13 enforce it on your second theory.

14 MR. SPAULDING: Well, Your Honor, assuming for
15 the sake of argument, if that's the Court's holding, I
16 think what would happen, if the only reason this is money
17 damages is that would send a signal to every construction
18 lawyer to run into Federal district court to file a TRO as
19 soon as a payment is missed, or even if the -- your
20 client --

21 QUESTION: What would be the authority for doing
22 that, to run into Federal court and file a -- an action
23 for a TRO against the Government?

24 MR. SPAULDING: Well, Your Honor, assuming, as
25 we have to for the sake of the argument here, is that the

1 subcontractor has rights to the funds, as we were
2 discussing earlier, that if the surety has these rights,
3 the subcontractor himself has --

4 QUESTION: I don't see that.

5 QUESTION: But I don't see that having made that
6 assumption. I mean, there's the contract and the contract
7 is with the prime contractor. It seems to me that you're
8 -- you're trying to create a contract running between the
9 United States and the subcontractor that doesn't exist and
10 then saying, and even better, not only do we have a
11 contract, but it's secured. Now, of course, we have to
12 wait to see that the -- that the prime contractor is going
13 to default, but we have created a contract between the
14 subcontractor and the United States. That's what it seems
15 to me you've done, and I don't see how you get to that.

16 MR. SPAULDING: Well, Your Honor, there's a
17 premise to your question which is at the basis of our
18 rights are in contract, and that's not correct. The basis
19 of our rights arise by operation of law. We have the
20 right to the fund for the very reason that -- that the
21 sureties have that right. I mean, the sureties' rights to
22 subrogation --

23 QUESTION: I mean, what law? You're talking --
24 you could talk about tort law, contract law, by operation
25 of law. It seems to me this is Government contract. So,

1 contract is the most natural body of law at which to look,
2 but what other law if not contract law?

3 MR. SPAULDING: This is Federal common law, Your
4 Honor, which has been recognized by this Court --

5 QUESTION: But common law is also contract law,
6 tort law, property law. So, what --

7 QUESTION: Are you talking about cases like
8 Pearlman and --

9 MR. SPAULDING: Yes, Your Honor. We're talking
10 about Pearlman and Henningsen where they -- they
11 recognized that there are equitable obligations of the
12 Government or of the owner.

13 QUESTION: Certainly the Government wasn't
14 involved in either of those cases. I mean, the Government
15 was not a party in either of them, was it?

16 MR. SPAULDING: No. In -- in the Pearlman case,
17 the -- the money was actually in the hands of the trustee
18 in bankruptcy. That's correct, Your Honor.

19 QUESTION: And isn't that true of Henningsen
20 too? The Government was not a party?

21 MR. SPAULDING: The Government was not a party,
22 but there -- these cases are important for purposes of --
23 I mean, I think they shed light on the appropriations
24 issue here to, is that the money was available. And --
25 and in this case, I would submit that the Government was a

1 stakeholder in this case. And certainly in all the
2 suretyship cases, that's the rule that the -- this money
3 doesn't belong to the Government anymore.

4 QUESTION: Well, but the Government -- you know,
5 when you're dealing with a -- with a body that has
6 sovereign immunity, you just don't likely say they were a
7 stakeholder unless there is some authority.

8 You would have been entirely protected if there
9 had been a Miller Act bond here, would you not?

10 MR. SPAULDING: In this case, yes, Your Honor,
11 we would have been.

12 QUESTION: And -- and I take it your client knew
13 that there was no Miller Act bond when you came in?

14 MR. SPAULDING: No. No, he did not, Your Honor.
15 He did what most construction contractors do. My client
16 is an experienced Federal construction contractor, and he
17 assumed that the law was complied with, and I think he's
18 entitled to that presumption. And then when he didn't get
19 paid, he started calling around and -- and found out, you
20 know, who's this guy's bonding company, and he found out
21 right around June 15th that there was no bond here.

22 QUESTION: There's no bond.

23 MR. SPAULDING: Of course, nobody from the SBA
24 or the Army ever told him about that, notwithstanding --

25 QUESTION: Why not? Hadn't there been a dispute

1 and the Government finally said, well, we're going to
2 classify this as a service contract and therefore service
3 contracts don't come under the Miller Act? Wasn't that
4 known that this -- that this contractor had been
5 classified as a service contract?

6 MR. SPAULDING: Well, no one told my client
7 that, Your Honor, and it was -- obviously, if -- if he
8 would have obtained the whole contract and read the whole
9 thing, that would have been said there, but -- I mean,
10 the --

11 QUESTION: Well, how would you find out whether
12 this was typed a construction contract or a service
13 contract?

14 MR. SPAULDING: Well, it -- in order to come up
15 with the bonding requirement, one needs to -- to -- at
16 least what the thinking was in the Army and the SBA at the
17 time, what we need to do is first classify either services
18 or construction. We only need to get the bond if it's a
19 construction. Now, what the Ninth Circuit characterized
20 as conscious avoidance of the Miller Act was going on here
21 because the -- they didn't want --

22 QUESTION: But that's not -- I'm asking you the
23 question. I -- I want to know whether a particular
24 contract has been typed by the Government a service
25 contract and therefore not under the Miller Act or a

1 contract that is subject to the Miller Act. How would I
2 find that out if I wanted just that information?

3 MR. SPAULDING: I think probably, Your Honor,
4 somewhere there's the standard industrial classification,
5 SIC, codes and 1731 is construction. If it's the 4833,
6 it's -- it's for services.

7 But the point here is --

8 QUESTION: So, just by looking at the number on
9 the contract, if I were in this business, I would know
10 that.

11 MR. SPAULDING: I -- I believe so, Your Honor,
12 that -- that somewhere in the -- if not in the contract
13 itself, certainly in the -- in the -- the documents that
14 the contracting agency generates, they have to assign a
15 SIC code to this.

16 But that -- that isn't determinative as far as a
17 -- whether a Miller Act bond is required. I mean, Miller
18 Act -- the statute says that a bond is required for any
19 contract.

20 QUESTION: Yes, and I could understand if you
21 say we have -- the United States committed a tort. It
22 didn't insist on a Miller Act bond when it should have and
23 my client was hurt. And then my question is, yes, but
24 there's the Federal Tort Claims Act and this doesn't seem
25 to come under it.

1 MR. SPAULDING: No. And -- and that's not our
2 claim at all, Your Honor. We're not saying that -- that
3 please remedy our loss because of the Government's
4 misconduct in not getting a Miller Act bond. That's not
5 our claim. Nor is our claim a contract based claim that
6 -- that we're -- we're entitled to the monies that Verdan
7 was supposed to pay us but did not. I think that that's
8 -- that's what Judge Rymer viewed it as, but under that
9 view, we would be entitled to be made whole irrespective
10 of the fund.

11 All we're seeking -- and this what distinguishes
12 this from a contract case -- is we're seeking if there is
13 money in the fund, that we're entitled to that.

14 QUESTION: But where does that come from? Let
15 -- let me make an heroic assumption. Go back to June
16 15th, all right, and at that point you've written your
17 letter. And let's imagine that there is a fund at that
18 time, which fund represents money that the Government has
19 set aside to pay the contractor for work already
20 performed, but it has not yet been paid. And your client
21 is not paid, the sub. And I will assume heroically that
22 if that fund existed, the later disbursement of the fund
23 doesn't matter because equity presumes to have been done
24 what should have been done, and therefore it reconstitutes
25 the fund.

1 Now, on that heroic assumption, what is the
2 source of law that says that you are entitled to assert
3 your equitable lien? For I take it that the Government
4 argues, well, 702 may waive sovereign immunity for
5 whatever -- I don't know -- I won't put this argument in
6 their mouths. I'll make it. That -- but nonetheless,
7 there has to be a source of law somewhere. There has to
8 be a statute or something because 702 can't make up an
9 equitable right where none exists, and the fact that
10 private contractors or subs have such a right is beside
11 the point when you deal with the Government because there
12 is no general statute that says equitable principles
13 automatically apply to the Government. And we have to
14 find a source of law. So, since 702 can't be that source
15 of law, what is?

16 MR. SPAULDING: Pearlman, Your Honor.

17 QUESTION: Pearlman.

18 MR. SPAULDING: The Pearlman doctrine allows the
19 sureties to recover these monies. It's -- the whole --
20 that whole concept is structured on the -- on the
21 notion --

22 QUESTION: Oh, my goodness, you know, what
23 they've done in the Court of Claims on that is that
24 they've said that the surety, rather than being subrogated
25 to the rights of the sub, which is what normal subrogation

1 is about, somehow falls into the shoes of the contractor
2 prime and can sue on the basis of the contract with the
3 Government. That's my understanding of it. Now, if I'm
4 right on that understanding, that wouldn't even help you
5 aside from the fact that -- aside from the fact that
6 that's a rather dubious theory. I mean, how did they get
7 from the rights of the sub to put him in the shoes of the
8 prime. I don't know how they did that. I'm not sure I'm
9 right on that, but I'm not sure, even if that's right, how
10 that would help you because you don't have a contract with
11 any Government on any theory.

12 MR. SPAULDING: And I think that's a different
13 question, Your Honor, but -- but -- but the notion of --
14 which is squarely within the holding of Pearlman, that the
15 subcontractors have equitable rights which arise under
16 Federal common law, and the surety steps into those rights
17 by paying the subcontractor --

18 QUESTION: Where did Pearlman find the -- the
19 source of the equitable right against the Government? You
20 just made it up?

21 MR. SPAULDING: Your Honor, the -- Justice
22 Black's, you know, words were that, you know, we're not
23 going to set aside these principles that are -- are so
24 embedded in our commercial practices, our economy, this
25 Court's decisions. They cited Henningsen, Prairie State

1 Bank, and then they cited 19th century decisions of this
2 Court dealing with subrogation in order to do that.

3 But --

4 QUESTION: So, your answer to what they're
5 saying about the source of law is Pearlman is the source
6 of law. All we're concerned about is whether 702 permits
7 you to enforce that law in a Federal district court.

8 MR. SPAULDING: That's correct. And -- and I
9 would agree with what Mr. Lamken said, that we're not
10 relying on 702 itself to give us the rights.

11 QUESTION: You can't really rely on Pearlman or
12 Henningsen except perhaps by analogy because the
13 Government was not a party to either of those cases.

14 MR. SPAULDING: Your Honor, they -- they form
15 the source of our rights. I think there's really two
16 components of what we're talking here: and what are we
17 suing for; what is our right? And we look at Pearlman
18 because it says that there is this right that the
19 subcontractor has. And the Court of Claims in all the
20 other cases have discussed this in the past --

21 QUESTION: We're not bound by Court of Claims
22 cases here.

23 MR. SPAULDING: No, you're not. Of course not,
24 Your Honor.

25 But what I'm saying is -- is that this right is

1 there. It belongs to the subcontractor and -- and I think
2 that's a given so long as one accepts the Pearlman
3 doctrine.

4 QUESTION: Yes, but there are lots of rights
5 that can't be enforced because of sovereign immunity.

6 MR. SPAULDING: That -- that's correct, Your
7 Honor.

8 And then we go over to the Bowen situation and I
9 think it's -- it's quite clear in this situation that
10 we're not dealing with money damages. And we talked in
11 our brief at some length about the origins of equitable
12 liens and how they're distinct from a compensatory device,
13 and the Government doesn't disagree with that. I mean,
14 they put all of their -- of their eggs in the
15 Appropriations Clause basket as far as that, but they
16 don't really seem to continue to argue that an equitable
17 lien is money damages.

18 QUESTION: Could you just put a regular
19 materialman's lien on -- on the Government's building?

20 MR. SPAULDING: No, you could not, Your Honor.

21 QUESTION: Well, why?

22 MR. SPAULDING: A materialman's lien would arise
23 under State law. I think that would have Supremacy Clause
24 implications and it's -- and certainly goes far beyond
25 what the limited circumstance of this case --

1 QUESTION: That was the whole reason for the
2 Miller Act, wasn't it, was that you couldn't get a lien
3 against Government property of a materialman? And so, the
4 idea was to have a surety come in and guarantee the
5 payments.

6 MR. SPAULDING: That's true, Your Honor, and --
7 and that wasn't done. The Miller Act certainly was --
8 was passed against a backdrop of immunity.

9 But this is a very narrow case. A situation
10 like this only comes up when there is no Miller Act bond,
11 and so it's -- it's really a very narrow situation. It's
12 not at all going to take the -- take the place of the
13 Miller Act remedy, and -- and it's -- it's quite a narrow
14 situation.

15 QUESTION: What is the -- what is the source of
16 the lien that you're claiming? Is it a State law source?

17 MR. SPAULDING: No, Your Honor. It's what we
18 were discussing.

19 QUESTION: It's a Pearlman source.

20 MR. SPAULDING: It's the Pearlman right of
21 unpaid laborers and materialmen to be paid out of the
22 remaining fund.

23 QUESTION: And that -- that has its origin in -
24 - in Federal equity law?

25 MR. SPAULDING: Yes, that has its -- its origin

1 in this Court's earlier cases which we were discussing
2 earlier. That is the source of our rights, and that these
3 rights have been recognized for decades, albeit
4 unenforceable by a subcontractor itself. Now, generally
5 most --

6 QUESTION: Well, although we haven't done --
7 recognized it for decades, could we by a like authority
8 recognize a Federal materialman's lien?

9 MR. SPAULDING: Well --

10 QUESTION: In other words, what I'm getting at
11 is -- is your answer to Justice Kennedy, an answer which
12 really divides this case from -- from the others, from the
13 materialman's case.

14 MR. SPAULDING: No, I don't think there's a
15 Federal materialman's lien itself, Your Honor.

16 QUESTION: Where did the Federal equitable lien
17 come from? Some judge thought it up. Why can't some
18 judge think up a materialman's lien?

19 MR. SPAULDING: This is limited to the situation
20 where we're talking about the unpaid laborers and
21 materialmen as in Pearlman, Your Honor. You know, beyond
22 that, conceptually speaking, someone could say that --
23 that, well, anybody down the chain might have some kind of
24 a claim, but the origins of this in this Court's opinions
25 are based upon people who contribute to Federal

1 construction projects. And that was the situation in
2 Prairie State Bank and Henningsen and so forth.

3 The Pearlman doctrine itself is -- has got --
4 has got to the point of being a bedrock principle, and
5 millions of dollars a year are disbursed based upon the
6 settled set of rules we have as the result of Pearlman.

7 QUESTION: So then wouldn't it make sense, if
8 you accept Pearlman -- now, I don't know the -- say, okay,
9 maybe Pearlman gives you this equitable right. Let's
10 assume heroic assumption number two, we're not so heroic.
11 All right, assume that. Then say, but all right, when
12 somebody asserts that right against a fund, they're really
13 asking for money, and because they're asking for money,
14 they better go to the Court of Claims because this is a
15 kind of Government contracting matter that the Court of
16 Claims is good at.

17 Then your contrary authority is Bowen, and then
18 I think what the Government says is, no, Bowen was a
19 special situation, a situation in which you had an ongoing
20 financial relationship over a long period of time between
21 a State and the Federal Government with money passing back
22 and forth nonstop every minute, and that's different.
23 What do you think of that?

24 MR. SPAULDING: Your Honor, we would love to go
25 to the Court of Claims if we could. I mean, that's --

1 there's no question that we can't. The Court of Claims
2 has said we don't have standing, and that's -- to bring a
3 contract kind of -- contract-based claim for the money.

4 QUESTION: So, the Pearlman claim is not
5 contract-based.

6 MR. SPAULDING: No. And Pearlman itself makes
7 clear in a footnote that the -- this right arises by
8 operation of law. It does not arise out of a contract.
9 So --

10 QUESTION: By operation of what law?

11 MR. SPAULDING: It arises out of the subrogation
12 laws we were talking about earlier, Your Honor, is that,
13 you know, when a surety pays off the debt of someone
14 else --

15 QUESTION: If I were going to type that, would I
16 say, well, it -- it belongs in the realm of secured
17 contract law as opposed to some other kind of law?

18 MR. SPAULDING: Well, I think it's -- it's the
19 suretyship law or the law of subrogation, Your Honor, that
20 it -- and Pearlman cites the 19th century cases of this
21 Court as support of that, that in order to prevent unjust
22 enrichment, it's only fair that when a surety --

23 QUESTION: And I hear all of these descriptions
24 of this case, but -- as equitable, but as I see it, at its
25 core what's happening is the subcontractor says when the

1 contractor defaults and doesn't pay us, at that point we
2 have a direct right of action against the United States
3 for the money that the contractor should have paid us.
4 That's really what it is, and then you can put all kinds
5 of labels on it, but isn't that what it is, that you have
6 a right to money from the United States when the
7 contractor defaults?

8 MR. SPAULDING: I would disagree with that
9 characterization, Your Honor. One -- one could assert a
10 contract-based claim because certainly we have a loss and
11 we would want to be compensated for that loss, but that's
12 not our claim. That misreads our claim. What we're
13 asking for is to be paid out from the remaining fund if
14 any.

15 Now, if we were asking to be compensated for the
16 loss we suffered because Verdan didn't pay us, conceivably
17 we would be entitled to our full loss, irrespective of the
18 content of the fund. And that's what distinguishes this
19 -- this claim from a breach of contract case. One doesn't
20 necessarily have to -- to even use the same amount. I
21 mean, we're not relying on the -- on the Verdan contract
22 in order to quantify it. We're saying that prevent unjust
23 enrichment, we should be entitled to that money. My
24 client used its labor its resources, borrowed money to
25 build this building. The Government uses it every day.

1 QUESTION: This happens all the time when people
2 are confronted with the defense of sovereign immunity.
3 That's the whole beauty of the defense. It lets the
4 Government get off when the Government ought to pay.
5 That's what it's all about. I mean, the fact that -- that
6 -- you know. It's just not persuasive as to the issue
7 that's before us. It's whether the Government can get
8 away with not paying what it ought to pay. That's the
9 whole issue.

10 MR. SPAULDING: Well, Your Honor -- and I would
11 suggest that that's what Congress was reacting to when it
12 passed the 1976 amendment to section 702, is that there
13 was this outcry that this just isn't fair, that otherwise
14 meritorious suits are being thrown out of court --

15 QUESTION: Well, but you've already conceded
16 that 702 doesn't give you the underlying right. So, we're
17 back to that old question again.

18 MR. SPAULDING: Your Honor, a right isn't based
19 upon 702, but the waiver of immunity is. And -- and what
20 they said in 702 is, is that we can come into court and
21 that immunity is not a barrier in order to proceed. But
22 we have these rights otherwise, and for decades they've
23 been tried -- subcontractors have tried to enforce them
24 and couldn't because of the bar of sovereign immunity.

25 And that's why these Postal Service cases are

1 important where three circuits, in a case of -- of the
2 Post Office where there's a clear waiver of immunity in
3 the Postal Reform Act, have said that the subcontractor
4 lien cases, based upon Pearlman rights, can go forward
5 where immunity is waived. And the source of those is --
6 is what we were talking about earlier under Pearlman --

7 QUESTION: But that's under a Post Office
8 statute that has a sue-or-be-sued provision, and it's just
9 not the same as the United States, eo nomine, as we say.
10 The Post Office has a special statute governing its -- its
11 immunity.

12 MR. SPAULDING: And, Your Honor, section 702 is
13 a statute which waives immunity. It's a broad waiver of
14 immunity. What this Court said is an important part of a
15 -- of a -- of a special piece of legislation which waives
16 immunity in all cases --

17 QUESTION: Mr. Spaulding, I may be a little
18 rusty in my memory of 702, but I thought the prime thing
19 that motivated that provision was that the United States
20 should not have sovereign immunity available to it in non-
21 monetary claims. Now, they did use the word money
22 damages, but I thought that the whole thrust of that act
23 was when you're seeking relief other than money from the
24 Government, the Government shouldn't have the defense of
25 sovereign immunity, that it waived immunity for non-

1 monetary claims. I don't see anything in the history of
2 702 that indicates Congress was thinking about, yes, this
3 waiver applies when money is involved.

4 MR. SPAULDING: Well, that was the whole point
5 in Bowen, Your Honor, is that -- is that the Court said
6 that Congress used the more limiting words, money damages,
7 as opposed to monetary relief in 702.

8 QUESTION: I -- yes, I know what -- what Bowen
9 said, but as far as what drove 702, wasn't it that the
10 United States should not have sovereign immunity for non-
11 monetary relief? In the -- in the congressional history
12 of -- of what led to 702, it was the United States using
13 sovereign immunity when there was no pocketbook claim at
14 stake.

15 MR. SPAULDING: I -- I would disagree, Your
16 Honor. I think what Congress was looking at is a --
17 especially if you look at the --

18 QUESTION: Is -- is there something in the
19 legislative history of 702 that indicates they were
20 thinking in terms of monetary relief that could be
21 characterized as equitable rather than legal?

22 MR. SPAULDING: What -- what they talk about,
23 Your Honor, is the 1970 hearing, which is quite extensive,
24 and they were talking about all -- all the cases of -- of
25 sovereign immunity where, in particular, cases would be

1 thrown out if they would expend themselves on the public
2 Treasury or somehow result in the disposition of
3 unquestionably sovereign property.

4 And there's a lot of discussion there about the
5 -- the two major waivers for money damages, the tort
6 claims and the Tucker Act. And -- and I think one could
7 look at those -- look at the legislative history and say
8 what -- what Congress had in mind was simply we're not
9 going to tread upon either of those. So, I mean, nothing
10 here is going to give something that the Tort Claims Act
11 forbids, for example, misrepresentation claims, or nothing
12 gives what -- what the Court of Claims could give under
13 the Tucker Act, for example.

14 But by using the term money damages rather than
15 monetary relief, Congress made very clear that there can
16 be kinds of what Judge Bork called in the Maryland case
17 specific monetary relief, which is transfers of money from
18 one side to the other without -- just transfers of the
19 money without being -- without it being money damages.

20 QUESTION: If -- ordinarily, you know, you get a
21 judgment for money damages. Then the damages are
22 transferred from the defendant to the plaintiff. How is
23 this any different from money damages?

24 MR. SPAULDING: Well, Your Honor, in Bowen this
25 Court defined damages.

1 QUESTION: Yes. I didn't agree with Bowen at
2 the time.

3 (Laughter.)

4 MR. SPAULDING: I -- I know, but Your Honor,
5 it's interesting because even in the view of the
6 dissenting judges in Bowen and Justice White's separate
7 opinion, everybody agreed that the Court would have
8 jurisdiction as to prospective economic relief. All nine
9 of the Justices involved were in agreement as to that
10 point.

11 So -- so, as to the point -- specific point,
12 here, if we go back to when my client wrote the letter as
13 to a request to enjoin enforcement or dissipation of those
14 monies, I think even under the dissenting opinion in
15 Bowen, we wouldn't have that problem because we're talking
16 about prospective monetary relief, and that's not damages
17 under any of the Justice's versions of -- in Bowen.

18 QUESTION: But if Bowen applies here, then Bowen
19 applies in 702, et cetera, applies whenever there's a
20 specified fund of money that the Government has. But if
21 that's so, then many Court of Claims cases -- many,
22 perhaps most -- will suddenly be dissipated throughout the
23 9 or 10 or 12 or 13 circuits, and there goes the exclusive
24 jurisdiction of the Court of Claims, which seems
25 counterproductive.

1 All right. Now, I've just made a statement.
2 It's really a question. What do you think?

3 QUESTION: Well, it's even worse than that.

4 QUESTION: Well, I mean, what I want to know is
5 that -- what's his response to that.

6 MR. SPAULDING: Well, I -- I think that's the
7 point Justice Scalia made in his dissent, that carried to
8 its logical conclusion the Claims Court would be --

9 QUESTION: But you have to argue to the contrary
10 on that. So, what -- what is your contrary?

11 MR. SPAULDING: Well, we're not -- we don't have
12 a claim that could be brought into the -- in the Court of
13 Federal Claims.

14 QUESTION: I know but, you see --

15 MR. SPAULDING: This is an --

16 QUESTION: -- Bowen seems -- if Bowen doesn't
17 apply here and we treat this as money damages, you've had
18 it. Right?

19 MR. SPAULDING: That's correct.

20 QUESTION: Okay. But I say if Bowen does apply
21 here, then we've suddenly got Bowen applied to any fund of
22 money held by the Government, and if we have that, then
23 suddenly the Court of Claims jurisdiction that seems to be
24 exclusive dissipates. And that's a bad result of agreeing
25 with you. So, I want you to comment on why, nonetheless,

1 we should agree with you. Why am I wrong in other words?

2 MR. SPAULDING: Your Honor, I think what the
3 Court should do if they agree with me is limit this to
4 cases arising through operation of law, which is a -- a
5 right arising out of Federal common law, which is a very,
6 very narrow kind of case. All those other cases --

7 QUESTION: Restitution.

8 MR. SPAULDING: Yes, restitution, specific
9 relief in restitution. So, we wouldn't get -- any other
10 -- any other case where somebody is evading the -- the
11 Claims Court avenue by going into Federal district court.
12 And as I said, we would love to be in Claims Court if we
13 could, but unfortunately, as -- as the dissenting judge
14 said, the hapless subcontractor ends up holding the bag.
15 I mean, obviously that's not fair.

16 But the question here is that we're just asking
17 for our day in court. And -- and what the Government is
18 saying is that -- is that even -- even freezing this as of
19 June 15th, we're still dealing with money damages. And
20 -- and -- as I mentioned it, under all nine Justices'
21 views in Bowen, a claim for prospective monetary relief is
22 not money damages. And -- and that's really the issue
23 here on the jurisdictional like he -- Mr. Lamken talked
24 about, well, you know, maybe the fund has been dissipated
25 as a matter of -- of substantive -- of lien law, I'm going

1 to lose, but that goes to the merits. I mean, we can get
2 into, you know, whether the money is still there. Perhaps
3 -- perhaps these -- some of these payments to Verdan were
4 unauthorized. I mean, Verdan has to submit certifications
5 with its request for progress payment saying that we're
6 going to pay the subcontractor. Perhaps there's --
7 there's a --

8 QUESTION: Thank you, Mr. Spaulding.

9 MR. SPAULDING: Thank you, Your Honor.

10 QUESTION: Mr. Lamken, you have 2 minutes
11 remaining.

12 REBUTTAL ARGUMENT OF JEFFREY A. LAMKEN

13 ON BEHALF OF THE PETITIONER

14 MR. LAMKEN: The basic principle that we believe
15 should control this case is that anybody seeking money
16 from the United States must show a waiver of immunity and
17 a substantive source of law applicable to the United
18 States giving them a right to the money.

19 In our view, neither section 702 nor Pearlman
20 make equity a source of substantive law applicable to the
21 United States that gives rise to the right to money from
22 the Treasury. In Pearlman, the United States was not a
23 party and the rights that were recognized were rights to
24 money that operated against only other private parties.

25 In fact, in OPM v. Richmond, there existed in

1 that very case a waiver of immunity, but the Court
2 rejected the notion that the -- that the lower Federal
3 courts could create a right to money under the theory of
4 equitable estoppel. We think the same rule applies to
5 creating rights to money under a theory of equitable
6 liens.

7 QUESTION: May I just ask one question about the
8 phrasing of the question presented in your cert petition?
9 It asks whether section 702 permits respondent to bring an
10 action, so forth and so on, which seems to me to raise
11 squarely the sovereign immunity question whether this is a
12 money damage case or not. I don't see that it raises the
13 question whether there's any other source of -- of law
14 that would support the claim.

15 MR. LAMKEN: I think it squarely raises that
16 question for two reasons. First, the -- the way we read
17 the Ninth Circuit decision -- I think the proper way to
18 read it -- is that section 702 renders certain sources of
19 law applicable to the United States and create the liens,
20 so that section 702 in a real sense permits people to
21 assert --

22 QUESTION: Well, it should have been permits or
23 authorizes.

24 MR. LAMKEN: Permits or -- permits --

25 QUESTION: But you're saying that they read it

1 as an authorization statute, not merely as a waiver of
2 sovereign immunity.

3 MR. LAMKEN: That's correct, but I think that
4 the second answer is that that in fact is a sovereign
5 immunity issue and the Court consistently has treated the
6 creation of substantive monetary rights against the United
7 States as an issue of sovereign immunity. It treated it
8 -- that as an issue of sovereign immunity in the United
9 States v. Testan. It created -- treated it as an issue in
10 the United States v. Nordic Village, and it treated it
11 again as an issue of sovereign immunity in United States
12 v. Idaho because sovereign immunity has two inherent
13 components. One is an immunity to suit, and the other is
14 an immunity of the United States' property and its funds
15 to seizure and encumbrances. And any plaintiff seeking to
16 get money from the Treasury must overcome both. It must
17 show both jurisdiction in the Federal court and that
18 Congress has affirmatively intended money to be leaving
19 the Treasury based on this source of law. And I -- thank
20 you.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lamken.

22 The case is submitted.

23 (Whereupon, at 11:58 a.m., the case in the
24 above-entitled matter was submitted.)
25

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:

DEPARTMENT OF THE ARMY, Petitioner v. BLUE FOX, INC.
CASE NO: 97-1642

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BY Ann Marie Federico

(REPORTER)