ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: GERALD L. BALILES, GOVERNOR OF VIRGINIA, ET AL., Petitioners V. VIRGINIA HOSPITAL ASSOCIATION

CASE NO: 88-2043

PLACE: Washington, D.C.

DATE: January 9, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

GERALD L. BALILES, GOVERNOR :
OF VIRGINIA, ET AL., :
Petitioners : No. 88-2043
v. :
VIRGINIA HOSPITAL ASSOCIATION :

Washington, D.C.
Tuesday, January 9, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

R. CLAIRE GUTHRIE, ESQ., Deputy Attorney General of Virginia, Richmond, Virginia; on behalf of the Petitioners.

JOHN G. ROBERTS, JR., ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae, supporting the Petitioners.

WALTER DELLINGER, ESQ., Durham, North Carolina; on behalf of the Respondent.

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PROCEDINGS

(11:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in 88-2043, Gerald Baliles v. Virginia Hospital Association.

Ms. Guthrie?

ORAL ARGUMENT OF R. CLAIRE GUTHRIE

ON BEHALF OF THE PETITIONERS

MS. GUTHRIE: Mr. Chief Justice, and may it please the Court:

This case comes to you today by way of an interlocutory appeal from a case pending in the Eastern District of Virginia which concerns the administration of the Virginia Commonwealth's Medicaid Program.

The case concerns, fundamentally, the significance of action Congress took in 1981 when it amended the Social Security Act by way of what is now commonly called the Boren Amendment. The Boren Amendment granted states new authority to set Medicaid payment rates for in-patient hospital services.

Exercising this new authority in 1982, Virginia adopted a prospective payment system as its method for reimbursing hospital rate -- hospitals for expenditures for Medicaid patients.

In March of 1986, Respondent in this case, The

Virginia Hospital Association, brought suit challenging our prospective payment system on the ground that it violated the terms of the Boren Amendment because it under-reimburses Virginia hospitals. Accordingly, the hospital association argued that our system is inconsistent with Federal standards.

The Commonwealth moved for dismissal or summary judgment on several grounds, including, among other things, the Eleventh Amendment and the lack of enforceable right under Section 1983 and collateral estoppel, and the district court initially granted judgment on the collateral estoppel grounds, but that decision was ultimately reversed by the Fourth Circuit.

We're now before you on appeals from subsequent decisions by the district court and the Fourth Circuit that rejected the Commonwealth's grounds -- remaining grounds for dismissal, and from a decision fundamentally that -- in which the Fourth Circuit ruled that the Boren Amendment guarantees cost-efficient hospitals, a substantive Federal right to reasonable and adequate reimbursement, and that this right can be enforced under Section 1983. The Commonwealth sought certiorari on four issues, but the Court decided to grant and to hear only this one.

I intend to focus my argument today on two key

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points relevant to our principal argument, which is that the Boren Amendment, as drafted, does not secure any substantive Federal rights that can be enforced under Section 1983.

QUESTION: Ms. Guthrie, do you think that the legislation, as it was written before the Boren Amendment, provided a private cause of action?

MS. GUTHRIE: I think, Justice O'Connor, there's a much better argument that could be made there, but we would not concede that point. There is a distinct difference in the language between the Boren Amendment and its predecessor. And that language -- the change in the language is to incorporate the express findings and assurances requirement and also to expressly repeal the cost-based reimbursement standard reflected in the prior language.

The prior language said that a state plan for medical assistance must provide for the payment of the reasonable cost of in-patient hospital services. That language is somewhat similar in nature to other standards incorporated in the Social Security Act that this Court has held enforceable.

But what's important about the Boren Amendment is that it doesn't say that anymore, that it makes a very significant change that must not be overlooked by this

Court. The Boren Amendment reflects congressional intention to interject the free enterprise system into the Medicaid program.

Under cost-based reimbursement, hospitals could argue that they were entitled, essentially, to present a bill to the Commonwealth and to have it paid, regardless of whether the charges made or the bill presented was in fact necessarily related to the services that the Medicaid recipients were entitled to. It is that fundamental change that we would stress in this case.

And our second important point today is that the language of the Boren Amendment itself doesn't secure any substantive Federal rights within the meaning of Section 1983. The only requirement, we would submit, that the Boren Amendment now imposes on the states is an administrative obligation to make findings and assurances to the Secretary of Health and Human Services, an administrative obligation that relates to how we administer our program, not to any entitlement to hospitals, and certainly not to anything that would remotely resemble an industry subsidy.

Alternatively, we would argue that even if the Boren Amendment could be said to impose an obligation to make payments to hospitals, the standards for determining the level of payment to be made under the Boren Amendment

are too imprecise, too general, too open-ended to secure any specific and Federal -- specific and definite Federal rights in any party.

QUESTION: But what about a Federal right to a good-faith determination by the state, and to a good-faith assurance? At least that is categorical in the act, is it not?

MS. GUTHRIE: Your Honor, we would argue that in fact the finding -- the findings and assurances language requires that the Commonwealth be accountable in making assurances to the Secretary, and certainly the presumption of regularity of administrative and state action would obtain. And we wouldn't, obviously, expect a state to make a finding or submit an assurance that was patently false and inaccurate.

QUESTION: I'm sure you would, but let's assume a state doesn't, and there's all sorts of evidence that this is all tricked up and it's as phony as can be.

MS. GUTHRIE: Well, I think that what I would hear in that particular question and would submit is the proper argument in that particular case is that what the state has done is arbitrary and capricious, and that might, in fact, state some sort of constitutional plane that possibly could be enforced under Section 1983. But we would argue that a statement that our findings and

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assurances are arbitrary and capricious does not state a claim under this particular statute.

QUESTION: Could you sue the Secretary under the APA if he accepted those assurances when the assurances were obviously insubstantial?

MS. GUTHRIE: We -- we think that there's an argument that could be made that the Administrative Procedure Act would permit someone to sue the Secretary for not living up to his obligations, but we do not believe that argument is persuasive in this case because of the nature of the right arguably created, which is one to findings and assurances. And the findings and assurances that are required are so defined by what comes after that language that by their terms they are more like the indefinite language this Court recently referred to in Webster v. Doe, language that might even foreclose a proper Administrative Procedure Act review.

The findings and assurances require the state to make a number of different, almost legislative, certainly policy-laden judgments. First, if you look at the actual language of the statute, it says that a state plan for medical assistance must provide for payment of hospital services through the use of rates, so we're making payment for the use of rates, which the state finds and makes assurances satisfactory to the Secretary are reasonable

and adequate to meet the cost which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable quality and safety standards and state and Federal laws, and to assure individuals eligible for medical assistance have reasonable access.

Buried in that somewhat labyrinthine language which is added to an already -- which you have already characterized as a byzantine statute, are several mandates for findings: one, the state has to look to see what is the care and services that must be provided in conformity with applicable state and Federal laws and regulations and quality and safety standards.

And once we know what the level of care that's required is, then we have to ask, now, what are the costs that have to be incurred -- have to be incurred by an economically and efficiently operated hospital in order to provide that level of care? And once we've determined what those mandated costs are -- because economic and efficient here is a limitation, not an expansion. It's meant to avoid overpayment, not to raise questions about underpayment.

Once we know the answer to the question of what costs are necessary, only then do we get to the issue of whether the rates that we set after that analysis are

reasonable and adequate to meet those costs. And only then, once we've established the rates, do we know anything about payments.

Now, when you look at that complexity, and when you look at the kinds of judgments that are buried and required of the state in that language, I think it's absolutely necessary to conclude that is the sort of language where there is substantial discretion delegated to the states that it is not the kind of language ordinarily determined by this Court to support a finding of specific and definite rights.

Contrast the language of the Boren Amendment not only with its predecessor, which specifically talked about cost-based reimbursement, but contrast it too with sections of the Social Security Act that this Court has already found enforceable, such as Section 1902(a)(8) of the Social Security Act, which is the part of the act that was at issue in Edelman v. Jordan, one of your most important holdings about enforceability of rights under Section 1983, under the Medicaid Act.

That section required that a state plan provide that all individuals wishing to made -- make application for medical assistance under the plan shall have the opportunity to do so, and that such assistance shall be furnished by reason -- with reasonable promptness to all

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eligible individuals.

Shall have the opportunity to apply for assistance; that assistance shall be provided with reasonable promptness -- very clear language. Even in that circumstance, the use of the word "reasonable" was interpreted by the Secretary of HHS' regulations, and accordingly could be easily enforced by the courts.

Moreover, the language of the Boren Amendment differs dramatically from the rights-granting language of the Brooke Amendment, which was at issue in the Wright v. Roanoke Development and Housing Authority case.

In Wright, the Court considered the effect of statutory language providing that tenants could be charged as rent no more and no less than 30 percent of their income, and the meaning of the -- and also looked at the meaning of an implementing regulation that included within that 30 percent standard a reasonable amount for utilities.

QUESTION: What if a -- the state just doesn't set up any standards at all for reimbursement?

MS. GUTHRIE: That's not this case. In this case we have an acknowledgement by Respondent that we have made findings and assurances, and that acknowledgement is bolstered by findings of fact made by Judge Merridge in the Mary Washington Hospital case. So we're in a

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circumstance in this particular case where that question is not an issue.

QUESTION: Well, I suppose if they didn't have a set of standards they wouldn't have presented anything to the Secretary, would they?

MS. GUTHRIE: That's correct, Your Honor.

QUESTION: I take it you suggested that if neither the state nor the Secretary was doing its job, somebody could complain in court?

MS. GUTHRIE: If the state was not doing its job, if we did not submit satisfactory assurances, if we've made no payments, for example, the Secretary --

QUESTION: So what -- who can sue whom for what?

MS. GUTHRIE: Well, the Secretary certainly in the first instance can refuse to approve our state plan, can withdraw his approval and can refuse to provide Federal participation

QUESTION: Can somebody sue?

MS. GUTHRIE: Yes. As I indicated earlier, if our actions were so --

QUESTION: Can somebody sue the state?

MS. GUTHRIE: If our actions were wholly arbitrary and capricious, I think that we would acknowledge that there would be a constitutional claim to which a 1983 action might attach.

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QUESTION: Why? Why? Why? I don't know why you -- why can't you say that the scheme is such that your protection is the Secretary? The assurances are made to him. All of the information has to be given to him. Why isn't it constitutional to have the Secretary protect -- protect the hospitals. That's their assurance --

MS. GUTHRIE: Well, I think --

QUESTION: And if the Secretary doesn't do the job, then the hospitals can sue him?

MS. GUTHRIE: I think that that's certainly a reasonable interpretation. I was only meaning to suggest that because of the level of state action involved in promulgating the state plan that's at issue here -- we have to promulgate a state plan under our Administrative Procedure Act as well as under the public notice and other requirements of the Federal law in this particular provision, and so we have state action --

QUESTION: I see.

MS. GUTHRIE: -- derived from this Federal-state cooperative program that might be independently attacked, you know, as arbitrary and capricious.

QUESTION: I understand. If you can sue when you don't have a plan, why can't you sue and just say look, the plan that was presented is just wholly arbitrary and capricious, so I want to sue the state? I want to --

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it's just a -- it's a nonplan, and look at these rates, they're just too low?

MS. GUTHRIE: In that circumstance, this statute is one that clearly sets up a scheme that contemplates that the states will be accountable and the Secretary will be charged principally with assuring that the states follow the mandate of Congress.

There is embodied in the statute a delegation to the states which is very broad and a recognition that this program is going to work only if it is a cooperative program of the state and Federal Government.

QUESTION: Well, does the state have a procedure whereby a provider can say look, you aren't paying me enough?

MS. GUTHRIE: Yes. There is a --

QUESTION: So the -- and is that reviewable in a state court?

MS. GUTHRIE: Yes. I'd like to reserve the rest of my time, if that's appropriate.

QUESTION: Very well, Miss Guthrie.

Mr. Roberts?

ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE UNITED STATES AS

AMICUS CURIAE, SUPPORTING THE PETITIONERS

MR. ROBERTS: Thank you Mr. Chief Justice, and

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may it please the Court:

It may be helpful at this point to return to the language of the statute. That language specifies that a state Medicaid plan must provide for the payment of rates which the state finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs that an efficiently and economically operated facility must incur to provide care and services and to assure that eligible individuals have reasonable access to services of adequate quality.

In providing for state findings and assurances, this language vests responsibility for rate setting squarely on the shoulders of the states. It does not secure any substantive Federal right to the payment of particular rates.

QUESTION: Mr. Roberts, can I just interrupt to ask you the same question that Justice O'Connor asked earlier of your colleague? What was -- what is your view of the situation before the Boren Amendment? Was there a cause of action under 1983 then?

MR. ROBERTS: I think there may well have been, Your Honor. Certainly several lower Federal courts found that there was. But the important distinction is -- there are two major respects in which the language prior to 1980 was very different.

QUESTION: Why, I -- I understand that. But basically you're saying, then, that even if there was, we should construe the Boren Amendment as taking away a preexisting remedy?

MR. ROBERTS: Well, I think it's different than in the implied right-of-action cases. I don't think it's, for example, like the Merrill Lynch case, where if Congress -- Congress did not provide a judicial right of action even prior to 1980.

The question is whether the language it used secured a right which then could be enforced under 1983. So I don't think you should look for particular evidence that they were withdrawing a judicial remedy. You simply construe the language of the statute to see if it secures a right, and in this case, looking first at the standard for payment, that standard is not the sort of language that suggests Congress intended there to be judicial policing of rates. How do we tell --

QUESTION: Is there some kind of right of action to require the state to include reimbursement provisions in the plan?

MR. ROBERTS: The statute requires that the state plan have a provision for payment of rates.

QUESTION: Is there -- is there a cause of action to require at least that much?

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MR. ROBERTS: There may well be, if the allegation in the complaint is that the state plan -- the state has not made findings that its rates meet this standard, or that the state has not given assurances to the Secretary at all. But that's not the relief that these plaintiffs seek.

QUESTION: Is there a requirement that the state act rationally in making those findings? Would that give rise to a cause of action?

MR. ROBERTS: I think not, Your Honor. It is only -- the only thing that the act requires is state findings and state assurances. There's no basis for a court to look behind those findings and assurances. This is not the pre-1980 situation, where the statute said the plan must provide for payment of rates at this level. The only requirements are that the state find that its rates meet this level and assure the Secretary.

QUESTION: Mr. Roberts, I must say I don't see that line, that you say it's all in the hands of the Secretary and sue him if you have any problems, unless there hasn't been any filing at all.

Why couldn't you say the same thing for that, that that's up to the Secretary? If he doesn't move against the state because of the state's failure to file, the remedy is against the Secretary?

MR. ROBERTS: In the first place, Your Honor, I didn't mean to suggest that you should sue the Secretary. I think the statutory standard, assurances satisfactory to the Secretary, is one that does not give law to apply under the Administrative Procedure Act.

QUESTION: Also, the Secretary could -- it doesn't matter what the Secretary approves. You're saying there is not only not a remedy directly here against the state, you're saying that even -- there is not even any remedy against the Secretary no matter what he approves?

MR. ROBERTS: I think that's right, Your Honor, and I don't think that's an absurd conclusion. The notion -- it is not the case that enactments of Congress that confer certain protections are meaningless unless they can be enforced in Court. It is a meaningful and significant protection to providers, perhaps, in this statute, that the state officials are required to stand up and say, we find that our rates meet this standard. It is an additional meaningful and significant protection that they must assure the Secretary that that is the case. But the providers want more. They want, as you suggest, to be able to haul the officials into Federal court and say, prove it, or say, under any other standard that's arbitrary and capricious, we don't think that your findings are right.

QUESTION: No, they just want to haul the Secretary in to be sure that he's doing the job he's supposed to under the statute. Why -- why would the normal judicial review that's available under the Administrative Procedure Act to be sure that the Secretary's action is not arbitrary or capricious, why is that suspended here? I didn't realize you were taking such a polar --

MR. ROBERTS: Because --

QUESTION: -- position on this.

MR. ROBERTS: Well, in the first place, of course, that question is not presented here, but in the second place, the statutory standard, assurances satisfactory to the Secretary, is one that by its very terms commits that decision to agency discretion. I don't think there are any standards for a district court or a court of appeals --

QUESTION: In any case, it's not involved here. I must say, though, that my view of what these people can get from the Secretary colors to some extent my view of whether they have any action here. If you're telling me they can't get anything anywhere, I might just say, you know, in for a penny, in for a pound. Let's let them sue the state.

MR. ROBERTS: My point is that they do get

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something, and they get it in two different places. They get it with the responsible state officials who have to make the findings, they get it with the Secretary who has to review the assurances.

They want a third option. They want to get it in Court. But Congress, in using the language in the Boren Amendment, did not secure to them any rights enforceable in court.

The language of the standard itself, quite apart from the findings and assurances language, is not the sort that suggests the securing of rights: reasonable and adequate, efficient and economical. What are the costs that must be incurred, as opposed to simply those that are incurred?

These are not objective facts that can be found by a court. They are policy judgments, policy judgments that Congress, in providing for state findings and assurances, clearly vested with the state.

QUESTION: It would be an objective fact if somebody brings a suit saying the Secretary is not even looking at these things. They don't even go into his office. Nobody -- nobody in the whole agency is even looking at them. That would be an objective fact, wouldn't it?

MR. ROBERTS: Even if you get over that hurdle,

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Your Honor, the only requirement -- that's -- that goes to the standard against which the state must make its findings and assurances, but the only mandate in the statute is that findings be made, assurances be given and the Secretary's approval obtained.

That is, of course, very different from the situation prior to 1980, when these lower case -- court cases were decided, when the repeal of the Eleventh Amendment immunity and the repeal of the repealer took place.

Perhaps there was a right of action at that time, but the one thing that's clear is that Congress made a significant change at that time. It not only changed the standard from reasonable cost, but it also inserted the language of findings and assurances. It left the responsibility for rate-setting with the states and not to be second-guessed in Federal court.

It is telling, I think, that there is no explanation in the plaintiffs' submission to this Court, or of that of their amici, as to what they thought Congress was trying to do when they made this change, when they inserted the requirement of findings and assurances. And it seemed -- the one thing that is clear with respect to the Secretary is that they wanted the Secretary to back off.

His review was not to look at the rates, but to assure proper accountability, to make sure that the findings were made, and it seems curious to suggest at the same time that Congress was pulling the Secretary back, it nonetheless intended that every provider have a right to challenge the level of its rates in Federal court before a Federal judge.

QUESTION: Well, that isn't quite that absurd, is it? And I suppose the standard would be quite different if the Secretary would take a fresh look and decide whether it was right, whereas they'd have a much heavier burden in court, wouldn't they, to show the statute was violated?

MR. ROBERTS: Well, I think it's unclear what the standard of review would be in court. Someone has suggested arbitrary and capricious, substantial evidence --

QUESTION: Well, they allege in this case that somebody who has 95 percent of the hospitals get less than the -- their costs out of this, and they say -- and that ergo, it's arbitrary. Isn't that their theory?

MR. ROBERTS: Well, I think it is, although I don't think it follows. It would not surprise me to find out that 95 percent of the hospitals are charging costs that are beyond those that would be charged by an

efficiently and economically operated hospital.

The purpose of the Boren Amendment, with its flexible standard and the express conferring of rate-setting authority on the states, was to drive the hospitals to efficiency.

I think it would be a very difficult task for a judge to decide, not simply what costs were incurred, but in an ideal world, what costs should have been incurred, what an efficient provision of care would entail. That's a policy judgment. It's one which Congress vested in the states in this system of findings and assurances.

QUESTION: And the state can reasonably find that 95 percent of the hospitals in Virginia are inefficient. That's what it amounts to.

MR. ROBERTS: The purpose of the Boren Amendment was to give the states the flexibility to set the rates that must be incurred to provide services. For example, a state could determine that a particular service is better provided on an out-patient than an in-patient basis, and therefore be willing only to reimburse the services at the out-patient level.

Thank you, Your Honor.

QUESTION: Thank you, Mr. Roberts.

Mr. Dellinger?

ORAL ARGUMENT OF WALTER DELLINGER

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ON BEHALF OF THE RESPONDENT

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

In response to questions from Justice O'Connor and Justice Stevens, Mr. Roberts acknowledges that there may well have been a right of providers to sue before 1981. Miss Guthrie, on behalf of the state, was not so sure.

Each of them, however, is quite convinced that somehow, some significant change was made in 1981 which retracts this right that in our view was not only settled, but a right with which Congress was extremely well aware.

Providers have been suing under these reimbursement agreements -- under these reimbursement standards of Congress for more than 20 years. The first case to come to the court of appeals was decided by the three-judge court in Catholic University -- Catholic Medical Center v. Rockefeller of 1969. And Congress was sufficiently aware that providers were suing to enforce this right --

QUESTION: But they were suing -- that was a right to a quite different substance than the right we are talking about here, wasn't it?

MR. DELLINGER: Not at all. The standard was revised in 1980 and '81. The previous standard was that a

state must provide the reasonable cost of providing hospital care. In the 1980 and '81 amendments for nursing home care and hospital care Congress provided the present language, which gives states the flexibility to adopt methods of reimbursement that encourage efficiency.

The state -- and we emphatically agree with this -- with the state on this point. States are not required to reimburse the actual costs of all hospitals. They are required to reimburse at a level that must be incurred by efficient and economical providers in providing care.

There's nothing in that change in the standard which continues to be enforceable and mandatory. The statute says a state plan must provide for payment of the hospitals, and Congress has never stopped with simply saying you must pay the hospitals a reimbursement for the costs they incur in providing care.

QUESTION: This Court never held there was a cause of action under the previous statute, did it?

MR. DELLINGER: This Court never had occasion to hold that there was a cause of action under the previous statute, but the sense of Congress on that point could not be clearer.

It's not merely a sense from matters that appear in floor statements or in committee hearings. Congress

twice in the '70s passed legislation expressly predicated on the existence of an underlying cause of actions upon which providers could sue.

QUESTION: Do you think that was a -- the cause of action given by the act?

MR. DELLINGER: Absolutely.

QUESTION: Or do you have to get to 1983 or something?

MR. DELLINGER: Well, the secured right comes from the Medicaid Act, the cause of action under 1983. The court decisions in the lower courts were, in the main, explicitly based on 1983.

Congress became concerned in 1975 that the 1983 cause of action for future injunctive relief wasn't enough of a remedy. Because of this Court's decision in Edelman against Jordan, a provider who sued in the '70s and challenged the state for failing the meet the minimum reimbursement standard could not receive compensatory damages because of the Eleventh Amendment barrier.

So Congress in 1975 passed legislation requiring states to waive their Eleventh Amendment immunity and consent to be sued not only for injunctive relief but for money damages as well.

That did not work out very well. Many state legislatures simply weren't meeting in time to comply by

March 31 of the ensuing year, and the penalty was draconian -- a 10 percent cut in Medicaid reimbursement to the state -- so the Congress in '76 withdrew, repealed the statute which required states to waive their Eleventh Amendment immunity.

It obviously makes no sense to require a waiver of Eleventh Amendment immunity if there's no underlying right to sue, but Congress could not have been clearer and the Solicitor General in his brief in the final footnote, page 23, note 16, notes that the House and Senate report explicitly state -- they say observe in passing -- explicitly state, with an interesting ellipsis here, that after the repeal "providers can continue" dot, dot, dot, "to institute suit for injunctive relief in state or Federal courts."

The ellipsed matter is: ", of course,". I mean, it was so well established that this statement -- the position of Undersecretary Marjorie Lynch in her testimony, Assistant Secretary Kersman, the repeal of this legislation -- should not be interpreted as placing constraints on the right of parties to seek prospective injunctive relief in a state or Federal judicial forum. It could not have been clearer that "of course" providers had a right to sue to enforce this standard.

Congress, as it had done previously -- Congress

has modified this statute in '69, '72, '75, '76, '80 and '81. The last '81 standards are intended to encourage efficiency on the part of hospitals by --

QUESTION: Well, Mr. Dellinger, exactly what is the obligation you think the current language imposes on the state?

MR. DELLINGER: The obligation that the current language imposes on the state is to come up with a plan that is not arbitrary and capricious. It is not certain what the standard will be on the merits.

QUESTION: So if there is a cause of action it's only to assure that the action of the state is not arbitrary and capricious?

MR. DELLINGER: That has not been finally settled in the lower courts that have heard this so far. It may well be that that's where the standard comes out, because the statutory language is "reasonable and adequate." That obviously gives the state some room and flexibility.

QUESTION: Well, certainly Congress apparently intended to remove from the Secretary the obligation for any detailed enforcement --

MR. DELLINGER: That's correct, and --

QUESTION: -- of particular standards.

MR. DELLINGER: That's correct, and that is I

think essential to what happened in 1980 and '81. I think the Solicitor General concedes, as he must, that there was a right to sue before '80 and '81, and one of the principal changes in 1980 and '81 was to reduce the oversight role of the Federal Secretary.

QUESTION: But you would have us increase the Federal oversight by virtue of having the Federal courts do what the Secretary cannot do?

MR. DELLINGER: No. The court's role is simply to see that the Federal statute has been enforced, that it has been complied with by the states. Only in those instances --

QUESTION: Do you think there's a private cause of action to achieve results and have Federal oversight through the courts that could not be obtained by the Secretary?

MR. DELLINGER: Yes, and in fact the access to Federal court is -- makes more sense once the Secretary's role has been diminished, that is, prior to 1980 and '81 it was more arguable that the Secretary's function, which was then a review and approval function, provided the remedy that was necessary. Now, this has been decentralized.

QUESTION: Well, it's kind of curious as an end result, though. One might think that what Congress had in

mind was a reduced Federal involvement across the board, whether it's through the courts or the Secretary.

MR. DELLINGER: There's absolutely no evidence of that in the legislative history, of reducing the role of the courts.

What Congress did want to do is to decentralize the function of adopting a reimbursement methodology. Previously, the Secretary had exercised something like a command and control function. When the Secretary engaged in that function, conceivably there could have been meaningful APA review.

QUESTION: What's his function now, Mr. Dellinger? What is the Secretary supposed to do now, just file them? He's not supposed to look at them at all?

MR. DELLINGER: That is the position of the Department of Justice, that the Secretary -- in its brief, the Solicitor General says, at page 5 of its brief, "The states are not required to submit to the Secretary the findings themselves or the underlying data or analysis."

QUESTION: Well, it's one thing to say they're not required to submit. It's another thing to say that he doesn't have some obligation, if he smells something wrong or somebody complains, to probe more deeply, ask for documentation and so forth.

What do you think he has to do? I mean, the way

you've just been talking, he's been read out of the act. Is that so?

MR. DELLINGER: I think that is largely correct. That is, at page 20 of their brief the Solicitor General says that "consistent with this legislative history, the Secretary has maintained" -- whether he gets Chevron deference in this judgment I don't know, but the Secretary has maintained that the statutory provision "does not require him to analyze or verify the state's findings," partly because we've now switched to a system from one in which the Secretary had a command and control function.

There are other areas of the Medicaid Act where the Secretary continues to be the effective decision-maker, but here Congress has decentralized to the point where it is the state which finds that its plan meets the requirement of the statute of being reasonable and adequate reimbursement.

QUESTION: Mr. Dellinger, supposing you win here, and then the Arlington Hospital goes into court and sues a year from now saying we incurred $10 million in costs, the Virginia people have only reimbursed us for $8 million.

So what issues -- what issues could a Federal court consider in deciding that case?

MR. DELLINGER: Well, the fact that they had

incurred $10 million in cost and the state had only reimbursed them $8 million would by no means suggest that they were entitled to win.

QUESTION: What issues could the Federal court consider?

MR. DELLINGER: I think if you look at the cases that have gone to judgment in the Courts of Appeal, and we have a number now that have been decided, you can see the process that the Federal court -- a Federal court can go through.

The state officials are asked to, in a sense come forward and explain how their system was designed and what is the theory that this is a reasonable and adequate rates that would meet the costs that must be incurred. That is not an impossible finding. I think it's the --

QUESTION: And if the district judge disagrees with -- that the plan is reasonable, he doesn't think it is reasonable, he can set it aside?

MR. DELLINGER: Not at all.

QUESTION: Well, what does he do?

MR. DELLINGER: Well, I mean if --

QUESTION: He gives them $2 million, doesn't he?

MR. DELLINGER: No, he -- by disagreeing -- I think I now understand, you want to know just what the result is. The result is that he disapproves the state

plan and the state is required to submit another plan, to make another annual finding.

QUESTION: And another plan to the Secretary?

MR. DELLINGER: To come up with -- to come up with another plan. That's essentially --

QUESTION: The hospital doesn't get any money judgment, then?

MR. DELLINGER: Not at all, not from the Federal district court. The only relief, as far as I know, in any of these cases is that the state plan be disapproved and that perhaps if it is an amendment to a state plan which is being eliminated that you call back. The state is given an order. The state is ordered by the court -- as I understand the judgment in the court of appeals cases -- to submit a plan, to come up with a new plan that meets the Federal standards.

We have cases that have gone to trial on this.

QUESTION: What -- is that a de novo standard of review? Does the Federal judge decide for himself whether this meets the Federal standard?

MR. DELLINGER: Yes. The Federal judge obviously must make in the final analysis a determination of whether the state's plan meets the Federal requirement, but that's not the same as a Federal judge having to decide what he thinks is reasonable.

That is to say, I think Edmond Kahn once said it's much easier to identify instances of injustice than it is to find justice. See, a court is only asked to identify instances in which a state plan is unreasonable.

Let me give you an example, if I may.

QUESTION: Before you --

MR. DELLINGER: Yes.

QUESTION: Can you think of any other instances where we have Federal courts passing upon the adequacy of state plans? I can think of a lot of Federal statutory -- or several Federal statutory schemes where you have a Federal administrator approving state plans.

Isn't it rather extraordinary to have state plans submitted to Federal judges -- and this will go on annually, won't it? I mean, every time a state makes an adjustment in its rate system?

MR. DELLINGER: Well, there have been, I think, in the history of this provision only 42 actions brought. I assume that in most cases -- there are only suits pending in 18 states at the present time. I think most states are in fact in compliance, judging by those figures.

They are -- they have a variety of different methodologies, just in the way in that, when we get our travel expenses reimbursed there are lots of different

ways in which payers calculate our travel expenses, but all of them seem to be a method to determine -- to be in -- actually a method of determining reasonableness and adequacy.

But you have cases, like the Colorado case brought by St. Mark's Hospital and Denver Lutheran that has now gone to judgment in the court of appeals, in which the state -- again it was a case like Virginia's where not a single hospital -- not 90 percent but 100 percent -- not a single hospital was receiving -- was being reimbursed its cost of providing care.

In Colorado, the state's method was to use one of the Medicare methods of determining cost per patient day, and at the next-to-bottom line the state simply multiplies by .54. They simply cut the amount in half.

That's not a very difficult judgment for a court to make, and particularly when the state has no theory. It's as if they said, we take the numbers and multiply them by last Tuesday's trifecta number.

I mean, the trial court asked the state, by what method or theory do you assume that multiplying by .54 and cutting the figures in half will result in reimbursement that meets the costs that must be incurred? The state essentially had no answer, so that the court was able to conclude that the record was "flagrantly devoid of any

effort to make the Federal required findings."

QUESTION: It told them to come up with another number?

(Laughter.)

MR. DELLINGER: It told them to come up with -- some numbers are -- you have a theory. One of the first things the state did was multiply Medicare rates by .88, but they had a theory that it was less expensive to treat Medicaid patients than Medicare patients, so they had a theory. But then when they cut it in half, they had no theory.

QUESTION: Well, what was the order?

MR. DELLINGER: The order was simply, in that case, to hold that the state plan was -- failed to meet the -- the state was failing to comply with the statutory requirement that it pay providers in accordance with a plan that is reasonable and adequate to meet the costs that must be incurred, and the state was ordered to --

QUESTION: You couldn't get any money out of the state because of the Eleventh Amendment, is that it?

MR. DELLINGER: That's right. There's no retrospective damages, so the state is only required to come up with a new plan, which Colorado has done. Colorado has now come up with a new plan and now has joined the ranks of other states that find it quite

possible to come up with a plan that meets this Federal standard.

QUESTION: In your view, is there an action against the Secretary under the APA?

MR. DELLINGER: If there is an action against the Secretary under the APA, there would be very little for the court to review because the Secretary's role is so limited and the Department of Justice has taken the position, as it did in Illinois Health Care v. Suiter -- the Department of Justice moves to dismiss the Secretary whenever the Secretary is sued now.

QUESTION: Well, why is the Secretary so limited? Just because it has to do with assurances that are satisfactory? I mean, doesn't the Secretary have to, in effect, make the same finding the state does?

MR. DELLINGER: No. The Secretary -- the state plan -- when a new state plan is adopted, it must be submitted to the Secretary. And the Department has taken the position, as the Secretary has, that he only reviews formal compliance. He looks and sees if the state has in fact rendered an assurance.

QUESTION: But it says that they have to be satisfactory, to -- not just that they have to be filed, but that they have to be satisfactory to the Secretary. I don't think they're talking about gastronomic

satisfaction.

(Laughter.)

QUESTION: I think he's supposed to look at them and see that they seem to be in rough compliance, right? I mean, it's not --

MR. DELLINGER: One would think that the Secretary would scrutinize these submissions, but it's -- there is a critical point here. There are two requirements in the statute. One is that the state submit assurances satisfactory to the Secretary, but that's a backstop requirement. The fundamental obligation is that the state find that it's plan meets the Federal standard.

QUESTION: Well, isn't there some -- I asked your opponent, is there some administrative scheme whereby you can in -- take -- get review in the state itself, in its administrative processes? Can you take this issue up there?

MR. DELLINGER: Absolutely not. This issue may not be brought in the state administrative appeals procedure. The -- at no point has the state ever said that you can challenge --

QUESTION: Didn't your adversary suggest --

MR. DELLINGER: No, she --

QUESTION: You don't -- you didn't understand her that way?

MR. DELLINGER: The way the dialogue proceeds on this question -- I did not understand her to say that, because the dialogue proceeds as follows: we say, since the Secretary is providing no remedy, and in fact the findings -- the annual findings do not have to be submitted to the Secretary. The findings are an annual requirement. The Secretary only even sees us when there's a new plan --

QUESTION: Well, is --

MR. DELLINGER: But on the state side --

QUESTION: Is the only way you can argue with the state is to go to court, or can't you argue in their -- don't they have some administrative structure?

MR. DELLINGER: Here's the state's administrative structure, and they do say this: the Federal statute and the regulations say that a state plan has to provide procedures for prepayment and postpayment claims review "with respect to such issues as the state agency determines appropriate."

When we say there's no remedy, the state says, oh, yes, we have an elaborate three-tiered administrative appeals process. But we look at the plan, and the plan says, you may not challenge the principles of reimbursement. The plan for long-term care says, and I quote, "The principles of reimbursement are not

appealable." And we respond with that; to which they say well, nobody's perfect.

I mean, there's -- the plan doesn't allow you to bring the issue that we want to litigate, and I understand this is not necessarily a critique of the plan. The state administrators are not appeals officials, are not Chief Justice John Marshalls.

QUESTION: So you just can't go in and say, I didn't get enough?

MR. DELLINGER: No. Here's what you can do --

QUESTION: Well, can you or not?

MR. DELLINGER: Not at all.

QUESTION: Well, what can you say in an administrative --

MR. DELLINGER: You can say they've miscalculated your reimbursement. Suppose, for example, the state plan provides that you get one-third of your cost. You can go into the state appellate process --

QUESTION: Say, you didn't multiply right.

MR. DELLINGER: You can go in and say look, you calculated this at 33 percent and we believe that one third means 33-1/3 percent, and the state plan says one-third.

QUESTION: Now, is that clear as a bell in this -- is it in the -- can we tell that that is so in this

record, or from any papers that you can read?

MR. DELLINGER: I think if you look at the Solicitor General's brief, at page 2, the Solicitor General -- the Solicitor General says at page 2 that we want to bypass the state administrative procedures, but at page 6 the Solicitor General says, "The Commonwealth Medicaid appeals procedure precludes administrative review of the principles of Medicaid reimbursement under the plan."

QUESTION: Well, what if, instead of seeking administrative review of those principles, you went into the Circuit Court of Fairfax County and said the statute requires that the state make these findings, that they will be adequate; the state's findings are inadequate? Why not go into the Circuit Court of Fairfax County instead of the District Court of the Eastern District of Virginia, which you did?

MR. DELLINGER: Well, the Virginia APA has a provision that grants of state or Federal funds are exempted from the judicial review provisions.

There's no definitive judgment of the Virginia Supreme Court, but that provision that exempts grants of Federal funds from APA review, and the provision that says that the validity of any statute, regulation, standard or policy, state or Federal, upon which the action of the

agency was based shall not be subject to review by the court, appear to preclude any access to court. The state administrative system clearly does not --

QUESTION: This is not a grant of state or Federal funds, is it? Is it a grant?

MR. DELLINGER: This involves a grant of state or Federal funds and --

QUESTION: The grant includes --

MR. DELLINGER: Conceivably the Virginia Supreme Court would decide differently, but it's important to note that once you're closed out of the state administrative appeals process, because it doesn't allow you to challenge the principles of reimbursement, there's nothing in the Federal Medicaid Act that requires state court judicial review.

So that any review that might exist by happenstance, the availability of which would be entirely a matter of individual state law, cannot, as this Court held in Wright v. City of Roanoke, foreclose a remedy under Section 1983. The state simply doesn't identify, as we can see it, any plausible basis.

I think in the end that what happened in 1980 and '81 was very significant for what Congress did not say, after manifesting its concern with provider remedies and having an extensive legislative history.

The Congress is said to have taken away and extinguished provider's right to sue, with no mention -- there's not a word in the legislative history, the extensive legislative history in '80 and '81, that says, oh, in addition, we're making another major change. We're extinguishing the right of providers to sue in state and Federal court which we've legislated about in '75 and '76. It's being extinguished by this statute.

That is, in this case, the dog that did not bark. There's not a word that Congress was withdrawing a right of which Congress was fully and clearly aware.

It seems to me that two approaches have been argued here today to take away the right to sue. One of those approaches would have this Court hold that a state's plan always meets the statutory standard, no matter how arbitrary, capricious, unsupported or untrue its plan might be.

The other would acknowledge the existence of the statutory right but shut the doors of the state and Federal courthouses to the only effective means that providers have of enforcing the requirements of this statute.

I think either one of those approaches would breathe an unhealthy skepticism and a lack of respect for Federal law.

The state says -- it takes umbrage in its brief at our suggestion that -- they're saying that a false finding satisfies this statutory standard. But the state itself says that we acknowledge that the Commonwealth has made the findings required by the statute. I thought, when did we ever say that -- acknowledge that the state had made the required findings under the statute?

They cite the complaint, footnote 12 -- I mean, the complaint, paragraph 12, which says that the assurances and findings provided by the Commonwealth were inaccurate. The state -- the heart of the state's position is, as it must be, that a state's requirement to find is satisfied by an inaccurate finding.

That simply does not square with what this Court held in Wright v. City of Roanoke, where the statute said the regulations involved spoke of reasonable utility -- reasonable amounts of utilities determined in accordance with the Public Housing Authority's schedule of allowances.

I don't see any difference between what the state finds to be reasonable and adequate in this case and what the state authority determined to be reasonable in City of Richmond Public Housing Authority, in Roanoke.

It seems to me that if the state's finding is to mean anything, then this case is one in which --

QUESTION: Is there been an example where you've utilized the state appeals procedure, administrative procedure, and then gone into court and asked the court to review the principles of reimbursement and have been denied?

MR. DELLINGER: No, Your Honor. The state filed -- the providers filed appeals in the state court system, but those have been stayed pending this litigation and the --

QUESTION: Well, you don't know whether you can get relief in the Virginia court.

MR. DELLINGER: We are quite certain that relief is not available in the state appeals process, because --

QUESTION: Well, in the administrative appeal. How about in court? Can you go to court and say look, these fellows won't listen to principle?

MR. DELLINGER: You mean go to state court?

QUESTION: Yes.

MR. DELLINGER: Well, we can certainly go to state court under Section 1981 as long as the Virginia courts are open, but there does not appear to be any state appeal otherwise.

QUESTION: Thank you, Mr. Dellinger. Miss Guthrie, you have five minutes remaining.

REBUTTAL ARGUMENT OF R. CLAIRE GUTHRIE

ON BEHALF OF THE PETITIONERS

MS. GUTHRIE: Thank you. I think I'd like to use my time in part to try to clarify a little confusion that's been introduced here about our appeals system.

First, turning to pages 36 through 40 and -- well, 42 of the joint appendix, which sets out the formal administrative hearing and the necessary demonstrations of proof that are available to hospitals, it says the hospital shall bear the burden of proof in seeking relief from its prospective payment rate, that a hospital seeking additional reimbursement for operating costs relating to the provision of in-patient care shall demonstrate that its cost exceed the limitations.

QUESTION: Now, you're not just going from 36 to 37?

MS. GUTHRIE: Right, and it goes through several pages, I think and ultimately focuses the attention of the director and the hospitals on showing what the Medicaid program really is all about.

It directs the attentions to show that the rates that the receive are not sufficient to cover operating costs related to in-patient care in a manner that's sufficient to provide care that conforms to applicable quality standards or, moreover, it also directs the hospitals to put their proof on related to the reasonable

access standard.

That was Congress' purpose in enacting the Medicaid Act and the Boren Amendment was intended to serve it. There's no issue here of those --

QUESTION: Isn't there an express provision that you cannot review the principles of reimbursement?

MS. GUTHRIE: There is an express provision --

QUESTION: Where is that?

MS. GUTHRIE: There is an express provision that states that you can't -- you can't review the principles of reimbursement. That's one of the terms of the administrative mechanism.

QUESTION: Does that mean that you can't claim -- you can't claim and be permitted to show that reimbursement is not reasonable?

MS. GUTHRIE: Not in the administrative process, but Section 32.1-325.1, which is a specific statute that we point out in our reply brief on page 10 --

QUESTION: Page 10 of the joint appendix?

MS. GUTHRIE: Of the reply brief, Mr. Chief Justice.

On page 10, we tried to clarify this matter in our reply brief. Virginia, after the Mary Washington Hospital case, enacted a specific provision that overrides the general APA exclusion for grant programs and says

specifically, the providers have a right of judicial review of reimbursement, and then that invokes the normal standards of Section 17 of our Administrative Process Act that includes the right to bring a Federal question issue before the state courts on judicial review of the administrative determination.

QUESTION: But -- you can't -- you can't do it in the administrative process, but you can in the state court, is that --

MS. GUTHRIE: Correct, because the agency doesn't want to delegate to an individual hearing officer the right to set aside its Medicaid program.

QUESTION: Well, but surely we shouldn't determine what the Federal statute means on the basis that Virginia happens to provide a state procedure?

MS. GUTHRIE: No.

QUESTION: I mean, we're trying to interpret the Federal statute, and I guess we have to assume that a state -- other states may not have such procedures --

MS. GUTHRIE: That's correct.

QUESTION: Whether Virginia does or not.

MS. GUTHRIE: That's correct, and we did not interject this issue in order to say that it -- that this Court is required to defer to those state procedures necessarily.

The whole issue of foreclosure is one that you need only address if you determine that there's a substantive Federal right that's secured within the meaning of that term "secured" under Section 1983, and we have submitted, and we continue to argue, that the language of the Boren Amendment in its complexity, in its delegation of discretion, in its lack of guidelines, and in forming the terms "reasonable and adequate," "economic and efficient," the measure related to assuring access, that all of those things taken together are a statute that is not subject to judicial enforcement and therefore cannot confer any substantive Federal right that can be vindicated here.

The Virginia Hospital Association tries to make much of two lines in the legislative history of the Eleventh Amendment repealer about not wanting to change the status quo ante with respect to Federal and state rights.

What they haven't told you, and which a careful reading of all of the cases that they refer to in their footnotes will show you, is that most of the cases that had been in existence up 'til that point -- the pre-1981 cases -- most of the cases involved suits against both the Secretary and the states, and in most of those cases the relief granted was against the Secretary, making the

Secretary go back and do his job over again.

The amici American Hospital Association brief recognizes that fewer than half of the cases that were decided before 1981 involved any 1983 claim at all, many of the issues regarding provider rights were resolved on questions of standing, which is why you see the parallel interest language and the zone of interest language in many of the cases, and even the Colorado Hospital case that they cite to -- cited to in argument today is a case eminently distinguishable from ours.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Miss Guthrie.

The case is submitted.

(Whereupon, at 12:07 p.m., the case in the above-entitled matter was submitted.)

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VIRGINIA HOSPITAL ASSOCIATION

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BY Leona M. May
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