In the

Supreme Court of the United States

DONALD C. CASS,

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

and

FRANCIS A. ADAMS, et al.,

Petitioners

vs.

THE SECRETARY OF THE NAVY, et al.,

Respondents

No. 73-604

No. 73-5661

Washington, D. C.

April 16, 1974

Pages 1 thru 34

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v.	:	
UNITED STATES OF AMERICA, Respondent	:	
and	:	
FRANCIS A. ADAMS, ET AL., Petitioners	:	No. 73-5661
v.	:	
THE SECRETARY OF THE NAVY, ET AL., Respondents	:	

Washington, D. C.

Tuesday, April 16, 1974

The above-entitled matter came on for argument at 1:19 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

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APPEARANCES: (Cont.)

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WILLIAM L. PATTON, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in Cass against the United States, No. 73-604; and Adams against Secretary of the Navy, No. 73-5661.

Mr. Hanson.

ORAL ARGUMENT OF ARTHUR B. HANSON

ON BEHALF OF PETITIONER CASS

MR. HANSON: Mr. Chief Justice, distinguished Associate Justices, may it please the Court: At the outset I would like to call the Court's attention to the fact that we did not receive the reply brief in this matter until this past Friday. We would ask the Court's indulgence in permitting us to file a typewritten brief in reply, if we may, certainly not later than the end of this week.

MR. CHIEF JUSTICE BURGER: That leave will be granted, Mr. Hanson, and you may take a little more time if you need it.

MR. HANSON: Thank you.

This applies, of course, to my brother Dougherty who is arguing the other cases.

Your Honors, we would like to call your attention to two items, one appearing at page 20 and another at 21 of the Solicitor General's brief. The footnote on page 20 refers to the time the Government filed its petition for writ of certiorari in Schmid v. United States, and it discusses

the fact that this might increase the Government's potential liability by more than $12 million if that case were not reversed. I had the pleasure of arguing Schmid in the Court of Claims, and I protested vehemently at the time that this remark was placed in the Schmid petition to this Court that it was outside the record. This was never raised in the court below, in the Court of Claims; it has never been raised in the Ninth Circuit nor in the district courts that have considered this matter, and I think it's improprietous that it be brought before the Court and would ask that it be disregarded. Truthfully, they can find out what it would cost, but they never have and they never tried to put it into the record, and I don't think it should be here today.

Secondly, on page 21 I would almost say the Freudian slip, but I will term it inadvertence. In the middle of the page when they quote under paragraph No. 2, they say, "For the purpose of this subsection" when they are trying to discuss our approach of interpreting the statute. I would urge the Court to note that this was done in Schmid and it was done in the Ninth Circuit and here it is again. We have repeatedly called the Government's attention that the statute reads, "For the purposes of this subsection," and that is highly important and I am sorry that it slipped back in.

Now, if I may, I will address my remarks to the case in chief.

We are here primarily on a matter involving purely a question of statutory construction. The statute involved is 10 U.S.C. 687(a), and in pertinent part that statute involves Reserve officers of all the services who have served more than their, one might say, indentured service, in a sense, whether they were in the draft call or whether they were called up for some other purpose. They served more than four years and then have extended onward their service at the request of the Government and then were discharged involuntarily before they reached a fifth year of service when the war in Vietnam was winding down, and they were released just prior to the fifth year in many instances within a few days of having completed five years of service.

Now, we have cited the statute for purposes of this discussion before the Court. As you see on page 2 of our brief, we have set it forth. And I think that since we are dealing with exact language, I would like to recite it to you in a sense. We say:

"Non-Regulars: readjustment payment upon involuntary release from active duty.

"(a) Except for members covered by subsection (b), a member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after

he had completed a tour of active duty, and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service (other than in time of war or of national emergency declared by Congress after June 28, 1962), but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release....For the purposes of this subsection--"

"For the purposes of this subsection--

"(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

"(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded;"

Now, with that statute in front of you with nothing else before you, I think the Court would reach the same conclusion that the Court of Claims did, and we urge that the Court read carefully the decision in Schmid. As you may recall, your Honors, you rejected the petitioner's certiorari in Schmid by a 5-to-2 vote.

Now, what has happened is that a number of officers -- in Schmid's case, he had a requirement for some 13 or 14 thousand dollars, so he had to go to the Court of Claims on the jurisdiction. Certain of the other people involved have gone to the Federal District Court as a matter of convenience

because they had ten thousand or less dollars involved and jurisdictionally they could use the District Court.

And that's why we are here today. Cass was one of those who had ten thousand some odd dollars, and he waived the above-ten thousand to come here in the District Court.

QUESTION: Mr. Hanson, is this applicable to commissioned officers only, or is it to all reservists who come within this?

MR. HANSON: In this particular part of the statute --

QUESTION: All these people are officers, I know.

MR. HANSON: Your Honor, these are all officers, but it would be my view that it's applicable to all members of the reserves who are in there on a voluntary extension of their four-year enlistment period.

Now, what happened in this case was that many of these people, officers and men, served more than the five years during the Vietnam unpleasantness, which was not declared a state of emergency or a war, and that's why the terms of the statute, but those have already been taken care of by recomputation. It happens that this applies only to those who had extended their service expecting to go on for as long as the Government needed them, and then when the Government saw that situation winding down, they quickly got a number of them out before they completed the fifth year.

It might interest you to know that Schmid in that

case had served four years plus in a previous enlistment as an enlisted man, and then came back in the Navy as an officer and served four years, six months, and some odd days, so that when actually we went in for his case, we were dealing with a recomputation based on his total years of service which gave him something in excess of $13,000 as opposed to the smaller amounts here, although he is of a similar rank.

QUESTION: Mr. Hanson, what if there had been an interruption in the service in the middle of a five-year period, say of five months, would you make the same argument?

MR. HANSON: No, because the statute very clearly states that a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days.

I am glad you raised that because that again emphasizes the defining portions of this statute. The statute's main body is defined in two areas: "For the purposes of this subsection-- (1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days." If it had been interrupted by a break in service of more than 30 days, which is the five months you raised, then he would not qualify for this statute.

QUESTION: Why couldn't you argue under your theory that the part of the year, six months or more, should be counted as a full year?

MR. HANSON: Because another section of the statute

covers it. The other section says that part of a year of six months or more is counted as a whole year and part of a year that's less than six months is disregarded, this is for purposes of eligibility in that sense, whereas if he doesn't have unbroken active duty, if it's only broken for 30 days, he still qualifies under section (2). But if he has a break of more than 30 days, is qualified, and he is eliminated from it under section (1).

What I am suggesting to your Honors is that you will find that you must read a statute as a whole, and it is not at all unusual to qualify a statement by the language in the following part of it, and I will call your attention to 6330, Title 10, U.S.C. 6330, which is quoted on page 11 of our brief. And that again is interesting because it is applicable to exactly the same sort of recomputation and eligibility. That applies to members of the Marine Corps and Marine Corps Reserve who are to be transferred to the Fleet Marine Corps Reserve. It says:

"(d) For the purposes of sections (b) and (c), a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded."

QUESTION: If this statute read the way 6330 does, you wouldn't have a problem, would you?

MR. HANSON: It does read that way, your Honor.

That's what we are saying. It reads exactly that way.

QUESTION: It seems to me the statutes are different.

MR. HANSON: They are different in one sense, but 6330 applies to someone who has served 19 years and 6 months, so they are released at the end of 19 years and 6 months, and this is a usual thing in the services to do, and they are given credit for that -- they are given 19 years 6 months and a day and they are then credited with 20 years of service.

QUESTION: The term "at least" is not in there, is it?

MR. HANSON: Sir?

QUESTION: The term "at least" modifying five years is not in 6330, is it?

MR. HANSON: Well, no, your Honor, it is not, but it says an enlisted member of the Regular Navy or Naval Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Reserve.

Then they say, for the purposes of this they let them out in nineteen and a half years and one day.

QUESTION: As Justice Blackmun said, if you had that kind of provision in 687, you would have a different --

MR. HANSON: Well, possibly, your Honor, but I would suggest that when they said at least five years of continuous active duty and then they come down and tell me

that for purposes of this subsection that a part of a year of six months or more is counted as a whole year, then he has completed at least five years of active duty.

QUESTION: Isn't it reasonable that Congress intended to give greater boon, if you want to call it that, to a man who served five enlistments of four years almost than someone who had just served four years and had been extended?

MR. HANSON: No, your Honor, because those people are what we call the 20-year group and they have been in for 20 years and are entitled to retire both to promotion flow and other items, whereas these people are called in in time of emergency, such as the Vietnam war. Most of these people were draftees who came in for an initial tour of four years and then they extended at the requirement of the Government and then asked to continue on, and then were involuntarily retired when it seemed to be in the Government's budgetary interest to reduce them.

QUESTION: But my question is is it not reasonable to assume that Congress was prepared, had a different attitude toward so-called 20-year people and 4-year people who might serve a little over?

MR. HANSON: Well, I would have some question of that, Mr. Chief Justice, as a Reserve officer for some 33 years and still one. I think the Congress is very concerned with the very people we are concerned with here, and I would

point out one other thing, that in the court's attempt in the Ninth Circuit to reach that conclusion, they made mention of the fact that the Senate report involved suggested that perhaps there was no substantive change in the statute when it was recodified.

I call two things to the Court's attention: First, 6330 was passed in 1958. That was subsequent to the initial passage of 687(a) which was passed in 1956. When they recodified these matters in 1962, some water had gone under the bridge and we believe that the Congress intended to do exactly what it did. They don't mention the House report. This bill had to go through both Houses; it didn't just go through the Senate. And the fact that the Senate said, "We don't think this is any substantive change," is really immaterial to consideration of this matter because when it was passed by both Houses, a change did appear, and the change is the one that finds 687(a) exactly as the Court of Claims found it. I would urge that this Court pay particular attention to the language in the Court of Claims decision where they went behind the statute and stated very clearly, on page 3 of their opinion, that, "Although we find the section clear and unambiguous on its face and it's susceptible on its face of only one interpretation," they then go on to say, "Although we find no ambiguity in the words of the statute, we are not precluded from examining the legislative history underlying

the enactment in order to detertermine whether there is clear and compelling support for the interpretation." They then went on and said, "After a careful review of the legislative history of section 687(a), we conclude that support which it lends to defendant's position, namely, the Government, is not so clear and compelling as to require us to adopt an interpretation of the section inconsistent with the clear import of its terms."

And I would like to add one other thing if I may.

QUESTION: Under paragraph (2) it says that a part of a year that is less than six months is disregarded.

MR. HANSON: Yes, sir.

QUESTION: That would have no conceivable application to eligibility, would it?

MR. HANSON: (Pause) It would to this extent -- If he served four years, five months and 27 days in a leap year February, why, he certainly would have served less than six months, and he would not be eligible. But if he had served four years, six months and one day, he would be eligible.

QUESTION: I know, but -- I can see how -- you might arguably say the first part of section (2) applies to eligibility as well as computation, but the last part of it, I would think, would apply only to computation. So arguably the whole section (2) is a computation section.

MR. HANSON: Well, again I can only state that the Court of Claims did review this with great care and they addressed that argument thoroughly. I would urge your Honors to address it carefully, and I think one of the items that persuaded them -- I was about to call your attention to this -- is the fact that this is a remedial statute and as such it's our view that it must be most carefully construed in favor of the petitioner in this case.

QUESTION: Mr. Hanson, on your view, why wouldn't the Congress have merely provided for four and a half years instead of five as the basic eligibility period and forget about section (2)?

MR. HANSON: I'm not being facetious when I say this, Mr. Justice Blackmun. The Congress does many things that I wonder about. But it's my view that there are many statutes which they describe in terms of this nature. They set out what a statute is and then they put a caboose on it, so to speak, in which they say, "For purposes of this section, we mean the following:" And that's what we say they have done here. And this isn't unusual.

My time is up and I thank you.

MR. CHIEF JUSTICE BURGER: Mr. Dougherty.

ORAL ARGUMENT OF WILLIAM A. DOUGHERTY

ON BEHALF OF PETITIONERS ADAMS, ET AL.

MR. DOUGHERTY: Mr. Chief Justice, and may it please

the Court: Might I point out in the beginning, our case is slightly different than that of Cass, in that we deal with three Marine captain aviators, and the statute we cite, 6330 of Code 10, deals specifically with the Navy and the Marine Corps and specifically with Regular and Reserves of the Navy and Marine Corps.

As does Cass, we take the position, of course, that the statute is clear on its face. First, it sets forth a standard and the standard is "at least five years of continuous active duty." And then with the preface, "For the purposes" -- "purposes," I emphasize -- "of this subsection," it goes on to define specifically what the phrase "continuous active duty" means, as was explained to Mr. Justice Rehnquist, and then it specifically defines the word "year."

Now, what the Ninth Circuit did, I submit, is it overlooked the plain meaning of the words in section (2) defining the word "year." And it took the first part of the statute, subsection (1), and then ignored (2).

The statute 10 U.S.C. 6330 uses exactly the same phraseology, the same words, as does 687(a) and specifically, as I pointed out, refers to Navy and Marine Corps personnel, both Regular and Reserve.

QUESTION: You are not suggesting that 6330 covers your clients because 6330 among other things applies only to enlisted personnel and also only to those who have completed

20 or more years. So what is your point that your case is different from --

MR. DOUGHERTY: My point is that 6330 allows a 6-months round figure both as to Regular and to Reserve, and I think that's significant. And since all our clients in this case are Reservists, I think it's significant. And I was just about to, if I may, call the Court's attention to a statute that no one has cited in the briefs, the Justice or the amicus curiae, or anybody, and it is 10 U.S.C. 77, and it states that the laws applying to both Regulars and Reserves shall be administered without discrimination (1) among Regulars, (2) among Reserves, and (3) between Regulars and Reserves. And I am submitting that there is a different treatment of Reserves in 6330 than there is in 687(a), and that contravenes the statute that I have just cited.

QUESTION: Does it help your case any, Mr. Dougherty, that the statute Justice Stewart just cited to you contains an expressed provision for rounding out when there is less than the full period, and this statute contains no such rounding out provision.

MR. DOUGHERTY: Mr. Chief Justice, it's our position that the rounding provisions of both statutes are exactly the same. The only difference is between "at least five years" as you asked earlier and the reference to 20 years.

QUESTION: Well "at least," those are two pretty

important words in that statute, are they not?

MR. DOUGHERTY: But if you take the subsection (2) as defining the word "year", it says a period of six months or more, and it says for purposes of this subsection. That means the whole subsection; it just doesn't mean part of it. That's the thing the Ninth Circuit missed, I submit.

QUESTION: Before 1962 you wouldn't have much of a case, would you?

MR. DOUGHERTY: Before 1962.

QUESTION: Well, before the statute was codified into its present form.

MR. DOUGHERTY: If you take, what was it, 1016 of title 50, that was a different statute, yes, I agree. That specifically used the term "for computation."

QUESTION: Didn't the reports indicate when they codified it that they didn't intend any substantive change?

MR. DOUGHERTY: It depends where you look. The Senate said, as Mr. Hanson pointed out, the Senate said it at one time, but --

QUESTION: That's the usual rule on codifications anyway, isn't it?

MR. DOUGHERTY: Well, Mr. Libonati's, as I pointed out in my brief, Mr. Libonati's original bill in 1956 contained three things: It amended, it changed, and it codified. There were three separate bills, not just one. That's on page 8 of

our brief, if you please. They were incorporated as Titles I, II, and II to the bill. I, to amend title 10, II to codify recent military laws, and III to improve the code.

So at best, the legislative history of this statute is ambiguous.

I reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Dougherty.

Mr. Patton.

ORAL ARGUMENT OF WILLIAM L. PATTON

ON BEHALF OF RESPONDENTS

MR. PATTON: Mr. Chief Justice, and may it please the Court: The Government's view is that this case presents an instance where a mistake was made in the codification of a statute.

Petitioners contend that the Act is clear on its face and that because it is clear, this Court cannot look either at the antecedent statute or the legislative history of the 1962 codification in construing the Act. And alternatively they argue that legislative history supports their claim that in 1962 Congress intended to change the eligibility requirement.

Our position is that the statute is not clear and that any doubt as to its meaning is dispelled by consideration of the antecedent statute and the legislative history. And even if the statute were deemed clear on a first examination, there surely is no rule which forbids resort to aids in

construction, and indeed resort to such aids as particularly appropriate in the case of codified statutes.

When we begin with subsection (a) of the Adjustment Act, we find that it deals with two subjects: First, Congress expressly fixed the eligibility requirement at five years of continuous active service. It then provided that the amount of pay would be computed by multiplying years of service by two months' basic pay. Because the amount of pay rests on years of service, it was then necessary to count the fractional service. And we submit that the rounding provision, that part of a year which is six months or more should be counted as a year and less than six months disregarded, applies to calculation and only to calculation.

We have a hypothetical in our brief which illustrates our position clearly. If the serviceman has served four years and eight months, he would not in our view be eligible for adjustment pay. If, however, he had served 13 years and four months, he would be eligible and the amount of the pay would be computed by multiplying 13 by two months' basic pay, the four months being disregarded under the rounding provision. If he had served 13 years and eight months, it would be calculated by multiplying two months' basic pay by 14 years, the eight months being counted as a year under the rounding provision.

It would be possible to read the rounding provision

to apply to eligibility by focusing on the plural "purposes", but to do so involves a number of problems. One, as Mr. Justice White has pointed out, that part of the rounding provision which calls for disregarding less than six months has no application. Secondly --

QUESTION: Would that be equally true under 6330?

MR. PATTON: It would be under 6330, that's right, Mr. Justice Stewart, and with respect to 6330, our position is that that statute is more clear than the Adjustment Pay Act.

QUESTION: Well, that's your submission, but I'm just asking now about this little argument you have made, that the less than six months would have no meaning if the petitioner's construction were accepted. But the less than six months has no meaning from the point of eligibility under 6330 even though you concede that that means what the petitioner --

MR. PATTON: It has meaning for computation, that's right.

QUESTION: So your argument would be equally adaptable to 6330.

MR. PATTON: That's correct. Frankly, I think 6330 on a first examination is somewhat curious.

QUESTION: But at least 6330 refers specifically to subsections (b) and (c).

MR. PATTON: That's correct, Mr. Justice Blackmun, and I think --

QUESTION: But in this case we only have one subsection, and this statute says, "For the purposes of this subsection." You can't say (b) and (c) here because there is no (b) and (c), there is only one.

MR. PATTON: That's correct. I don't suggest that this statute is a model of clarity, and I do say that if 6330 were --

QUESTION: That's where you differ from your brothers on the other side; they say it is very clear.

MR. PATTON: That's right, Mr. Justice Stewart, that's where we disagree. And the question is whether the Court can resort to aids in construction in determining what Congress intended with this provision.

Now, an additional factor is that in the Adjustment Pay Act Congress specifically required five years of continuous service for eligibility. A rounding provision would not be necessary for eligibility, I agree would not be necessary in 6330 either. And since a rounding provision really serves only one function as a matter of necessity, we submit that the words immediately preceding it in the Adjustment Pay Act, "For the purposes of this section," are ambiguous. And any doubt as to what Congress intended is dispelled by consideration of the original Act and the legislative history of the 1962 codification.

The adjustment pay was established in 1956 and at

that time there was no ambiguity in the statute. That Act required five years' continuous service. And then with respect to the rounding provision, it expressly stated the rounding provision would be applied in computing the amount of adjustment pay. The eligibility requirement and the restriction of the rounding provision to computation remained unchanged until 1962. In 1962 Congress recodified recent military pay legislation, and in the course of codification the words preceding the rounding provision were changed from, "For the purposes of computing the amount of adjustment pay," to "For the purposes of this subsection." That this change was inadvertent is demonstrated by consideration of the legislative history. The Senate report states that no substantive change was intended.

While the Senate and House reports purport to list all changes made in the codified legislation, the change in the rounding provision is not referred to. There were no debates, no hearings, indeed no reference to changing eligibility requirements.

QUESTION: This is an argument, I gather, that based on that absence of legislative history, that we ought to read the change as if it weren't made.

MR. PATTON: That's correct, Mr. Justice Brennan. I think it's a little more than just the absence of legislative history, because there is an affirmative statement in the

Senate report that no substantive changes were intended.

QUESTION: How about the House report?

MR. PATTON: The House report does not contain that statement. Basically the House report simply lists the changes made.

QUESTION: Including this one.

MR. PATTON: It doesn't list this one. The reports are somewhat confused. The reports list as changes the omission of the words "For the purposes of" is surplussage, but in fact that phrase was not omitted.

Now, another point is that substantive changes in military legislation are ordinarily made under the supervision of the Armed Forces Committees of the Senate and House. But the codification was carried out by the Judiciary Committees. It would have been most unusual for them to make substantive changes.

QUESTION: Mr. Patton, what if this 687(a) as you show it at the top of page 3 of your brief where it says "at least five years of continuous active duty," supposing that said "at least three years of continuous active duty," and it had gone through committee and that language passed on the floor, that language, we wouldn't listen to you now, I take it, say that what Congress really meant was five years and that they simply made a mistake in putting in the word "three."

MR. PATTON: Well, it would be a much more

difficult case. Happily that's not presented here. I think the reason it would be much more difficult is because there is a certain specificity about numbers. It would make it difficult to argue that no change was intended. I think it unlikely that that would have escaped unnoticed.

Now, I think when you consider --

QUESTION: Particularly when the report contains the statement there was no substantive change, one might ask if the difference between three and five wasn't substantive. One would assume that someone in Congress would think of that.

MR. PATTON: I would certainly hope so.

I think it's in the original Act and legislative history, there really is no dispute that Congress did not intend to change the eligibility requirement.

As I understand petitioners' argument from their briefs, their argument essentially is that this Court can't look at the original statute or the legislative history but that the Government must be bound by what they consider to be the plain meaning of the language.

Now, in supporting of the plain meaning doctrine, petitioners rely largely on older precedents of this Court, many of them 19th century decisions. If the plain meaning doctrine was ever applied in the pristine form contended for by petitioners, it can no longer be deemed controlling. I suggest that upon analysis most cases which invoke the plain

meaning doctrine do not in fact apply it. In any event, as this Court has said in American Trucking, United States v. American Trucking, which is cited at page 22 of our brief, "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"

Now, the resort to aids in construction is particularly appropriate when codified statutes are in dispute, and at the bottom of page 22 of our brief we have cited a number of decisions of this Court which indicate the changes in language in codification do not ordinarily result in changes of meaning even where a literal reading might result in a substantive change.

QUESTION: The statutes were passed by both Houses, final, as they now exist.

MR. PATTON: That's correct.

QUESTION: What are we going to do about it?

Well, let me ask you another question. Has the Government asked Congress to clarify it? Has the Government told Congress it made a mistake? Has the Congress told them that they misstated what they meant? Has Congress asked the statute to be amended? Has Congress done any of those -- I mean, has the Government done any of those things? Or do you want us to rewrite it?

MR. PATTON: It is my understanding, Mr. Justice Marshall, that we have not. It's our position that the Court can construe the statute in accordance with what we think Congress' purpose clearly was, and it is not necessary to go back --

QUESTION: Where is the clearly?

MR. PATTON: Well, that rests on our position that it is a codified statute and that this Court can look to the antecedent Act and the legislative history in construing its terms.

QUESTION: I want the clearly.

MR. PATTON: I think if you look at the original Act, which had the restriction in it, the rounding provision applied only to computation, and the Senate report in the codification which states that no substantive change was intended, that I think it follows that no substantive change was intended --

QUESTION: Disregard the House.

MR. PATTON: Well, the House report is silent on this matter. There were no hearings.

QUESTION: So all you have got is one sentence in one report which makes it clear.

MR. PATTON: Well, there is a complete absence of any suggestion --

QUESTION: How does absence make it clear?

MR. PATTON: Well, --

QUESTION: You have shouldered the burden of showing that this is clear, and I don't think you have convinced me that it is clear.

MR. PATTON: Perhaps I have misled the Court. I don't suggest that the statute is clear. I think the statute is unclear. But I think when you --

QUESTION: Well, you said clearly Congress intended something other than what it says.

MR. PATTON: I don't think --

QUESTION: Is that an accurate statement?

MR. PATTON: I don't think Congress intended to change the eligibility requirement.

QUESTION: Do you say that Congress didn't say what it said?

MR. PATTON: Well, --no, I don't say that. The statute was passed. I say that the omission of the words, "For the purposes of computing the amount of pay," was inadvertent.

QUESTION: What do you mean by inadvertent?

MR. PATTON: I think it was unintentional. There is no suggestion anywhere that Congress intended to reduce the eligibility requirement.

QUESTION: Then you say clearly it was inadvertent.

MR. PATTON: Well, I think it's clear that it was inadvertent, and I hope the Court will agree with me.

QUESTION: The court of appeals agreed with you in a very persuasive opinion. The Court of Claims didn't agree with you at all.

MR. PATTON: Well, the Court of Claims found the statute clear on its face in requiring four and a half years, and the Court of Appeals for the Ninth Circuit found it clear in requiring five years.

QUESTION: You now tell me that the Ninth Circuit is clearly correct and the Court of Claims is clearly incorrect.

MR. PATTON: No, I think -- the statute is ambiguous, and I believe this Court may construe it in accordance with the purposes of Congress as found in the legislative history.

For example, in City of Greenwood v. Peacock, which involved the application of the Federal Civil Rights removal statute to prosecutions against private citizens, this Court found that the original removal statute in the Civil Rights Act of 1866 had provided for removal of prosecutions against officers or other persons. In 1948 when Congress codified what is now title 28 of the Code, that phrase is omitted, and relying on the legislative history reports which stated that no substantive change is intended, this Court read the statute as though that phrase had not been omitted.

QUESTION: I think it had a little more than one sentence in one report.

MR. PATTON: Well, it may have been in both the

Senate and House reports.

QUESTION: It was more than one sentence. You only have one sentence going for you.

MR. PATTON: Well, we only have one sentence, affirmative sentence, but we have no indication that there was any consideration given to changing the eligibility requirement.

QUESTION: Except that they passed the bill as it was written.

MR. PATTON: Well, that doesn't indicate consideration.

QUESTION: Does that indicate that Congress didn't read the bill before they passed it?

MR. PATTON: I have no doubt, Mr. Justice Marshall, that that occurs in some cases, in terms of the technical language of a bill.

Now, I would just like to add finally that the construction which the Government urges is supported by an established administrative construction. The regulations of the Department of Defense and the pay manuals of the services have uniformly construed the rounding provision as applicable only to computation.

And, finally, on page 11 of our brief we have listed a number of statutes which include a rounding provision and we submit that our construction is consistent with a pattern of similar legislation. Five years of continuous active service

is required for eligibility. None of the petitioners in these cases have served five years, and therefore we submit that the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Patton.

Mr. Dougherty, do you have anything further?

REBUTTAL ORAL ARGUMENT OF WILLIAM A. DOUGHERTY

ON BEHALF OF PETITIONERS ADAMS, ET AL.

MR. DOUGHERTY: May it please the Court, Mr. Chief Justice, I will be brief.

We submit that the best refutation for the last argument that all the services administratively construe this the same way is specious because it's a Department of Defense order and it's axiomatic that if the Department of Defense construes the statute one way, all four branches will routinely take the order of the Department of Defense.

And, secondly, we submit that the Government has construed this statute, or should construe this statute in the same way it is construing 6330, as it has done routinely in 6330 for the last 16 years.

QUESTION: Well, you have a different situation here, Mr. Dougherty. Up until 1962 it was very clear that this statute meant precisely what the Government now says it means. Up to 1962 you wouldn't have had any case at all, would you?

MR. DOUGHERTY: 'Fifty-six to 1962, agreed.

QUESTION: None. Because the statute was crystal clear that it applied only to those who had served actually five years or more.

MR. DOUGHERTY: Yes.

QUESTION: And then what happened was it was recodified and there is a statement in one of the committee reports, that of the Senate, that no change was intended. So it's quite a different situation from the language of 6330 which remained, I gather, unchanged from its enactment, hasn't it?

MR. DOUGHERTY: Yes, sir. But I might invite the Court's attention to the fact that all these other statutes that the Government has cited with the exception of 6330 and the Coast Guard statute, 42 212, have nothing to do with eligibility, it's all for computation. These are the only two statutes that have anything to do with eligibility.

QUESTION: But nevertheless, between '56 and '62, it would have been quite clear that the statutes had a different meaning.

MR. DOUGHERTY: Yes, I agree with that. But certainly the tenor and the mood of Congress certainly changed from '56 to '62, the war situation --

QUESTION: The Senate report said they didn't intend any change, and other reports that purported to list changes, didn't list this one although I would assume this would

be quite a substantial change if they were changing eligibility.

QUESTION: It did list one that wasn't made.

MR. DOUGHERTY: But the best test of the statute is the statute itself. As Mr. Justice Black used to say when he'd talk about the First Amendment, if he took this out to the man on the street and put it in front of him, he would say, yes, the man should get paid. Six months means what it says.

QUESTION: So does five years.

MR. DOUGHERTY: But five years, your Honor, is not modified by, "For the purposes of this subsection."

QUESTION: I know, but you are still applying this six months requirement, for purposes of that subsection, for purposes of computation. I mean, you are not ignoring it.

MR. DOUGHERTY: No, but the modifying phrase, "For the purposes of this subsection," must mean what it says. If a man, a part of a year that is six months or more is considered as a whole year.

MR. CHIEF JUSTICE BURGER: Mr. Dougherty, before you sit down let me express the Court's appreciation for your accepting the appointment to appear in this case for Mr. Adams and his friends and for your help to them and your assistance to the Court.

MR. DOUGHERTY: They are all worthy reigns, and I am delighted to do it. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you. The case is submitted.

[Whereupon, at 2:04 p.m., the oral argument in the above-entitled matter was concluded.]