ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1181

TITLE LOCKHEED AIRCRAFT CORPORATION, Petitioner v. UNITED STATES

PLACE Washington, D. C.

DATE Tuesday, November 30, 1982

PAGES 1 - 41

ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

LOCKHEED AIRCRAFT CORPORATION,

Petitioner

v. No. 81-1181

UNITED STATES

Washington, D.C.

Tuesday, November 30, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:07 p.m.

APPEARANCES:

WARNER W. GARDNER, ESQ., Washington, D.C.; on behalf of the Petitioner.

MS. CAROLYN F. CORWIN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Gardner, I think you may proceed whenever you're ready now.

ORAL ARGUMENT OF WARNER W. GARDNER, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case involves the crash of a C-5A aircraft which was delivered to the Air Force by Lockheed in September of 1970. In March of 1975 the plane was stationed at the Travis Air Force Base in California. On March the 16th it was cannibalized and two tie rods were removed for the benefit of another plane. Eight days later the tie rods -- other tie rods were replaced.

At the time the rigging of the lock which held the aft cargo ramp was not fully rigged. On April the 1st the plane left Travis, went to Georgia where it picked up 50 tones of howitzers. From there it went to Saigon with some trans-Pacific way stops and arrived at noon on April the 5th, 1975. That was one or two days before the final fall of Saigon.

Within a space of three hours the howitzers were unloaded and 301 passengers somehow put aboard the plane, most of whom were Vietnamese orphans. Shortly

after takeoff the locking mechanism on the door to the aft cargo ramp gave way. The ramp fell, severing the control lines of the plane. In an unsuccessful effort to regain the Saigon airport it crashed with heavy loss of life and injury to almost all of those who survived.

Several hundred product liability suits were filed against Lockheed. They were consolidated by the Multidistrict Panel in the District of Columbia courts here. In each case Lockheed joined the United States as third party defendant.

After extensive discovery, the United States and Lockheed produced an agreed statement of material facts and further agreed between themselves upon a percentage division of any recovery. That last agreement reserved, however, the rights of the United States under the so-called exclusive liability provisions of the Federal Employees' Compensation Act in respect of civilian government employees.

There were about 33 suits filed involving civilian government employees. This is the lead case. The case was filed by Mr. Thomas as administrator of the estate of a deceased civilian government employee. He was paid an award under the Federal Employees' Compensation Act and brought suit against Lockheed on product liability. That suit has been settled with the

agreement of the United States. There remains open only the claim of the United States to immunity or absence of liability because of the provisions of Section 8116(c) of Title V.

That exclusive liability provision is printed at page 2 of the blue brief. The Government insists that its plain words provide that the Government should be liable to no one in respect of an employee covered by the Employees' Compensation Act.

We would be inclined to agree with the Government if the statute stopped at the fifth line as we have printed it. It would then read: "The liability of the United States or an instrumentality under this subchapter with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality."

If there came at that point a period, as I have indicated, we think the Government would be right. Instead, the statute goes on for another eight lines, all of which would seem to be surplussage in the Government reading.

Moreover, those eight lines themselves contain a second, inexplicable redundancy under the Government's reading. If suit is barred by all persons, why ever did the Congress enumerate the employee, his legal

representative, spouse, dependents, next of kin?

QUESTION: Well, Mr. Gardner, isn't that a fairly rational drafting of a sentence that starts with the noun "liability" and then is talking about the liability -- what liability, the liability to, and then starting in the sixth line, to the employee, his legal representative --

MR. GARDNER: Yes, sir, I think it's an entirely rational statute. I think this has three times been so read by this Court. It is barring the liability of the employee and those who claim through the employee because of the injury or death. The Government in its reading would exclude the limiting clauses which I have summarized as saying those who claim through the employee. In the Government's reading all they need is to bar liability with respect to the death to any person, period.

If, as I insist, this is surplussage, it is important to note that it did not arise because of hasty drafting on the floor just prior to enactment of the statute. It has deliberately been enacted by four legislatures, all using virtually identical words: the New York Legislature in 1922 when it passed its Workmen's Compensation Act; the Federal Longshoremen and Harbor Workers' Act of 1927 when they copied virtually

intact the words from the New York statute; the Congress again in 1949 when this act was passed; and again in 1966 when Title V was codified.

I would think the government should have some explanation for what by its reading must be a pervasive and persistent addiction to surplussage over a period of 60 years by four legislatures.

QUESTION: Well, as you read the statute I take it you don't find any of that surplussage.

MR. GARDNER: No, sir.

QUESTION: And would you say that the term "any other person otherwise entitled to recover damages from the United States" that appears in, I think, the seventh and eighth lines, would you say that covered an individual or corporation like Lockheed in this case?

MR. GARDNER: No, sir.

QUESTION: Why not?

MR. GARDNER: I would say that under the very familiar principles of ejusdem generis that coverall phrase is intended to refer to others of the same class. For example, the draftsmen in looking to those who might be claiming through the employee could not know what varieties of persons under one state law or another would have that right. For one of many examples one can take the guardian ad lidem for a minor

dependent. Obviously, to be safe you would want a coverall clause.

This Court has three times approached this language with consistent results, a consistency not shown by the Government. In the Ryan case, Ryan against Pan-Atlantic Steamship Company in the 350th United States, the Court quoted these provisions in their almost identical form as they appeared in the Longshoremen and Harbor Workers' Act and said: "The obvious purpose of this provision is to make the employer's compensation liability exclusive to anyone claiming under or through such employee" -- that limiting phrase was repeated twice at page 129 of the 350th United States. That interpretation was adopted at the urging of the Government.

Seven years later this Court considered Weyerhaeuser Steamship Company against the United States. This time the words were those in this statute, the Federal Employees' Compensation Act. Mr. Justice Stewart, writing for a unanimous Court, turned to these words and said that the Government's contention as to their plain meaning was not at all plain. This time the Government was containing -- contending that plainly the provision barred any third party claim over. He referred to the principle of ejusdem generis in reaching

that conclusion. He went on to examine the legislative history, and he found that that history was clear, that the remedy of the Compensation Act was made exclusive for the government employees and their representatives or dependents, and that there was no evidence, I quote, "no evidence whatever that Congress was concerned with the rights of unrelated third parties."

Again this Court in Federal Marine Terminals against Burnside Terminal -- Burnside Shipping Company six years later in the 394th United States similarly -- similarly read the provisions as stating that there was no quid pro quo for third persons, and the statute was not to be thought to extend to them. Quote, "On the contary, as emphasized in Ryan, the Act is concerned only with the rights and obligations as between the stevedore -- stevedoring contractor and the employee or his representative."

If the Court will forgive me, I will need a bit of water before I attack long words.

We see no occasion to retrace the legislative history which was covered in Justice Stewart's opinion in the Weyerhaeuser case. We have printed the committee reports which are the sole explanation of these exclusive liability provisions.

We do note, however, that in that statute,

statutory history, the Court said that the statute was drawn from the Longshoremen Workers -- Longshoremen and Harbor Workers' Act and from the New York statute in 1922.

In 1938, 11 years before this enactment, the New York Court of Appeals had decided the Westchester Lighting case. There an employee of the development company was asphyxiated when another employee broke the gas main of the lighting company. The employee received an award, then obtained a judgment against the lighting company which claimed over for tort indemnity against the development company. The Court of Appeals allowed the claim, stating that the lighting company sued for its own injury and not for the injury to the deceased employee.

By 1949 when this statute was enacted, the New York rule had become firmly established. It had been applied in a number of the lower New York cases once again by the Court of Appeals of New York. The lower Federal courts addressing the same words in the Longshoremen's Act had by a large majority allowed the claim, typically in reliance upon the Westchester reasoning.

The Government has not seen fit to address the impact of the New York rule upon this case. If it did,

so far as I could tell it would be forced to urge upon this Court that neither the members of Congress nor the Congressional committees or the staff or the committees or the lawyers at the Federal Security Agency, which drafted this statute by copying the provisions of the New York statute, had any idea how the New York statute had been interpreted. It seems to us most improbable.

I'd like to return for a moment to the merits of the Weyerhaeuser case. There an Army dredge collided with the Weyerhaeuser liner off the coast of Oregon. A civilian government employee was aboard the dredge, and after receiving award under the Compensation Act brought suit against Weyerhaeuser and received a judgment.

The Admiralty Court found both vessels at fault and divided damages. Weyerhaeuser presented in its bill the payment made to the government employee. This Court sustained Weyerhaeuser's position unanimously.

I find no way to distinguish in terms of Section 8116(c) the admiralty claim for damages and the tort indemnity claim for restitution. The Government's principal distinction as I read their discussion is that Weyerhaeuser dealt with an admiralty rule, that of divided damages, of ancient vintage and well established. Well, so, too, tort indemnity is a remedy long established, found in decisions of this Court for

more than a century past.

QUESTION: Mr. Gardner, what in your case is the analog to the Public Vessels Act in Weyerhaeuser -- the Federal Tort Claims Act?

MR. GARDNER: Yes, sir.

QUESTION: Mr. Gardner, are you going to touch on the independent duty and derivative?

MR. GARDNER: I plan, if Your Honor will give me a minute or two to, in the vernacular, go to town on that one. It is to my mind something that deserves a great deal of comment, all of which should be adverse.

Nothing in Section 8116(c) draws any distinction between admiralty and law, between divided damages and tort indemnity, nor indeed any distinction between the government employee who travels on an Army dredge in contrast to the one who travels on an Air Force plane.

I come now to the independent duty basis of the decision below. The court's opinion seems to me to have been a quite remarkable one. It dutifully quoted the words of Section 8116(c) and never again referred to them. It made no reference to the legislative history of the provision. It paid no attention to the New York rule. It made no meaningful citation of the Weyerhaeuser case and none at all of the Ryan case.

Instead, it said that for Lockheed to recover it must show an independent duty, independent, that is, of the claim of the employee, and that Lockheed had not shown a duty which was so independent.

In my view the term "independent duty" does nothing but to generate what might be called a metaphysical fog which obscures the true issue in the case. The true issue must necessarily be what did the legislature enact.

The term is, moreover, inevitably and inherently question-begging. Every third party claim will necessarily involve the death or the injury of the employee. That necessary ingredient to the action is in the but-for sense a cause of the action.

The observe side of this elusive coin is that every third party claim also involve another ingredient: the injury to the third party inflicted when it is required to respond in judgment because of the negligence of the Government or the employer.

I know of no way in which these interrelated duties could be said to be either independent or to be derivative. That's not entirely accurate. I know one way, which is to look to the judgment and then go back and describe the duty as independent or as derivative according to the result.

The last thought which I would like to present to the Court relates to the policies which the Congress has uniformly followed in these exclusive liability provisions. It has never curtailed a right or a remedy without offering a compensating benefit called sometimes in the committee reports a quid pro quo. Thus, the employee, who is forbidden to bring suit against the Government in search of a jury verdict, is given a fast, fault-free, prompt award, which at least in the years close to the enactment of the provision is a generous one.

The Government, stripped of its customary defenses, or the stevedoring employer in the other act of contributory negligence, assumption of risk and so on, gains a ceiling, a definite, assured limit to its liability.

In 1972 the Congress amended the Longshoremen's Act in two respects. First, it eliminated the liability without fault of the vessel based on the unseaworthiness doctrine to the longshoremen. Having done that, and only because it did that, it went on to eliminate the claim over by the vessel against the stevedore on the ground that if the vessel was now liable only for its own negligence, there was no occasion to limit the claim over.

The Government here asks the Court to do to the same words in this statute what the Congress was required to do to the same words in the Longshoremen's Act. It asks, moreover, that this Court act without the sensitivity to the equities of the third person held liable without fault which the Congress betrayed in the 1972 amendments.

We suggest that the Government's request that you usurp the power to the Congress exercises more harshly than the Congress would should be denied.

QUESTION: Mr. Gardner, may I ask, even if we were to agree with you on your interpretation of the Section 8116(c), what would we do about determining whether there is a substantive right to indemnity under the D.C. law? Would the Court have to remand?

MR. GARDNER: That has already been determined, Your Honor. The District Court found first that there was a substantive right to indemnity; second, that there was no bar found in 8116(c).

QUESTION: But, of course, the Court of Appeals didn't agree.

MR. GARDNER: The Court of Appeals did not face that question. It was not appealed to it. The Court of Appeals did not touch the substantive right of indemnity. It was not presented to it by the

Government's appeal. It said that absent an independent duty that indemnity was barred. If the bar of 8116(c) were eliminated, the unappealed judgment of the District Court on indemnity remains, it would not be necessary to remand to have that one determined.

QUESTION: Mr. Gardner, if you lose this case, do you still have a claim under the Suits and Admiralty Act?

MR. GARDNER: It's not worth very much, Your Honor. Under the Executive Jet decision --

QUESTION: So you -- you would not press it.

MR. GARDNER: We think it unlikely that we have an admiralty claim, but no one could be absolutely sure whether this vessel -- this aircraft starting out from Saigon to the Philippines was discharging the traditional duties of a surface vessel.

MR. GARDNER: I would like to reserve what few minutes I have left, Your Honor.

CHIEF JUSTICE BURGER: Very well.

Ms. Corwin.

ORAL ARGUMENT OF CAROLYN F. CORWIN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The section that is at issue in this case is a

portion of a major workers' compensation program. It was enacted by Congress in 1916, and it covers virtually all Federal civilian employees.

Under the program, an employee who is injured on the job receives compensation, and that compensation occurs promptly, it occurs without regard to the fault of either the employer or the employee, and it occurs without litigation. It is an administrative scheme.

Thus, in the present case the Federal employee, Ann Nash Bottorff, was aboard the C-5A when it crashed and who died in that crash, had survivors. Those survivors applied for death benefits under the Federal Employees Compensation Act. It was concluded that Ms. Bottorff was in the course of her duties at the time of the crash, and the survivors received death benefits.

Benefits are paid out of the Employees' Compensation Fund within the Treasury Department. Benefits paid out at the present time are running around $1 billion per year. Payments to the employees under the Federal Employees' Compensation program essentially take the place of tort damages that an employee might otherwise be entitled to recover.

QUESTION: Mr. Corwin, there were nine employees injured and who died in the crash, weren't

there?

MS. CORWIN: That is correct. There were civilians, there were civilian employees.

QUESTION: Has the Government conceded liability as to those?

MS. CORWIN: The Government has entered into agreements with Petitioner under which, as Petitioner's counsel indicated, there will be payment of a portion of the settlement liability.

The payment of the compensation to the Federal employees who were a part of the group that died in the C-5A crash, as I said, takes the place of tort damages, and in essence what that creates is a ceiling for the Federal agency. The agency can look to a ceiling that allows it to avoid the uncertainty of potential tort damages. In addition, the agency can avoid the constant litigation that would arise if work-related injuries were always settled in the courts under the tort system.

Now, this creates what has been referred to as a limited liability feature: a limit on the liability of the employer, in this case the federal agency. This is something that Congress was particularly concerned about in 1949. The legislative history does show that Congress was quite concerned about complaints from federal agencies. The agencies had found that they were

facing suits by -- facing suits concerning these work-related accidents. They saw that they were being opened to potential tort liability. They saw that they were facing litigation. They would be forced to expend time and resources on this litigation.

Congress did mention frequently in the legislative history -- and we've cited some of the portions in our brief on page 36 -- Congress expected that by enacting Section 8116(c) there would be an end to this sort of litigation; that agencies would be free to proceed with their business, that they would not be tied up in litigation, and that there would be savings that could in turn by applied as compensation for the employees.

Virtually all workers' compensation programs include this sort of limited liability feature. And this Court on several occasions has acknowledged in the context of other compensation statutes that the limited liability feature creates a protective mantle for the employer, the federal agency in this case.

Under the Longshoremen's statute this Court stated in Cooper Stevedoring that there was a protective mantle created by limited liability and that that mantle extended to third party claims against the employer which had arisen out of the claim of the employee

against the third party based on the work-related injury.

QUESTION: Ms. Corwin, is there any weight of authority among state decisions interpreting state workmen's compensation laws as to whether the governmental employer would be liable in a situation like this or whether a private employer would be liable in a situation like this?

MS. CORWIN: There is indeed authority to that effect, and I believe we've cited in our brief some of the summary discussion of that issue by Professor Larson.

QUESTION: Yeah. I asked you whether there was authority to the effect that the Government would be liable, and you said, I believe, that yes, there was a lot of authority that the Government would be liable. Is that what you meant to say?

MS. CORWIN: No. I must have misunderstood your question. I did not mean to say that. The indication under the state laws governing private employers is that the employer is immune from this sort of third party suit; that in addition to the liability, limited liability vis-a-vis the employee or any dependents or whatever, in addition, any sort of third part suit of the sort that Petitioner is urging here also is barred.

Now, Petitioner's counsel raised the New York

law and suggested that we had not addressed the New York law. I believe we've indicated at least at one point in our brief that there is some question as to what the New York law in fact was at the time of passage in 1949 of this section.

I think it's important to note that both the House and Senate reports on this legislation do not refer to the New York law; rather, the language that Congress used was state workmen's compensation laws in general have this sort of provision, referring to the exclusive liability provision. There is some mention of New York laws -- Petitioner has referred to it in its brief -- but that mention is in the hearings, and it is in the context of mentioning that this legislation is based on the Longshoremen's statute, the New York statute and other workers' compensation statutes.

QUESTION: These were the 1949 hearings, not the original enactment of the LHWCA.

MS. CORWIN: That's correct. This is in 1949 when Congress was looking at this problem that the Federal agencies had brought up to it, and there was realization that in fact there were models for this sort of provision around, that states had it, that the Longshoremen's statute had it, and in fact that this was something that might fit the bill for the Federal

agencies.

Now, I suggest that New York was one among many and that if there was any model, perhaps it was the Longshoremen's statute, which as this Court has observed is very close to the language here.

The New York situation in 1949 was simply not that clear. Petitioner's counsel has referred to the Westchester Lighting case in 1938. That case has been interpreted by the Second Circuit on several occasions as referring to a contractual sort of claim, not a tort claim of the type that Petitioner is urging, but rather -- and this is where the independent duty language comes in -- the Court used the term "independent duty" in the New York case, but the Second Circuit has interpreted that as a duty arising out of a contractual relationship between the lighting company and the landowner in that case. So it is not at all clear that anyone was contemplating New York law vis-a-vis tort indemnity of the sort the Petitioner is urging here.

The Longshoremen's statute is not the only area that this Court has looked at with respect to the limited liability feature of a compensation scheme. The Court examined the military compensation scheme in Stencel Aero in 1977. This was a claim that was very similar to the one that's put forward here. It involved

a contractor. It involved product liability.

The Court examined several features of that case, and one of them was the limited liability feature of the military compensation statute. The Court again referred, as it had in the Longshoremen's case, to the protective mantle that is granted to an employer under a compensation statute, and it said that it's an essential feature of a compensation scheme such as the military compensation scheme that was before it, and I suggest such as the compensation scheme that applies to Federal civilian employees.

The Court indicated that it would be a circumvention of that limited liability feature for the Court to permit the third party claim that was urged so strenuously in that case. That sort of reasoning applies to this statute as well -- again, the limited liability feature in a workers' compensation scheme.

In essence --

QUESTION: How do you overcome the Weyerhaeuser case, however?

MS. CORWIN: I think that this Court in the Weyerhaeuser case was looking at a rather different situation than what we have in this case. The claim in Weyerhaeuser was not a tort, a purely tort claim. It was not even under the Tort Claims Act. It's not the

sort we have here. Instead, it was an admiralty claim. The Court perceived -- the Court described it in terms of an ancient rule that seemed to have governed rights and duties in the area of collisions in the maritime area.

The Court also looked at the fact that it had decided the case long ago, long before the Federal Employees Compensation Act was even enacted initially in 1916. The Court in the preceding century had decided the Chatahoochee, another admiralty case involving the divided damages rule. And I think the Court was seeking to reconcile what it had before it in Weyerhaeuser with what it had decided in the past and -- and had been on the books at the time the Compensation passed -- Act was passed.

Essentially, I think what the Court saw in Weyerhaeuser was something it viewed as analogous to the contractual indemnity provision that -- or contractual -- implied contractual indemnity in Ryan. The Court in Weyerhaeuser did turn to Ryan and said we don't find a contract here, but we find something that's very similar to the contract, and therefore, we think that Congress probably did not intend. We think this is more like Ryan which we've already said is not barred by the Longshoremen's equivalent provision.

And I think the Court there simply was --

QUESTION: But the language used certainly is broad enough to have some implications here, wouldn't you agree?

MS. CORWIN: I think that the Court did make some statements about the language in Weyerhaeuser that do appear to be broad, but I think the language that you're referring to is not necessary to the Court's decision in that case, and I think in fact what the Court concluded was that the language simply was not enough to allow it to answer that question that was before it in Weyerhaeuser.

The conclusion of the Court was that the language simply wasn't -- it wasn't plain, and it had looked through the legislative history, and it didn't find a mention of third parties; and, therefore, it felt it ought to move on and consider these other features I've referred to -- the ancient admiralty rule, the analogy to Ryan.

I think that the Court was simply not faced with the sort of tort indemnity claim that we have here in which the liability alleged is basically a -- the liability of a joint tort feaser. It is not based on some sort of contract. It is not based on some ancient admiralty rule. Rather, it is purely a tort claim.

QUESTION: But wasn't the claim in Weyerhaeuser, didn't it arise out of the -- out of -- out of the injury or death of a crewman?

MS. CORWIN: Indeed, the element of damages at issue in Weyerhaueser was in fact the amount that had been paid to an employee who had previously received compensation.

QUESTION: And that's what -- that's what the Court said could be claimed over.

MS. CORWIN: Well, the Court was not necessarily talking about a claim over in that case. It was referring to a rule under the admiralty system in which the damages, all sorts of damages, were really put into one pot and then split in half. This was a way that apparently admiralty had had for a number of years of divying things up when two ships ran into each other, in essence. So it was not really what you'd call a contribution claim or an indemnity claim. It was this question of what you ought to do with all the damages, and the decision was yes, you could include this.

QUESTION: But how did -- how did the case get started in Weyerhaeuser?

MS. CORWIN: Well, the case started essentially when the two ships ran into each other.

QUESTION: Well, I know, but the lawsuit, what

lawsuits, what lawsuit was brought?

MS. CORWIN: I think there was a -- my knowledge of admiralty is limited, but I believe that there was a -- probably a limited -- limitation on liability proceeding, and there was -- the question at issue before the court was --

QUESTION: Well, did the injured person get a judgment against the third party other than the employer?

MS. CORWIN: I believe there was a settlement. I believe there had been a suit by the employee that was settled.

QUESTION: I guess the third party.

MS. CORWIN: I beg your pardon?

QUESTION: I guess the third party, third party --

MS. CORWIN: That's correct.

QUESTION: -- In the sense somebody other than the employer.

MS. CORWIN: That's correct. The employee had sued the third party and had recovered a settlement, not a judgment but a settlement. And the question was whether that $16,000 settlement ought to go into the pot.

QUESTION: And did the third party bring in the Government in that suit or what?

MS. CORWIN: I believe that the third party

then in the separate proceeding involving how you ought to apportion the damages, including the property damages from the collision, then said we ought to put in this other element of damages as well.

QUESTION: Well, so there was a claim over: please pay part of the damages that we've had to pay.

MS. CORWIN: Well, I think that --

QUESTION: That's what it was.

MS. CORWIN: -- One could argue that it is the same sort of thing, but I think this Court saw it in a somewhat different context, in the context of a proceeding that was really part of the rules and rights and liabilities of the individuals who were out there sailing around the ocean.

QUESTION: Yes, but the -- those rules survived the enactment of this statute. This statute didn't cut off the liability at the ceiling of the compensation program. And I'm wondering if the Government has at any time since that decision asked Congress to straighten it out, because I think you acknowledge in your brief that you think that decision was wrong.

MS. CORWIN: I am not aware of any effort to try to overturn that sort of court-created admiralty rule. I'm not aware of any legislative effort.

QUESTION: Well, in a sense it was an admiralty rule, but it was also construction of this very provision we have before us. They quote the same -- Justice Stewart quotes the same language in --

MS. CORWIN: It quotes the same language, but as I suggested, I think the conclusion was the language simply wasn't enough to answer the question before the Court concerning what you do with this divided damages rule.

QUESTION: What do you do with your opponent's argument that if the statute meant what you say it means, why don't you just stop after the word "instrumentality?" Why isn't the rest of the statute redundant?

MS. CORWIN: Well, I think there are several answers to that question. First, I think it's strange to suggest that the first part of the statute in fact gives the Government exclusive liability, but then somehow the expansion and the explanation that follow take it away again. I'm not sure that that makes very much sense in terms of statutory construction.

QUESTION: Well, it doesn't take it away. It just describes the area with which -- in which the viability shall be exclusive as he reads it.

MS. CORWIN: Well, Petitioner's counsel

suggests that the first part in fact would grant exclusive liability, but the fact that it's been expanded upon in the latter part of the section somehow takes it away. I'm not sure that that's a proper reading.

I think that that language, much of it was added in 1949, and there was no explanation of why there was an enumeration, but the language was very similar to what one finds in the Longshoremen statute and a number of state statutes. Not only New York. I believe places like Georgia and Minnesota and others had this same sort of enumeration.

QUESTION: But to the extent that it's the same as the Longshoremen's Act doesn't the Ryan case cut against you?

MS. CORWIN: No, I think not. Ryan very specifically turned on the implied contractual indemnity that the Court found in that case and that the Government urged on the Court to find; that really the focus was is there something other than tort liability here; can we look to the relationship between the parties in Ryan and find a service relationship, a contract to perform a duty and to perform it well, and can we read into that some sort of obligation to indemnify.

The Court concluded in that case that yes, it could, and it specifically stated that it did not address the problem that Petitioner presents; that of this noncontractual indemnity, the purely tort-based indemnity.

I think that this Court and the lower courts looking to this Court's decisions have been rather careful to distinguish that sort of contract, whether it be express or implied, from the kind of pure joint tort feaser situation that we have here.

Now, I don't know exactly why Congress chose the particular enumerations it did. It may well have been that the thought was to give some notice to individuals that would be affected by this act to be sure everybody understood just who was excluded. But I think that the addition of the rather very broad phrase "all other persons" or "anyone," as it was at that time, "anyone otherwise entitled to recover damages," I think that is a broad phrase that one simply ought not to confine to some very small category. I'm not sure there is anything else to put into that category other than third parties.

QUESTION: But even your emphasis on that language just -- it might have been written "any liability to any person otherwise entitled to recover

damages from the United States," but it doesn't -- there are a lot of ways you could have written your interpretation more briefly, I think.

MS. CORWIN: Well, I agree there are many different ways. I think the general tone of the statute is a very broad one.

QUESTION: Yeah.

MS. CORWIN: I think when you look at the legislative history you don't find any expectation on the part of Congress that this limited liability feature is going to be somehow breached in particular cases. You don't have Congress giving any indication that its expectations about the savings of money to government, and particularly the savings in litigation having to be in court all the time over these thousands of work-related accidents, you don't find any indication that Congress thought sometimes this will be the case and sometimes not. Rather, the statements were we believe this is going to keep the agencies out of the courts.

So I think you have to read the statutory language in light of that expectation. You have to read it in light of the expectation that under a compensation scheme the limited liability feature is going to be an effective one; that it ought not be circumvented, as the

Court has suggested, by the third party claim. If it were, you would have the anomaly under which the mere fortuity of the involvement of a third party in an accident would break down the limited liability feature; that is, if you had the Government as the only party and individual tort feaser that was one hundred percent negligent, under Congress' statute the Government -- the Government's liability is confined to its compensation payment. However, if somehow you have a third party that comes into the picture, then suddenly that breaks down. If the Government is 75 percent negligent and someone else is 25 percent negligent, then you have no more limited liability.

QUESTION: Well, I don't understand the Petitioner's claim here to extend to a case where there is is simply joint tort feasers, both the Government and somebody else both harm the employee. Isn't the Petitioner's claim predicated at least in part on some differing degree of responsibility?

MS. CORWIN: I'm not sure there's any way to limit Petitioner's claim in that manner. The sort of allegation in the question presented is framed in terms of active negligence and secondary liability. I think it was Justice Black who pointed out in his dissent in Ryan that those are very slippery terms. You really

can't quite tell what they mean.

QUESTION: Well, your impression then is that the Petitioner's claim would claim the same sort of right even if it were just simply two joint feasers, neither of whom would be entitled to contribution from the other at common law, by the law of the state?

MS. CORWIN: I think that's correct. I don't see any way to really cut off this principle at some 50 percent level. And as I say, I'm not sure what active negligence means, but if it means more than 50 percent I'm not sure why this principle that breaks down the limited liability can apply on a 51 percent liability but not on 49 percent liability.

I don't see anything in the way that Petitioner has framed its argument in this case that really limits to something like an indemnity claim as opposed to a contribution claim. I think the courts have recognized that this sort of indemnity claim, not based on a contract but based on differing degrees of negligence, is really an extreme form of contribution. There is really not that much to differentiate it from any joint feaser claim.

QUESTION: Did -- did -- wasn't there a claim in the Court of Appeals and isn't there still here that the Government owes Lockheed because of some independent

duty that -- that the Government owes Lockheed?

MS. CORWIN: We certainly read Lockheed's brief to suggest that they thought that was the case, and we pointed that out in our reply and got a firm denial. I'm not sure where we stand on independent duty.

QUESTION: What did -- the claim was made in the Court of Appeals, though, I take it.

MS. CORWIN: Certainly the claim based on independent duty was made in the Court of Appeals based on some law that had arisen in the D.C. circuit.

QUESTION: And was rejected by the Court of Appeals.

MS. CORWIN: It was not -- the concept was not rejected, but the Court of Appeals --

QUESTION: Said there wasn't an independent duty.

MS. CORWIN: The Court of Appeals looked at the claims that were being made and said these just clearly aren't independent duties.

QUESTION: These are indemnity -- this is an indemnity.

MS. CORWIN: These are things that are -- and it specifically referred to the statutory language, although it picked the earlier version rather than the later version -- it said these duties are on account of

or, alternatively, because of injuries or death. There are simply not the sorts of independent duties that other courts have been talking about, and those are things like the Ryan implied contractual indemnity and perhaps this divided damages rule.

QUESTION: So do you think -- do you think we need deal at all with the independent duty? Do you think there's any claim here that the Government's liability rests on that?

MS. CORWIN: I think that -- I think not. I think Petitioner has suggested that it is not particularly interested in pressing that point, and I think that any independent duty as formulated by any other court is more a matter of contract and not this sort of pure indemnity claim.

I believe Justice O'Connor asked Petitioner's counsel about this independent duty.

QUESTION: Yes.

MS. CORWIN: And I didn't hear any response that suggested that in fact they had prevailed on that or that they were pressing that here. So I don't think it's something that the Court needs to address.

QUESTION: Am I correct in assuming that the original plaintiff has no interest whatsoever in the outcome of this dispute; that the recovery, the

settlement recovery is precisely the same whether it's paid entirely by Lockheed or shared with the Government?

MS. CORWIN: That is correct. I think the amount has been determined and possibly paid out. I'm not sure of that. The question here is simply should the Government be asked to take on part of that tort settlement.

Now, Petitioner has referred to itself in the brief as a stranger to the compensation system; and we suggest that that's not really the case. The compensation systems have been around for a long time, and I think that Petitioner is well aware of them in the state context; in fact, probably takes advantage of this limited liability in the states where it is an employer. Petitioner is an experienced government contractor and is used to dealing with the government; in fact, could have anticipated that in this case the likeliest thing that could have happened would be the C-5A going down with a full complement of troops, military personnel; and under Stencel Aero this Court has said that there would be simply no chance of a third party claim in that case.

So I think that Petitioner is complaining largely about the fact that the tort system allows a plaintiff to recover against single tort feaser and

sometimes another is not available to help share. And this is the sort of thing that can be foreseen and planned against, particularly by someone in Petitioner's situation.

In sum, we urge that this Court protect the limited liability feature that we think Congress fully intended in 1949 to make clear to codify and incorporate into the act. Petitioner's interpretation, we urge, is one that would break down that limited liability feature and would be contrary to the sort of scheme that Congress set up. We urge the Court to reject that interpretation and to maintain what we believe to be the intent of Congress ever since 1949.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Gardner?

ORAL ARGUMENT OF WARNER W. GARDNER, ESQ.,
ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. GARDNER: If I can indulge the Court's patience for about one and a half to two minutes, I have a comment or two I would like to make.

CHIEF JUSTICE BURGER: You have four minutes remaining.

MR. GARDNER: Maybe I can hand back a half a minute of a minute, sir.

The Government continues to state that the concern of Congress for the expense and the cost of litigation indicates that they're right here. This Court said in Stewart, as we've, I think, demonstrated in our quotation as to the legislative history, Congress was concerned, but it was concerned with the cost and the expense of litigation brought by the Government employee. It never thought of the third person.

The weight of authority in the state courts is a more complex inquiry than the Government has indicated. Professor Larson, their favorite employee or commentator, does not distinguish according to the terms of the statute. Of the 38 cases cited by him, 19 relate to states in which there is a broad and comprehensive elimination of liability. The remaining 19 are divided roughly 6 to 6 if one excludes the 7 state cases which were concerned with state tort indemnity or contribution law, not with the bar of the statute.

We're left, I think, without any form of guidance if we look to the majority view of the states. But I don't believe we should. I think the New York statute, explicitly adopted by the Congress and firmly interpreted by 1949 -- the criticisms of the New York rule are those of the Second Circuit after 1949. At the time this statute was adopted there was not question.

The tort feaser point, whether or not we are claiming something like contribution, I think can be put aside. As Justice Stevens explained in the Northwest Airlines case, tort indemnity is like the ancient chancery remedy coming into play when there is an inadequacy of the legal remedy. And it could well be in that one state or another there would be difficulties with a joint tort feaser contribution. But the principle of restitution which underlies tort indemnity now, as in the 13th and 14th centuries, is expected to fill the need. That was discussed very thoroughly in the New York and the Illinois cases which we've cited in our brief.

One last thought on the Stencel case. The Government naturally seizes upon one of the three factors which the Court in the aggregate found sufficient to bar recovery over by the contractor. Those three factors were the preeminence of the Federal interest and the undesirability of subjecting it to state law in the conduct of military operations. The second factor was the compensation system which was in effect for the serviceman. The third factor, the overwhelming factor, in my view, is the fact you can neither discipline troops nor conduct wars in terms of tort litigation.

I would suggest that the Brown case, decided after Feres, and the Brooks case cited before it dealing with ex-servicemen and dealing with off-duty servicemen and finding Feres inapplicable even though there was a compensation system suggests that the military discipline factor is the preeminent one.

Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 3:02 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

Lockheed Aircraft Corporation, Petitioner v. United States

No. 81-1181

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY _____

(REPORTER)