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THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BARBARA FINLEY, Petitioner V. UNITED STATES

CASE NO: 87-1973

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IN THE SUPREME COURT OF THE UNITED STATES

BARBARA FINLEY,

Petitioner,

v. : No. 87-1973

UNITED STATES

Washington, D.C.

Tuesday, February 28, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:56 p.m.

APPEARANCES:

JOSEPH T. COOK, Irvine, Calif; on behalf of Petitioner.

DAVID L. SHAPIRO, Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

1:56 p.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1973, Barbara Finley versus the United States.

Mr. Cook, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOSEPH T. COOK

ON BEHALF OF PETITIONER

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

This case involves the question of whether or not pendent-party jurisdiction may be exercised when the anchor jurisdiction is the Federal Tort Claims Act. Although a constitutional question is presented and a detailed analysis of federal jurisdictional statutes has been undertaken, the moving force behind our presence here in the Court today is logic, reason, common sense, and judicial economy.

QUESTION: How can you fail?

(Laughter.)

MR. COOK: I was hoping it would work, Mr. Chief Justice.

(Laughter.)

MR. COOK: In responding to our opening brief,

the United States seems to give short-shift to what are considered by me the practical reasons for recognizing pendent-party jurisdiction. But for Barbara Finley, the Petitioner here, the practical reasons are the only reasons that count.

Barbara Finley seeks one trial in one court for her tort claim arising from the loss of her husband and her two daughters. She seeks to limit her own financial and emotional expenditures. What she seeks would result in judicial economy, although I confess that that was not what she asked me for when she came and asked me to represent her.

Most significantly to her, the exercise of pendent-party jurisdiction in this case would eliminate the possibility of inconsistent and irreconcilable verdicts and judgments. One from the state court and another one from the federal court right across the street.

QUESTION: Why wouldn't that be the case with respect to diversity jurisdiction as well? Where --

MR. COOK: Justice Scalia --

QUESTION: -- where there's not complete diversity but you want to get everybody together?

MR. COOK: A substantial factor in a diversity case where there is incomplete diversity is the fact

that the claimant, the plaintiff, has the option -- in this case, Barbara Finley would have the option if she so chose -- to bring all of the actions in state court. She could get everybody in front of one jury and judge.

QUESTION: Uh-huh.

MR. COOK: With the Federal Tort Claims Act as the anchor jurisdiction, and absent diversity, as diversity is not present here, she is precluded under the present law in the Ninth Circuit.

QUESTION: Are all the defendants always suable in one state?

MR. COOK: Justice --

QUESTION: I understood that, you know, very often you want to bring a diversity action because you've got plaintiffs all over the place -- or, defendants all over the place.

MR. COOK: Well, Justice Scalia, there are times when complete diversity may not work for -- if you've got a multi-party case. There are times when that may arise.

QUESTION: You can't get them all in state court either --

MR. COOK: Well --

QUESTION: -- because some of them are not -- are not reachable there.

MR. COOK: That's a -- that is a different problem than the one that's posed by this case. This is a case where the anchor jurisdiction is exclusive. Now, there may be cases where choices have to be made at the outset by the attorneys representing the client. But in a case where there is exclusive federal jurisdiction, I don't have any options with respect to the United States as a defendant.

This case arises from an airplane accident in which Barbara Finley's husband and two daughters were killed. They were passengers in the airplane. Originally suit was brought in state court in San Diego against two non-diverse defendants, the City of San Diego and San Diego Gas & Electric Company.

In the course of preliminary discovery, it was determined that the runway lighting system at the airport in question which had been charged by my original complaint to the City of San Diego as the operator of the airport was operationally maintained and managed by the Federal Aviation Administration, the United States of America.

The appropriate procedures for a Federal Tort Claims Act case were commenced, and a separate lawsuit in federal court against the United States was brought, literally across the street from the state courthouse in

San Diego.

A motion was brought in the federal court seeking to amend the federal complaint to add the state court defendants and resting upon pendent-party jurisdiction. District Judge Schwartz applied the Gibbs standards, the Gibbs -- United Mine Workers v. Gibbs pendent jurisdiction standards, exercised his discretion in that regard, acknowledged the Ninth Circuit prohibition against pendent-party jurisdiction, and distinguished the existing Ninth Circuit law, granted my motion, and also granted the government a 28 U.S. Code 1292(b) immediate appeal.

The Ninth Circuit summarily reversed on the grounds of its longstanding history of antipathy towards pendent-party jurisdiction, principally set forth in Ayala, the Ayala decision, and we sought certiorari.

QUESTION: Mr. Cook, what is the California law concerning joint and several liability --

MR. COOK: You've --

QUESTION: -- if there are separate trials required?

MR. COOK: The California voters recently passed -- recently, two years ago approximately -- two and a half years ago -- passed an initiative, Proposition 51, it is known as -- which has thrown the

question you asked, Justice O'Connor, into a little bit of confusion right now. We're still waiting for some Supreme Court decisions, state supreme court decisions. But basically joint and several liability applies -- or, comparative liability, I really should say --

QUESTION: Uh-huh.

MR. COOK: -- to all joint tortfeasors in California, whether they are named as defendants or not. The existing jury instruction which has -- under the new Proposition 51 which has not been tested in the California Supreme Court, makes provision for the jury to determine the liability, the percentage of liability and causation, for a party that's not even named.

And that is the reason that we're concerned about inconsistent and irreconcilable differences -- or, excuse me, verdicts -- in this case. In the state court case against San Diego Gas & Electric and the City of San Diego, it could and probably would be argued that we're sorry about the accident, but it's all the fault of the United States. So, don't hold us responsible.

And two weeks later or two months later, or whatever, in federal court across the street the judge hearing the Federal Tort Claims Act case would hear from the government that the fault was really with San Diego Gas & Electric.

QUESTION: But the -- except for the Federal Tort Claims Act you could not have brought in this -- these parties.

MR. COOK: But for the Federal Tort Claims Act I could not have sued the United States.

QUESTION: Yes. And you could not have gotten -- you could not have independently sued in the federal court.

MR. COOK: That's correct, Justice White. There is no independent basis of jurisdiction in federal court for either the City of San Diego or San Diego Gas & Electric. The only way to do it is the reason we're here, is the acknowledgement of the propriety of pendent-party jurisdiction.

QUESTION: Well, there's no -- no statute about it, is there?

MR. COOK: There is no statute about it.

QUESTION: And you don't think there is any Article III question?

MR. COOK: Well, we -- I'm prepared to discuss that, Justice White. The general proposition of pendent jurisdiction is -- was initially or perhaps best defined in the United Mine Workers v. Gibbs case. And that was pendent claim jurisdiction, not pendent-party jurisdiction.

QUESTION: Well, all the parties were properly before the court.

MR. COOK: Correct. Correct. But the parameters or factors to be examined by the district court judge in exercising discretion as to whether or not that new claim, the state court claim, should be brought in pendent to the existing federal jurisdiction were set forth in that case.

Subsequently this Court in Aldinger v. Howard addressed the question of pendent-party jurisdiction. In that case, pendent-party jurisdiction was not found, but it was not a Federal Tort Claims Act case. It was a civil rights case arising under 28 U.S. Code 1343, I believe.

In any event, in the course of the Aldinger case several comments were made which are instructive here. First of all, it was recognized that there are some circumstances where pendent-party jurisdiction may be appropriate. One of which was where jurisdiction is exclusive in the federal court, such as under the Federal Tort Claims Act. That was clearly dicta, but it was encouraging to me when I read it.

The two factors that the Aldinger case set forth in determining when pendent-party jurisdiction might be appropriate were, first of all, the existence

or absence of congressional -- constitutional authority, which is the question you raised, Justice White. And secondly whether or not the anchor federal jurisdiction negates pendent-party jurisdiction.

I would submit that where the Federal Tort Claims Act is the anchor jurisdiction and the United States Government is the defendant, then Article III, Section 2, Clause 1 provides ample constitutional grounds for the exercise of pendent-party jurisdiction. That particular clause provides federal judicial power in controversies in which the United States shall be a party. Under the Federal Tort Claims Act, the United States is clearly a party. And from that point forward, the court should have continuing judicial power to resolve the entire tort claim, including joint tortfeasors.

QUESTION: You're talking about your fear of inconsistent verdicts if you have to sue the state defendants in Superior Court in San Diego and the United States in the District Court. But aren't you going to run that risk in a consolidated pendent-party jurisdiction case in the District Court? The government is not -- you're not going to get a jury trial against the government. Do you waive your jury trial against the defendants? If you get a jury trial against them,

the jury can come in with a different result than the judge, can't it?

MR. COOK: Chief Justice Rehnquist, the practical procedural problems that exist under the scenario that I'm seeking, they do exist. That's true. But they are manageable problems. They can be handled by counsel and by the court.

QUESTION: Well, how do you manage that one?

MR. COOK: Well, if I may give an example. Right this minute in Los Angeles, California there is a trial ongoing arising from a midair collision in Los Angeles in which the United States Government is in as pendent-party -- excuse me, as Federal Tort Claims Act. An airliner, a foreign airliner, is in on exclusive federal jurisdiction of the Foreign Sovereign Immunities Act. The other pilot of a midair collision airplane is in on other grounds. There is an advisory jury as to all. The judge will make the ultimate determination after the advisory jury renders its verdict and determines whether or not and to what extent to accept the advisory jury.

It is -- it is not as simple as getting everybody in a state court in front of a jury and having that the final answer. I'd love to have that.

QUESTION: Are you entitled to a jury under

the Foreign Sovereign Immunities Act?

MR. COOK: You are not, Chief Justice Rehnquist.

QUESTION: Well, then your client would have to in effect give up the right to jury trial against the state defendants and -- if you have pendent-party jurisdiction in the federal court, would she not?

MR. COOK: The proposition that I would make to District Judge Schwartz in this case, the Finley case, is that we have an advisory jury -- we have a jury as to the two state defendants, advisory as to the federal government.

Now, Judge Schwartz may say, "No, I don't want to do that." In which case I may rethink it tactically and waive jury. That's something that I may choose to do after discussions with the court.

But these procedural difficulties exist but they're not insurmountable.

QUESTION: Well, but you have a problem, albeit somewhat lessened, of inconsistent verdicts even if pendent-party jurisdiction is allowed, do you not?

MR. COOK: I think that the magnitude of the problem is considerably less. There is a problem of procedure, but I don't --

QUESTION: Well, there is a problem of

possible inconsistent jury verdicts, is there not?

MR. COOK: There is a -- there is a problem that the jury could come in with one verdict and the judge would --

QUESTION: Well, I would call that --

MR. COOK: -- come in with --

QUESTION: That would be my idea of an inconsistent verdict. Is it not yours?

MR. COOK: I don't -- my hope, my belief, my expectation would be that if all the evidence were presented to the jury and the judge in the same courtroom at the same time, that the inconsistencies either would not exist or would be minimal, as contrasted with the situation I face now where it's presented twice in two different courtrooms.

Now, I concede, Chief Justice Rehnquist, that it would be possible for a judge, reserving to himself his power under the Federal Tort Claims Act, to say, "I'm not going to pay any attention to what that jury says." I don't think that that's likely, and I'd rather -- I think I've got a better chance on behalf of my client if we're all in the same courtroom listening to the same evidence at the same time.

QUESTION: It's not probable in this case, or in most cases, but are you aware that in Ayala there was

a single trial with two judges? A state judge and a federal judge?

MR. COOK: Justice Kennedy, I am not aware of the final result of Ayala, and I was not aware that that had taken place. I was aware, or am aware, that subsequent to the decision in Ayala the government impleaded some of the non-diverse nonfederal defendants and removed to a certain extent some of the problems that are in my case.

I'm not even sure impleador by the Federal Government is a satisfactory solution, first of all, because it puts the entire conduct of the litigation in the hands of defendant government. And I think on behalf of my client I should be able to represent her and determine who the proper defendants are myself rather than wait at the beck and call of the Federal Government. But I was not aware of how they handled the state and federal difference. That would be instructive if I'm not successful here today.

With respect to whether or not the anchor jurisdiction in the Federal Tort Claims Act negates pendent-party jurisdiction, there are three points that I would like to make.

The first point is that the language of the jurisdictional statute in the Federal Tort Claims Act,

28 U.S. Code 1346(b), specifically includes broad coverage. The language provides federal courts with exclusive jurisdiction of civil actions -- and I underscore the word "actions" -- on claims against the United States. The word "action" is broad, I would submit.

QUESTION: Well, but the word -- but the words "against the United States" is not broad.

MR. COOK: But it provides jurisdiction, Chief Justice Rehnquist, to the entire action, which includes a segment against the United States. The action against the United States and against the City of San Diego and against San Diego Gas & Electric. The jurisdiction on the action is provided by the statute.

QUESTION: The claim is against the United States. All the actions on the claims against the United States --

MR. COOK: Well, the only way that there could be any action, including a claim against the United States, is if there were a claim against the United States and -- but it does not limit it to that claim and that claim alone.

QUESTION: Well, that's exactly the claim of the other side, and they bolster that by saying that the limited waiver of sovereign immunity in the Federal Tort

Claims Act was patterned after the Tucker Act where you can't bring other parties in. And that is certainly persuasive evidence of what Congress had in mind, isn't it?

MR. COOK: Justice O'Connor, the comparisons between the Tucker Act -- or, for that matter, the Court of Claims jurisdictional provisions as against the Federal Tort Claims Act were discussed in some length in the Yellow Cab case back in 1951. And my reading of the Yellow Cab decision by this Court suggests that the comparisons that the government tries to make now between the Tucker Act and the Tort Claims Act were not well received at that time and they ought not be well received today.

If -- if Congress had wanted to establish a jurisdictional pattern or system similar to the Tucker Act and the Court of Claims, they could have passed a Court of Torts Act and they could have established a separate legislative court to handle torts. They didn't do that. And it brings me --

QUESTION: Well, that's true. They may have wanted to permit plaintiffs the option of spreading out among all the federal district courts the opportunity to hear the claims. But I'm not sure that answers what Congress' intent was with regard to pendent-parties.

MR. COOK: If I may proceed to the second element, which is beyond the word "actions" in the statute, the second element I think may answer that, Justice O'Connor.

One of the reasons I submit that Congress wanted to spread it out amongst the various district courts is the scheme of the Federal Tort Claims Act provides for liability of the United States as a private party in like or similar circumstances. 1346(b) itself says where the United States, if a private person would be liable. The administrative provisions, the administrative claim portion at 2672 of Title 28 where the U.S., if a private person would be liable to the claimant in accordance with the law of the place where the tort occurred.

And most significantly, 28 U.S. Code 2674, which describes the extent of United States' liability says in the same manner and to the same extent as a private individual under like circumstances.

They spread it out to the district courts all over the country because they were going to use the law of the district courts all over the country because they wanted the United States to be liable, like people all over the country --

QUESTION: Well, you --

MR. COOK: -- and that --

QUESTION: -- bring some Tucker Act claims in the district courts, can't you?

MR. COOK: Ten -- well, there is a --

QUESTION: Ten thousand and less, is it?

MR. COOK: Another distinction, Chief Justice Rehnquist, between the Tucker Act, the Court of Claims situation, and tort claims is that the contractual jurisdictional waiver of sovereign immunity involves a somewhat narrow and distinct body of federal contractual law. It has to do with contracts with the government, which is a kind of a specialized and -- and definable -- not by me, I'm not a contract lawyer -- but a specialized area.

Whereas, the Tort Claims Act covers the entire universe of torts. And it covers all the activities of the government, not just the contractual activities. And any government employee acting in any manner within the course and scope of his or her employment can generate liability on the part of the United States by acting tortiously.

The scheme of looking to local private personal law can only be achieved if all party defendants are joined together in one forum before one judge and one jury. That way, one forum can decide all

the issues of liability, causation, including contributory negligence, comparative negligence, contribution amongst joint tortfeasors, comparative indemnity, and total indemnity.

I've already addressed briefly Proposition 51 in this case, in the Finley case in California, which provides the allocation of liability to someone -- to a party that's not even before the court. The Proposition 51 instruction in the Finley case, if I'm unsuccessful, would permit the jury in the state court in San Diego to decide that the City of San Diego is ten percent at fault, and San Diego Gas & Electric is 20 percent at fault, and the United States of American are -- or, the pilot is 20 percent at fault -- and I'm going to lose my math -- the United States of America is 50 percent at fault.

And that could happen in the state court. And that is not, I submit, the intention of the drafters of the Federal Tort Claims Act in providing for private personal liability of the United States.

QUESTION: It seems -- excuse me -- it seems, Counsel, that the weakest case for pendent jurisdiction is where the jurisdictional statute is framed in terms of parties. Here the only reason there is jurisdiction is because there is a party statute.

It seems to me that this is a weaker case than it it had been a federal question case under 1331.

MR. COOK: Justice Kennedy, the Federal Tort Claims Act does identify a party. And in their brief, the United States dwells on that to some extent.

I would submit that identifying the United States as a party, as a single party, is a bit of an oversimplification. The Federal Tort Claims Act, as I've already stated, provides for liability of all of the governmental activities and all of the governmental employees of the entire Federal Government in a whole host of areas of tort.

It does identify that there will be one defendant, and that defendant will be --

QUESTION: Well, is the nature of the defendant that confers the jurisdiction?

MR. COOK: Well, it's -- it's the nature of the jurisdiction -- excuse me, the nature of the defendant that moved Congress, I would submit, to create jurisdiction. But it's also the nature of the -- the area of litigation, the tort area, and the private person law aspect of it that moved Congress to want to include all of the joint tortfeasor responsibilities. The third party claims which have already -- third party claims against the United States under the Yellow Cab

case. Third party claims by the United States.

QUESTION: Well, I suppose that it may be possible that -- that the liability, the extent of the liability the United States might be -- might depend on your claim against this other -- this other party.

MR. COOK: The extent of the United States' liability would depend -- if I could get them all in the same courtroom -- would depend upon how the judge and the jury heard the evidence and decided the evidence. And that's all we want.

QUESTION: Was the United States -- doesn't the United States implead some people sometimes when they are sued under the Federal Tort Claims Act?

MR. COOK: Justice White, they do that sometimes and they don't do that sometimes.

QUESTION: Well, I know. But let's assume they wanted to.

MR. COOK: They've done it.

QUESTION: Well, how come they can do that under the Federal Tort Claims Act?

MR. COOK: Well, they don't do it under the Federal Tort Claims Act. They do that under the -- Title --

QUESTION: If they are sued under the Federal Tort Claims Act, then how do they get another party into

court?

MR. COOK: They exercise a separate jurisdictional provision. And forgive me for my -- detail of my memory -- I think it's 28 U.S. Code 1335 or 45 that permits them to be a plaintiff.

QUESTION: Yes.

MR. COOK: So they act as a third party plaintiff, and Rule 14 --

QUESTION: All right.

MR. COOK: -- of the Federal Rules of Civil procedure --

QUESTION: All right.

MR. COOK: -- let them implead that party. So, there's a separate jurisdictional avenue for them to do it. And the Yellow Cab case --

QUESTION: Right.

MR. COOK: -- from this Court permits a -- a defendant that I've got in, for example, by diversity --

QUESTION: Uh-huh.

MR. COOK: If Mrs. Finley lived in a different state and had sued the City of San Diego, the City -- and I did it in federal court pursuant to diversity -- the city could implead the United States of America under the Yellow Cab case.

It's just this circumstance in the Ninth

Circuit, where if you don't have diversity and it's not the pleasure of the United States to implead, -- let me back off from that. I'm not even sure that implead by the United States solves all my problems because if the United States decides to implead the City of San Diego and San Diego Gas & Electric, and I'm unsuccessful in my case against the U.S., then the other two defendants go away because I don't have independent jurisdiction over them.

QUESTION: Well, if you -- I don't suppose you claim that if the -- suppose the Federal Tort Claims Act was just dismissed? And -- but do you think you could -- even though they had jurisdiction at the outset, do you think you could continue your suit against this third party?

MR. COOK: Justice White, I answer that with the same sort of discretionary scheme that was started in the Gibbs case and which was on a slightly different issue.

QUESTION: Well, you just said the court would have the power then, if you followed Gibbs.

MR. COOK: I think the court has the power. Yes, I do, Justice White.

QUESTION: Well, then -- when I practiced the rules said you could implead someone -- a different --

could implead someone who you claimed was liable to the defendant. But you couldn't implead someone who you claimed was liable to the plaintiff.

MR. COOK: That's correct, Chief Justice Rehnquist. And -- but that's used by defendants in saying I'm going to implead someone who is liable to me because it was really their liability that caused this problem, and I'm going to get stuck for it because there's a sympathetic jury out there. And that's been a --

QUESTION: But I would think the theory of the rule was that the plaintiff would not have any claim against the impleaded defendant.

MR. MALLARD: The plaintiff would not, using Rule 14, implead. That's correct.

QUESTION: Yes, but in these Federal Tort Claims Act cases where the government brings in a third party defendant aren't there cases in which the plaintiff gets judgment against the third party defendant?

MR. COOK: Not in the Ninth Circuit --

QUESTION: No?

MR. COOK: -- that I'm aware of, Justice Stevens.

QUESTION: All right.

MR. COOK: Not that I'm aware of in the Ninth Circuit. In other circuits, the Fifth, the Eleventh, and the Tenth, this -- the procedure I'm seeking is used regularly and successfully, and it does not create the parade of horribles.

QUESTION: Well, that's -- they just recognize pendent-party jurisdiction.

MR. COOK: They recognize the exercise of pendent-party jurisdiction relying on Aldinger.

I want to reserve some time for rebuttal, so I would like to close with this. Under the tests established in Aldinger, pendent-party jurisdiction exists when the Federal Tort Claims Act is the anchor. District court judges should be given the opportunity to apply the Gibbs factors to those cases and to decide whether or not pendent-party jurisdiction ought to be utilized in any given case. Here the district court judge decided those questions favorably to Mrs. Finley and the Ninth Circuit summarily reversed.

I ask this Court to reverse the Ninth Circuit Court of Appeals, to reinstate the lower court order by district court judge, and to permit Mrs. Finley to go on with her lawsuit.

I'd like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cook.

Mr. Shapiro, we'll hear now from you.

ORAL ARGUMENT OF DAVID L. SHAPIRO

ON BEHALF OF THE RESPONDENT

MR. SHAPIRO: Thank you, Mr. Chief Justice, and may it please the Court:

There are, we submit, three basic points that need to be stressed in the consideration of this case. First, federal subject matter jurisdiction depends not only on a source of authority under Article III of the Constitution, but also on a specific statutory grant of authority in an act of Congress. In the context of pendent-party jurisdiction this Court made it clear in Aldinger against Howard that the question is whether the governing statute expressly or by implication negates an existence or negates the existence of pendent-party jurisdiction in the particular case.

Second, when we look at the relevant statute in this case, Section 1346(b), the Tort Claims Act jurisdictional provision, we find that the statute does indeed negate pendent-party jurisdiction. It does so both, in our view, because of the clear statutory language which is limited to the existence of jurisdiction for claims against the United States and because any doubts about the meaning of that language

are, we submit, resolved by the very specific legislative history which makes it clear that joinder of other codefendants is not contemplated as being within the scope of this jurisdictional grant.

Third, the Petitioner in this case has placed great emphasis on claims of convenience and judicial economy as being a basis for pendent-party jurisdiction in this case. We submit that even where those claims as strong as petitioner makes them out, they cannot supply subject matter jurisdiction where the statutes in point do not confer it.

But to the extent that the statutes themselves may create any doubt, we submit that the claims of convenience and economy in Petitioner's brief and at argument here today are very much overstated, that the fact is that very significant differences between tort claims litigation against the United States and ordinary state law litigation against private parties are so great that these claims of efficiency and economy are very unlikely to be realized, and that indeed if pendent-party jurisdiction were recognized here, the cost to the federal system might be very great without any corresponding gains to the state courts where these controversies in our view belong.

On the first of these points, that is, the

necessity of looking to the governing statute, I don't think there is much need to spend a great deal of time. This Court has made it clear repeatedly in cases like Aldinger and others that statutory authority for jurisdiction must be found and the Petitioner concedes that that is the question here.

We would emphasize only that in this context the question that we should take to this statute is whether the statute has addressed the party against whom an action may be brought. In this case, the Tort Claims Act Section 1346(b) has done exactly that. As the statute was originally enacted in 1946, it conferred jurisdiction on the district courts to hear, determine, and render judgment on any claim against the United States.

Now, this Court held in the Yellow Cab case that the phrase "claim against the United States" must be broadly construed to encompass any claim against the United States in tort, including third party claims for contribution or indemnity. But in this case Petitioner is asking us to read that language as if it meant claims not only against the United States but against nonfederal governmental parties as well, and we submit the language simply does not admit that construction, particularly in the context of a waiver of sovereign

immunity, which is what the Tort Claims Act itself involved.

There was a minor change of wording in the Tort Claims Act in 1948. As part of the revision of the title and the codification of it into positive law, the revisers changed the language so that the district courts were given jurisdiction of civil actions on claims against the United States.

We submit that this minor change in wording accomplished no effect in terms of the jurisdictional scope of the Act. And we believe that is true for several reasons.

First of all, we don't think the words themselves accommodate any different reading. We believe it is still true that the most natural reading is that the grant of jurisdiction is confined to the entertainment of claims against the United States.

Second, this particular change was part of a very thoroughgoing revision of Title 28 of the U.S. Code, and the revisers in the course of their revision took great pains to note any changes in wording that were intended to accomplish significant changes in substantive outcome. For example, in the removal provisions of 1441(c), the revisers said that the change in language from separable controversy to separate and

independent controversy was intended to achieve a significant result.

No such comment was made here --

QUESTION: But, Mr. Shapiro, it is true, isn't it --

MR. SHAPIRO: -- by the revisers.

QUESTION: -- that you must look at legislative history to make this point. Because if one just looks at the language of the statute in its preexisting form, it would not have covered a suit in which these two private parties are also defendants. But in plain language now it does cover it. Because even if they were joined, it would remain an action on a claim against the United States and they would be then parties to that action.

MR. SHAPIRO: Your Honor, I don't think the language of the 1948 revision is as clear as the original language of the 1948 -- '46 statute. However, I think the language of the 1948 revision by itself does support the result that we are advocating because it does not say civil actions involving claims against the United States --

QUESTION: No. But it --

MR. SHAPIRO: -- which would be --

QUESTION: -- is a civil action on a claim

against the United States no matter how many parties there are to the action.

MR. SHAPIRO: But I think --

QUESTION: I think the plain language is dead against you. But I understand your history argument. Now, the question I just -- for some of us it makes a difference whether you have to go beyond the plain language or not.

MR. SHAPIRO: Your Honor, I think -- I think we could rest our case on the language of the '48 statute. But I think our case is greatly strengthened by two things. One is it's earlier version in 1946 and the other is the legislative history of the Tort Claims Act.

QUESTION: Well, if you just compare it with the earlier version, one could say well, the change was intended to make some difference, and ergo, it's a different rule now than it was before. That always cuts both ways.

MR. SHAPIRO: We think there are really two reasons in addition to the problematic character of the language itself why the '48 change was not intended to make any -- not intended to make any revision. One is, as I say, the revisers took pains to spell out where a change was intended, and this would have been a rather

dramatic change to be making. Secondly, the use of the words "civil action" here was, we think, consistent with the general effort by the revisers to identify actions as civil, i.e., in accordance with the provisions of Rule 2 of the Federal Rules of Civil Procedure which said there shall be one form of action known as the civil action.

Throughout the revision of the judicial code, the revisers incorporated references to civil action to distinguish them from the criminal actions that were also within the jurisdiction of the district courts.

We acknowledge that the language of the '48 revision is somewhat broader, although we think it too sustains our result. We think it is consistent with the '46 version both because no change in substance was intended by the revisers and because the legislative history of the Tort Claims Act in 1946 is very clear.

To understand that legislative history it is necessary to understand the case of United States against Sherwood which was decided in 1941, only a few years before the Tort Claims Act was passed.

United States against Sherwood was an action under the Tucker Act in the district court against the United States. It was brought by a judgment creditor for the purpose of enforcing a contract right of his

judgment debtor against the United States. As required by New York law, the judgment creditor sought to join the judgment debtor as a codefendant against the United States. And it appeared that that joinder was required in order for the action to go forward.

This Court held that the jurisdiction conferred on the district courts by the Tucker Act was not broad enough to encompass the joinder of that private defendant. The Court said that Congress' waiver of sovereign immunity with respect to the Tucker Act was no broader in the District Court than it was in the court of claims and that did not admit of an action against a private codefendant.

Now, we do not contend that standing by itself Sherwood governs this case. This case is different in several respects. It's different because we're dealing with the Tort Claims Act rather than the Tucker Act. It's different because the jurisdiction of the federal courts is not the mirror image tied into the jurisdiction of the Court of Claims.

What makes United States against Sherwood so relevant here is that in drafting the Tort Claims Act Congress was very much aware of the decision and, we think it is clear, intended the very same limitation to exist with respect to the Tort Claims Act.

In 1942 in the first major version of what became the Tort Claims Act the House Report on their version of the Tucker Act cited the Sherwood case and went on to say that the intention of the Tort Claims Act was identical. The bill does not permit any person to be joined as a defendant with the United States.

After that, the House Report goes on to discuss the point raised by Petitioner in her reply brief to say that the liability of the United States as a joint tortfeasor would be determined by state law. But then it goes it goes on to say, however, as noted before, no person may be joined with the United States as a defendant.

The language in the 1942 House Report was repeated in the 1945 House Report of the very bill that did become the Tort Claims Act in 1946. And so we contend there can be very little doubt that Congress intended a limited waiver of sovereign immunity, did not intend to authorize suits both against the United States and private codefendants on the --

QUESTION: Do you think it makes any difference, Mr. Shapiro, that -- that these local parties, these non-government parties, were already in the case? They had been sued in state court and they filed indemnity actions against the United States in the

same court. So there they were.

MR. SHAPIRO: Your Honor, they were in state court. After the state court action was filed each of those defendants did file a separate indemnity action in the federal court.

QUESTION: So, they were in the federal court?

MR. SHAPIRO: They were in the federal court but only very problematically because the United States in both actions filed motions to dismiss on the grounds that there was no case or controversy. The United States has taken the position in those indemnity actions that --

QUESTION: Well, --

MR. SHAPIRO: -- that an indemnity action will not lie until and unless --

QUESTION: Well, that may be, but were they dismissed on that ground?

MR. SHAPIRO: The district judge has stayed the motion to dismiss until the resolution of --

QUESTION: Then the answer is they're still there.

MR. SHAPIRO: They're there only because the motion has not been ruled on, pending the outcome of this case.

QUESTION: I suppose this -- was the state

court action ever dismissed?

MR. SHAPIRO: I believe the state --

QUESTION: Or was there just a stipulation to do it?

MR. SHAPIRO: I'm not certain, your Honor. I believe that the state court action was dismissed, but basically --

QUESTION: If it was, why -- if it was, the indemnity actions --

MR. SHAPIRO: The indemnity actions would --

QUESTION: -- would fall with that.

MR. SHAPIRO: -- fall unless this court were to reverse and uphold pendent-party jurisdiction.

QUESTION: What, again, is the government's position on the indemnity actions filed by the state court defendants, Mr. Shapiro?

MR. SHAPIRO: The government's action on the opposition in those indemnity actions is that an -- an independent action for indemnity or contribution may not be brought until there is an underlying judgment of liability. And the government's position, which has been supported with considerable authority, is one on which a motion to dismiss is now pending in the federal court.

QUESTION: But, now, what if the state court

action had gone to judgment against these defendants? Then do you agree they would have a right to sue for indemnity in the federal court?

MR. SHAPIRO: Assuming they've got underlying legal basis for a claim of indemnity or contribution, yes, sir, under the Tort Claims Act.

QUESTION: That's Yellow Cab.

MR. SHAPIRO: Yes, it is. The legislative history, as I was suggesting, in 1945, in our view, leaves no doubt that it was not the purpose of the tort claims jurisdictional provision to allow joinder of a codefendant in a suit against the United States.

QUESTION: Mr. Shapiro, refresh my recollection, if you would. The Federal Rules of Civil Procedure were adopted in 1948, was it?

MR. SHAPIRO: '38, sir.

QUESTION: Oh, '38. Okay.

QUESTION: '34.

QUESTION: '34. I see.

MR. SHAPIRO: Well, they were effective in '38.

QUESTION: The judicial code was -- that's right. Thank you.

MR. SHAPIRO: I would like to address briefly the arguments that have been made and have been dealt with here, oral argument by Petitioner, for the position

that allowing pendent-party jurisdiction in this case would achieve considerable economies and efficiency, and that perhaps primarily, if not exclusively, for that reason, this Court should recognize pendent-party jurisdiction.

As I said at the outset, we contend very strongly that those arguments cannot supply a basis of jurisdiction if authority for the exercise of that jurisdiction cannot be found in a governing statute. But we contend also very strongly that the Petitioner's position on questions of efficiency and economy is grossly overstated, that in fact there are so many differences between a tort claims action against the United States and a state law action against a nonfederal defendant that these efficiencies are very likely not to be achieved.

I would like just to refer briefly to a few of the major differences. With respect to a tort claims action against the United States, there must first be an acministrative claim filed.

Secondly, there is a separate statute of limitations for that. It must be done within two years. Action against the United States must be brought within six months of the denial of the claim. Liability of the United States can be based only on negligence or

wrongful conduct. It cannot be based on contract unless an action can be brought under the Tucker Act. It cannot be based on a theory of strict liability. It cannot be based on a variety of tort claims that I --

QUESTION: Mr. Shapiro, what has all that got to do with this case? None of those problems exist in this case or --

MR. SHAPIRO: Two --

QUESTION: -- in most of these cases.

MR. SHAPIRO: Two of the problems that I think exist as potential problems in any case do exist here. A number of problems that do not exist here might well exist in situations where the plaintiff is alleging not only tort liability on behalf of the private defendants but some kind of strict liability in a product liability case or some kind of contractual liability on a breach of word theory. So that there would be a number of issues to be tried in the federal court that would clearly not be subject to trial in an action on the Tort Claims Act.

QUESTION: But, of course, none of it would if you can't --

MR. SHAPIRO: In this --

QUESTION: -- sue those parties. But, I mean, it seems to me that all follows from whether they can be

made parties or not. I don't see how it complicates or changes the issue.

MR. SHAPIRO: Well, what we're suggesting, your Honor, is that if pendent-party jurisdiction were upheld in a case like this, first of all, there would be two immediate problems in this very case, one of which is that the Plaintiff has alleged a claim for punitive damages against the nonfederal defendants. And that would presumably have to be tried at a federal court. Additional issues to be tried that could not be tried against the United States and which, indeed, if they were tried in the same trial, might be thought in some ways perhaps to prejudice the interests of the United States.

QUESTION: I don't see how it could prejudice the interests of the United States if the Plaintiff is saying these people are so outrageously negligent that they should be held liable for punitive damages. I just don't understand the argument.

MR. SHAPIRO: I think the argument, your Honor is --

QUESTION: And that can also happen if the United States should bring them in, which I suppose it could have done in this case, or if they get in on their own motion.

MR. SHAPIRO: The United States --

QUESTION: But the strange thing about it is that there are two -- the private defendants can get in and the federal defendant can bring them in, but the Plaintiff is the only person who can't bring them in.

MR. SHAPIRO: Yes. But I think there are reasons, not only of the technicality of the jurisdictional statutes, but --

QUESTION: And it still --

MR. SHAPIRO: -- in the policies --

QUESTION: And it still remains just an action on the claim -- or, an action on the claim against the United States even though they are brought in in that fashion.

MR. SHAPIRO: I think the decision of the United States to allege a third party claim in many situations is likely to be governed by the concern of the United States that in doing so they may be bringing into the case a lot of issues that they would rather not have there. And, of course, the United States always retains an option to bring in a debated action for indemnity or contribution at a later stage if it feels that asserting a third party claim would needlessly complicate the issues.

The jurisdictional statues, we contend, each

one does have a significant policy justification. The ability of the United States --

QUESTION: Well, but the 1345 wasn't enacted for this purpose. I suppose this is a kind of a by-product of that -- that statute.

MR. SHAPIRO: The underlying justification for 1345 is that the United States should be able to resort to federal courts for the vindication of its own interests, rather than to subject itself to possible bias or unfair treatment in the state courts.

QUESTION: And within the meaning of that statute, we treat the third party claim there as an action commenced by the United States even though the action had really been commenced by the private parties sometimes earlier -- sometime earlier.

MR. SHAPIRO: Yes. Although I'm not certain there's any Supreme Court decision squarely at point. I think the lower courts have virtually unanimously -- not quite unanimously but almost unanimously said that 1345 allows not only an independent action by the United States for indemnity but the assertion of a third party claim in a tort claims case. And we certainly agree with that interpretation of 1345.

But there is no comparable jurisdictional provision here. Certainly not 1346(b) which authorizes

the bringing of a state law action against a non-diverse defendant simply because there is pending in the federal courts a tort claims action against the United States. And we believe to read 1346(b) to authorize that would lead to the ejection, potentially, of a whole variety of issues into a federal court that would not otherwise be there.

In this very case one of those issues is punitive damages. Also in this very case the Plaintiffs have -- the Plaintiff has demanded a jury trial. So that what would otherwise not be a jury trial with all the procedural and other advantages that that has for litigating on behalf of the United States would either be converted into a kind of dual trial, a jury trial at a non-jury trial, or perhaps because of that very problem the judge might find it necessary, even if the cases were one case, to separate the two out for trial and to have a non-jury trial of the tort claims action and a jury trial of the independent state law action.

QUESTION: If the United States had sued this gas company in this very action for indemnity or some such a claim, I take it that wouldn't make any difference. In your case the Plaintiff still couldn't sue the gas company in the federal court.

MR. SHAPIRO: The only situation where I think

the Plaintiff might be able, as a result of existing jurisdictional statutes, to make a claim directly against these defendants would be if the United States were to implead them as third party defendants in this action. In that case, we took the position in Ayala that the plaintiff could make a claim directly against the third party defendants. After Kroger that's not so clear.

QUESTION: Well, I thought the rule provided that a defendant could implead a third party defendant only on the basis of a claimed liability over to the defendant and not because the third party defendant might be liable to the plaintiff.

MR. SHAPIRO: Well, that's true, your Honor. But Rule 14 does specifically say that if you have properly impleaded a third party defendant on the basis of a right to contribution or indemnity, that at that point the plaintiff may assert any claim she has against the third party defendant.

QUESTION: Even though there is no independent federal jurisdiction --

MR. SHAPIRO: Well --

QUESTION: -- for that action.

MR. SHAPIRO: -- of course, that -- in Kroger that was held to be a barrier to the assertion of the

claim. Whether it would also be a barrier in this case is not an issue that's presented here. We're not sure of the answer to that. It may or may not be the case.

But that would only happen if there were a specific decision by the United States that in view of its interests, in view of the institutional interests of both the United States and the federal courts, it made sense to implead those parties as third party defendants.

Once that were done, I think there would be a very strong argument for allowing the plaintiff to allege a claim directly if she has one against the third party defendants. Rule 14 does authorize that.

But, at least in the situation where those parties are not already in the case, our concern is that recognizing pendent-party jurisdiction might throw on the discretion of the district courts a very heavy burden, a discretion that would be essentially unreviewable. To make decisions about when and whether consolidation of trial makes sense.

Our suspicion is that many of these cases would end up in state courts anyway. In the case of Moor against the County of Alameda, a 1983 case, that's exactly what happened and this court did not reach the pendent-party question because the district court had decided, in its discretion, to send the state case back

to the state courts.

Even in those cases that were kept in federal court, we contend that the trial judge would in many cases find it inconvenient and inefficient to consolidate for trial and would end up separating the cases out for trial anyway because of the number of separate issues involved and because of the existence of a jury in one situation and not in another.

QUESTION: Well, if the Plaintiff -- if the Plaintiff here had been a resident of some other state, she could have sued these --

MR. SHAPIRO: Yes.

QUESTION: -- and then you'd have the same problem before the district judge, I suppose.

MR. SHAPIRO: We would as a result of two --

QUESTION: About jury trials and all of that.

MR. SHAPIRO: Well, we would have the same result, but as a result of two quite independent jurisdictional provisions. Not as the result of a specific Congressional policy determination. The trial of these cases as a matter of one single lawsuit makes sense. And, indeed, it might well be that even though there were two separate lawsuits pending in the same court, there would be no effort made to consolidate them. Or they might be consolidated. But, that does

not reflect any special Congressional judgment that consolidated trial makes sense. It's simply the fortuitous --

QUESTION: Right.

MR. SHAPIRO: -- incidents of two separate jurisdictions.

QUESTION: And in this case the joinder or the suit -- it would be in the same case.

MR. SHAPIRO: Yes, it would. Yes, your Honor. So, for all those reasons, we respectfully request that the judgment below be affirmed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Shapiro.

Mr. Cook, do you have rebuttal? You have four minutes remaining.

REBUTTAL ARGUMENT OF JOSEPH T. COOK

ON BEHALF OF PLAINTIFF

MR. COOK: It's undoubted that the weakest portion of my case is the legislative history portion of the case. And my position on that, our position on that, is that the plain language of the Act, and particularly after the -- the amendment in 1948 -- the plain language provides for anchor -- for the anchor jurisdictional statute to include additional parties where appropriate. It does not negate pendent-party

jurisdiction.

Secondly, again, looking to the scheme of the Act, the private person state law scheme of the Act, that too indicates Congress' intent to make the United States liable as a joint tortfeasor with all other potential parties. And we would submit that those two factors make the legislative history from back in '42 or '45 or '46 to be on a relative basis of no interest.

I would also point out that the -- there is an inconsistency within the legislative history itself. It says that the United States is to be liable as a joint tortfeasor in accordance with state law. Then it says there can't be a defendant with the United States. And that's incorsistent. They can't be a joint tortfeasor in accordance with state law if there's not another joint tortfeasor in the lawsuit with them. It's an inconsistent statement within the legislative history itself.

QUESTION: That's part of trying out the claim against the United States, is trying out a claim against a -- an alleged joint tortfeasor.

MR. COOK: If there are joint tortfeasors, they all should be in the same -- the same lawsuit, Justice White.

Mention of the Federal Rules of Civil

Procedure, both Gibbs and Aldinger refer to the federal rules recognizing that they don't grant jurisdiction, but the scheme of the federal rules is let's get it all together, let's get it all tried, let's get it all taken care of. The federal rules promote that. They suggest that. They support what we are seeking here today.

The comment was made that this action can't be tried with the actions against the other defendants because it wouldn't be a state law or state -- a state law action. The action against the United States in the 1346(b) is a state law action. It depends on the state law of the place where the act or omission occurred. So, it is a state law action, it just includes the United States as a defendant.

The efficiencies and the absence of any real efficiencies, I don't know how to respond to that other than experientially. But my experience in a number of cases where the United States and private defendants were joined for various reasons -- either out of the Ninth Circuit where pendent-party jurisdiction was acceptable, or in the Ninth Circuit were other jurisdictional provisions applied such as diversity -- those procedural problems were all dealt with, they were all handled. I've never seen a case involving a single action with multiple defendants tried twice in a federal

court. We've always worked out ways to solve the jury problem.

We submit the Ninth Circuit should be reversed and the other circuit should be followed. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cook.

The case is submitted.

(Whereupon, at 2:54 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

No. 87-1973 - BARBARA FINLEY, Petitioner V. UNITED STATES

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BY Judy Freilicher

(REPORTER)