ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: KEENE CORPORATION, Petitioner v. UNITED STATES

CASE NO: 92-166

PLACE: Washington, D.C.

DATE: Tuesday, March 23, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

KEENE CORPORATION, :

Petitioner :

v. : No. 92-166

UNITED STATES :

Washington, D.C.

Tuesday, March 23, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

RICHARD G. TARANTO, ESQ., Washington, D.C.; on behalf of the Petitioner.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in 92-166, Keene Corporation v. The United States.

Mr. Taranto.

ORAL ARGUMENT OF RICHARD G. TARANTO

ON BEHALF OF THE PETITIONER

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

This case involves the meaning of 28 U.S.C. section 1500, which says that the Court of Federal Claims shall not have jurisdiction over a claim against the United States if the plaintiff has pending in another court another case against the Government or its agents for or in respect to that claim.

The Federal circuit, expressly repudiating long-settled precedent, held that section 1500 automatically requires dismissal whenever the plaintiff had pending sometime during its suit another action growing out of the same transaction or operative facts.

QUESTION: When you say, repudiating long-standing precedent, Mr. Taranto, you mean Federal circuit or Court of Claims precedent, right?

MR. TARANTO: Yes. Yes, that's right, and it required dismissal even if the actions had to be pursued

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separately, and even if the other action is over.

Based on this new rule, petitioner came and had its cases dismissed after 10 years of pretrial proceedings were completed. Denying Keene a hearing on its claims based on the Government's sale of asbestos, its requirement of asbestos in products it's purchased, and its manner of operating shipyards.

Our position is that the Federal circuit misconstrued section 1500 in two respects, and that two longstanding constructions of 1500 should be reinstated.

First, two suits are not for or in respect to the same claim where Congress has insisted that the claims in the two suits are different by demanding that they must be brought separately, and second, by its plain terms, the statute does not apply after the plaintiff no longer has pending any other suit.

Now, on the first position, I want to make four points. The first is that it was settled law in the Court of Claims and the Federal circuit, two of the only courts, aside from this Court, that could ever address this question, for more than a quarter of a century, that when Congress has declared that two separate rights of action must be litigated in two different courts, the court should not turn around and read 1500 as saying that the two suits are really for and in respect to the same claim.

QUESTION: On what general principle of law do you base this argument, Mr. Taranto? I mean, we don't ordinarily review Court of Claims or Federal circuit precedent.

MR. TARANTO: No. I think that -- well, stare decisis in its strict terms perhaps applies only to this Court's review of its own precedent. Nevertheless, because stare decisis is a policy-based doctrine the same --

QUESTION: We wouldn't take a case here, I don't think, to hear it argued that the Ninth Circuit had failed to follow stare decisis in connection with a Ninth Circuit precedent.

MR. TARANTO: No, I think that's right, but this, I think, presents two unique circumstances. One is that the issue of 1500's interpretation is unique to the Federal circuit. There can't be a lower court conflict, and as a consequence, all of the reliant's interest both of litigants like Keene and of Congress in legislating in the area, must necessarily look to established law in that circuit to guide litigants and guide Congress, and it's for that reason that we think that cases like the Casman line of cases demand special respect.

QUESTION: But I -- you would still say that even if there hadn't been a precedent until this one, that

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the court of appeals just had it wrong.

MR. TARANTO: Yes, I think that's right. The principle --

QUESTION: And since it would be the only court to construe that statute, you couldn't wait for a conflict.

MR. TARANTO: That's right. The reading that the Court of Claims and the Federal circuit gave to the statute for a quarter of a century in fact we think reflects the most natural reading of 1500's language.

QUESTION: Are you in any position to make an argument that Congress might be deemed to have accepted that interpretation? Was there any reenactment or amendment that might have picked it up if we accepted the theory that, given the peculiarities of claims in the Fed circuit jurisdiction, Congress might be deemed to accept that?

MR. TARANTO: Yes, we do have a version of that argument. In 1982, Congress took a broad look at the whole set of statutes governing what was then the Court of Claims, transformed that court into a trial court, claims court and the Federal circuit, and reenacted 1500, merely changing the name of the court to which it applied.

By that time, the statute had been consistently construed in both of the ways that we suggest, and we

think it is an appropriate inference that had it been construed otherwise, its quite draconian consequences would in fact have led Congress to take a second look at it. The fact that it had been construed so as not to deprive litigants of rights is I think the best explanation for why no real issue was made of 1500 when it was reenacted in 1982.

QUESTION: Well, did Congress overhaul the statutes governing the Court of Claims and the Federal circuit in 1982 other than just do what was necessary to create the new court?

MR. TARANTO: It did make a number of substantive amendments in looking through the entire range of statutes. It added certain limited jurisdiction to the -- now the claims court to provide certain kinds of equitable relief that it couldn't have provided before.

It provided a special transfer statute to ensure against precisely the kind of loss of rights for filing in the wrong court that is at issue here, and it also made a number of substantive amendments that governed other aspects of what used to be the Court of Claims and also the court of customs and --

QUESTION: Amendments you say that weren't occasioned by the creation of the new court.

MR. TARANTO: Yes, that's right. It was a more

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general review in 1982 of the statutory regime governing suits against the United States, and in particular in the Court of Claims.

When the statute asks if a second suit is for and respect to the claim in a first suit, it is naturally understood, we think, as targeting repetitive litigation, situations where two suits are brought when there really should be one, but that is not the situation. There is no repetition when two suits are brought on different legal rights that Congress has said must be litigated separately.

This is exactly the rule of claim preclusion law, which we think is the obvious place to turn to in defining when two suits should be treated as for or in respect to the same claim.

QUESTION: But you wouldn't need a special statute, would you, if all Congress wanted was the application of claim preclusion law? That would apply without any statute. Certainly other courts throughout the country apply it without having a special statute.

MR. TARANTO: What 1500 does is apply before any judgment is reached. Claim preclusion law only kicks in once there is a judgment in a first suit. What 1500 does is to say a plaintiff cannot proceed in two different forums up to the time of judgment, which claim preclusion

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would say nothing about. It protects the Government against that problem.

So 1500 performs a role in addition to claim preclusion law, but we never --

QUESTION: But would that interpretation that you've just explained have satisfied the congressional concern with the cotton litigation that prompted this statute?

MR. TARANTO: I think it would.

Let me say first that I think that it would be a mistake, in any event, whatever that 1868 legislative history concerning the cotton claim * said, to carry that forward to the new statute in a new legal landscape to control the interpretation of this.

But even on its own terms, the only thing that one can tell from the 1868 history is that Congress wanted to relax one condition of claim preclusion law, and that is the condition of mutuality of the parties. Nothing about the 1868 history suggested that two claims, aside from mutuality of the parties that would otherwise be the same, would be within the statute.

The cotton claims would, under the best view that we can discover of 19th Century res judicata law, in fact have been the same had they been against the same defendant. One of the tests for establishing sameness of

claims was the so-called same evidence rule. If the evidence in one case would be enough to support the claim in the other case, the same evidence would suffice in the claims, it would be treated the same, and a common law conversion claim would under that test be the same as the statutory conversion claim which added simply the element of loyalty, because the same evidence that proved loyalty in conversion would, as with a lesser included offense, prove conversion.

QUESTION: But the --

QUESTION: Mr. Taranto, it seems to me that it's possible that the precedent in the Court of Claims decisions is not quite as uniform as you suggest. The British American Tobacco case, I think the Court of Claims held that the word "claim" refers to the fact that the facts existing and operating in both cases are the same, and there's a similar holding in the Los Angeles Shipbuilding and Drydock case, and so I'd like you to explain to me whether the precedent really was as uniform as you suggest.

MR. TARANTO: I think it was when you take time into account. Like any other body of precedent, at a certain point earlier decisions are reinterpreted and perhaps even altered. The earlier interpretation of 1500 or its predecessor in the Court of Claims took this

broader view.

What happened, then, in 1956 with the Casman case was that the court recognized that where Congress has existed that claims be brought in two different forums, they should not be treated the same.

QUESTION: But Los Angeles Shipbuilding was decided after Casman.

MR. TARANTO: I think within a year of that.

QUESTION: Yes.

MR. TARANTO: But shortly after that, it became the established rule, repeated over and over again in the Court of Claims, that if a litigant was forced into two separate suits, they were not to be treated as the same, and I certainly don't know of a single instance -- and I don't think the Government has cited one -- where any litigant was thrown out under 1500 after Los Angeles Shipyard, which may simply have not fully appreciated Casman.

But in any event, since the early sixties, for 30 years I don't think there's a single case where that rule failed to be applied where a litigant lost rights by virtue of bringing in two separate suits claims that Congress has said had to be brought in two separate suits.

QUESTION: Well, has the CA Fed up to now recognized that rule they're talking about?

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MR. TARANTO: It first moved away from that rule in a predecessor of this case, the Johns-Manville case, and then clarified that *view --

QUESTION: Well, did it ever accept it?

MR. TARANTO: The CA Fed -- it did, in I think the Boston Five Cents Savings Bank case, if I recall it right.

QUESTION: When was that decided?

MR. TARANTO: That was -- I don't remember exactly. In the mid-eighties, I think.

QUESTION: 1988.

MR. TARANTO: 1988.

QUESTION: But by the time the CA Fed was created, the -- you say the law in the Court of Claims was pretty clear.

MR. TARANTO: Yes. The Court of Claims -- the Casman decision had been cited over and over, and it had been specifically applied in 1976 in the Allied Materials case to circumstances even where money damages were sought under two different claims, so that the type of relief was not the only condition for distinguishing claims.

QUESTION: Mr. Taranto, under the civil version of the same evidence rule that you were referring to a moment ago, would two suits simply based on at least a community of fact but one sounding in tort and one

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sounding in contract have been precluded as simultaneous suits?

MR. TARANTO: In the 19th Century, the answer is probably not. There is always some difference in evidence, as there would be here with the tort and contract claims, if only because there are different legal elements. In the 19th Century, that same evidence test probably wouldn't have applied, but on the other hand there would have been no real need for it, because --

QUESTION: Because you had the mutuality.

MR. TARANTO: Well, mutuality, and in the 19th Century res judicata insisted on something much closer to the legal theory as opposed to the transaction base *at best.

Now, let me say that under this reading, this long-established reading of 1500, the statute performs two very limited but sensible functions, and these were in fact the functions that when the Justice Department last year opposed repeal of 1500 it told Congress it performed.

The Justice Department did not say that the provision applied to the sequencing of merely related claims. It said one function was to bar forum shopping in those cases that are within the concurrent jurisdiction of the Court of Federal Claims and the district court. A plaintiff -- which includes all tax refund cases and

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Little Tucker Act cases, and perhaps and others.

The plaintiff can't just test out the two forums up to the time of judgment and see which judge is going to look more favorably upon its claim.

QUESTION: Little Tucker Act is district court under 10,000, or whatever it is.

MR. TARANTO: Yes, up to $10,000, all contract claims, constitutional claims, et cetera.

The second function is to preclude simultaneous suits where there is not concurrent jurisdiction but the plaintiff has filed the case in two different forums, and there the statute simply bars the plaintiff from proceeding in the Court of Federal Claims until the district court's lack of jurisdiction has been established, as it sometimes requires some years of litigation to do.

And these functions are obviously modest, but as I say, the Justice Department explained why 1500 should be kept, when it opposed repeal to Congress by reference only to those functions and not to the much more draconian function that it suggests today of sequencing merely related suits.

QUESTION: And this was after the CA Fed's change of theory.

MR. TARANTO: It was.

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The final reason, then, in support of this first position is precisely the draconian consequences of the Federal circuit's new version. The fact is that, like Keene, many litigants seeking redress against the Government must file in separate cases, whether they have tort and contract claims, or as many of the amici in this case point out, they have a statutory challenge to some Government action and also are taking challenge.

The regular and unavoidable effect of the Government's position requiring sequencing of these suits is the loss of many litigants' Tucker Act claims either through the sheer delay of postponing their adjudication perhaps for years, as in this case it would be 7 or 8 years, or even worse, through the expiration of statutes of limitations if equitable tolling is unavailable.

Let me turn --

QUESTION: How many different cases did your client have pending in connection with this asbestos litigation?

MR. TARANTO: Well, we had two cases in the Court of Claims, which were then consolidated, one involving the contract claims, one involving the takings claims. In other courts, we had an omnibus tort claim with a --

QUESTION: When you say, in other courts, would

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you be specific?

MR. TARANTO: Yes. The initial omnibus FTCA action was brought in the Southern District of New York. After that was thrown out the same action was tried in the District of Columbia, essentially exactly the same complaint.

QUESTION: Why was it thrown out of the district court in New York?

MR. TARANTO: Essentially because the administrative notice requirement of the FTCA imposes a specificity requirement that the court found Keene could not meet as to each of the underlying tens of thousands of claims against the Government.

QUESTION: Did you in effect try to relitigate that in the District of Columbia?

MR. TARANTO: Yes, after filing a new series of administrative notices, which were subsequently also found to be jurisdictionally inadequate.

QUESTION: So you went back and tried to cure, basically, the defect that the --

MR. TARANTO: Yes.

QUESTION: District court in New York had found.

MR. TARANTO: Yes, that's right, and the one other suit that I --

QUESTION: And unsuccessfully.

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MR. TARANTO: Unsuccessfully, that's right. Keene has never had a hearing on its tort claims because of this jurisdictional problem or because of this ruling on the contract claims.

The one other suit that I didn't mention is, briefly in one of the suits brought against Keene there was a third-party action impleading the United States and that was voluntarily dismissed in order to proceed on that issue in these other suits.

The second point, section position, is that section 1500, regardless of the scope of the claim language, has no application once the other suit in another court is over, and that's so whatever the court should do when 1500 is raised while another case is pending.

Again, I have three, I think simple points for this. First, by its terms, the statute applies only when the plaintiff in the Court of Federal Claims has pending another suit. It simply does not come into play, let alone require dismissal, when no other suit is pending.

Second, even the Government's version of the policy of 1500, protection against simultaneous dual related litigation, has no application once there is no dual litigation. After any other suit outside the Court of Federal Claims is over, there is simply no dual

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litigation of any sort to protect against.

QUESTION: But I suppose that the 1500 is couched as a jurisdictional statute, and normally you would think that means the Court of Federal Claims had no jurisdiction.

MR. TARANTO: Justice O'Connor, I think that there are two separate questions to address. One is whether at the time when another suit is pending the jurisdiction label automatically requires dismissal. No issue is raised as to that here.

The other issue, which is the issue here, is what happens if there was earlier in the proceeding a jurisdictional defect that is no longer present, and what this Court's decision in Newman-Green establishes, what was established even before, is that even as to a pure jurisdictional provision, the existence of an earlier jurisdictional defect does not mean that the case shouldn't go forward. In fact, the court said the case should go forward once that defect is cured.

That's exactly what we have here, even on the assumption that 1500's jurisdiction language has to be read as making it a pure jurisdictional provision. We have a situation where, even on the assumption that there was a jurisdictional defect earlier in the litigation, by the time the question of dismissal arose, there was no

longer that jurisdictional defect, and as in Newman-Green, we think it is perfectly appropriate, and indeed it would be unfair --

QUESTION: You say by the time it arose. Does that mean -- are you saying, then, by the time the Government made a motion?

MR. TARANTO: Yes, that's right. By the time --

QUESTION: Why wouldn't it arise at the very beginning of the second lawsuit?

MR. TARANTO: Well, I'm just saying that as a practical matter the issue was not brought to anybody's attention here for 8 years during this litigation.

QUESTION: But if it's a jurisdictional matter, ordinarily that wouldn't make any difference. That's not something that the Government can waive.

MR. TARANTO: Right, but in Newman-Green itself, had the parties raised at the outset of the litigation the fact that there was a nondiverse party, and had that defect not been cured, of course, dismissal would have been required.

What this Court said in Newman-Green, confirming many lower courts' views, is that even though there was no jurisdiction because of the nondiverse party at the day the suit was filed, and years during the litigation, once

that defect was cured, the case should and can go forward.

QUESTION: Mr. Taranto, I thought Newman-Green was sort of, if not a dodo bird, at least an exception. I thought the normal rule was otherwise, that if you don't have jurisdiction at the outset, you can't patch it up later. Do you know any other situation, other than Newman-Green, in which we've allowed absence of jurisdiction to be -- jurisdiction that did not exist at the outset of the case to be remedied later?

MR. TARANTO: Justice Scalia, I don't know of any other example either way on that question. I've been looking for other situations where the question of a jurisdictional defect that existed earlier in the proceeding but now coming to an end has been presented, and I don't know of any situation except the Newman-Green one, and there, I think the rationale does properly extend to other situations, including this one, that a certain measure of practicality is necessary, and once the jurisdictional defect is over, there's no reason to dismiss the suit.

QUESTION: Do you think if I'm not a citizen of a diverse State and then later move to a diverse State the suit becomes retroactively validated?

MR. TARANTO: Well, there is --

QUESTION: A diversity suit, I mean.

MR. TARANTO: That has not been the traditional rule for measuring the time at which diversity must arise.

QUESTION: Yes, I -- that's all I'm saying. I always assumed that the traditional rule looked to the outset of litigation, and that Newman-Green was noteworthy because it was an exception to that.

MR. TARANTO: Right, but I think Newman-Green confirmed what was a longstanding recognition in the lower courts that a jurisdictional defect, even if it required dismissal when it was present, did not necessarily require dismissal once the defect was over.

QUESTION: Well, Mr. Taranto, you -- if there's a suit pending in another court when you file a suit in the Court of Claims, and the Court of Claims dismisses it, even though at the time of the dismissal the other suit has itself been dismissed -- which is the case here, isn't it?

MR. TARANTO: Yes.

QUESTION: Suppose it dismisses it. Can you then file another suit in the Court of Claims? I would think you could.

MR. TARANTO: Yes, that's right, but then -- but --

QUESTION: Except for what?

MR. TARANTO: Except --

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QUESTION: Statute of limitations.

MR. TARANTO: For the statute of limitations, and the question is an open one. Although the claims court has recently addressed it favorably, the question is an open one whether equitable tolling would be available.

QUESTION: You say the Court of Claims has what?

MR. TARANTO: The claims court in a decision that came down just a couple of weeks ago held in exactly these circumstances that equitable tolling would be available.

QUESTION: So if you lose the suit here, if we affirm the CA Fed, you might be able to sue again in the --

MR. TARANTO: We might.

QUESTION: Court of Claims.

MR. TARANTO: We might, although I must say it would take no doubt several years of litigation for the issue to go back to the Federal circuit to decide whether the claims court, which is now just a trial court, was correct in that particular decision.

QUESTION: Mr. Taranto, the Tucker Act has a rather unusual formulation. It says that the Court of Claims shall have jurisdiction to enter judgment in any case, rather than shall have jurisdiction over a case. Does anything turn on that? It does seem to help you in

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that it speaks toward the jurisdiction at the end of the case, but it's a little odd to talk about jurisdiction at the end of the case.

MR. TARANTO: We -- I mean, I do think that it does help. I don't want to place too much weight on it, but it does suggest that 1500 appearing amidst numerous other provisions that talk about jurisdiction to enter judgment properly can be interpreted to focus on the presence of any jurisdictional defect at the time judgment is entered, judgment -- the entry of judgment often being described as the single distinguishing characteristic of what makes a court a court as opposed to anything else.

QUESTION: But how then do we explain its authority at the outset?

MR. TARANTO: Well, for one thing its authority at the outset, before 1948 section 1500 didn't use the word, "jurisdiction" at all. It was a provision about what should happen in the filing and the prosecution of a claim, and there I think the language helps us considerably, because one would not ordinarily think that a rule like that should automatically carry the rigid dismissal result as a matter of remedy.

There would still be an open question about what the remedy is for the violation of a filing rule, and it's that flexibility as to remedy that in fact the Court of

Claims itself regularly applied, starting in the 1960's, time and time again to merely require a stay of the case, or a suspension of the case, and that rule says two things: 1) what is at issue here, which is that the case goes forward once the defect is no longer present.

The other thing that it says, which is not present here, is that even at the time the defect is present, dismissal is not required, mere suspension will do, and I should note that in the Pennsylvania Railroad case, that is exactly what this Court did. It reversed a Court of Claims dismissal of the case and ordered the Court of Claims merely to suspend the proceeding while another case in district court was proceeding.

QUESTION: Mr. Taranto, wasn't the original language of this -- I can't find it in the briefs -- wasn't it bring or prosecute?

MR. TARANTO: Yes, that's right.

QUESTION: And doesn't that cut against the interpretation that you're giving.

MR. TARANTO: No, I don't think so. I think --

QUESTION: I mean, it was changed but without any indication that the change was meant to be a substantive one.

MR. TARANTO: Right. I think all that that language does is make clear that there is an impropriety

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in the original filing, or the prosecution. Two questions would remain. One is merely suspending the case, does that mean it's still being prosecuted if there are no litigation burdens being imposed on the Government, and the other question is, what would be the remedy for a filing violation?

As to both, I think, the case would still be proper, that mere suspension would be required.

QUESTION: All the same, you'd have to say, though, that the statute was violated at some point, but you'd just say, bygones are bygones.

MR. TARANTO: Yes, if --

QUESTION: It was violated when it was brought, but it's no longer being brought, it's only being prosecuted, and that's okay.

MR. TARANTO: If the filing took place at a time when the statutory condition was met, then the statute was violated at that time.

Let me just refer, finally, to the arguments in our briefs for both nonretroactivity and equitable tolling in the event this Court adopts the Federal circuit's interpretation, both of which rest on the fundamental unfairness of overruling settled law more than a decade into this litigation and depriving Keene of any day in court on its claims against the Government.

If the Court has no further questions, I'll reserve the balance of my time.

QUESTION: Very well, Mr. Taranto.

Mr. Wallace, we'll hear from you.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE RESPONDENT

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

The text of section 1500 speaks in the language of subject matter jurisdiction. It unmistakably excludes a certain category of cases from the subject matter jurisdiction of the Court of Federal Claims.

That court's sole function is to hear claims against the United States for monetary awards and occasionally certain ancillary relief. These are claims against the sovereign, and just as waivers of sovereign immunity are to be strictly construed, an express exclusion from the waiver of sovereign immunity that Congress has enacted should be fairly construed to accomplish its purpose of restricting the waiver of sovereign immunity.

So much of the argument that has been made on behalf of the petitioner in this case that claims that Congress has authorized might be foreclosed by this provision overlooks the fact that this provision is an

exclusion on the waiver of sovereign immunity, and to the extent this provision applies, the claims are not authorized against the United States.

From the beginning in 1868, when the predecessor statute was enacted, the central purpose was clear, and that was to prevent simultaneous litigation of related claims. The cotton claimants were unable to bring the two categories of claims the Congress focused on in the same court. That's the common sense of it.

Petitioner has theorized about whether it could have brought -- whether those claimants could have brought the cases in the same court if the claims against the Federal officers could have been brought against the United States, but there was no possibility of doing that at that time. The Federal Tort Claims Act was not enacted until 1946.

So from the beginning it was recognized that the paradigm class of cases that the statute was designed to apply to were cases in which related claims had to be brought in two different courts, and the purpose of the statute was --

QUESTION: Well, Mr. Wallace, you say related -- brought in two different courts. Wasn't the reason that the cotton claimants sued the officials away from Washington not so much that Congress said they couldn't

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sue in the Court of Claims, but that venue requirements, if you were going to sue a local official who converted the cotton, you would have to sue where that official was found?

MR. WALLACE: Well, that certainly was the practical reason why most of those cases were brought outside of Washington, but if they had been brought in Washington, it could not have been in the Court of Claims, which would not have had jurisdiction over suits against the officers. In those days, the officers had to be sued in their individual capacity for having committed a tort while they were supposedly conducting their official duties.

QUESTION: So you say, even if there hadn't been the venue problem, there would have been a jurisdictional problem.

MR. WALLACE: Exactly so. They would have had to be brought in the district court here, rather than in the Court of Claims, so from its outset it was recognized that it applied to force claimants to choose between --

QUESTION: Let me be sure I understand --

MR. WALLACE: Two different claims -- related claims.

QUESTION: I just want to be sure I understand why they had to be brought in different suits. If

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recovery was going to take the form of recovery against the officer individually, it would have to be brought in the district court, but the amount of money recovered would be the same in either event, would it not?

MR. WALLACE: That is correct, Mr. Justice.

QUESTION: So it's just a question of really a formal procedural difference between the two suits. They're really sued on the same basic set of facts.

MR. WALLACE: Well, it was -- they were being sued on the same basic set of facts, but the judgment --

QUESTION: And would have gotten precisely the same relief in terms of dollars, at least. The judgment would read differently, because in one case it would read against the individual and in the other against the United States.

MR. WALLACE: That's correct. It would be paid by someone different.

QUESTION: Wouldn't it have depended -- you could have gotten a judgment, I suppose, against an insolvent official, and you wouldn't have gotten any money as a result of it, whereas you get a judgment against the Government, and hopefully it's not insolvent.

(Laughter.)

MR. WALLACE: At least for purposes of paying judgments, that's quite correct, Mr. Chief Justice.

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The one significant change that was made in the statute was made to carry this function forward after the enactment of the Federal Tort Claims Act in 1946, in which these suits, the tort claims that formally had to be made against officers could now be made against the United States, and so in the 1948 addition of the Judicial Code, as the revisers redrafted this, they added suits against the United States in any other court to the original language that referred only to suits against officers in any other court, so the substance was being carried forward.

In fact, the revisers' note said this was nothing but a change in phraseology, but the substance of precluding putting the Government to simultaneous defense of the tort suit in the district court and the claim in the then Court of Claims was carried forward. The plaintiff could not force that choice upon the Government.

Now, in the rehearing petition that the Government filed in this case in the Federal circuit, I think the Government articulated two important, telling points that I believe led the court in the Federal circuit to reexamine its series of precedents in this matter.

The first point that I want to recount to the Court has to do with the purpose of the rule, and why the rule applied to the situation that Keene had presented to

the Court, and as the Government put it in the rehearing petition, the rule propounded by the panel whereby if the claimant dismissed its district court case before the Court of Federal Claims ruled on the motion to dismiss, then it would have been all right for the two suits to go forward simultaneously, one of the alternative grounds proposed by petitioner today.

What we said in the rehearing petition was, the rule propounded by the panel would permit a claimant to tie up Government resources in two courts simultaneously for an indefinite period of time while the claimant continues to assess its relative chances of recovery in one forum or the other. As long as the claimant bails out of the district court before the claims court actually rules on the section 1500 motion, the claimant can do, as plaintiffs did here, precisely what Congress intended to preclude.

Now, in this particular case, the suit that was initially pending in the district court was a third-party complaint against the United States involving just one of these asbestos claims, but we have to be aware that even though the suit in the -- later brought in the Court of Federal Claims against the Government was an omnibus suit involving many similar claims, we have to be aware that modern rules of collateral estoppel would allow an

individual suit of that sort to be used as a stalking horse, and if it looked as if that suit would succeed, it could go forward and then be used for its possible collateral estoppel effect against the Government under this Court's decision in United States against Stauffer Chemical Company.

QUESTION: Well, of course, the theory that it would tie up Government resources in two suits doesn't hold water particularly. Your latter point of collateral estoppel *, but I would suppose that if there are two suits going on in two different courts over roughly the same set of facts, one of the courts is going to stay and let the other court go forward --

MR. WALLACE: That could happen if both courts are aware of it.

QUESTION: So that one suit will be quiescent and the other one won't.

MR. WALLACE: Once there was an awareness --

QUESTION: I would assume the Government would want to stay one of them.

MR. WALLACE: Well, the Government is not always aware of the overlap of these claims promptly, and this -- you know, even though there may be other remedies that the Government could turn to now, and there certainly are arguments that have been put to Congress and that will

continue to be put to Congress about whether section 1500 should be repealed or revised, the fact is Congress proposed a remedy of barring initially, it said, the plaintiff from filing or prosecuting in the Court of Claims, and now it says that the Court of Claims shall not have jurisdiction if there is a suit pending on a related claim in any other court.

QUESTION: If your view prevails, may the Government collaterally attack final judgments in the Court of Claims?

MR. WALLACE: Well --

QUESTION: Based on this new theory.

MR. WALLACE: That possibility has been raised in some briefs amicus curiae. We have not thus far attempted to do that. It would depend on the particular situation in a case, and whether it would come within the Federal circuit's rules for collateral attacks within 2 years of the judgment.

QUESTION: Well, I take it that a judgment that lacks subject matter jurisdiction is void, and if that issue has at least not been litigated or raised by the parties, it's open to you to attack it.

MR. WALLACE: But there are rules of repose, and under the Federal circuit's rules, that kind of challenge has to be raised within 2 years of the judgment, it's my

understanding. I can't say that I've focused in detail on that question.

I do think --

QUESTION: You certainly do not negate the possibility, I take it.

MR. WALLACE: I could not do that, Mr. Justice. That remains for determination in future litigation.

QUESTION: Have you got to the second reason you gave the Federal circuit?

MR. WALLACE: Well, the second point in the rehearing petition was that the rule adopted by the panel in focusing on the time that the motion was ruled on was logically inconsistent with one of the exceptions that the old Court of Claims had developed to section 1500, the so-called Tecon exception, which focused exclusively on the time of filing complaints and said that so long as the complaint is filed first in the -- what was then the claims court, and then is filed in the district court, it's all right for both cases to go ahead simultaneously.

It's only if another suit was already pending in a district court when the claim was filed in the old Court of Claims that 1500 would be applied, and our point was that there was a logical inconsistency between these two doctrines, and we could not say that either of them was consistent with the language or purpose of section 1500

and therefore we agreed with the dissenting opinion of Judge Mayer on the panel that the court might be well advised to review its precedents under 1500 altogether, because they had strayed so far from the language and purpose of the statute.

QUESTION: Section 1500, Mr. Wallace, doesn't affect claims pending in any court other than the Court of Claims, does it?

MR. WALLACE: That is correct, Your Honor.

QUESTION: In other words, one could have pending several actions in different district courts throughout the country, and they would be in no way affected by section 1500.

MR. WALLACE: It is an exclusion of jurisdiction only in the Court of Federal Claims, that is what it in terms does. It provides an exception to any jurisdiction the Court of Federal Claims otherwise would have if these related claims are pending.

QUESTION: Mr. Wallace, at the time that Keene 1 was filed, the only suit then pending was the single action, which you said -- the counterclaim that you said could be -- or the cross-claim that you said could be used as a stalking horse, right?

MR. WALLACE: Well --

QUESTION: That involved one --

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MR. WALLACE: Possibly.

QUESTION: That involved one single action --

MR. WALLACE: That is correct.

QUESTION: Right. Now, would that have precluded suit in the claims court on the other 999, or 9,999 actions?

MR. WALLACE: That is both our position and the ruling of the Court of Federal Claims in this case, which held that Keene's suit was barred and did not come within any of the established exceptions.

QUESTION: Well, it doesn't involve the same cause of action, even remotely. It's a totally different cause of action.

MR. WALLACE: It arises from a common nucleus of operative effect, even though it's only a particle of that nucleus.

QUESTION: Common nucleus? I don't feel it arises out of a common nucleus of operative fact at all. The Government did one thing in one contract, and it happened to do the same thing in a totally different contract. Why is that a --

MR. WALLACE: That particular one was among the hundreds that were brought before the Court of Federal Claims.

QUESTION: Well, it seems to me -- it's a common

legal issue, but I don't see how it's the same within the language of the statute.

MR. WALLACE: It's a common legal issue between the same parties, and it also is a common issue with respect to the same facts, and if you can break away individual ones into other courts, you're in a situation where the Government could be subjected to collateral estoppel effect.

That's exactly what happened in the Stauffer Chemical case, where the company had first sued to quash a warrant to inspect its facility in Wyoming and had prevailed in the 10th Circuit, and then when the Government attempted to enforce a similar warrant with private contractors to enforce a facility of the same company in Tennessee, this Court held that the company, because it was the same parties, the company was entitled to collateral estoppel benefit of that judgment.

So the fact that it is not a co-extensive claim initially really doesn't change that. Of course --

QUESTION: Collateral estoppel goes issue by issue. You can have a lot of issues involved in a single claim, so I don't see how the fact that you'd be collaterally estopped as to certain issues in one claim necessarily means that for purposes of this statute it's the same claim.

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MR. WALLACE: Because it's a claim in respect to. It's -- what the statute says is that the Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff has pending in any other court any suit or process.

QUESTION: You say if it involves any issue that's involved in that -- if the other suit involves any issue that is involved in that claim, that would be collateral estoppel as to that claim it is in --

MR. WALLACE: It is in respect to, because we have to worry about defending against it, because it could be used against us in the claim in the Court of Federal Claims were it not for the bar, the jurisdictional bar.

Now, it happens that in this case shortly after filing the initial suit in the Court of Federal Claims, the petitioners then filed their omnibus tort action in New York, so to the extent the court -- the Federal circuit was correct in repudiating the Tecon rule now, that issue would wash out of the case in any event.

QUESTION: Mr. Wallace, I'm a little puzzled by the collateral estoppel argument, because it seems to me that would cut both ways, that if a -- you might prevail in the other suit and get the benefit of it, also.

I thought the justification for the statute was something beyond collateral estoppel. It was the burden

of defending multiple cases whether or not -- and that collateral estoppel would not be a sufficient protection against that burden of simultaneous litigation.

MR. WALLACE: Well, that is true. I'm using the collateral estoppel point to show why it is in respect to the same claim that's pending in the Court of Federal Claims even though the one is just a particle of the nucleus of operative fact that --

QUESTION: Is that --

MR. WALLACE: In an omnibus suit.

QUESTION: I understand what you're -- was that -- is that theory of what the words, "in respect to" mean been expressed in any cases? It seems a rather strange use of the language, very candidly, even though I understand the point you're making.

MR. WALLACE: Well, it has not been expressed in any case that I'm aware of. This case is unusual factually --

QUESTION: I see.

MR. WALLACE: Because the two claims are not just an individual's particular claim against the Government brought in two courts, but in the one case it was an individual claim and in the other it's an omnibus bringing together of hundreds of claims, including that one, so the facts as they happen to arise in this case

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were peculiar, but I do think it significant that while petitioner is -- concern and complains that the court of appeals has reexamined some precedents that existed, and they were not precedents of this Court, as the Chief Justice rightly has pointed out, they were only precedents of the old Court of Claims, that both the claims court --

QUESTION: No, but they were precedents, I suppose. They had nationwide effect, and they were precedents on which the business community might reasonably rely for a long period of time.

MR. WALLACE: That is correct, but we do not believe that any of them properly applied to Keene's case to begin with. That was the ruling of the Court of Federal Claims in this case. That is also the understanding of those precedents by the Federal circuit expressed in the Johns-Manville case that preceded this one.

Petitioner takes a generous, and we think an unwarrantedly generous view of one line of these exceptions called the Casman exception, which had generally been understood to apply when the kind of relief sought in the court other than the Court of Federal Claims was different in nature from a monetary award.

QUESTION: What you're arguing now is that they

may not prevail even under the rule they advocate, but that also suggests that maybe the Federal circuit didn't have to go so far to defeat this particular claim.

MR. WALLACE: Well, I think it did not. It could have affirmed the judgment of the Court of Federal Claims on the narrower grounds that that court used, but Keene and the other parties that were before the Federal circuit that did not pursue their cases to this Court, were arguing for a broadening of some of the established exceptions, and I think it was within the proper functioning of the Federal circuit for them to consider whether, before broadening any of these exceptions, the exceptions were sound to begin with, and this has been hardly a new question.

If I may refer the Court to the leading article on the subject, what is still the leading article on the subject, which was published in the Georgetown Law Journal and it's cited in the briefs on both sides, back in March of 1967, shortly after each of the major three lines of exceptions had been established, the author -- the editors of the Georgetown Law Review summarized the author's thesis as follows, if the Court will indulge me for a moment, because it's the final sentence of this summary that is the most telling for our purposes, and I'm speaking of this article by David Schwartz that is

cited --

QUESTION: This has greater authority than the Court of Claims decisions, I guess.

(Laughter.)

MR. WALLACE: No, but I think that it shows that the problems with these exceptions were well-known both to the judges and to practitioners and had caused considerable disuse of the statute, but if I may just quote the editor's summary, "After a careful discussion of the historical background and judicial construction of section 1500, Mr. Schwartz concludes that the statute no longer serves the purposes for which it was enacted. He argues that the tortured constructions made of the statute in efforts to reach equitable results in spite of its wording have resulted in such confusion that it is no longer possible for the practitioner to ascertain what the statute means.

"In light of these developments, Mr. Schwartz urges the repeal of the section and substitution of a rule of res judicata."

That is rather close to the principal submission being made by the petitioner to this Court, although obviously the author of the article at least thought that it would require repeal of the statute to reach the result that is being advocated to this Court, and that was the

issue that was considered in the recent 1992 hearings in which Senator Heflin's bill to repeal the statute was not adopted by the committee.

There was advocacy of its repeal as well as the statement opposing repeal by the Department of Justice that my colleague adverted to.

QUESTION: Did it ever get out of committee?

MR. WALLACE: Not the repeal provision. All that got out of committee was changing the language again to reflect the new name of the Court of Federal Claims, if I can keep up with this.

Now, it is also significant that several of the briefs amicus curiae that are nominally supporting the petitioner in this case say relatively little about why the petitioner should prevail, and their chief point is that the Court of Federal -- that the Federal circuit needlessly reached the question of whether the Casman exception should be repudiated, because this is not a case within the Casman exception.

And that is the view that the Federal circuit had in the Johns-Manville case as well, and these amici are concerned about the repudiation of the Casman exception. They did not understand the Casman exception to cut as broadly as petitioner claims it cut. They understood it the way we in the Federal circuit understood

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it, to apply only if a different form of relief were being sought, injunctive relief, for example, in the district court, while monetary damages were being sought in the Court of Federal Claims, and here it was essentially the same monetary award that was being sought in both courts.

I just want to say a word about equitable tolling, which we do not think would be appropriate in this case because petitioner, with notice of this statute, deliberately decided to pursue its monetary claims in three different district courts as well as in the Court of Federal Claims.

QUESTION: Well, you say with notice of the statute, and you also say with notice of the interpretation that the Court of Claims had given to the statute which you say would not have brought this within any of the exceptions.

MR. WALLACE: Well, that's right. They cite, basically, as we point out in our brief, only one aberrational order of the Federal circuit in support of their broader view that the Casman exception really meant that if you had to litigate in two separate courts it was all right to litigate both suits, but that is what the situation of the cotton claimants was, and that was not our understanding, the Federal circuit's understanding, or the understanding of various amici, of the scope of the

Casman exception.

My time has expired.

QUESTION: Thank you, Mr. Wallace. Mr. Taranto, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF RICHARD G. TARANTO

ON BEHALF OF THE PETITIONER

MR. TARANTO: Thank you, Mr. Chief Justice.

I want to make two points, one about reliance interests, and one about the effect of the Federal circuit's interpretation.

The first is that Keene certainly relied on what was a clear rule, whatever the type of relief, in separately filing its tort and contract actions. So did the Government.

The Government in 1980 initially made a motion under 1500 and then, for tactical reasons, according to its own attorney, withdrew the motion.

The second point: a stay takes care of any Government interest in avoiding or securing the benefits of collateral estoppel, and there can't be any claim that the Government has no way of becoming aware of other suits. Even if its own internal mechanisms don't provide that awareness, all it need do after the filing of an action is submit an interrogatory and ask if any other actions are proceeding.

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So concerns about multiple overlapping litigation -- not merely litigation of exactly the same claim, but overlapping related litigation that might involve certain similar issues, are simply not what justifies Federal --

QUESTION: Mr. Taranto, would you comment on what I understand Mr. Wallace's argument to be, that you really don't come within the exception, the particular exception that makes the strongest case for saying Congress said you have to sue in two different forums because you are not seeking purely equitable relief in another forum and damages in this forum?

MR. TARANTO: Let me make two points. First, on the has pending question, that's a separate line of authority under which it was absolutely clear and without any kind of dispute that once the other suit was over, the Court of Claims action proceeds. We win our case under that exception without regard to the scope of claim.

As to the scope of claim, Casman enunciated a principle that said if different types of relief are sought, they're not the same claim because the cases have to be brought in different forums.

It then extended that principle to its natural scope. Whenever two different claims had to be brought in different forums, they were not the same, and I don't know

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of a single case in which it was restricted to claims involving different types of relief.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Taranto. The case is submitted.

(Whereupon, at 11:07 a.m., the case in the in the above entitled matter was submitted.)

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BY Lora M. May

(REPORTER)