

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: KEY TRONIC CORPORATION, Petitioner v.
UNITED STATES, ET AL.

CASE NO: No. 93-376

PLACE: Washington, D.C.

DATE: Tuesday, March 29, 1994

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KEY TRONIC CORPORATION, :

4 Petitioner :

5 v. : No. 93-376

6 UNITED STATES, ET AL. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, March 29, 1994

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 12:59 p.m.

13 APPEARANCES:

14 MARK W. SCHNEIDER, ESQ., Seattle, Washington; on behalf of
15 the Petitioner.

16 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf of
18 the Respondents.

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1 PROCEEDINGS

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 93-376, Key Tronic Corporation v. United
5 States.

6 Mr. Schneider.

7 ORAL ARGUMENT OF MARK W. SCHNEIDER

8 ON BEHALF OF THE PETITIONER

9 MR. SCHNEIDER: Mr. Chief Justice and may it
10 please the Court:

11 This case raises a question of statutory
12 construction. Key Tronic submits that the Federal
13 Superfund statute, or CERCLA, authorizes the recovery of
14 attorneys' fees by private parties where they undertake
15 cleanup and then take steps to compel others to
16 participate in the cost of the cleanup.

17 CERCLA section 107(a)(4) provides for the
18 recovery of response costs by parties. The term
19 "response" is defined in section 101(25) to include
20 enforcement activities. Where a party imposes the
21 liabilities and obligations of CERCLA on others by
22 undertaking cleanup and then compelling others to share in
23 the cost of cleanups, those actions constitute enforcement
24 activities within the meaning of the statute.

25 The term "enforcement activity" as that term is

1 used in CERCLA includes attorneys' fees because the
2 primary enforcement activity in the context of section
3 101(25) and in the context of section 107 is a suit to
4 impose the liabilities and obligations of CERCLA on
5 parties that have caused environmental contamination.

6 QUESTION: Because that has already occurred,
7 hasn't it, prior to the stage that we're dealing with
8 here?

9 MR. SCHNEIDER: Yes, Justice Souter, in this
10 case that has already occurred.

11 QUESTION: And it may have -- indeed, have
12 occurred because of action commenced by non-Government
13 parties, but there's sort of an obvious reference to them
14 as enforcers in the citizens' suit provision, so it's not,
15 on the face of it, obvious that a person in the position
16 of your client is enforcing as opposed simply to spreading
17 the burden of liability.

18 MR. SCHNEIDER: In the context of a Superfund,
19 Justice Souter, the meaning of the word "enforcement
20 activities" does include the activities of a private
21 party. As this Court recognized in the Union Gas
22 decision, EPA does not have the resources to engage in
23 activities at all of the sites across the country, and so
24 Congress in CERCLA expressly provided for and encouraged
25 private parties to engage in cleanup and then to bring

1 cost recovery.

2 QUESTION: That's the citizens' suit provision.

3 MR. SCHNEIDER: No --

4 QUESTION: I'm sorry.

5 MR. SCHNEIDER: No, Justice Souter. The
6 citizens' suit provision is in section 9659, and a
7 citizens' suit can bring an action to compel the EPA to
8 act if there's a violation of a standard.

9 Section 107 provides for a right to recover
10 response costs. The definition of response costs is
11 defined in section 101(25), and section 101(25) is a
12 section of general application. It's a definitional
13 section to define the word "response cost." A response
14 cost is something that a private party may recover.

15 QUESTION: May I ask you one other question? I
16 should know the answer to this, but I don't. Is there a
17 separate counsel fee provision for citizens' suits?

18 MR. SCHNEIDER: Yes, Justice Souter. Section
19 9659 provides that when a citizen brings a "citizens' suit
20 under section 9659, it may recover its attorneys fees,"
21 but that is the only relief that a citizens' suit
22 plaintiff can recover.

23 In CERCLA section 1 -- a citizens' suit
24 plaintiff under section 9659 does not have the ability or
25 the authority to bring an action to recover response

1 costs. That is limited --

2 QUESTION: Can they get investigators' fees, and
3 so on?

4 MR. SCHNEIDER: No, Justice Souter, they cannot.

5 QUESTION: It's strictly limited to counsel.

6 MR. SCHNEIDER: The only monetary reimbursement
7 that a citizens' suit plaintiff can recover under section
8 9659 are the attorneys' fees enforcing the EPA to act, no
9 other monetary reimbursement.

10 In contrast, section 107, which is an action for
11 cost recovery, which applies both to the Government and to
12 private parties, states that parties can recover their
13 costs of response. Section 101(25) specifically defines
14 response to mean enforcement activities.

15 In the context of a Superfund site, the primary
16 enforcement activity will be an action to compel other
17 parties, pursuant to their statutory obligations, to pay
18 their fair share of cleanup cost.

19 Typically, what happens is one party will
20 undertake cleanup and pay for the entire cost of the
21 cleanup. That party will then bring an action to enforce
22 the statute to compel other parties who are also liable
23 under the statute to pay for their fair share of the
24 cleanup costs.

25 QUESTION: What happens if a party does not

1 think it's liable at all, but thinks that parties A, B,
2 and C are?

3 MR. SCHNEIDER: That would be an enforcement
4 activity if that nonliable party is able to establish that
5 the other parties are liable under the statute to pay
6 portions of the response costs.

7 QUESTION: And does he bring a suit other than
8 for money?

9 MR. SCHNEIDER: No, Justice Kennedy. The only
10 relief available for a cost recovery plaintiff is to
11 recover costs that have been spent for cleanup. By
12 definition, a cost recovery case under section 107
13 requires the plaintiff, whether it's the Government or a
14 private party, to undertake cleanup, to spend response
15 costs, and then bring an action to recover those costs.

16 QUESTION: The Government's right to recover
17 attorneys' fees comes from still a different section,
18 doesn't it, under the legal studies section?

19 MR. SCHNEIDER: Mr. Chief Justice, that's
20 correct. Prior to the passage of the amendment of CERCLA
21 in 1986, the United States relied on section 104(b) as
22 well as section 107 to recover the costs of attorneys'
23 fees in bringing these types of actions. Prior to the
24 amendment of Superfund in 1986, all of the lower courts
25 held that the Government was entitled to recover its fees

1 under section 104(b) as well as under section 107.

2 Key Tronic submits that if -- and the language
3 used in section 104 was cost of legal study or
4 investigation. Key Tronic submits that if the term "cost
5 of legal study or investigation" is sufficiently explicit
6 to authorize the award of attorneys' fees, then certainly
7 the word "enforcement activities," which appears in the
8 section of general application to both private parties and
9 the Government, also is entitled to recover its attorneys'
10 fees.

11 The reason that an enforcement activity includes
12 attorneys' fees is because the primary enforcement
13 activity within the meaning of section 101(25) and section
14 107, is an action to compel other parties to pay their
15 share of cleanup costs. Enforcement activities means the
16 actions that are undertaken to enforce the statute.

17 In most cases, as a practical matter the word --
18 the activities will be undertaken by attorneys, and so the
19 most logical reading of the phrase "enforcement
20 activities" includes attorneys' fees. But "enforcement
21 activities" is broader, because there are some activities
22 that will be undertaken not by attorneys. For --

23 QUESTION: Doesn't the word "enforcement
24 action" -- "enforcement activities" usually refer to
25 Government action, action by Government agencies?

1 MR. SCHNEIDER: No, that is not correct, Justice
2 Ginsburg. As this Court noted in the Cargill case, where
3 the Court was construing section 4 of the Clayton Act, the
4 Court characterized a private action under section 4 of
5 the Clayton Act as a private enforcement action. In the
6 Alyeska decision, this Court stated that Congress often
7 encourages private parties to act by awarding attorneys'
8 fees, and that will allow for "private enforcement of the
9 statute."

10 QUESTION: Well, but that's quite different. I
11 mean, the Sherman Act situation, you're talking about a
12 party who's been injured going after the wrongdoer.
13 That's quite a different situation from one wrongdoer who
14 has been compelled to cough up the entire compensation for
15 the wrong going after another wrongdoer to get back some
16 of what he's paid. That seems to me not -- I would not
17 normally call that enforcement. I would call it
18 contribution.

19 MR. SCHNEIDER: With all due respect, Justice
20 Scalia, under the Clayton Act, a party is taking steps to
21 enforce the liabilities against those parties who have
22 undertaken activities prohibited by the antitrust statute.
23 In CERCLA, the word "enforce" is used to enforce the
24 liabilities and obligations of the statute.

25 For example, in CERCLA, a party is liable if it

1 arranges for the disposal of hazardous substances. To
2 enforce this statute in the context of section 101(25)
3 means to make sure that that party that arranged for the
4 disposal of hazardous substances pays for the cost of
5 cleanup.

6 In the -- I would note that even both prior to
7 the amendment of Superfund --

8 QUESTION: Can you give another example of a
9 Federal statute where enforcement action, or enforcement
10 activity, is -- the actor is someone who is himself liable
11 for violating some prescriptions of the statute, who has a
12 liability as distinguished from someone who is either a
13 private attorney general or has been injured in fact and
14 is bringing a claim against a wrongdoer?

15 MR. SCHNEIDER: Off-hand, Justice Ginsburg, I
16 cannot think of another example, but CERCLA is a unique
17 statute which uses the word "enforcement" in section
18 101(25) which is a definitional section.

19 It says, for purposes of section 107, in
20 defining the word "response," that word "response"
21 includes the words "enforcement activities." The reason
22 that CERCLA is a unique statute is because in 1986, when
23 Congress amended the Superfund statute, the legislative
24 history was replete with references as to what an utter
25 failure the Superfund program had been. The legislative

1 history contains many references explaining that EPA
2 simply was unable to make the Superfund program work by
3 itself.

4 The response, Congress decided to fix that
5 problem by giving more incentives to private parties to
6 act. One of those incentives was in section 101(25),
7 enabling private parties to recover their costs of
8 enforcement activities which we submit includes attorneys'
9 fees.

10 The language of the statute is unlike virtually
11 any other statute, and this Court has recognized in the
12 Exxon decision that in fact it is an inartful statute, but
13 what Congress decided to do in Superfund was to make sure
14 that any party, whether it was a governmental party or a
15 private party, whether it was a liable party or a
16 nonliable party, any party that undertook cleanup could
17 then bring an action to recover its cost, and it used the
18 term "enforcement activity" in a section which expressly
19 applies to any party, liable or nonliable, governmental
20 party or private party.

21 QUESTION: You want us to construe the term
22 under the policy of the amendments, which was to induce
23 private parties to act. As I understand it, no one has an
24 inducement to act under the circumstances that your client
25 acted unless that person has already been found liable and

1 otherwise, as Justice Scalia said, would have to pay the
2 whole tab, so that the public as a practical matter gets
3 nothing from the recovery that you want.

4 The problem has been identified, someone has
5 been made liable, and somebody's got to pay the bill, and
6 I don't see why Congress had any reason to induce this
7 action.

8 MR. SCHNEIDER: Justice Souter, with all due
9 respect, in this particular case Key Tronic acted -- well,
10 Key Tronic has never been held liable. It acted
11 voluntarily, immediately after contamination was
12 discovered, but what Congress noted --

13 QUESTION: It didn't contest liability.

14 MR. SCHNEIDER: No action had been brought. It
15 started its actions in 1980, 3 years before the EPA was
16 involved, 10 years before --

17 QUESTION: I'll grant you that, but isn't it
18 fair to say that basically what your client was doing was
19 essentially what might be called a preemptive strike? I
20 mean, ultimately, what it wanted to ensure was that it
21 would not end up paying the whole bill.

22 MR. SCHNEIDER: Justice Souter, there's nothing
23 in the record which would support that statement, but
24 regardless of what happened in this particular --

25 QUESTION: Well, why else was it doing it? I

1 mean, it has not contested liability. You don't argue
2 here that it would have been free of liability, and what
3 else was it doing?

4 MR. SCHNEIDER: We don't argue that it would
5 have been free of liability, but a case was never brought.

6 What Congress did, though, in 1986, was it
7 recognized there were not enough Key Tronics in the world
8 to make the Superfund process work. Congress in 1986
9 noted that EPA had not done its job. It was simply too
10 enormous a task to be undertaken by EPA alone, and this
11 Court recognized that in the Union Gas decision. Congress
12 did not think it enough to give the tools only to EPA. As
13 a result, it also encouraged private parties to act.

14 The question, Justice Souter, you raised as to
15 what does the public get as a result of this cleanup, what
16 the public gets is a clean site that might otherwise not
17 occur.

18 Congress had two goals when it passed the
19 Superfund statute. One of the goals was prompt -- making
20 sure that hazardous waste sites were promptly cleaned up,
21 and the other goal was to make sure that those parties
22 that caused the contamination would pay for the
23 contamination costs that they had caused.

24 As a practical matter, Congress chose as its
25 mechanism to get to cleanup -- it chose to arm private

1 parties and the Government with extraordinary abilities to
2 enforce the Superfund statutes.

3 QUESTION: You're implicitly arguing, I guess,
4 that two pockets are better than one, and that's what the
5 public gets.

6 MR. SCHNEIDER: Justice Souter, I am arguing
7 that in the context of --

8 QUESTION: Which I don't think is a bad
9 argument, having just made it myself.

10 (Laughter.)

11 QUESTION: I mean, but isn't that sort of
12 what -- the point that you're making?

13 MR. SCHNEIDER: Well, it is --

14 QUESTION: The public does get something,
15 because it gets another pocket to go after if the first
16 one is not full enough.

17 MR. SCHNEIDER: Absolutely, and the reason
18 Congress used the word "enforcement activities" and not
19 "attorneys' fees" is because the enforcement activities
20 could include the actions in this case, for example, where
21 a private investigator was hired to do the gumshoe work to
22 find out who disposed of hazardous substances at the
23 corporate landfill. The cost --

24 QUESTION: Mr. Schneider, is the term "response"
25 or "respond" used anywhere else besides section 107(4)?

1 MR. SCHNEIDER: Yes, Justice Scalia, it's used
2 in a number of other places within the statute.

3 QUESTION: Well, I think your argument would be
4 a lot stronger if the only place in which the term
5 occurred was in this provision, because then that
6 specification that it includes enforcement activities
7 would have to be referring to this section, but if it
8 appears elsewhere, there might well be what Justice Souter
9 and I would call genuine enforcement activities, in other
10 sections that are involved.

11 MR. SCHNEIDER: The -- Justice Scalia, the
12 problem with that argument is that if Congress had wanted
13 only to give the right of attorneys' fees to EPA, it could
14 have done so by using the terms "enforcement activities"
15 in the section that applied only to EPA -- for example, in
16 section 104(b) -- but it didn't do that. It could have
17 put the right to recover attorneys' fees or enforcement
18 activity costs in section 107(a)(4)(A), which applies only
19 to the Government, but it didn't do that.

20 In defining the term "response" -- in defining
21 the word "response," it put that definition in section
22 101(25), and section 101(25) defines the term "response"
23 as that term is used in section 107(a)(4)(B) of CERCLA.

24 The enforcement activity under CERCLA is to make
25 sure that those parties that have caused contamination

1 will pay for a portion of the cleanup costs. That's
2 consistent with the common, every-day understanding of the
3 word "enforce."

4 In our brief, we have set forth the position
5 that a party wants to enforce its rights -- that doesn't
6 require governmental action -- or that there's an
7 enforceable contract. That doesn't require enforceable
8 action.

9 This Court's decision in the Alyeska case and in
10 the Union Gas case, both refer to the word "enforcement"
11 without any consideration of governmental involvement. As
12 a practical matter, the use of the word "enforcement" in
13 the Superfund statute has to include attorneys' fees.

14 Now, the United States -- well, maybe I should
15 take a step back. Key Tronic's argument is supported by
16 the fact that the phrase, "enforcement activity," was
17 added to the statute in a definitional section, section
18 101(25).

19 Prior to 1986, the word "response" meant
20 environmental investigation, technical services, cleanup
21 activities. Prior to the amendment in 1986, all of the
22 lower courts had held that the EPA was already entitled to
23 recover its attorneys' fees.

24 In 1986, Congress put the word "enforcement
25 activity" in section 101(25), which is a definitional

1 section of general application. Since prior to the
2 amendments, the phrase had -- since prior to the
3 amendments, the EPA was already entitled to recover its
4 attorneys' fees, and since Congress put it in a section of
5 general application --

6 QUESTION: You're talking about subsection (25)
7 now?

8 MR. SCHNEIDER: Yes. That's section 101(25) of
9 the Superfund statute.

10 QUESTION: Well, certainly the way the
11 section -- that (25) starts out, the term "respond" or
12 "response" means "remove," "removal," "remedy," and
13 "remedial action."

14 MR. SCHNEIDER: That's --

15 QUESTION: Certainly you wouldn't think lawyers
16 were much good for cleaning up waste, or cleaning up a
17 mess.

18 MR. SCHNEIDER: That's correct, and we expressly
19 rely on the new language which was added, the words
20 "enforcement activities." That's the language we rely on
21 in order to establish that Congress intended both the
22 Government and private parties to recover fees.

23 QUESTION: So that "respond" and "response" and
24 "remove" now mean -- now include enforcement activities
25 relating to removal or remedies.

1 MR. SCHNEIDER: That is correct, Mr. Chief
2 Justice, and in this case an action to reallocate cost
3 among liable parties is related to a removal action. It's
4 related in the sense --

5 QUESTION: Well, that's rather attenuated, isn't
6 it?

7 MR. SCHNEIDER: Well, Congress used the word
8 "related," which is a very broad word, Mr. Chief Justice.

9 QUESTION: Well, it -- it's a word that could
10 have a broad meaning or it could have a narrow meaning,
11 depending on how one defines it. Certainly it doesn't
12 just spring to one's thoughts immediately that there's
13 that connection that you say.

14 MR. SCHNEIDER: Mr. Chief Justice, Congress used
15 the word "related" in the common, ordinary use of the term
16 "related," meaning does it pertain to, does it relate to
17 an action to reallocate cost of cleanup, does it relate to
18 the cleanup.

19 But there's a second argument that we raise, and
20 that is, actions to reallocate costs among liable parties
21 will directly lead to cleanup, and the reason it will lead
22 to cleanup, Mr. Chief Justice, is because if private
23 parties know that they can undertake cleanup, spend the
24 money, spend far more than their fair share of the cleanup
25 costs, and then get a portion of those costs and

1 attorneys' fees back from other parties, they are far more
2 likely in the first place to undertake cleanup.

3 And so the use of the word "related" we submit
4 has a very broad meaning, but even if one used a very
5 narrow meaning, Congress decided that the mechanism to get
6 to cleanup was to allow private parties as well as the
7 Government to enforce the statute.

8 If I could respond to the question of Justice
9 Souter, the United States argues that enforcement
10 activities is something that only the EPA can conduct, but
11 nothing in the statute or the structure or the language of
12 the statute supports that argument. CERCLA expressly
13 provides that any party, whether it's a governmental party
14 or a private party, may undertake response action, and as
15 this Court noted in the Union Gas decision, EPA cannot
16 address all of the sites across the country.

17 Here, as a result, Congress expressly provided
18 for and it encouraged private parties to act. Here, Key
19 Tronic did precisely the same things that the EPA does
20 when it does enforcement activities. Key Tronic did an
21 environmental investigation, it prepared the cleanup plan,
22 it performed a search for potentially responsible parties,
23 it sued the Air Force, which was ultimately held liable,
24 and then the Air Force finally paid.

25 These are precisely the same steps that the EPA

1 takes when it undertakes enforcement activities.

2 QUESTION: Did Key Tronic itself arrange to have
3 any of the cleanup done?

4 MR. SCHNEIDER: Yes. Key -- there were two
5 phases of cleanup, Mr. Chief Justice. In the early
6 phases, before the EPA got involved, Key Tronic did the
7 environmental investigation, it provided bottled water, it
8 provided a new water main so that residents living near
9 the landfill would not be exposed to that.

10 They also did, as I understand it, some
11 excavation measures, but the real long-term cleanup
12 occurred once the -- after Key Tronic prepared the consent
13 decree which set forth the remedy in the case, that as the
14 long-term cleanup, and the long-term cleanup, and it's
15 going on today, is to pump the groundwater out of the
16 water -- pump the contamination out of the groundwater,
17 and to treat it.

18 That long-term cleanup occurred, as the district
19 court found, because Key Tronic acted to prepare the
20 consent decree. We hired the scientists who prepared the
21 work plan. Key Tronic hired the lawyers who wrote the
22 consent decree which set forth the cleanup plan that EPA
23 ultimately adopted, and which the Air Force belatedly
24 contributed to.

25 QUESTION: May I ask you a question? I'm just

1 trying to piece this statute together as in your brief.
2 9607 is the liability provision, and it describes in
3 subsection 4 any person, and so forth, shall be liable.
4 Now the "any person" we're referring to in this case is
5 the Air Force, right?

6 MR. SCHNEIDER: That's correct, Justice --

7 QUESTION: "Shall be liable," then down to (B),
8 "for any other necessary costs of response incurred by any
9 other person," and that's you.

10 MR. SCHNEIDER: That's correct.

11 QUESTION: But now, does the -- where does the
12 source of your action against the Air Force come from? Is
13 it in 9606?

14 MR. SCHNEIDER: No. Unfortunately, Congress --

15 QUESTION: Because I -- let me just get the
16 whole thought out so you can explain what my problem -- I
17 read 9607 as describing the liability that may be incurred
18 in actions authorized by 9606 -- it follows the next
19 one -- and I thought you said earlier that the private
20 cause of action under 9659 wasn't relevant here.

21 MR. SCHNEIDER: That is correct, Justice
22 Stevens.

23 QUESTION: So if it relates to 9606, why does it
24 authorize payments to you? That's what I --

25 MR. SCHNEIDER: Justice Stevens, it does not

1 relate to section 106. Section 106 allows the EPA to seek
2 injunctive relief. Section 107 is what gave the authority
3 to Key Tronic to recover its cost, and it gives --

4 QUESTION: But there's no provision in 9607
5 authorizing the cause of action by Key Tronic against the
6 Air Force, is there?

7 MR. SCHNEIDER: Justice Stevens, the only answer
8 I can get is, every court has considered this statute and
9 says that the authority to bring a private action comes
10 under section 107. It's a very in --

11 QUESTION: It's an implied cause of action we're
12 talking about.

13 MR. SCHNEIDER: Well, Congress -- every court
14 has held it's an express cause of action.

15 QUESTION: Well, I'm not saying that makes it
16 wrong. I'm just trying to understand how it fits into the
17 statutory --

18 MR. SCHNEIDER: Maybe I could take a step back.
19 The private -- if a party seeks to recover the cost it has
20 spent, the only mechanism it has, or the only mechanism at
21 issue in this case, is section 107, which applies to both
22 EPA and to private parties like Key Tronic.

23 Justice Stevens, you are correct, the words do
24 not appear in section 107(a), which would expressly
25 authorize that, but all of the lower courts have held that

1 private parties, when they seek to recover their cost
2 under section 107, that's their authority, and that
3 applies both to the Government, and it also applies to
4 private parties.

5 Section 106, which, Justice Stevens, you have
6 referred to, allows the EPA to seek injunctive relief, or
7 to --

8 QUESTION: Doesn't it also authorize action by
9 State agencies in some situations?

10 MR. SCHNEIDER: In the event that the EPA has
11 authorized the State agency to act, that's correct.

12 QUESTION: Basically, they're governmental
13 enforcement actions.

14 MR. SCHNEIDER: That's correct, Justice.

15 If there are no further questions, I would like
16 to reserve the remainder of my time for rebuttal.

17 QUESTION: Very well, Mr. Schneider.

18 Mr. Wallace, we'll hear from you.

19 ORAL ARGUMENT OF LAWRENCE G. WALLACE

20 ON BEHALF OF THE RESPONDENTS

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

23 We do not contest that there is an implied cause
24 of action under 9607 to recover contribution of costs.
25 And that was confirmed by Congress in adding a

1 contribution provision in the 1986 amendments in 9613, but
2 that does not itself provide the cause of action; it
3 provides guidelines for the cause of action.

4 And Key Tronic has been paid its costs of the
5 cleanup. The issue here is its claim for attorneys' fees,
6 not for other costs. And if I may just amend one other
7 factual point in petitioner's response to a question, we
8 do refer to a consent decree that Key Tronic entered into
9 at the bottom of page 3 and the top of page 4 in our
10 brief.

11 Now, they did not explicitly admit liability,
12 but they entered the consent decree which recounted
13 actions that would have made them liable under CERCLA and
14 actions of depositing hazardous wastes at the site, and
15 this is consistent also with a jury trial that was earlier
16 reached on the complaint of some neighbors that we refer
17 to in footnote 2 of our brief. So there has been some
18 adjudications with respect to liability.

19 Now, the -- in our view, the issue in this case
20 is controlled by the rule of this Court's decisions in
21 Alyeska and Runyon against McCrary, which hold that under
22 the American rule there has to be explicit authorization
23 for the recovery of attorneys' fees. And in Runyon
24 against McCrary in particular, there was an effort by the
25 plaintiffs to rely on what they argued was an implicit

1 authorization and a broadly granted -- a broadly worded
2 grant of remedial authority, and the Court said, no, it
3 has to be an explicit authorization for recovery of
4 attorneys' fees.

5 Petitioner's claim here is -- rests on a request
6 that the Court build an inference upon an inference from
7 the statutory language on which the petitioner relies, and
8 that does not meet the standard.

9 QUESTION: Well, Mr. Wallace, how is the
10 Government's desire to recover attorneys' fees any easier
11 to discern?

12 MR. WALLACE: There is an explicit reference to
13 legal costs incurred by the Government. Not -- that is in
14 section 104(b), and we quote it at the very bottom of page
15 13 and the top of page 14 of our brief. And it's the
16 interplay of sections, including this one, which is the
17 only one that the Government can rely on as explicitly
18 referring to legal costs.

19 QUESTION: Well, what about States and Indian
20 tribes, how does that leave their ability to recover
21 attorneys fields, in your view?

22 MR. WALLACE: Well, we think that they would
23 enjoy that -- the fees under the same provision because
24 they act only by delegation from us with respect to a
25 particular site. When EPA, which has delegated authority

1 from the President, turns over the lead responsibility at
2 a particular site to the local or --

3 QUESTION: It doesn't sound very explicit to me,
4 as you describe it, does it, for States and Indian tribes?

5 MR. WALLACE: It's not as ideal as we would wish
6 it but, of course, that is not the question at issue in
7 the case.

8 QUESTION: One might say it was building
9 inference upon inference.

10 (Laughter.)

11 MR. WALLACE: But at least -- at least there is
12 a reference to costs of attorneys explicit in the statute.

13 QUESTION: Well, but that's -- excuse me, but
14 that's not specifically what it says. It refers to costs
15 of legal and other studies.

16 MR. WALLACE: Yes.

17 QUESTION: I mean, to speak of a cost of a legal
18 study as being the way to recover attorneys' fees is a
19 very odd use of language. I mean, it's not only a
20 question of inference; it's a question of sort of
21 wrenching, isn't it?

22 MR. WALLACE: Well, I understand that this
23 language is not ideal as a starting point for our own
24 purposes. It was construed by the lower courts to
25 authorize EPA to recover attorneys' fees, and that was

1 really reconfirmed, in our view, in the SARA amendments
2 which added the words "enforcement activities." But the
3 question in the case is not EPA's right to recover; the
4 question is petitioner's right to recover.

5 QUESTION: Well, no, but if EPA is resting on a
6 thin reed and you knock out the other block you might rest
7 on, the next case might be an expensive one.

8 MR. WALLACE: Well, we have been sensitive to
9 that problem in the way we have briefed this case, I can
10 assure you, Mr. Justice.

11 (Laughter.)

12 MR. WALLACE: It has been the subject of much
13 discussion.

14 (Laughter.)

15 MR. WALLACE: Nonetheless, we can't responsibly
16 ask the Court to resolve that issue in this case, which
17 doesn't involve that question. The --

18 QUESTION: But may I ask you if the word "legal
19 studies," maybe that fits in more with the Tenth Circuit
20 kind of inbetween decision of this case; no litigation
21 fees, but other legal fees.

22 MR. WALLACE: Well, it certainly fits in well
23 with that, but we don't think it's limited to that because
24 it -- the statutory phrase doesn't end there. It says as
25 it may deem necessary, appropriate to -- and/or

1 appropriate to plan and direct response actions. And that
2 includes enforcement activities in our view, that could
3 include litigation as -- but it is not ideally drafted,
4 from our standpoint. Nonetheless, there has been a course
5 of judicial decision upholding EPA's and the Environment
6 Division's ability to recover these fees as part of its
7 enforcement activities, and we think Congress built upon
8 that in the SARA amendments, in adding that reference to
9 "enforcement activities."

10 But to get back to this case, petitioner has
11 to -- in order for its view to prevail, it has to have two
12 inferences -- not just one of the two, but both of them
13 drawn in petitioner's favor. And the first inference is
14 that enforcement activities standing alone, without the
15 support, such as it is, of this reference, at least, to
16 legal activities, would be a reference to attorneys' fees
17 explicit enough to meet the standard of Alyeska and
18 Runyon.

19 QUESTION: Well, if they don't include
20 attorneys' fees, what do they include when private parties
21 are -- just investigators and stenographers?

22 MR. WALLACE: Well, of course, our view is that
23 they don't include anything for a private party; that's
24 the second inference. But if there isn't agreement on
25 that, then we would think that it would perhaps be --

1 QUESTION: Yeah, but you can't -- you can't
2 really plausibly argue that costs of response do not
3 include enforcement activity. That's the only thing
4 that's clear in the text of the statute, in section 25.

5 MR. WALLACE: Of course. Of course.

6 QUESTION: It says response includes enforcement
7 activity.

8 MR. WALLACE: Well --

9 QUESTION: But you're disputing that.

10 MR. WALLACE: We don't dispute that. We think
11 that enforcement --

12 QUESTION: Well, then, if you don't dispute
13 that, what is it that enforcement activities includes,
14 other than attorneys' fees, when you're talking about
15 private litigation?

16 MR. WALLACE: The most direct things involved
17 are the studies and nonlitigation attorney time that would
18 have to be involved in arranging for the cleanup. You're
19 entering into contracts with the landfill companies and
20 others who --

21 QUESTION: You acknowledge that is covered in a
22 private action.

23 MR. WALLACE: Well, we don't think that
24 "enforcement activities" refers to that. We think
25 "enforcement activities" refers only to the Government.

1 But we do think that those are appropriate response costs
2 by a --

3 QUESTION: Private party.

4 MR. WALLACE: -- Private person undertaking the
5 cleanup activities. The line that we think is drawn --

6 QUESTION: Well, what about the argument that
7 enforcement activities would be redundant because the EPA
8 was already getting its -- those costs?

9 MR. WALLACE: But that was being contested in
10 litigation and this was a way of reconfirming that EPA
11 would have that authority.

12 QUESTION: And so, Mr. Wallace, you can't give
13 us an example of an enforcement activity applicable to a
14 private party that is not also covered as -- in the term
15 "response."

16 MR. WALLACE: Well, I can't, because we don't
17 think enforcement activities applies to activities by
18 private parties.

19 QUESTION: But, if it did, what -- you say it's
20 just an empty set.

21 MR. WALLACE: No. The -- I think it would be
22 redundant of what they could already recover as responses.
23 And it was put in, as the House report indicated -- we've
24 quoted it right in the middle of page 23 of our brief --
25 that this refers -- "This section also modifies the

1 definition of response action to include related
2 enforcement activities. The change will confirm the EPA's
3 authority to recover costs for enforcement actions taken
4 against responsible parties."

5 It was Government enforcement that Congress had
6 in mind in making this change --

7 QUESTION: May I ask, Mr. Wallace -- I didn't
8 mean to interrupt -- but the enforcement action, that's
9 you recovering Government counsel's attorneys' fees, is
10 that right?

11 MR. WALLACE: That is correct.

12 QUESTION: How do they compute those? How do
13 they compute Government counsel's attorneys' fees?

14 MR. WALLACE: Well --

15 QUESTION: Is that on an hourly basis as if
16 market value, like we do?

17 MR. WALLACE: The -- it's -- there's a
18 complicated accounting method that's used that attributes
19 time spent by the hourly wages and fringe benefits that
20 the attorneys get --

21 QUESTION: I see.

22 MR. WALLACE: -- On particular sites, plus what
23 would be regarded as an overhead factor, according to
24 proper accounting methods.

25 QUESTION: Is it unusual for the Government to

1 be authorized by statute to recover its attorneys' fees
2 against someone it's litigating with?

3 MR. WALLACE: Well, I can't think of any other
4 example in particular.

5 QUESTION: I can't either.

6 MR. WALLACE: But I do think that it is not
7 correct to think of this as a disparity between the
8 Government and private parties. What were --

9 QUESTION: It may not be if none of them can
10 recover their attorneys' fees.

11 (Laughter.)

12 MR. WALLACE: Well, that's true, Mr. Chief
13 Justice. But there -- there -- the litigation in this
14 area typically proceeds in stages. There is an initial
15 stage to accomplish the cleanup, and that is typically
16 brought not against all of the potentially responsible
17 parties; there can be scores or even hundreds of those,
18 many of which are relatively small factors. It's brought
19 against somebody who's a major factor, who can be depended
20 upon -- or maybe two or three who can be depended upon to
21 get the cleanup done, and there are certain time bars that
22 prevent other litigation from going forward until cleanups
23 are accomplished.

24 And then the second stage of litigation, which
25 is what we are talking about in these contribution

1 actions, is litigation in which these people who were
2 jointly and severally liable and who tend to be relatively
3 strong litigants and relatively well-to-do, can seek
4 contribution from a large number of other potentially
5 responsible parties who may be much smaller contributors
6 to the site.

7 And there tends to be a considerable disparity
8 of bargaining power between the litigants in these
9 contribution actions to begin with, because the ones who
10 are going to become the plaintiffs were selected because
11 of their ability clean up the site in the first place.
12 And that disparity in bargaining power can be considerably
13 exacerbated in some cases if there is also the potential
14 liability for attorneys' fees.

15 I'm not saying that Congress had this in mind
16 and made a conscious decision to bar recovery of
17 attorneys' fees in the contribution litigation, but I'm
18 pointing out that Congress was aware of these underlying
19 problems. And one of the less admired aspects of the
20 implementation of CERCLA, that the so-called transaction
21 costs -- which is a word that has become part of the
22 lexicon of environmental law, the costs of litigation and
23 of studies, the costs that are not directly involved in
24 the cleanup itself -- have been soaring. And --

25 QUESTION: Mr. Wallace, can you help me out? I

1 reveal my ignorance about the whole program, but is it the
2 fact -- you mentioned the deep-pocket person who's given
3 responsibility. Is it true that if you have -- say three
4 companies contributed to pollution of a particular site
5 and the very large company was only 75 percent responsible
6 for the pollution, can that large company be made to pay
7 100 percent of the costs and then seek contribution from
8 the others?

9 MR. WALLACE: So long as the pollution has
10 become mixed.

11 QUESTION: I see.

12 MR. WALLACE: And has not -- is not severable
13 within the site, and that they're jointly and severally
14 liable.

15 QUESTION: So then the costs that it has to
16 recover because it had to pay in the first place include
17 not only the physical costs of the actual engineering and
18 so forth, but also the costs that it had to pay to the
19 Government for its enforcement activities. That's part of
20 what it then seeks contribution for.

21 MR. WALLACE: It can get contribution for its
22 cleanup, but we're of the view that it cannot get
23 contribution for its attorney costs for either trying to
24 resist its liability to EPA or for trying to find out who
25 else were the contributors --

1 QUESTION: For bringing contribution actions.

2 MR. WALLACE: -- And getting the contribution.

3 Because those costs can soar a good deal, and can --

4 QUESTION: Maybe the total amount in dispute
5 would be significantly reduced if we followed the American
6 rule across the board?

7 MR. WALLACE: Perhaps so, but considerable
8 budgetary adjustments would have to be made in order for
9 Federal enforcement to be able to proceed.

10 QUESTION: Mr. Wallace, you acknowledged a bit
11 earlier that it's unusual, if not, indeed, unique, for the
12 Federal Government to be awarded its attorneys' fees. Is
13 it not also unusual and perhaps unique for the Government
14 to be able to recover its enforcement costs, apart from
15 attorneys' fees? Do you know of any other statute that
16 lets the Government get its --

17 MR. WALLACE: Well, there are fee statutes in
18 some agencies that require applicants for licenses to bear
19 what amounts to the Government's costs.

20 QUESTION: Enforcement costs? I mean --

21 MR. WALLACE: Well, they're not really
22 enforcement costs.

23 QUESTION: -- Enforcing violations of the law,
24 I'm talking about.

25 QUESTION: Well, your civil penalty statutes

1 often do this, yeah.

2 MR. WALLACE: I guess that would be true. We
3 haven't really given thought to analogies of that kind
4 because the case before the Court is not about the
5 Government's ability to recover.

6 QUESTION: No, but I'm trying to help you, Mr.
7 Wallace.

8 MR. WALLACE: Yes --

9 QUESTION: I will say, you know, just as well --
10 you may it is unusual to get attorneys' fees, but it's
11 also unusual to get enforcement costs. In for a penny, in
12 for a pound.

13 MR. WALLACE: It certainly is an unusual --

14 QUESTION: But you were referring to statutes
15 that have user fees.

16 MR. WALLACE: Yes, user fees. It certainly is
17 unusual, to get a little closer to home here -- and I
18 appreciate all of these thoughts, but to get a little
19 closer to home --

20 QUESTION: I don't often help you, Mr. Wallace.

21 (Laughter.)

22 MR. WALLACE: I should welcome it when it
23 occurs. It certainly is unusual for attorneys' fees to be
24 available in contribution actions. This is not the common
25 law rule, and as a matter of fact, the contribution

1 provision itself says that it will be governed -- that
2 contribution will be governed by Federal law, and the
3 Federal common law rule is the rule of Alyeska and of
4 Runyon against McCrary, that in the absence of explicit
5 authorization there should be no recovery of attorneys'
6 fees.

7 Now, I don't think that it is for the Court in
8 this case to resolve whether it would be more desirable or
9 less desirable for attorneys' fees recoveries to be
10 available in contribution actions, and I don't think that
11 Congress decided to bar the recovery of attorneys' fees.
12 What I do think is that the line that we see between
13 actions that are taken to remedy the pollution and assure
14 that a polluter -- rather than the public -- who is
15 jointly and severally liable will bear the cost -- the
16 line between that and reallocating costs among polluters
17 is a very rational line.

18 And it is rational in terms of considerations
19 the Congress was aware of in the course of considering
20 this legislation, and I want to just refer very briefly to
21 a couple of indications of that. Not because I say that
22 Congress explicitly resolved it, because -- but because I
23 think it shows the wisdom of applying the Alyeska rule
24 here, that Congress could have rationally not wanted to
25 proceed that far.

1 And one is in the Senate committee report which
2 accompanied the 1986 amendments, and the committee says
3 that responsible sites often involve dozens or even
4 hundreds of potentially responsible parties with differing
5 types and degrees of involvement with the release. While
6 the Government may sue all potentially responsibilities,
7 it need not sue all these parties; it may instead sue a
8 limited number of parties to secure a complete cleanup or
9 all costs of cleanup under the principle of joint and
10 several liability.

11 Generally the Government seeks to obtain
12 complete cleanup. In some instances where the Government
13 has sued major contributors of hazardous substances to a
14 site but not lessor contributors, the parties named by the
15 United States have, in turn, sued other potentially
16 responsible parties in the same judicial action. In
17 several cases this has resulted in massive and potentially
18 unmanageable litigation.

19 There is an amicus brief filed in our support in
20 this case by a group called Sand Springs Superfund PRP
21 Group, which claims to be put upon in this way, mostly
22 because of claims for attorneys' fees that are being made
23 against it. I can't vouch for the accuracy of what they
24 say, but it's an example of the kinds of complaints that
25 have been made.

1 Then on -- in supporting the conference report
2 on the floor of the Senate, Senator Simpson, who was a
3 member of the conference committee, pointed out to his
4 colleagues:

5 "There is not doubt that the immense transaction
6 costs generated under Superfund, meaning lawyers' fees and
7 the many technical and scientific studies required in
8 litigation, have come to symbolize the worst excesses of
9 the American legal system. Senator Domenici quoted
10 Dickens' Bleak House in describing it last year, and he
11 was right. We simply must work to have more societal
12 resources spent on necessary and effective cleanup of
13 Superfund sites and less on convoluted litigation which
14 merely extends any public health threat that exists from
15 these sites."

16 There are plausible reasons why Congress might
17 have wanted to draw the line that we think emerges on the
18 face of the statute, and reasons why there might have been
19 concern that settlements that might be encouraged were
20 attorneys' fees available in the contribution phase of the
21 litigation, might sometimes be in terrorem settlements
22 rather than something that would move the litigation along
23 in a fair and just manner.

24 In any event, when the provisions on which
25 petitioner relies are contrasted with the explicit

1 provisions made for the award of attorneys' fees -- and I
2 realize that these create some difficulties for us as
3 well, but not as much. And we've set forth the citizens'
4 suit provision on page 13 of our brief -- Justice Souter
5 was asking about it earlier -- where section 310(f) of
6 CERCLA provides that a court, quote, may award costs of
7 litigation, including reasonable attorney and expert
8 witness fees, to the prevailing or the substantially
9 prevailing party whenever the court deems such an award
10 appropriate. This is far different --

11 QUESTION: But Mr. Schneider said that that's
12 all you get under citizens -- it's the only -- there's
13 nothing -- no other category that this can be placed
14 under, as distinguished from the cleanup recovery.

15 MR. WALLACE: It still is a rather striking
16 difference in statutory drafting, and this provision was
17 added at the same time in the 1986 amendments that the
18 reference to enforcement activities was added, which
19 certainly makes no explicitly reference to attorneys'
20 fees. And then we refer later in the same paragraph to
21 section 110(c) of CERCLA, which also is an explicit
22 attorneys' fees provision.

23 So we think that there simply is not a
24 sufficiently clear -- there's too much ambiguity in
25 resting on the double inferences that petitioner asks the

1 Court to draw, to meet the standards of Alyeska and
2 Runyon. And as we've explained in the concluding pages of
3 our brief, the request for nonlitigation attorneys' fees
4 really should be evaluated under the same standard;
5 whether these were office costs devoted to securing a
6 remedy and actually doing the cleanup or whether they were
7 office costs devoted to reallocating the costs among
8 consumers.

9 If the Court has no further questions.

10 QUESTION: Thank you, Mr. Wallace.

11 Mr. Schneider, you have 5 minutes remaining.

12 REBUTTAL ARGUMENT OF MARK. W. SCHNEIDER

13 ON BEHALF OF THE PETITIONER

14 MR. SCHNEIDER: Thank you, Mr. Chief Justice.

15 The Government contrasts the citizens' suit
16 provision, which uses the word "attorneys' fees," with the
17 cost recovery provision, which uses the word "enforcement
18 activities." The reason Congress chose the word
19 "enforcement activities" in section 10125 is because it's
20 broader than attorneys' fees, to encompass the costs
21 of -- incurred in enforcing the statute which are not
22 incurred by attorneys; for example, private investigator
23 costs.

24 The Government draws a distinction between the
25 fees that might be awarded when a party is not liable

1 versus the fees that might be awarded when a party is
2 liable. There's no basis for that distinction in the
3 statute. Nothing in the language or the structure of the
4 statute supports that distinction.

5 And as a practical matter, that distinction does
6 not make sense in the Superfund context, because Superfund
7 imposes liability on virtually any party which is even
8 remotely associated with the contamination. In fact, in
9 many, if not most of the cases that EPA brings against --
10 that the United States brings against one or two private
11 parties, it's the United States Department of Defense
12 which is, in many cases, the largest polluter at that
13 particular site.

14 With respect to the issue of "enforcement
15 activities" meaning fees, I think that the Government has
16 acknowledged that the word "enforcement activities" in
17 section 10125 includes attorneys' fees. We agree.

18 The Government has contended that the language
19 in section 10125 confirmed EPA's right to recover fees.
20 We agree, but Congress put that language of "enforcement
21 activities" in section 10125, which was a section of
22 general application, not one that applied only to the
23 United States.

24 Thank you.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

1 Schneider.

2 The case is submitted.

3 (Whereupon, at 1:53 p.m., the case in the
4 above-entitled matter was submitted.)

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CERTIFICATION

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KEY TRONIC CORPORATION, Petitioner v. UNITED STATES, ET AL.

CASE NO.: 93-376

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BY *Ann Marie Federico*

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