OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DIGITAL EQUIPMENT CORPORATION, Petitioner v.

DESKTOP DIRECT, INC.

CASE NO: No. 93-405

PLACE: Washington, D.C.

DATE: Tuesday, February 22, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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DIGITAL EQUIPMENT CORPORATION :

Petitioner :

v. : No. 93-405

DESKTOP DIRECT, INC. :

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Washington, D.C.

Tuesday, February 22, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

JOHN G. ROBERTS, JR., ESQ., Washington, D.C.; on behalf of the Petitioner.

REX E. LEE, ESQ., Provo, Utah; on behalf of the Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 93-405, Digital Equipment Corporation v. Desktop Direct, Inc. Mr. Roberts.

ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE PETITIONER

MR. ROBERTS: Thank you, Mr. Chief Justice; may it please the Court:

This case is here from the United States Court of Appeals for the Tenth Circuit. That court held that petitioner Digital Equipment must await the end of trial before appealing the district court's denial of its claim that it had the right to avoid trial altogether pursuant to its settlement agreement with respondent Desktop Direct.

The district court had rescinded that settlement agreement and vacated Desktop Direct's dismissal after finding that a factfinder could conclude that Digital failed to disclose facts to Desktop that would cause Desktop not to accept the settlement offer.

The Tenth Circuit refused to hear Digital's appeal from that ruling under the collateral order doctrine because it determined that the issue of the enforceability of settlement agreements was not "important

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enough" to justify appeal.

QUESTION: Mr. Roberts, the district court order seemed to indicate that the district court thought there was a factfinding determination necessary on whether the settlement agreement should be set aside.

MR. ROBERTS: The district court order stated that he was granting the motion because a factfinder could determine that Digital failed to disclose facts.

QUESTION: And the appeal taken was on the theory that no factfinding could be allowed on that question?

MR. ROBERTS: Well, there are a number of grounds for appeal, the first being that that is the wrong standard. He threw out the settlement agreement, vacated the dismissal with prejudice because a factfinder could determine. That's plainly the wrong standard. At the very least, a factfinder should find fraud, and we think must find fraud under clear and convincing evidence. That was not done here, but there is a final decision on the validity of the settlement agreement. The settlement agreement has been thrown out. The motion to rescind it was granted, and as the Tenth Circuit found, that's all the district court is going to do on that issue.

QUESTION: Suppose the trial court had made findings on the factual issues, making a finding that the

Digital Corporation did know of the Desktop name, could the ruling in those findings then be the subject of a separate appeal?

MR. ROBERTS: Yes, Your Honor, because the issue on appeal is the validity of the settlement agreement. That is what gives us our right to avoid trial.

QUESTION: But that's not separable from the merits, that's right at the heart of the merits -- what the Digital Corporation knew and when they knew it.

MR. ROBERTS: No. The Tenth Circuit found that the issue on appeal was separable from the merits and it was correct, for this reason: the merits concern the validity of their claim that we violated their trademark rights. They filed that complaint, of course, before any settlement discussions took place. They presumably felt that all they needed to know was there at that point.

Now, the issue of the validity of the settlement agreement raises entirely different questions about what was said during negotiations, what was not said.

QUESTION: Well, suppose there were a finding that Digital knew at the time the agreement was negotiated and beforehand, and before it began using the Desktop name, that Desktop had a trademark interest in it. It seems to me that that is highly relevant to the substantive litigation.

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MR. ROBERTS: I think the most that can be said is that their allegations with respect to the settlement may be relevant on damages. That's the only thing that they allege at this point, but even there, it is, as the court has said in Mitchell v. Forsyth, conceptually distinct.

In Mitchell v. Forsyth, of course, there was complete overlap on the facts. The question was qualified immunity, and you needed to know what the allegations were before you could judge that, but the court said because in Mitchell you take as true the allegations and ask if that violated a substantive legal standard, that was conceptually distinct from whether or not the allegations were true. Same thing here.

QUESTION: Mr. Roberts, let me ask you a question about those first two criteria. You seem to present an agreement between the parties that meet the first two requirements, but this is a jurisdictional question, is it not?

MR. ROBERTS: Yes, Your Honor, it is.

QUESTION: So if we don't think that you did meet those requirements, it doesn't matter that you and your adversary agree that you did.

MR. ROBERTS: Correct.

QUESTION: And Justice O'Connor started to ask

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you about the -- a factfinder could find. Let me put it to you this way: suppose you lose here, and we say there is no immediate appeal. Are you foreclosed from going back to the lower court and saying, the district judge said only a trier could find -- a trier could find the other way, so we would like you now to determine that question finally, and if you determine it in our favor, the settlement will indeed stick. Are you foreclosed from making such an argument?

MR. ROBERTS: Yes, and let me be precise. We are foreclosed, as we understand the record and as I gather Desktop understands it as well, from arguing the validity of the settlement agreement. That has been decided, but -- and it is important to emphasize -- no one has found fraud. We are not foreclosed from arguing whether on damages or some other issue, that there was no fraud. The error in the district court's ruling is that he vacated the settlement agreement without making any findings with respect to fraud at all, so yes, we are foreclosed from arguing the validity of the settlement agreement, but not from arguing that there was no fraud.

QUESTION: Mr. Roberts, may we take the case a step further? Supposing on remand you lose, but then you appeal, and after -- you know, assume we don't agree with your present appeal, and after months of litigation you

ultimately prevail and have the court of appeals rule that the settlement agreement was indeed valid from the beginning. It therefore would follow, would it not, that they had breached the settlement agreement, and you would be entitled to damages for all that happened in the interim?

MR. ROBERTS: I'm not sure, Your Honor, for this reason. I don't know that there's a cause of action under Utah law or whatever other law would govern for that type of damages.

QUESTION: For breach of contract?

MR. ROBERTS: Well, there is a cause of action for breach of contract, but I'm not sure that --

QUESTION: And this is a contract, isn't it?

MR. ROBERTS: This is a contract, but this is what happened. They went to the district court and they said, rescind the contract. I don't think an action alleging that the contract is invalid is a breach of the contract. The district court did that. He threw out the contract, and then they went --

QUESTION: Yes, but we're assuming the court of appeals will reverse the district court. That's your position -- the district court was wrong.

MR. ROBERTS: Yes. I don't believe -- I don't -- I'm not certain, but I don't believe you can

maintain an action for breach of contract for filing a Federal lawsuit when the district court has said, you have the right to file this lawsuit.

QUESTION: But the district court has erroneously said you have the right to file this lawsuit.

MR. ROBERTS: Well, I understand that, but I still think --

QUESTION: If you have a right not to be sued, that's your whole --

QUESTION: It's strange to say that Utah doesn't recognize a breach of contract lawsuit.

MR. ROBERTS: There's no contractual obligation binding them at the time they reinstituted their litigation. That contract --

QUESTION: Do you have a -- where does your right not to be sued arise from?

MR. ROBERTS: Under the settlement agreement --

QUESTION: Yes --

MR. ROBERTS: -- by its plain terms.

QUESTION: -- and if that right has been breached, isn't compensation for that right adequate to redress any injury you have?

MR. ROBERTS: The breach would come from the filing and pursuit of the lawsuit. At the time they did that, the Federal court had said the contract is invalid.

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You have the right to go ahead and sue.

I don't think you can maintain an action for breach of contract after the contract had been thrown out, and that's one of the reasons that we are irreparably harmed by forcing us to go to trial, to wait until the end of trial to pursue our appeal.

In addition to the fact that any of the damages that would flow from that would certainly not be calculable, the damages to our commercial program, our venture, the losses we sustained there, are not sufficiently calculable to be recoverable even if there could be a breach of contract action.

QUESTION: I suppose, Mr. Roberts, that your right not to be sued was a right not to be sued on the underlying cause of action --

MR. ROBERTS: That's correct.

QUESTION: -- not a right not to be sued for rescission of what is claimed to be an invalid agreement.

MR. ROBERTS: Well, that's right, and as I --

QUESTION: Indeed, such an agreement not to sue you for fraud or for any other invalidity of an agreement is probably void as contrary to public policy, I would think, wouldn't it be?

MR. ROBERTS: Well, those are the hurdles to our recovery of any damages, that it is not a breach to

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rescind the contract, and once the contract is rescinded, you can't argue breach because there's no contract to breach.

Now, our case --

QUESTION: Mr. Roberts --

QUESTION: You may be arguing to the contrary later on in this proceeding.

(Laughter.)

MR. ROBERTS: It is --

QUESTION: Mr. Roberts, may I ask you just a narrow question? Is wilfulness an element both of the fraud claimed as a basis for the rescission as well as the damages claimed in the action on the merits?

MR. ROBERTS: Well, wilfulness I guess is an element of the fraud claim, but the damages claim --

QUESTION: So isn't that the end of the issue, so far as the second element under Cohen is concerned?

MR. ROBERTS: Not at all. We have a much stronger case on separability than the other cases in which this Court has found Cohen applicable. The Double Jeopardy Clause --

QUESTION: Well, I think your -- I don't want to be too picky, but I think you're saying, yes, on the face of it there is not a complete distinction between the issue upon which the rescission turns and the underlying

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cause of action, but you are now saying that this Court really has not insisted on that degree of separability, is that fair to say? Is that your argument?

MR. ROBERTS: I think not, Your Honor, in this sense. I do think there is a complete separation between the issues because the question of factual overlap is not the test to determine if the issues are separate or not.

In Mitchell, the question was qualified immunity.

QUESTION: In other words, a common element is not sufficient to defeat separability.

MR. ROBERTS: Absolutely not. It is not sufficient. If it were, the claim in Mitchell would not have been appealable, because obviously there's a common element there, and the Double Jeopardy cases would not be appealable, because there are common elements here.

QUESTION: How about claim preclusion? You mention Double Jeopardy on the criminal side, but isn't the closest analogy, since you have a civil case here, claim preclusion, and it was not my understanding that if you unsuccessfully plead claim preclusion that you have, under Cohen v. Beneficial, a right to immediately appeal the adverse ruling.

MR. ROBERTS: It's not our understanding, either. We don't think you do, and the reason is that the

claim preclusion test, it fails the second element of the Cohen test. There is overlap there.

There's not here, because on appeal our argument will be 1) the district court applied the wrong standard. Could someone find fraud is not a sufficient basis for vacating the settlement agreement, 2) even if, looking at the merits, there is no duty on our part to disclose material facts to our adversary during settlement negotiations. That's conceptually distinct, as Mitchell put it, from the merit of the allegations.

QUESTION: But isn't claim preclusion a right not to be sued on this claim, and isn't that the heart of your argument, that you have a right not to be sued, and that that's what claim preclusion is on the civil side? It is the analogue to Double Jeopardy on the criminal side, only there is no Cohen v. Beneficial right?

MR. ROBERTS: Our claim is that we have the right not to be sued. That's set forth expressly in the settlement agreement. That may well be the same argument in the claim preclusion cases, but in the claim preclusion cases there is -- the issues are not separate. In ours, they are.

QUESTION: Why aren't they? There's factual overlap, perhaps, but the issue is whether a court found -- against you. It's a simple, factual issue of whether a

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court previously found against you on this point. Whether rightly or wrongly doesn't matter. That's no overlap, it seems to me.

MR. ROBERTS: You need to examine the factual allegations and perhaps even --

QUESTION: You've just told us that common facts don't make the difference.

MR. ROBERTS: In the claim preclusion case, it is different because you need to examine it and perhaps even wait until you've determined exactly what the facts are to see exactly, precisely what the claim is or what the issue is that's allegedly precluded.

It's very different in our situation, where we are talking about a legal standard, a legal issue on appeal, as opposed to the merits of the factual allegations, and in fact as in Mitchell, our argument on the standard even accepts as true the factual allegations and says, even if that's true, do we have a duty during settlement negotiations to disclose facts to our adversary, and the answer we will argue, if we're afforded the opportunity on appeal, is no.

QUESTION: What about a right not to be sued because of a statute of limitations bar?

MR. ROBERTS: The statute of limitations does not confer a right to avoid trial. It is much more like

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the speedy trial right this Court considered in McDonald. It is the delay between the event and the trial that is the harm, and the holding of a trial does not increase that delay.

QUESTION: No, but once the delay has occurred, you have a right not to be sued, don't you?

MR. ROBERTS: Well --

QUESTION: Just as once your agreement has been signed you have a right not to be sued. I mean, a right not to be sued is a right not to be sued if --

MR. ROBERTS: And this is the way the court analyzes all of these questions. It focuses on the exact nature of the right. For example, in the speedy trial of a case.

QUESTION: Oh, I agree with that, but I think it does so to determine whether it's important enough, and you deny that that's the element. What is the element, if that's not it?

MR. ROBERTS: The element, as the courts pointed out -- in the Van Cauwenberghe case it said the critical question, in Mitchell it said the heart of the issue -- is this a right to avoid trial?

QUESTION: There's a certain amount of word play there, though, you know, and in the court's opinions it isn't all that easy to distinguish the various rights,

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some of which have gone one way and some the other.

MR. ROBERTS: It is not easy, and there is word play, but the manner in which word play must be avoided is to make every claim a right not to be tried. That's an easy example. If you have a defense, I didn't do it, if you didn't do it, then you have no right to be sued under it, but that's not the way the court has pursued the analysis.

It has asked, is there a right not to be tried.

QUESTION: Mr. Roberts, you just said the cases are not so completely neat and tidy, and you chose this route. You didn't try as an alternate -- not the exclusive, but the alternate, a 1292(b) certification. Why didn't you even try that as a fallback position?

MR. ROBERTS: Well, several reasons, Your Honor. First, it's not clear that it's available. 1292(b) is available for orders that may not be appealed under 1291. We think this may be appealed under 1291. Therefore, we do not have the right to go under 1292(b).

Second of all, at the --

QUESTION: Now, but sometimes lawyers say but if I'm wrong about that, then here's my backup position.

MR. ROBERTS: At the time the appeal was filed, the circuits were unanimous that in this situation you had a right of appeal under 1291. The Second, the Fifth, and

the Eleventh, the only published opinions, all said, this is a final decision under Cohen, you may pursue it, and therefore it's not at all inexplicable, as our friends on the other side point out, why we went this way.

Second of all, it's not even clear that we would have a right under 1292(b). It is available only under certain limited circumstances, and it's certainly not clear that the district court would think that those circumstances were met here. It's doubly discretionary. You need the discretion of the district court and the court of appeals before you pursue that route.

And finally, some courts have taken the position of holding it against a party if they assert an alternative basis, as you've suggested. There are cases where a court says, you must not have much confidence in your 1291 position, because you went ahead and sought certification under 1292(b).

When we filed this appeal, the law was, to the extent it had been decided, every circuit in published opinions said we had a right under 1291, and that's the route that we took.

Justice Scalia mentioned earlier that the issue of how important a right is or is not is one that -- well, in this case that Desktop argues is determinative. We think, even under that standard, our right is an important

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one. Settlements play a critical role in the administration of justice in the Federal system, and when we have an agreement that purports to resolve the litigation between the parties and precludes any further litigation, we ought to be very sure that it does not do that.

QUESTION: A firm final judgment rule is also important in the Federal system.

MR. ROBERTS: Yes, there are policies of judicial economy and efficiency that support the final judgment. We think that we promote those policies in this situation. When you have a settlement between the parties that resolves the merits and precludes litigation, it is in the interest of judicial efficiency and economy to make sure that that really does not do what it says before imposing on the parties and the courts, the system as a whole, the costs and burdens and expense of trial.

QUESTION: Mr. Roberts, you argue that there is no textual basis for imposing an importance test. What textual basis is there for the Cohn exception at all?

MR. ROBERTS: The two key words in section 1291, final decisions, and what this Court said in Cohen, and what it has said repeatedly in applying the collateral order doctrine, is we are interpreting that phrase. If you meet the various Cohen tests, then it is a final

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decision.

It is not a judicial exception to the final decision rule, it is an interpretation of the final decision rule.

QUESTION: Interpretation of the word final to mean not everything that's final --

MR. ROBERTS: No, it's --

QUESTION: -- and you consider that a textual basis.

MR. ROBERTS: It's an interpretation of final to say that there are some circumstances when there are not final judgments, but final decisions, as the statute specifies.

QUESTION: One narrowly final decision means that the district court has disassociated itself from the case. That is the ordinary meaning of it. The meaning in Cohen v. Beneficial is different. It's not that meaning.

MR. ROBERTS: Yes. In the general case you will have a final decision when there is a final judgment, and there is nothing further for the district court to do.

QUESTION: Mr. Roberts, you stated that you cannot ask for a 1292 appeal under 1292(b) if the order is appealable under 1291? Have we said that? Is that case law, or is it --

MR. ROBERTS: No. It's unclear. What 1292 says

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is that it's limited to those situations where you have interlocutory orders that aren't final decisions, and if that's --

QUESTION: Well, it says that when the district judge is making a civil -- in a civil action an order not otherwise appealable under this section, so that doesn't seem to me to be inconsistent with saying that you can ask for a 1292(b) order and still maintain your Cohen position under 1291.

MR. ROBERTS: Well, there are -- if it's a final decision under Cohen, of course, you don't need to put yourself at the mercy of the district courts to say it is certified.

QUESTION: Well, you indicated that it would be inconsistent to do that, and certainly the statute does not indicate that. The only qualification under 1292(b) is that it not be appealable under 1292(a).

MR. ROBERTS: 1292(a) --

QUESTION: And you're proceeding under 1291.

MR. ROBERTS: Proceeding under 1291 which gives us an appeal as of right. 1292(b) is doubly discretionary both with the district court and the court of appeals, so if you proceed in a situation where you say, if you allow us to appeal, we want to and we will, it seems to me inconsistent with the theory that under 1291 we have the

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right to appeal and here's our notice of appeal.

QUESTION: Well, but it's certainly not inconsistent with the statutory language or with any authority that you've cited.

MR. ROBERTS: Well, the authority of the cases, one of which we cite in our brief where the courts have held it against you if you're trying to proceed under 1291 that you tried under 1292.

It's not always the case that the courts allow alternative and inconsistent arguments without penalty.

To get back to the question of statutory authority, there have been a number of theories advanced, ways to limit the collateral order doctrine. The importance is one.

It is important to keep in mind what the court is about in all of these cases. It is construing a statute, a statute that has one criterion, and one criterion only, and that is finality. Nowhere in section 1291 are Federal courts given the authority to pick and choose which issues may be appealed and which may not --

QUESTION: But Cohen v. Beneficial is something made up by the courts, is it not? I mean, the statute says, final decision. You agree that final decision generally means the district court is finished, washes -- it's done. This case is over, it goes to the next stage.

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The courts in Cohen v. Beneficial gave that a different meaning, so you can't really attribute that to the legislature. Cohen v. Beneficial is a judicially created doctrine.

MR. ROBERTS: Cohen v. Beneficial is a statutory interpretation. The elements in Cohen all relate to finality. The first prong, has this been conclusively determined, obviously related to finality. The second prong, is it separate from the merits? Again, related to finality, because it will be decided in part even as the merits go on. And is it effectively unreviewable after trial, if it is, it is because it is in a sense final at that point.

The parts of the test that do not have anything to do with finality are the importance of the right, or even more so, whether or not it has an explicit statutory or constitutional basis.

QUESTION: Well, certainly the issue involved in Cohen, the cost bond, might well not qualify as important, if that were a test.

MR. ROBERTS: And in many others, the attachment rights at issue in the Swift case, a variety of others, might not seem important if courts were put in the position of deciding what is and isn't, and I have no idea --

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QUESTION: Well, how does the effective reviewability have to do with finality?

MR. ROBERTS: Because it will --

QUESTION: You mean that something that is effectively reviewable cannot be final? My goodness, we review final orders all the time.

MR. ROBERTS: The point -- what I meant by effectively unreviewable, Your Honor, is if we don't get review at this point, we will finally, once and for all, lose our right --

QUESTION: Oh, I see.

MR. ROBERTS: -- to avoid trial.

QUESTION: Well, that's a totally different meaning of finally. You mean, we will finally lose our --

MR. ROBERTS: It would be final for us. It's over and done with. If we are forced to go to trial --

QUESTION: Just as in Lauro, then finally -- and it was over and done with, they lost their right to be sued in one tribunal and in no other. That was their deal. We will -- we select this forum, and we exclude all others. They could never get back to that situation, once there was no interlocutory appeal of the rejection -- of the objection to the forum that was chosen.

MR. ROBERTS: And the distinction which was spelled out in Lauro Lines itself, and which applies in

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the other cases as well, is that it is not a complete right to avoid trial. That's the line that the court is drawing.

Here, we have a complete right to avoid trial. It's not simply trial here as opposed to somewhere else. It's not simply trial under some circumstances as opposed to others, as in Van Cauwenberghe.

QUESTION: As in the case of claim preclusion, we have a right not to have this matter litigated. It's been litigated.

MR. ROBERTS: It's not this prong of the Cohen test that the claim preclusion issue fails, it's the second prong, the separateness. I don't dispute that it may share all the attributes on this issue, the unreviewability issue, but it's the separateness issue where it falls short.

Now, the idea that the Court should pick and choose between different issues based on importance strikes me as extremely problematic. There are no standards to guide this Court's decision. It mixes the merits with jurisdiction.

If the Court thinks that qualified immunity is a very troubling or important issue, we'll hear the appeal.

QUESTION: Whereas there are standards to guide what is a complete right to avoid trial and what is not a

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complete right to avoid trial, so that a statute of limitations isn't, but this is. You consider there are standards for that.

MR. ROBERTS: What the Court said in Lauro Lines and the others is, you need to take a very close look at the nature of the right, and that's what the courts have done in the statutes of limitations.

QUESTION: It seems to me quite fictional, and that you are really discussing what is the crucial issue when you discuss importance, rather than deal with philosophical questions of what is a complete right to avoid suit and what isn't a complete right to avoid suit.

MR. ROBERTS: Well, I -- in response, Justice Scalia, I would just reiterate, importance is not something that's found anywhere in the statute. What the Court is about is interpreting the statute, and it is fundamentally inconsistent with the allocation of roles between the courts and the Congress to say that the courts are going to decide what issues may be appealed and what may not.

QUESTION: That's a good argument if you think that Cohen is to be found within the statute.

MR. ROBERTS: And I --

QUESTION: Which I don't.

MR. ROBERTS: And what the Court has said

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repeatedly is that it is. Look at Abney, look at Mitchell -- the other cases -- it doesn't say, here's this exception we've created, this case comes within it, so we allow appeal. It says, no, because of these reasons, this is a final decision under section 1291.

QUESTION: Well, if it's a complete answer to Justice Scalia to say that the courts have repeatedly found that the Cohen exception is appropriate, the courts have just as repeatedly said that importance is to be considered, so why don't we get to the merits of importance.

MR. ROBERTS: My point, Your Honor, was not that the courts have repeatedly said it, but that they have viewed it as an interpretation of section 1291. It's not simply saying it, but that is how they understand their role, and if that is the role of the courts, then I don't see how there can be an importance test, I don't see how there can be a limitation based on the source of the right, and getting to the merits of importance --

QUESTION: So your argument really isn't a stare decisis argument, then, on that, in response to Justice Scalia. You're not saying stare decisis to preserve Cohen, but no stare decisis to preserve importance.

MR. ROBERTS: No, what I'm saying is, importance -- there's no stare decisis force behind the

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importance test as understood by the court below, because this Court has never rejected a Cohen appeal because it thought that the right at issue was not important enough.

QUESTION: We've never had a trivial case.

MR. ROBERTS: Well, that may be, Your Honor, in 45 years, but --

QUESTION: Mr. Roberts, anything else on the 60(b) list that you would put in this category? That is, you have a judgment. This judgment has been reopened by the district court. Is there anything else where 60(b) would be used to reopen a judgment where you couldn't -- if you get an adverse ruling in the district court you could go under Cohen v. Beneficial?

MR. ROBERTS: No. No. The settlement agreement is the only additional category, because it's the only one that confers an absolute right to avoid trial.

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

QUESTION: Very well, Mr. Roberts. Mr. Lee, we'll hear from you.

ORAL ARGUMENT OF REX E. LEE

ON BEHALF OF THE RESPONDENT

MR. LEE: The starting point for analysis is, of course, the language of the statute, and in this case it is plain. The courts of appeals had jurisdiction of appeals from all final decisions of the district courts.

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Because the collateral order rule is an exception, and it is, the Court has said that many times, to this clear congressional directive which on its face recognizes no exceptions, this Court has very carefully and consistently clarified that as an exception it is to be narrowly construed, and it applies only to a small class of cases.

QUESTION: Well, if you're going to say it's an exception, you're saying, then, that final judgment and final decision are identical terms.

MR. LEE: That is correct, and the Court has so said on a number of occasions, including the principal case that lays down the test, or at least it so implies -- Coopers & Lybrand v. Livesay.

QUESTION: How about Cohen? Cohen certainly didn't say that.

MR. LEE: Cohen didn't, but there was an earlier case, Cobbledick, that said -- Cohen did not. I think the best statement that decision equals judgment is found in the Coopers & Lybrand case.

For three separate reasons, any one of which is independently sufficient in the sense that if the Court agrees with us on any one of the three then the judgment of the Tenth Circuit should be affirmed, this case does not fall within that small class, and the three reasons

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are, first of all, it does not satisfy the Midland Asphalt requirement, which requires a distinction for purpose of determining the right to avoid trial between public rights on the one hand and private on the other. Second, it fails the importance test, and third, it is effectively reviewable on appeal.

Two preliminary observations with regard to these three points. The first is that they are separate in the sense that if the Court agrees with us on any one of the three, then we win the case, but there are interrelationships and overlaps among the three.

With regard to the Midland Asphalt requirement, the petitioner's whole case rests on its contention that it has been deprived of a right not to go to trial, but there has been no such deprivation, as that right has been defined by this Court.

Midland Asphalt states unequivocally that a right not to be tried in the sense relevant to Cohen rests upon an explicit statutory or constitutional guarantee that trial will not occur.

The petitioner's claim here finds its source neither in the Constitution nor in statutory law, so that faced with this dilemma, the petitioner takes the only position that it possibly can take, which is that the Court didn't know what to say, or the Court made a mistake

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in Midland Asphalt, and they rely on Mitchell v. Forsyth, contending that there was no explicit constitutional or statutory guarantee in Mitchell v. Forsyth. In our view, that contention is 180 degrees wrong.

The Court found that the right at issue in Mitchell, which was the qualified immunity of the Attorney General of the United States, was based on separation of powers. Now, those three words -- separation of powers -- are nowhere to be found in the Constitution, but the principle of separation of powers is the structural cornerstone, mainstay of the Constitution itself.

The real distinction that is drawn in Midland Asphalt, I submit, is a distinction between those rights that rise to the level of what is contained, and clearly contained in the Constitution, or a statute on the one hand, and private expectations on the other.

The separation of powers which is the central doctrine that links all of the first three articles in the Constitution qualifies the private expectations contained in this individual contract --

QUESTION: Well, Mr. Lee, do you think that Congress couldn't change the result on the merits in Mitchell?

MR. LEE: Of course they could.

QUESTION: Well then, it's not a constitutional

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doctrine.

MR. LEE: But, as long as Congress has not changed the substantive rule, then having Midland Asphalt, which ties the nature of the right to avoid trial back to something that is rooted in the Constitution, in the absence of congressional modification of the rule itself, the rule remains the same, and that I --

QUESTION: But by definition, if Congress can change it, the rule is not constitutional.

MR. LEE: Well, Congress can't change separation of powers.

QUESTION: It can't, but you said a moment ago Congress could change the result in Mitchell.

MR. LEE: Oh, excuse me, I'm sorry. I misheard, Mr. Chief Justice. Of course Congress couldn't change the result in Mitchell. Congress could change the re -- Congress could change the Cohen doctrine. I misheard. I apologize.

QUESTION: You say Congress could not change qualified immunity of the Attorney General.

MR. LEE: Of course not. Of course not.

QUESTION: I'm surprised to hear you say that.

MR. LEE: Congress could not change -- no, I don't think so, because the Court makes it quite clear that it is based on separation of powers, but even if

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Congress could change it, you would still have -- it would still meet the Midland Asphalt test, which of course is the relevant issue here, which would be a statutory basis.

QUESTION: Of course, there are some dispositions, such as whether the President has particular powers, which we would find to be present in the Constitution absent legislation, but which we would find that legislation can nonetheless change, and it's conceivable that immunity is one of those things.

MR. LEE: I agree, and I think that is one of the premises that underlies Midland Asphalt.

QUESTION: To say that it comes from the Constitution is only necessarily to say that absent a statute to the contrary, we think that the disposition, given the Constitution, is such-and-such --

MR. LEE: That is precisely --

QUESTION: -- but that doesn't necessarily say you couldn't change it by a statute.

MR. LEE: Yes, and that is precisely our point, that in order to qualify as a right not to go to trial, it has to rise to a certain dignity, and that dignity is emphasized, or that dignity is, according to the Court's unanimous opinion in Midland, which was repeated just 2 months later in Lauro Lines, something that rises to the level of a statute or the Constitution.

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QUESTION: There is an important distinction, Justice Stevens, in answer to your question about breach of contract, between constitutional rights and statutory rights on the one hand not to go to trial, and those that derive from breach of contract.

Typically, in order to vindicate statutorily created or constitutionally created rights not to go to trial, the only way that can be done is to stop the trial, whereas in the case of a private contract, there is an additional remedy, and it's the same remedy that is available in any contract case, and that is damages for breach of contract which can be reviewed after the case finally goes to final judgment, as 1291 says that it should.

We fully recognize that, and I expect fully to hear those words played back to me at a later point in time in a Utah court -- in the Utah district court, but that's our position on this point of law.

QUESTION: Mr. Lee, would you explain your position on the first two Cohen standards? I take it that you agree with Mr. Roberts that those two standards are met, and I was -- I didn't understand why you agreed --

MR. ROBERTS: At least on the second.

QUESTION: The first one, that it conclusively determined that the --

MR. ROBERTS: This issue.

QUESTION: -- settlement is out.

MR. ROBERTS: This issue. Not the case, not the decision, but this issue, and it does conclusively determine the issue of --

QUESTION: Even though the district court put it in terms, as Justice O'Connor pointed out, of could find that?

MR. ROBERTS: Either way, I think this case is not appealable, but the way I have worked that one out for myself, Justice Ginsburg, is the following.

The Tenth Circuit is absolutely right that the district court's opinion on this matter is somewhat cryptic, but the Tenth Circuit went on to conclude, and I think absolutely correctly, that the court nevertheless did find fraud, because in the Tenth Circuit's language, it rescinded the agreement, and I think that for purposes of this Court's work, which has to decide the important legal issues in this case, the most efficient thing for you to do is to simply accept the district court's -- excuse me, the court of appeals characterization as to what the district court really did, but in either event, that issue should not be appealable.

Now, with regard to the --

QUESTION: May I just interrupt you here for a

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second?

MR. LEE: Sure.

QUESTION: Do you agree with Mr. Roberts that wilfulness is a common element both of the fraud claim on which the rescission is based as well as the cause of action?

MR. LEE: I surely do not, Justice Souter, and I have to confess that that separability argument did not make it into the final draft of this brief as a fourth argument, but I will say that I think it would be a perfectly legitimate ground, alternative ground, on which the Court could affirm the Tenth Circuit.

The only reason it isn't in here is because of the tactical judgment that the other three arguments were so strong that we wanted to include those and those only.

Turning to the importance issue, I just want to make this very, very clear. I agree with Justice Scalia, it is the issue in this case, and it overlaps both of the other two.

Now, whether -- whether the Cohen exception is an interpretation of the word final, as the Court has said on a few occasions, or whether it is an exception to section 1291, as the Court has said on many more occasions, that importance language is not something that the Court has read into 1291.

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Mr. Roberts is absolutely right that importance does not appear in the language of 1291, but where it does appear is in the Cohen opinion, and has been repeated 15 times over the intervening period from 1949 to 1994, and as a consequence, it is one of the mainstays. It is one of the requirements.

Now, Mr. Roberts is absolutely right that it has never been the deciding factor. That is, it has never been the sole deciding factor, but two facts in that respect: the one is that it has been repeated 16 times, and the second is, I suspect -- well, I won't suspect anything.

Justice Scalia reminded us in his separate concurrence in Lauro Lines that it's not something to be forgotten, and while Mr. Roberts has pointed out quite correctly that that was only a concurrence, no member of the majority objected to it, and even more significantly --

QUESTION: Is that the test of the validity of a concurrence, that no member of the majority objects to it?

MR. LEE: Even more significant is the fact that it was cited with approval by the majority in the Court's most recent opinion, which is Puerto Rico Sewer & Aqueduct.

QUESTION: May I just go back a second to the

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Cohen opinion itself. You say that the word important there is used, but it only says, it's too important to be denied review altogether. That's the only significance of importance there.

MR. LEE: And this one can be reviewed. This one can be reviewed on final appeal, just as 1291 says, and I'll talk about that more in just a moment.

If private expectations arising from --

QUESTION: Then you would have -- you would say, I take it, if the language is too important to be denied review altogether, if that's the language from Cohen, and you say it is ultimately capable of being reviewed, you could concede the importance of this and still say that it's not being denied review altogether.

MR. LEE: Yes, but I think the clear thrust of all of those -- of Cohen, taken together with all of the other subsequent cases that have interpreted this importance review, particularly the most recent cases, the ones that have come down in about the past 5 years, I certainly would not be as presumptuous as to tell this Court what their opinions really mean, but I will tell you that as I read them, importance is still there.

QUESTION: Well, if you read these recent opinions, it seems to me you can go further than that and say that the collateral order doctrine is a very, very

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narrow one, and we will be very loth to extend it to anything it doesn't already cover.

MR. LEE: Oh, that is correct. That is clearly correct, and that, of course, is our principal position.

QUESTION: I took the language, too important to be completely denied review, to be a reference to one of the Cohen conditions. That is to say, is it effectively -- you don't even debate about the rest of it, unless you've determined that it's effectively nonreviewable, unless you review it now. That's one of the requirements --

MR. LEE: Oh, I think that's right.

QUESTION: -- okay, but even given that, it's not enough. It has to be too important to be denied review altogether.

MR. LEE: I could not --

QUESTION: There are some things, impliedly, that are not so important that they can't be denied review altogether.

MR. LEE: And that's why we advance this as a separate issue. It's not the only ground on which we win, but if private expectations now make the grade, then forget about what the Court has been saying over these 45 years in 16 different opinions about the importance of importance.

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Just -- excuse me.

QUESTION: I was just laughing at your statement, the importance of importance.

MR. LEE: It's a pretty good line.

(Laughter.)

QUESTION: The importance of being important.

MR. LEE: That's right.

Briefly, the petitioner's contention that his claim satisfies the importance requirement because of the need to honor settlement agreements is completely beside the point.

We agree that settlement agreements are in the public interest, but no one has ever suggested that fraud is in the public interest, and once again I will simply refer back to what I said earlier, Justice Ginsburg, that though there is some dispute as to what the district court found, I think the most efficient thing to do is simply to adopt what the court of appeals said in that respect.

But even if you assume, for purposes of argument, that the district court did not find fraud, and that the review the petitioner seeks here is a review of the standard by which the court determined that rescission was proper, that legal issue involves nothing more than Utah State law dealing with matters of contract and evidence. It is plainly not one that warrants

interlocutory appeal, if the importance requirement means anything at all.

Now, finally, even if the Court were now to conclude that it did not know what it was talking about when it drew a distinction between public and private rights in Midland Asphalt, and even if the importance requirement is now to be eliminated because we now know what we have not known for 45 years -- that it involves inquiries inappropriate for courts -- piecemeal appeal would still be inappropriate in this case, and the reason is that the petitioner's claim is effectively reviewable after trial, because the essence of the petitioner's claimed right need not be characterized, and therefore under this Court's decisions in Van Cauwenberghe and Midland Asphalt should not be characterized as involving a right not to go to trial.

The petitioner's entire case depends on this Court's acceptance of its premise that the essence of the right it claims is the right not to stand trial, but the premise itself fails. First, as already discussed, the right not to go to trial in the sense relevant to Cohen must be rooted in the Constitution or in statutory law.

Second, under the standards set by this Court in Van Cauwenberghe and Midland Asphalt, the essence of the claim here is something other than a right not to stand

trial.

The Court pointed out in Van Cauwenberghe that in some sense any litigant who has a meritorious pretrial basis for dismissal has a right not to go to trial, and that is true across a broad range of possible defenses. If the case is dismissed on statute of limitations grounds or on personal jurisdictional grounds, there will be no trial, and it was for this reason that the Court cautioned in Midland Asphalt that we must not play word games in this area with what is really the essence of the right not to go to trial.

We submit that -- oh, we submit that where you have an option between two characterizations, two interpretations, one of which will increase the number of interlocutory appeals contrary to the plain language of section 1291, and the other of which will control the number of those interlocutory appeals, that under Van Cauwenberghe and Midland the better approach clearly is to limit rather than to increase --

QUESTION: Mr. Roberts says there's nothing else like settlement, that settlement is a class by itself. There's nothing else on the 60(b) list, I take it nothing else on the 8(c) affirmative defense list that would qualify.

MR. LEE: Perhaps nothing else on the 60(b)

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list, but I really see no difference between this and the statute of limitations. If I have my case dismissed because the statute of limitations is run, there's going to be no trial, and similarly, as in Van Cauwenberghe, if service of personal jurisdiction is improper, there's going to be no trial.

Moreover, and this is an even more important point, when you have these two alternative interpretations, which one of them do you pick. As a matter of acceptable usage of the English language, this agreement could be interpreted, just as Mr. Roberts interprets it, as conferring a right not to go forward with the trial.

But there are three other options that are equally acceptable as a matter of appropriate English language, one is that what they really wanted was a bottom line decision as to how much money they were going to have to pay. They wanted a limitation on their damages. Second is that they wanted the lawsuit settled, and behind them, and the third is, they wanted the use of the trademark.

Now, when you have that kind of a choice between picking -- between characterizations that will increase interlocutory appeals and those that will control them, Van Cauwenberghe very clearly said which of those choices

we should make, and that language is as follows:

Because of the important interests furthered by the final judgment rule, and the ease -- the ease with which certain pretrial claims for dismissal may be alleged to entail the right not to stand trial, we should examine the nature of the right asserted with special care.

Now, if you apply that special care test to the facts of this case, I submit common sense tells you that the essence of this claim, even without the Van Cauwenberghe tilt, tells you that the essence of the claim was not the right not to stand trial.

We're dealing here with a huge corporation, and their lawyers and their employees are in court every day. It just defies common sense that what they really wanted was to avoid one more courtroom in the district of Utah.

I submit that what common sense tells us is that what they really wanted was the bottom line determination as to how much money they were going to own -- they were going to owe, get the obligation of the lawsuit out of the way, and acquire the right to the trademark.

The petitioner's policy argument that we need to be concerned about crowding the district court documents, or dockets, fails for several reasons. First and most important, policy arguments about how the crowded district and court of appeals dockets should be adjusted should be

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left to that branch of Government that has been saying ever since 1789 that appeals from district court decisions should only be from final judgments.

Second --

QUESTION: Before you go on and get too far away from your last point -- that is, the characterization --

MR. LEE: Right.

QUESTION: -- of this agreement, if we decide for you on the basis of that argument, all we really will have achieved is that all settlement agreements in the future will say, the purpose of this settlement agreement is to ensure that we don't have to be sued.

MR. LEE: In the event that --

QUESTION: They could certainly write it that way, right?

MR. LEE: That is true, if they were prescient enough, Justice Scalia --

QUESTION: Yes.

MR. LEE: -- to know that it was later -- the fraud issue would later arise. I'll take it on that ground. You may want to write it on a brighter ground, or on a broader ground.

The second reason that the policy argument concerning congestion is beside the point is that it proves too much. If it is really true, as it is not, as

I'll show in just a moment, that the real problem with congestion in our courts is in the district courts rather than in the appellate courts, then what we ought to do is repeal section 1291 altogether, and that judgment, again, ought to be made by Congress.

Finally, the argument is factually flawed. As set forth in our brief, the conclusion -- the focus of the Federal Court Study Committee when it did its work was on the congestion -- was on the problem of congestion in the appellate courts rather than in the district courts, and in any event, to whatever extent those things need to be balanced, it should be done by Congress.

QUESTION: If the district court found the court didn't fraud didn't infect the settlement, that would be the end of it. The settlement would hold. So it's only if the district court finds --

You said that you didn't make the separateness argument because you thought your other arguments were stronger, but that is an argument that this Court could look into because this is a jurisdictional question.

MR. LEE: Absolutely.

QUESTION: So what -- Mr. Roberts insists that the merits are not bound up with this question, and can you tell us as concisely as you can why you think that this appeal fails the separateness test as well?

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MR. LEE: Well, they both involve fraud, both the claim on the merits and also the setting aside of the settlement agreement, and many of those fraudulent issues will be the same. There is not a complete overlap, and as I say, it was solely a tactical judgment, and I would be delighted if you overruled my tactical judgment and ruled in our favor on that ground.

With regard, very briefly, to the -- the petitioner completely misunderstands our argument with respect to 1292(b). Whether they did or did not avail themselves of 1292(b) is in our view irrelevant. That doesn't matter at all to the outcome of this case.

The only thing we are saying is that, as the Chief Justice mentioned a moment ago, the Court has said that this is, whether you call it an interpretation of the word final, or an exception to the Cohen rule of law, has made very clear it is to be very narrowly construed.

On occasion it has used the term, utmost strictness, and our only point with respect to 1292(b) is that that is another reason to continue with that strict approach, because in the event you do have some truly meritorious cases that really do need to be appealed by breaking up the trial right in the middle of it, the safety valve, there is another safety valve applicable to 1292(b).

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That does not say that you overrule Cohen. All it says is that the momentum that I see building in recent years toward a narrow construction of the Cohen rule should continue.

One final observation. As I count them up, in any collateral order case, any one, there are at least four requirements which this Court -- by which this Court has controlled access to interlocutory appeal. They are the three that are stated by Coopers & Lybrand v. Livesay, except that the second one, Justice Ginsburg, is really two. It's the separateness, and importance, so you really have those four.

But in a case involving an asserted right to avoid trial, you have two more, because of the Midland Asphalt rule and because of this characterization problem that we've been talking about. So at a maximum, six hurdles that you have to get over, six controls -- six control points by which this Court can limit the number of interlocutory appeals.

The only way that the petitioner can win this case is for the Court to say that three of those six no longer count, and I submit that to do so would be squarely inconsistent with what this Court cautioned in Firestone Tire & Rubber when it said that such a movement would, and I quote from the Court, transform the limited exception

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carved out in Cohen into a license for broad disregard for the finality rule imposed by Congress in section 1291.

Mr. Chief Justice, unless the Court has questions, I've nothing further.

QUESTION: Thank you, Mr. Lee.

Mr. Roberts, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE PETITIONER

MR. ROBERTS: Thank you, Your Honor. First, to begin with fraud, the court of appeals did not find fraud. Its discussion of that issue is at page 4(a) of the petition appendix. It's one paragraph. It does not find fraud. That seems to be a key element in the respondent's case. The fact of the matter is, no court -- district court, court of appeals -- has found that we were guilty of fraud.

On the question of our --

QUESTION: What was the basis on which the settlement agreement was set aside?

MR. ROBERTS: The erroneous district court standard that it could set it aside if it believed that a factfinder could find fraud. He thought that was the standard. That's what his order says at petition appendix 13(a). That's what we are trying to get to the Tenth Circuit and appeal on.

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QUESTION: So its decision was fraud related, even if it didn't find fraud. Its decision to set aside the settlement was fraud related.

MR. ROBERTS: Well, I'm not sure I even know what fraud-related means. He said --

QUESTION: It said that a factfinder could find fraud.

MR. ROBERTS: Yes. That's --

QUESTION: So its decision is related to the notion of fraud.

MR. ROBERTS: Yes, and our issue before the Tenth Circuit will be the purely legal one: is that the correct standard? Do you throw out a settlement agreement if a factfinder could find fraud? The answer to that to me seems clear.

On the question of, are we being denied our right to review altogether, we are. Our right is the right to avoid trial. We will lose that right altogether if we have to go to trial.

Now, is it true that that right secures other rights in interest? Of course, but that is true in every case under Cohen. The Double Jeopardy defendant has an interest in avoiding trial. If he pursues that interest, it also protects the interest in not being found guilty. That's not a distinguishing factor in this case at all.

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Is Cohen an interpretation of 1291, or a judicial exception to the rules of jurisdiction created by Congress? It's the former. I'm not aware of any authority that this Court has to create exceptions to the jurisdictional rules that Congress creates, and even though the term, final decisions, is subject to interpretation, it doesn't mean that all bets are off and the Court can say, we're going to allow an appeal of issues that we think are important.

Think of how that would look in the different circuits. Different circuits will have very different views of what's important. The issues in securities cases may seem important to the Second Circuit. Issues in mining cases may seem important to the Tenth Circuit, and this Court would have to umpire all of those decisions.

The word importance does appear, my brother counted, 15 or 16 times. Never has that word been used to support an analysis such as that engaged in by the Tenth Circuit below -- not once.

Finally, on the statute of limitations cases, the distinction again is set forth in those cases. They are not a right not to be tried, they're a right to be tried within a certain period.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you,

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Mr. Roberts. The case is submitted.

(Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.)

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DIGITAL EQUIPMENT CORPORATION, Petitioner v. DESKTOP DIRECT, INC. No. 93-405

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

BY Ann Marie Federico

(REPORTER)