

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: HUGHES AIRCRAFT COMPANY, Petitioner v. UNITED  
STATES, EX REL. WILLIAM J. SCHUMER

CASE NO: 95-1340

PLACE: Washington, D.C.

DATE: Tuesday, February 25, 1997

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Supreme Court U.S.

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   HUGHES AIRCRAFT COMPANY,                   :

4                   Petitioner                   :

5           v.                                   :   No. 95-1340

6   UNITED STATES, EX REL. WILLIAM :

7   J. SCHUMER                               :

8   - - - - -X

9                                   Washington, D.C.

10                                  Tuesday, February 25, 1997

11           The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   10:03 a.m.

14   APPEARANCES:

15   KENNETH W. STARR, ESQ., Washington, D.C.; on behalf of  
16   the Petitioner.

17   LAURENCE GOLD, ESQ., Washington, D.C.; on behalf of the  
18   Respondent.

19   SETH P. WAXMAN, ESQ., Deputy Solicitor General, Department  
20   of Justice, Washington, D.C.; on behalf of the  
21   United States, as amicus curiae, supporting the  
22   Respondent.

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1 PROCEEDINGS

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 95-1340, Hughes Aircraft Company v. United  
5 States, on the relation of William J. Schumer.

6 Mr. Starr.

7 ORAL ARGUMENT OF KENNETH W. STARR

8 ON BEHALF OF THE PETITIONER

9 MR. STARR: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 This case brings before the Court three issues  
12 under the False Claims Act that represents the Court's  
13 first occasion to address some of the myriad issues which  
14 have arisen under the 1986 amendments to that act, and  
15 beyond, it is this Court's first qui tam case since World  
16 War II.

17 Two of the issues, the meaning of the public  
18 disclosure provision of the 1986 amendments and the  
19 meaning of the pivotal bedrock statutory term, false  
20 claim, are of enduring and high practical significance to  
21 the law.

22 The threshold issue in the case is  
23 retroactivity, addressed, of course, in terms of first  
24 principles by this Court in Landgraf. If the Court  
25 pleases, I will speak to the retroactivity issue before



1 turning to the other two questions, which are looming  
2 large nationwide in Federal court litigation.

3 As to retroactivity, although issues of  
4 retroactivity and, indeed, its very meaning are not  
5 without difficulty, we believe that this case fits well  
6 within the Landgraf analysis.

7 In particular, the public disclosure provision  
8 of the 1986 amendments did something very specific. It  
9 eliminated a defense, a very basic defense, namely the  
10 defense of Government knowledge. That is, at the time of  
11 the conduct in question, Hughes' accounting practices  
12 under a variety of Government contracts, the fact that the  
13 Government had knowledge of the information or the  
14 allegations would constitute a complete bar to Mr.  
15 Schumer's lawsuit.

16 The 1986 amendments wipe this out, thereby  
17 expanding the circumstances under which a Government  
18 contractor could face liability.

19 QUESTION: Mr. Starr --

20 QUESTION: Do they wipe it out as to everyone,  
21 or do they wipe it out as to suit by the Government?

22 MR. STARR: Well, Government knowledge would  
23 not, of course, be a bar with respect to the Government.  
24 The Government can, in fact, bring a False Claims Act --

25 QUESTION: So in fact he's liable. Both then

1 and now he was liable for the same conduct, regardless of  
2 the Government's knowledge. I think the argument made by  
3 the other side is that all the change does is to say in  
4 the future we're going to let private people bring that  
5 suit as well as the Government, right?

6 MR. STARR: Your Honor, if I may, it seems to me  
7 that under the Landgraf analysis, the fact that you are  
8 permitting private parties theretofore barred to bring the  
9 action is indeed an additional burden using the judgmental  
10 process that this Court in Landgraf said is --

11 QUESTION: Mr. Starr, the conduct that can be  
12 charged is the same, but in one case you have the  
13 Government as a prosecutor. Now you have added a private  
14 prosecutor.

15 How does that differ from a U.S. Attorney's  
16 Office that has no strike force at the time a crime is  
17 committed and then beefs up with a -- just a tremendous  
18 high-powered crew? Can the defendant say, well, it was a  
19 thin prosecutor's office when I did it, and therefore you  
20 can't retroactively set the strike force after me?

21 MR. STARR: Justice Ginsburg, we believe the key  
22 distinction is the fact that there is an expansion in your  
23 hypothetical of the public service, which is quite  
24 decidedly different, in our view, than empowering private  
25 individuals who do not take the oath of office and who do

1 not operate, as this Court has noted in case after case,  
2 with the same sort of strictures that a public actor, a  
3 public official acts under.

4 It's altogether different if you're in fact  
5 facing the United States Government, including a beefed-  
6 up United States Government, as opposed to a private  
7 relator who is motivated by an entirely different set of  
8 motivations.

9 This Court noticed -- noted that in its 1943  
10 opinion, decision in *Marcus v. Hess*. There may be issues  
11 or motivations of greed, or an effort to seek vengeance  
12 and retribution with respect to a particular *qui tam*  
13 action.

14 Those are inadmissible qualities of an orderly  
15 public prosecution function, and there are any number of  
16 safeguards in place to assure that the public prosecution  
17 function that you identified is in fact carried out within  
18 the context of a culture of regulations and procedures  
19 and, indeed, those procedures are very important. It was  
20 Justice Frankfurter who reminded us that the history of  
21 liberty is in no small part the history of procedure.

22 QUESTION: Mr. Starr, are you then saying that  
23 if the Government agency -- let's say there's an  
24 antidiscrimination law that's put in the charge of a  
25 Government agency, and then Congress decides to add on to

1 that a private right of action because the agency isn't  
2 well-enough staffed. The private actors who are given a  
3 private right, they cannot reach any conduct that occurred  
4 before the private right was created?

5 MR. STARR: It seems to us that, while that is a  
6 more difficult question in terms of the creation of that  
7 sort of private right of action, yes. We believe that  
8 under a Landgraf analysis that, in fact, is going to a  
9 very material change in the exposure of the defendants in  
10 an analytically distinct way.

11 QUESTION: Mr. Starr, you're not really saying  
12 that they can't do that. You're just saying that if  
13 Congress wants to do that it has to make it clear.  
14 Congress could say, this statute applies to acts committed  
15 before the private right of action is created.

16 MR. STARR: Exactly.

17 QUESTION: So you're not speaking of the  
18 constitutionality.

19 MR. STARR: No. This is not a Turner-Ellicorn  
20 due process --

21 QUESTION: Right.

22 MR. STARR: -- issue at all. We are speaking of  
23 what is the default presumption, and we think, just in  
24 terms of fairness considerations, this Court went to some  
25 length in its Landgraf opinion to talk about fairness and

1 the burdens to the parties who are affected by this,  
2 and --

3 QUESTION: Well, what fairness here seems to be,  
4 in effect, an estimate of the odds of getting prosecuted,  
5 or the odds of getting caught. That is not what we  
6 normally mean by fairness in this context.

7 MR. STARR: It is -- I accept the point that the  
8 odds of getting caught would not, I believe, harkening  
9 back to Justice Ginsburg's hypotheticals, carry the day  
10 for me.

11 Justice Souter, it is only if you accept what we  
12 believe is an established proposition in this Court's  
13 jurisprudence that an action by the sovereign is  
14 qualitatively different than an action by a private actor  
15 who is animated by a different set of considerations.

16 The Court has said it, and we believe that is  
17 indeed an additional burden that should call upon  
18 Congress, as Justice Scalia is suggesting. What we are  
19 talking about here is, what should be the default  
20 presumption?

21 There's no indication that Congress believed  
22 that it was enabling a new category of candidates to in  
23 fact look retrospectively, and especially in this context,  
24 where what was changed in the law -- what was changed in  
25 the law was the fact that in the ongoing relationship



1 between the Government contractor and the Government, if,  
2 in fact, in this relationship of information flow, if the  
3 Government contractor is flowing information to the  
4 Government in that relationship, that contractual  
5 relationship, no stranger to the relationship under the  
6 regime that existed since World War II could then come  
7 into Federal court and assail a particular practice.

8 That seems to us to be a fairness consideration.

9 QUESTION: Well, it's not only fairness. I  
10 suppose it's depriving you of a defense you earlier had.  
11 What's your best case for the fact that if you're denied a  
12 defense, that this is a substantive expansion of the  
13 liability?

14 MR. STARR: This Court has said with respect to  
15 statutes of limitation in particular that the elimination  
16 of that kind of defense does, in fact, work a change, and  
17 should not, in fact, be retroactively applied.

18 QUESTION: What's your best case for that?

19 MR. STARR: I can get you that on rebuttal, Your  
20 Honor.

21 QUESTION: But that's a defense against  
22 everybody, isn't it, Mr. Starr, and this is not a defense  
23 against everybody, and it's a defense that doesn't have  
24 any relationship to the primary conduct.

25 MR. STARR: It does have a relationship, Justice

1 Souter, I believe, if I may beg to differ, with respect to  
2 what this bar is all about.

3 If one carefully reads 3730(a)(4)(A), it is  
4 about the disclosure of information. Who originally had  
5 the information?

6 The information, by definition, is in the hands  
7 of the Government contractor. The Government contractor,  
8 under a regime that existed for 40 years, 43 years, knew  
9 that all it needed to do was to keep the Government  
10 informed, and that insulated it from qui tam relator  
11 exposure. That, to us -- if one doesn't accept that, that  
12 is our submission. We think that is in fact looking to  
13 the underlying conduct of what the contractor is doing and  
14 the incentives --

15 QUESTION: Yes, but of course, your answer  
16 assumes that in any event, even under the old regime, the  
17 Government could have sued for precisely what this  
18 particular relator is suing on.

19 MR. STARR: That is correct. There is no  
20 question that the underlying issue could, in theory. I  
21 think it does bear noting that -- and this moves me, if I  
22 may, to some of the other issues in the case, that -- and  
23 what was Congress' policy that was being implicated here?

24 Congress' policy concern was that there were not  
25 enough levels of activity with respect to ferreting out

1 "fraud," that there was insufficient Government action.

2 What this case represents, a sort of -- the  
3 extreme of the most elaborate and careful exacting  
4 governmental scrutiny, and that in the context of highly  
5 sophisticated and sensitive Government contracts where  
6 there is, Justice Souter, a flowing of information  
7 continually, including with governmental auditors resident  
8 on premises.

9 That is a very different kind of regime that I  
10 think the concerns that were animating Congress, which was  
11 what? We want to -- and this moves me, if I may, to the  
12 public disclosure issue and the meaning of false claim.  
13 With respect --

14 QUESTION: Before you leave that, could -- if --  
15 suppose we were to disregard the label, jurisdictional or  
16 not, and look at it under --

17 MR. STARR: I missed the first part of your --

18 QUESTION: Suppose that in looking to see  
19 whether it's retroactive or not you don't necessarily look  
20 just to the label, which is what you want.

21 MR. STARR: Yes, that is correct.

22 QUESTION: Suppose we were to look at whether  
23 there was fair notice, reasonable reliance, and the  
24 settled expectations of your client, all right?

25 MR. STARR: Yes.

1 QUESTION: Landgraf. All right. On the one  
2 had, they know they're not supposed to make false  
3 statements, whoever can sue them, but you think that in  
4 fact this change as to who can sue makes a material  
5 difference as to how they behave.

6 MR. STARR: It makes a material difference as  
7 to --

8 QUESTION: As to how they would have behaved had  
9 they only known.

10 MR. STARR: It makes a -- sorry.

11 QUESTION: And what I want you to do is to  
12 explain how.

13 MR. STARR: It makes a material difference in  
14 terms of the incentives to keep the Government apprised.  
15 Under the prior regime, one has an enormous amount of  
16 incentives, and obviously I'm speaking in the abstract,  
17 because responsible Government contractors keep the  
18 Government informed, and what is at issue here was an  
19 extraordinarily hypertechnical dispute as to disclosure,  
20 disclosure that was ultimately found, of course, not to  
21 not only cost the Government any money, but the underlying  
22 accounting practice actually saved the Government money.

23 QUESTION: Well, you don't argue now and you  
24 don't argue in your brief that it gives them the incentive  
25 to disclose to some public group that there is a problem,

1 and I suppose that that's because that's just unrealistic?

2 MR. STARR: It is in the context of highly,  
3 shall I say sensitive and important projects.

4 What it does do under the prior regime, and  
5 again, it troubles --

6 QUESTION: Let me put the question  
7 differently --

8 MR. STARR: Yes.

9 QUESTION: -- because I'm trying -- suppose you  
10 find out that the Justice Department hires 50 more  
11 lawyers.

12 MR. STARR: Yes.

13 QUESTION: Nobody would say that that makes any  
14 difference.

15 MR. STARR: I agree.

16 QUESTION: Although individuals might think, oh,  
17 boy, I better really be careful. All right. How is this  
18 different from that?

19 MR. STARR: Again --

20 QUESTION: That is, what practical difference  
21 does it make to your client, had your client known in  
22 advance that this new law would have governed?

23 MR. STARR: Again, it seems --

24 QUESTION: Other than --

25 MR. STARR: Yes.



1 QUESTION: -- there are 50 more lawyers.

2 MR. STARR: No, that the incentives again are,  
3 with respect to the underlying conduct, keep the  
4 Government fully informed.

5 There was an additional set of incentives under  
6 the Government knowledge bar, because as soon as you made  
7 the Government aware -- there is a dispute as to whether  
8 the Government was aware or not with respect to what we  
9 were doing, but under the prior bar, as soon as you made  
10 the Government aware of it you were free and clear. It  
11 was air-tight. That strikes us as a material difference.

12 With respect, if I may, with the Court's  
13 permission, move to public disclosure. The Ninth Circuit  
14 here in a very important ruling in this respect held that  
15 the disclosure of allegations concerning these accounting  
16 practices to employees, undisputed, of both Northrop and  
17 of Hughes did not trigger the public disclosure bar.

18 Now, why did the Ninth Circuit conclude that?  
19 It concluded that those employees operate within what the  
20 court called a closed loop of secrecy. This holding, with  
21 all respect to the Ninth Circuit, is not moored to the  
22 statute at all.

23 Here, and simply engaging in a textual analysis  
24 and then I would like to move briefly to the policy, there  
25 was a disclosure outside of the Government, and that took

1 the form, or in the vehicle of an administrative audit,  
2 one of the enumerated categories of disclosure, and in an  
3 investigation, another enumerated category.

4 Those categories we think are illuminating,  
5 because in contrast to other categories such as the news  
6 media, or a congressional hearing, or a congressional  
7 report, there is not going to be wide dissemination of a  
8 Government audit.

9 In particular, in the context of defense  
10 contracting -- and this is undisputed. The Government  
11 will not dispute this. The DCAA, the Defense Contract  
12 Audit Agency, which cleared Hughes totally and said thank  
13 you, you saved us lots of money, you're terrific, \$15.4  
14 million now goes to you. That's a good thing.

15 What DCAA also said is, we're not going to be  
16 issuing press releases with respect to that. We do not  
17 disseminate. That's DCAA regulations.

18 Congress, of course, knows what its own entities  
19 do by way of practice and, thus, it is unrealistic to look  
20 to whether the general public would know.

21 What we believe the statute contemplates is  
22 divulgence by the Government to a person outside of the  
23 Government in one of the vehicles that are enumerated.

24 QUESTION: Mr. Starr --

25 QUESTION: Mr. Starr --

1 QUESTION: With respect to that, just a --  
2 suppose the Government agency gives to the chief auditor  
3 of the company a report and says, I want to ask you some  
4 questions about this. That's a person outside the  
5 Government.

6 MR. STARR: Yes.

7 QUESTION: Is that a public disclosure?

8 MR. STARR: Yes, it is. Under our theory --

9 QUESTION: Just one person --

10 MR. STARR: Yes.

11 QUESTION: -- no matter how high up in the  
12 company.

13 MR. STARR: Yes, it is, and the reason that,  
14 Your Honor, while that seems counterintuitive, we think a  
15 careful reflection of the -- both congressional purposes  
16 but also, Your Honor, if one looks at the rest of  
17 3730(e)(4)(A), there is a very important and forgotten  
18 person in the drama, and that's the original source.

19 This statute was designed -- the 1986  
20 amendments -- and this Court has very recently said you  
21 want to look to the purpose of what Congress had in mind  
22 when it was changing a statute or enacting it.

23 What Congress was getting at, and one can say,  
24 was it an artful way or not, but what Congress was getting  
25 at was to protect original sources, and those are defined

1 in the statute, and the original sources, Justice  
2 Ginsburg, are not affected by your hypothetical.

3 That is to say, that would exclude anyone in the  
4 universe except an original source from coming forward  
5 with a quit tam action and as previously stated an  
6 obvious --

7 QUESTION: But Congress did use the words,  
8 public disclosure, and the words public disclosure  
9 generally imply something more than tell one officer of  
10 the company.

11 MR. STARR: I could not agree more in the normal  
12 context. If one simply -- and our colleagues on the other  
13 side have very ably invited the Court to focus very  
14 specifically on two words. We believe that's not a  
15 correct method of statutory interpretation. You look at  
16 the entire provision, and then you also look at something  
17 that's very important.

18 Very briefly, what Congress was trying to do in  
19 the 1986 amendments was to get the right balance. It  
20 didn't just say anybody in the world filed a qui tam  
21 action. That's terrific. It was a balance, and what was  
22 that balance?

23 The balance was, we want to encourage true  
24 whistleblowers, those who are not opportunistically  
25 availing themselves of material that is already available,

1 known to the Government. That doesn't assist in ferreting  
2 out --

3 QUESTION: Well, what your interpretation may  
4 mean in effect is that for almost any Government  
5 investigation, or audit of some suspected fraud or false  
6 claim, if, in conducting the audit or the investigation  
7 anyone other than the wrongdoer is asked questions, other  
8 employees, sub-employees, any employee, then it seems  
9 under your interpretation it virtually wipes out an audit  
10 or an investigation for any qui tam action, ever, because  
11 inevitably I guess some employee would be talked to who  
12 wasn't party to the alleged wrongdoing.

13 MR. STARR: The apparent harshness of the regime  
14 that I am espousing and that you're discerning, Justice  
15 O'Connor, is upon reflection true to Congress' intent. If  
16 one examines the background of these amendments, one sees  
17 that what really had Congress concerned -- the National  
18 Association of Attorneys General was up in arms on this.  
19 This is undisputed -- was State of Wisconsin v. Dean,  
20 which embodied the value of the original whistleblower.

21 That's the true qui tam relator, Justice  
22 O'Connor. That's the good qui tam relator. It is not  
23 someone who is not adding value in the sense of bringing  
24 information to light that is otherwise hidden.

25 QUESTION: Yes, but there's another value, and



1 that's the value of the prosecution. It seems to me that  
2 the amendment allows for that value to a degree that the  
3 prior law perhaps did not. It's not just information.  
4 It's prosecution.

5 MR. STARR: I agree with that as well, because  
6 there is, in fact -- but I don't think that that should  
7 change the Court's disposition, but the Second Circuit's  
8 approach is correct and the Ninth Circuit's approach is  
9 wrong, because, in fact, of the concern that in this  
10 balance that the public prosecution function is important,  
11 but it in fact needs to be supplemented by private  
12 relators.

13 But Congress has been making a qualitative  
14 judgment about who are good qui tam relators and who are  
15 not, and under, Justice Souter, your regime a relator is a  
16 good relator, but Congress didn't make that policy  
17 judgment. It has said, no, we want to bar what otherwise  
18 would not be brought as a qui tam action save by an  
19 original source if there has been public disclosure in one  
20 of the exhibits, and that was its way of overruling State  
21 of Wisconsin --

22 QUESTION: Mr. Starr, it's public disclosure in  
23 one of a series of different kinds of hearings and so  
24 forth.

25 MR. STARR: Yes.

1 QUESTION: Which is the category in which this  
2 public disclosure was made?

3 MR. STARR: In an administrative audit or  
4 investigation. There were two forms, Justice Stevens.  
5 Air Force first classified audits, and then a series, all  
6 before the qui tam action was filed, and that's why the  
7 qui tam action here is utterly -- not only worthless, it's  
8 counterproductive. Three DCAA audits, finally concluding  
9 again that, not that it's material to the disposition of  
10 the case, but that Hughes had in fact saved the Government  
11 money. Those were --

12 QUESTION: Mr. Starr, suppose Congress had  
13 written this statute 3729(a)(1) and (2), which is what  
14 you're addressing here --

15 MR. STARR: Yes.

16 QUESTION: -- without the word public in it, and  
17 it just said, no court shall have jurisdiction under this  
18 section based upon the disclosure of allegations or  
19 transactions in a criminal, civil, or administrative  
20 hearing and a congressional blah, blah, blah, blah, and so  
21 forth.

22 How would that differ from the interpretation  
23 you were giving the provision with the word public in it?

24 MR. STARR: Yes. Our interpretation does not rob  
25 public of meaning but rather it seems to us that what

1 Congress is getting at here is that disclosure outside the  
2 Government. We believe that's the most natural meaning.  
3 Whereas, if it had simply said disclosure, but not public  
4 disclosure, that could very naturally be interpreted DCAA  
5 informs --

6 QUESTION: But an administrative investigation  
7 doesn't necessarily mean disclosure outside the  
8 Government, does it?

9 MR. STARR: No, it does not, but there has to be  
10 disclosure -- the point is, as one takes the entirety of  
11 the provision, there must be a disclosure, then apply  
12 allegations or transactions in this -- so under my  
13 interpretation of your redrafted statute, Justice Scalia,  
14 it might very well be that under this disclosure would  
15 have taken place if there was a communication from DCAA to  
16 the Air Force. Whereas public disclosure to us means a  
17 divulging of information outside the Government, which is  
18 what happened.

19 QUESTION: But is there such a thing as an audit  
20 or investigation where they don't even tell the person  
21 audited? I mean, I don't know how you'd do that.

22 I guess there could be such a thing, but --  
23 you're saying Congress could possibly have just wanted --  
24 it was trying to distinguish cases where you're -- the  
25 very object of the investigation being told the result of

1 the investigation, the wrongdoer, is enough to make it  
2 public in your view?

3 MR. STARR: Your Honor, I think you have  
4 collapsed the object of the wrongdoer, which is a  
5 "corporate entity" with what Congress was trying to  
6 encourage --

7 QUESTION: No, I'm just saying in your view --

8 MR. STARR: -- which is whistleblowers.

9 QUESTION: In your view, it makes it public if  
10 you just tell the corporate entity being investigated?

11 MR. STARR: I think it has to come to the  
12 attention of an individual who was -- we believe the  
13 Second Circuit is right here, which is the most natural  
14 approach, someone who is not involved --

15 QUESTION: Fine. Then why isn't it a perfectly  
16 minimal definition of public to say that disclosure to the  
17 public at least means disclosure to a person who is not  
18 the wrongdoer, which could include an employee, provided  
19 he's being disclosed in his capacity as member of the  
20 public, such as he independently gets it.

21 Now, why isn't that a perfectly clear, minimal  
22 definition, though I imagine you'd lose on that definition  
23 here.

24 MR. STARR: I would very much lose because of  
25 the last part of your definition.

1 QUESTION: Yes, but if you're interested in,  
2 say, a clear rule of law that's minimal and satisfies all  
3 your requirements, why wouldn't that do it?

4 MR. STARR: Because I think that will strike a  
5 very different balance than what Congress struck, Justice  
6 Breyer, because what you will be doing is, in fact,  
7 encouraging, quote, whistleblowing actions by individuals  
8 who have no information to provide to the Government.

9 Remember, what is the value here? If the Court  
10 dwells on what Congress' purpose was, Congress' purpose  
11 was encourage whistleblowing.

12 In your hypothetical, Your Honor, there's no  
13 whistleblowing going on. That's the --

14 QUESTION: Why do you make the assumption that  
15 Congress did not also have the purpose to encourage  
16 prosecution?

17 MR. STARR: It is a balance. I do agree by  
18 virtue of asserting my part of the balance, and I hope  
19 that when the other side stands up the other side will  
20 speak to the important part of the balance as well, which  
21 is avoiding nonvalue-laden qui tam actions.

22 There is simply no value, Congress has  
23 determined, if one does not come forward with information  
24 that is useful to the Government if the Government is  
25 already caught on the trail of fraud, save again, Your



1 Honor, for the original source, which is pivotal to our  
2 argument.

3 QUESTION: Will the fact that in fact it saved  
4 the Government money at the end of the day result in some  
5 reduction of the ultimate liability here?

6 MR. STARR: If there's a technical -- this is --  
7 if I may --

8 QUESTION: If it's technical, because I just  
9 don't understand the real effect --

10 MR. STARR: The --

11 QUESTION: -- if you allow the suit to go  
12 forward at the end of the day.

13 MR. STARR: The underlying problem, Your Honor,  
14 is in fact the Ninth Circuit's -- which is our third  
15 argument, the definition of false claim as the Ninth  
16 Circuit has now defined it.

17 We believe that in the context of Government  
18 contracting that there must, in fact, be some effect, or  
19 potential effect on the Treasury, that you are submitting  
20 a claim for payment of money to which you are not  
21 entitled. Something disentitles you.

22 The Ninth Circuit has held in this case that is  
23 not necessary, that an entirely regulatory violation could  
24 run afoul of the False Claims Act.

25 QUESTION: Well, but the act doesn't just say

1 false or fraudulent claim, it says a false or fraudulent  
2 claim for payment or approval.

3 MR. STARR: That's exactly right.

4 QUESTION: So if you seek approval of -- you  
5 know, I assume that means approval that this portion of  
6 the job has been fully completed satisfactorily. Would  
7 that be covered?

8 MR. STARR: It depends upon whether it is, in  
9 fact, a condition of contracting and whether there is a  
10 falsity that affects your entitlement to claims.

11 QUESTION: It doesn't say that. It says a claim  
12 for payment or approval. What, in your estimation, does  
13 or approval mean?

14 MR. STARR: For approval simply means that the  
15 Government must, in fact, say, we are -- we have your  
16 request, and we will now pay or approve its payment, and  
17 what we think, Your Honor, the difficulty in what the  
18 Ninth Circuit has done, is to take any kind of violation,  
19 whether it has an effect on your entitlement to the  
20 payment or approval for payment and says regardless,  
21 whether it's an environmental regulation, if it's not a  
22 condition for contracting, you've stated a False Claims  
23 Act, and Justice O'Connor --

24 QUESTION: So you read approval to mean,  
25 approval for payment. It states false or fraudulent claim

1 for payment or approval.

2 MR. STARR: Approval for payment.

3 QUESTION: It doesn't say that. That's the only  
4 problem with that.

5 MR. STARR: Well, we think that the case law,  
6 Your Honor, is very clear with respect to what the nature  
7 of a claim is. If you go to the nature -- the definition  
8 of a claim, a claim is in fact a request for payment that  
9 money or property is owed by the Government to the  
10 claimant.

11 If I may, I'd like to reserve -- the remainder  
12 of my time.

13 (Laughter.)

14 QUESTION: Thank you, Mr. Starr.

15 MR. STARR: I thank the Court.

16 QUESTION: Mr. Gold.

17 QUESTION: Mr. Gold, would you mind telling us  
18 what's in it for a plaintiff who at the end of the day is  
19 faced with the fact that this procedure that was followed  
20 here saved the Government money?

21 Is the claimant's recovery diminished? Are we  
22 talking about attorney's fees and the nuisance of a suit?

23 What are we talking about here in a case like  
24 this, where at the end of the day the Government saved  
25 money?

1 ORAL ARGUMENT OF LAURENCE GOLD

2 ON BEHALF OF THE RESPONDENT

3 MR. GOLD: Two things, if I could, Justice  
4 O'Connor. First of all, when the case was brought, the  
5 audit reports within the Government had not reached the  
6 conclusion that the Government had saved money --

7 QUESTION: Right.

8 MR. GOLD: -- but rather that the Government had  
9 lost money.

10 Secondly, if in the end the only claim left here  
11 is the claim based on the improper cost accounting  
12 disclosure statement, we presume that all that would be at  
13 issue in terms of the liability would be the penalty  
14 provision for filing a false claim.

15 QUESTION: And what is that penalty if no money  
16 is lost --

17 MR. GOLD: Well, it is still -- at the time it  
18 was \$2,000 -- a false claim, and I think the point of  
19 this, Justice O'Connor, is shown first of all by the  
20 particular provision we have here in the background, or as  
21 we emphasize in our brief, a case like the Rohleder case  
22 in the Third Circuit, where the contractors certified that  
23 subcontracts had been let as was required by the  
24 Government regulations through competitive bidding, when  
25 in fact they hadn't.

1           QUESTION: Mr. Gold, I expect the \$2,000 is  
2   peanuts compared to what else you're entitled to, and that  
3   is the costs of the action, the costs of the civil action.  
4   I expect that by the time the discovery that the  
5   Government hadn't lost any money was made, the plaintiff  
6   here had invested well in excess of \$2,000. You do get  
7   your costs, don't you, as well?

8           MR. GOLD: And getting those from the  
9   plaintiff's --

10          QUESTION: Would be --

11          MR. GOLD: -- point --

12          QUESTION: Right.

13          MR. GOLD: Well, but also from the point of view  
14   it is not -- from the plaintiff's point of view it's not  
15   much of an enrichment. It's a nonloss for having gone  
16   forward. I don't say it is --

17          QUESTION: But that explains why the suit  
18   proceeds. You would think that once it was found the  
19   Government hadn't lost any money, it would say, gee, it's  
20   not worth expending a lot more money prosecuting this suit  
21   for \$2,000, but you're going to get the \$2,000 plus all  
22   that you've spent up to now prosecuting it.

23          MR. GOLD: Right.

24          QUESTION: Plus what you'll spend in --

25          MR. GOLD: And if I could, and then I'd like to



1 go back to the law issues here, the two issues left in  
2 this case.

3 The other one on which there are no audit  
4 findings, and on which if you compare the original  
5 Northrop request for an audit with the final audit reports  
6 there's nothing but confusion, is whether Hughes misled  
7 Northrop in terms of what costs would be charged to the  
8 radar development for the B-2, and whether that generated  
9 false claims.

10 Now, there is nothing in -- there is nothing but  
11 discord at this point, and that's why the Ninth Circuit  
12 sent that issue back, and therefore there may be real  
13 money here. That's just not clear yet.

14 There are two claims, one of which rests on the  
15 issue that the -- that Hughes has brought up here, the  
16 disclosure statement issue, and on that our position is  
17 that if the Government requires as a condition of  
18 contracting that you provide certain accurate information  
19 in order to safeguard the contracting system and to assure  
20 that the charges are proper charges, and if you knowingly  
21 provide false and incomplete and misleading statements and  
22 certifications, then there is a false claim, and that is  
23 true whether or not the claim is overstated.

24 So we think the answer to the sole question that  
25 the -- that Hughes raises in this regard is no. In that

1 situation the False Claims Act does apply, and it  
2 generates at least the penalty which assures the integrity  
3 of the contracting system and provides the Government that  
4 kind of benefit, and that's true whether it's, you have to  
5 show us what your cost accounting system is, or you have  
6 to let subcontracts by competitive bidding, or you have to  
7 tell us what the qualifications of certain employees are  
8 if they're to be paid a premium.

9 QUESTION: This is addressed to the third  
10 question?

11 MR. GOLD: The third question.

12 If I can, now, going rapidly backwards, I'd like  
13 to turn to the first question.

14 QUESTION: On that question, Mr. Gold, it seems  
15 to me just as a practical matter the board of directors of  
16 a defense corporation would say, you know, in the light of  
17 this new statute, we have an expanded new liability for  
18 punitive damages. We're going to have to change our  
19 conduct in the way we disclose. A defense has been taken  
20 away from us so that the law has changed.

21 In lay terms, they would explain it that way. I  
22 have some difficulty, other than perhaps the Winfree case,  
23 in finding a case that would support that theory. That's  
24 just what I'm thinking about this issue.

25 MR. GOLD: I don't think there is any doubt that

1 when you change a jurisdictional bar, which we think it's  
2 fair to call this -- I mean, it doesn't go to the  
3 merits -- in a way which makes it easier for plaintiffs to  
4 bring suit, opens the courthouse door, you have some  
5 effect on the legal regime.

6 QUESTION: But it does take away a defense, does  
7 it not?

8 MR. GOLD: I don't believe it takes away a  
9 defense.

10 QUESTION: Because previously you had a defense  
11 if you disclosed to the Government. Now you don't have  
12 that defense.

13 MR. GOLD: You had a defense in terms of saying,  
14 this person cannot be a plaintiff. You didn't have a  
15 defense if what you disclosed to the Government caused the  
16 Government to understand that you had made false claims on  
17 it, and -- because the Government could sue.

18 And the change here in terms of opening the door  
19 to the courthouse to individuals who would otherwise be  
20 subject to a bar is one which doesn't change the  
21 underlying rights, doesn't change the underlying duties,  
22 and in this case, since there can be only one suit for  
23 false claim, whether it's brought by the Government or a  
24 relator, it doesn't change the liability.

25 Indeed, it doesn't even necessarily change the

1 plaintiff, because the Government can take over any case  
2 brought by a relator, so I do think that what you have  
3 here is not a creation of a new cause of action as in the  
4 statute of limitation revivor case, but a true rule  
5 regulating the procedural and jurisdictional rules of the  
6 Court.

7 QUESTION: Mr. Gold, would you explain to me  
8 again how it could be under the old regime that if I was a  
9 contractor and I disclosed to the Government, I could  
10 nonetheless be held liable --

11 MR. GOLD: You -- if --

12 QUESTION: -- under the False Claims Act.

13 MR. GOLD: If you had a situation in which you  
14 disclosed to the Government your prior nondisclosure, the  
15 Government certainly could act to bring the suit. In  
16 other words --

17 QUESTION: Let's assume I disclose at the  
18 outset. I don't have any --

19 MR. GOLD: Well, there's simply no violation.

20 QUESTION: Under the old regime.

21 MR. GOLD: Under any regime.

22 QUESTION: Well, you're not saying, Mr. Gold,  
23 that the statute made no change by eliminating a defense  
24 that had previously been available. That's what we're  
25 trying to get at here.

1 MR. GOLD: No, I -- I would not want to say  
2 that. I don't think that's right.

3 It made a change in the rules concerning the  
4 jurisdiction of the courts to entertain suits brought by a  
5 private relator on behalf of the Government. It did not  
6 change any underlying substantive rule, and it did not  
7 change in any way the Government's preexisting and pre-  
8 1986 and post-1986 rights to go into court.

9 QUESTION: So the effect of a disclosure before  
10 this change was exactly what it is after the change, and  
11 secondly you're saying there is no provision under the new  
12 statute for a relator to bring an action if the Government  
13 couldn't bring an action.

14 MR. GOLD: There's no -- if the Government  
15 brings the first case, there can be no relator. If one  
16 relator brings a case there cannot be a second or third  
17 relator, and if a relator brings a case, the Government  
18 can always take it over.

19 QUESTION: But they're saying, I think, which is  
20 bothering me too, that it just isn't fair. You see -- and  
21 that's, I think, relevant, because after all a statute of  
22 limitations -- suppose Congress passed a statute of  
23 limitations and tried to revive some action that expired  
24 in 1810?

25 I mean, I don't think whatever you call it that



1 would be so upsetting of reliance interests that we  
2 wouldn't permit it, and -- I don't think -- and so they're  
3 saying here, you see, it's unfair. We had this defense  
4 against the private, and we had a course of action telling  
5 the Government everything, working it all out with the  
6 Government. We're home free. And now we don't.

7 So is it -- I mean, is there a way that you can  
8 address this question that they say they reasonably relied  
9 on the old statutes, it's unfair to upset that reasonable  
10 reliance.

11 MR. GOLD: The proposition that you can after  
12 the fact, which is what we're dealing with here, tell the  
13 Government something and save yourself from liability is  
14 simply an erroneous statement. The Government --

15 QUESTION: Well, but now you're ignoring, I  
16 think, the point, which is if you fail as a Government  
17 contractor to disclose something on the form that the  
18 Government said you should have put it on, and the  
19 contractor later realizes, oh, that should have been on  
20 that form 8929, and it wasn't, I'm going to tell the  
21 Government, I really goofed, I made the mistake, the  
22 Government can still sue, but you've told 'em.

23 But, under the new law, no qui tam action could  
24 have been brought by a third party for that because the  
25 contractor had told the Government. Yes, the Government

1 could file a suit, but a disgruntled employee could not.

2 MR. GOLD: Well --

3 QUESTION: So to that extent there is a  
4 retroactive change, is there not?

5 MR. GOLD: There is a retroactive change in  
6 terms of the -- the openness of the courts to the private  
7 party.

8 If that kind of change, which seems to me also  
9 to be true of taking the jurisdictional amount out of the  
10 Federal question jurisdiction which was done, or a change  
11 which otherwise creates the ability after the fact of  
12 somebody else to sue where before only the United States  
13 could sue --

14 QUESTION: Well, but isn't that what this  
15 petitioner is coming before us and alleging, that until  
16 the 1986 amendments we had assumed that while the  
17 Government could still complain, that no qui tam action  
18 could be brought by this particular relator, and they say  
19 that was this situation. Now, could it possibly be?

20 MR. GOLD: Well, two things, if I could, because  
21 I'm down to my last 5 minutes. One is that there is no  
22 showing that Government contractors after the fact made  
23 these representations to the Government in order to cut  
24 off qui tam relators, and there's no showing that Hughes  
25 made any such showing.

1 All of this came out in the fullness of time,  
2 and no showing that the Government didn't act after the  
3 fact, if you came in and you said we knowingly gave you  
4 false statements, or we knowingly misled a contractor, and  
5 I don't think those kinds of expectations have ever been  
6 seen to be the kind that are protected by this rule of  
7 fairness on public disclosure.

8 The -- it seems to us the critical points are  
9 that at no juncture in the evolution of the '86  
10 jurisdictional bar provision were all Government  
11 disclosures a basis for prohibiting the going forward of a  
12 qui tam suit. At every stage, the forms of disclosure  
13 which led to the bar were limited.

14 There was a set of negotiations which are not  
15 public, and in this instance as opposed to Landgraf after  
16 the discussions statutory language came out and nobody  
17 tried to explain it.

18 Everyone seems to have kept their word that the  
19 statute would be the statute, and at that point the forms,  
20 or the means by which disclosure could be made, were  
21 expanded.

22 But at the very same time, the word public was  
23 added before the word disclosure for the first time, and  
24 it's just impossible, if you read the statute for what it  
25 tells you, to say that a disclosure within a contractual

1 relationship marked confidential, for business purposes  
2 only, in the only way that a disclosure can be made to a  
3 fictitious entity which is the other contracting party,  
4 namely to its responsible officials, is a public  
5 disclosure.

6 QUESTION: But do you agree with the Solicitor  
7 General's definition, because as I read the briefs, you  
8 and the Solicitor General have a different approach.

9 MR. GOLD: Well, in the peculiarities of this  
10 case, our approach and the Government's come down to the  
11 same thing.

12 We say a disclosure within the contractual  
13 relationship as such is not a public disclosure. The  
14 Government says a disclosure to the allegedly wrongdoing  
15 party is not a public disclosure and here, because the  
16 allegedly wrongdoing party is a corporation, the  
17 disclosure to its responsible officers is the only way you  
18 can make such a disclosure.

19 I would point out that the Government's position  
20 at least averts the problem that's inherent in the tiny  
21 bit of concession that the petitioner makes, namely that  
22 the petitioners would have you have a jurisdictional  
23 inquiry into who in the corporation was involved in the  
24 wrong, where the Government at least faces up to that  
25 problem.

1 QUESTION: Thank you, Mr. Gold.

2 Mr. Waxman, we'll hear from you.

3 ORAL ARGUMENT OF SETH P. WAXMAN

4 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

5 SUPPORTING THE RESPONDENT

6 MR. WAXMAN: Mr. Chief Justice, and may it  
7 please the Court:

8 I'd like to take the issues presented in the  
9 reverse order, if I may.

10 On the merits as to the third point, the  
11 assertion Hughes now makes as opposed to the assertion it  
12 made in its petition that a claim under the False Claims  
13 Act is false and fraudulent only if it involves the  
14 submission of an inflated request for payment is quite  
15 wrong.

16 As this Court stated 30 years ago in United  
17 States v. Neifert-White Company, "The act was intended to  
18 reach all types of fraud, without qualification, that  
19 might result in financial loss to the Government. It  
20 covers all fraudulent attempts to cause the Government to  
21 pay out sums of money."

22 That interpretation was expressly endorsed in  
23 the Senate report accompanying the 1986 amendments, and it  
24 is consistent with virtually every decision applying the  
25 act.



1           Thus, in our view, whenever a -- a claim is  
2 false or fraudulent within the meaning of the act whenever  
3 it knowingly misstates facts bearing on the claimant's  
4 entitlement to payment or a benefit, regardless of whether  
5 the misstatement relates to price, the character or  
6 quality of the goods or services provided, the eligibility  
7 of the claimant to receive the benefit, or compliance with  
8 governing laws, regulations, or contract terms.

9           Turning to the second point --

10          QUESTION: Excuse me. What if there's just a  
11 violation of a contract term that is so minor that it  
12 would not be the basis for the Government's refusal to pay  
13 the contract price?

14          MR. WAXMAN: Justice Scalia, if the misstatement  
15 could not as a matter of law have borne on the  
16 entitlements claimant, or entitlement to payment, it would  
17 not be a violation of the act, and there are many  
18 statements that might be false statements under 1001 that  
19 would not qualify.

20          I mean, if I misstate my social security number,  
21 unless there is a very strange regulation that makes it a  
22 condition of receipt, it wouldn't be a false claim.

23          QUESTION: Well, I mean, there also may be some  
24 provisions about you have to report this, that, and the  
25 other thing. Let's assume you don't report one thing. I

1 wouldn't think in the ordinary case the result of that  
2 would be the Government can refuse to pay the entire  
3 contract.

4 MR. WAXMAN: I think that's right. In the  
5 ordinary case, unless it was made an express or implied,  
6 under the law, condition of payment, it wouldn't relate to  
7 a false claim.

8 QUESTION: So you're willing to be committed to  
9 that. It has to be the condition of payment.

10 MR. WAXMAN: Yes. It has to bear on the  
11 entitlement to payment in some way.

12 QUESTION: Is that another way of saying it must  
13 be material?

14 MR. WAXMAN: Yes.

15 QUESTION: Yes.

16 MR. WAXMAN: In fact, I think, although the  
17 courts have torn themselves inside out trying to determine  
18 whether in this provision and the criminal false claims  
19 provision materiality is an element, in fact, to the  
20 extent materiality is an element, it really is embedded in  
21 the test of whether it bears on entitlement to payment or  
22 a benefit.

23 I mean, taking this Court's definition from  
24 Gaudin and Kungys, the natural tendency to influence or be  
25 capable of influencing the decisionmaker seems to

1 incorporate this test. Any fact that bears on entitlement  
2 is one that is capable of influencing.

3 With respect to the public disclosure bar, we  
4 believe that allegations and transactions are publicly  
5 disclosed by the Government whenever they are revealed to  
6 a member of the public outside the Government other than  
7 to the suspected wrongdoer.

8 In the context of a corporate wrongdoer, I will  
9 rush to the test that Justice Breyer identified as a clear  
10 minimal definition and state that, since corporations can  
11 only act through individuals, the test should be whether  
12 the persons to whom the Government disclosed the  
13 allegations or transactions received the information in  
14 his or her capacity as an employee or agent of the  
15 corporation, not just as an individual who happens to be  
16 an employee. For example --

17 QUESTION: What about a disclosure to, say, not  
18 just to Hughes but to Northrop in a case like this?

19 MR. WAXMAN: Well, I think a disclosure to  
20 Northrop would be in most instances a public disclosure.  
21 Northrop actually is the whistleblower in this case, and I  
22 think a disclosure to Northrop or Northrop employees would  
23 have to be considered a disclosure to a member of the  
24 public, in this case the paradigm qui tam relator.

25 But as to disclosures to employees, and I know

1 it is very important for this Court to announce some sort  
2 of bright line rule so that we can apply this, this  
3 provision, let me give you some examples of --

4 QUESTION: Well, Mr. Waxman, before you do that,  
5 have you -- are you changing your position from what the  
6 Government -- I didn't understand that to be the  
7 Government's position in its briefs.

8 I thought the brief was not whether it's  
9 disclosed to the employee as an employee or as a member of  
10 the public, but rather, whether the employee to whom it  
11 was disclosed had an obligation to keep it secret or was  
12 free to disclose it to the rest of the public.

13 MR. WAXMAN: To the extent --

14 QUESTION: Wasn't that the test in your brief?

15 MR. WAXMAN: There was some language in our  
16 brief to that effect. With all respect, I don't think --

17 QUESTION: Well --

18 MR. WAXMAN: -- that was the burden of our  
19 statement, but we -- in an effort to create a bright  
20 line --

21 QUESTION: So you --

22 MR. WAXMAN: -- we are saying that if it's  
23 disclosed, either by the Government or by Hughes  
24 management, to someone in the corporation because they're  
25 a corporate employee, that's not public disclosure.

1           On the other hand, if someone who happens to be  
2 a public -- a corporate employee files an FOIA request,  
3 and obtains it, that is a public disclosure.

4           If the Government, the Attorney General,  
5 pursuant to her authority under 3733, files a civil --  
6 sends a civil investigative demand out to persons who may  
7 have knowledge of the alleged wrongdoing and one of them  
8 happens to be a corporate employee, that is a public  
9 disclosure.

10          If a DCAA investigator goes out and talks to  
11 people, some of whom are corporate employees, and in the  
12 course of the interviews discloses allegations and  
13 transactions, that is a public disclosure. That was the  
14 Second Circuit's test in Doe.

15          QUESTION: As an employee means he acquires it  
16 by reason of his employment. Is that what your as an  
17 employee, receives it as an employee means?

18          MR. WAXMAN: Receives it because he is an  
19 employee. In other words, Hughes general counsel sends it  
20 to their director of auditing because he is their director  
21 of auditing and it's his responsibility to respond to the  
22 DCAA's charges.

23          QUESTION: What if somebody who happens to be a  
24 messenger in the company happens to see that? It wasn't  
25 sent to him, but he sees it. He wouldn't have seen it



1     except that he's an employee.

2             MR. WAXMAN: I was confident we would get into  
3     some hypotheticals.

4             QUESTION: Well, you say it's a clear line.

5             (Laughter.)

6             QUESTION: This is what I'm worried about.

7             (Laughter.)

8             MR. WAXMAN: My clear line is that that would  
9     not be a public disclosure, because we need a clear line.  
10    The employee was there because he was an employee. He was  
11    performing his functions as an employee, and if he happens  
12    to see it, that's not a public disclosure, and what is --  
13    although this is a clear line, it leaves contractors like  
14    Hughes the ability to calibrate the universe of people it  
15    will allow to see these reports.

16            Hughes could decide that only the general  
17    counsel is going to receive this report, and no one else  
18    is going to see it.

19            QUESTION: Unless it has nosy messengers.

20            MR. WAXMAN: Excuse me?

21            QUESTION: Unless it has nosy messengers.

22            MR. WAXMAN: Unless it has nosy messengers, and  
23    I think that this really is the test that does approximate  
24    as best as we can determine what Congress' intent was with  
25    respect to the changing of the -- just changing of the qui

1 tam bar from Government information to public disclosure.

2 With respect to retroactivity --

3 QUESTION: On that point, with respect to  
4 retroactivity, assume this is not a jurisdictional bar.  
5 Assume we think that Congress has eliminated a defense.  
6 Should the statute be applied retroactively?

7 MR. WAXMAN: We think that the statute is not  
8 truly retroactive even taking your point about the defense  
9 as against a qui tam relator, because this Court stated in  
10 Landgraf that a statute has genuine retroactive effect  
11 only where the statute would either impair rights a party  
12 possessed when he acted, increase a party's liability for  
13 past conduct, or impose new duties with respect to  
14 transactions already completed. Here --

15 QUESTION: So how does it work with the statute  
16 of limitations?

17 MR. WAXMAN: Here, application of the new qui  
18 tam provisions will not impair any legal rights that  
19 Hughes possessed when it acted, it will not increase any  
20 Hughes legal liability for its past conduct, and it will  
21 not impose any new legal duties on Hughes with respect to  
22 transactions already completed. We think --

23 QUESTION: As to number 2, that depends on  
24 whether you want to be realistic or not.

25 MR. WAXMAN: Well, yes, but this Court did

1 say -- I do want to be -- I want to be very realistic, and  
2 I think this Court in Landgraf was realistic in saying a  
3 statute does not operate retrospectively merely because it  
4 upsets expectations based in prior law. The test is  
5 whether it has new legal consequences, not practical  
6 consequences but new legal consequences.

7 QUESTION: So you would say if there were  
8 additional punitive damages that would be no good.

9 MR. WAXMAN: That --

10 QUESTION: That would up the penalty.

11 MR. WAXMAN: That is correct.

12 QUESTION: But the fact that there are going to  
13 be more litigation costs --

14 MR. WAXMAN: That is absolutely correct.

15 QUESTION: So how does reviving an action by,  
16 say -- statute limitations, 10 years later, 20 years  
17 later, Congress says, oh well, we'll change it.

18 MR. WAXMAN: The cause of action here is a cause  
19 of action under the False Claims Act. That action never  
20 lapsed, and -- may I finish my answer?

21 QUESTION: Finish your answer.

22 MR. WAXMAN: And, indeed, even under the prior  
23 regime, if Mr. Schumer had filed an action, and it turned  
24 out the information was in the Government's files, we  
25 could have taken over the case and it would have

1       proceeded.

2               Thank you.

3               CHIEF JUSTICE REHNQUIST:   Thank you, Mr. Waxman.

4       The case is submitted.

5               (Whereupon, at 11:03 a.m., the case in the  
6       above-entitled matter was submitted.)

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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of*

*The United States in the Matter of:*

HUGHES AIRCRAFT COMPANY, Petitioner v. UNITED STATES, EX REL.  
WILLIAM J. SCHUMER  
CASE NO. 95-1340

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

BY Don Mari Fedele-----

(REPORTER)