

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: VERMONT AGENCY OF NATURAL RESOURCES,
Petitioner v. UNITED STATES, EX REL., JONATHAN
STEVENS.

CASE NO: 98-1828 c. 1

PLACE: Washington, D.C.

DATE: Monday, November 29, 1999

PAGES: 1-56

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UNITED STATES

CAPTION: AFRONT AGENTS OF NATURAL RESOURCES

Defendant v. UNITED STATES, et al. (DOJ)

STUBS

CASE NO. 99-1884

PLACE: Washington, D.C.

DATE: Monday, November 29, 1999

PAGES: 40

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Supreme Court

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 VERMONT AGENCY OF NATURAL :
4 RESOURCES, :
5 Petitioner :
6 v. : No. 98-1828
7 UNITED STATES, EX REL., :
8 JONATHAN STEVENS. :

9 - - - - -X

10 Washington, D.C.
11 Monday, November 29, 1999

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:04 a.m.

15 APPEARANCES:

16 J. WALLACE MALLEY, JR., ESQ., Deputy Attorney General,
17 Montpelier, Vermont; on behalf of the Petitioner.

18 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of
19 Respondent Stevens.

20 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf
22 of Respondent United States.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 98-1828, Vermont Agency of Natural Resources
5 v. the United States, ex rel., Jonathan Stevens.

6 Mr. Malley.

7 ORAL ARGUMENT OF J. WALLACE MALLEY, JR.

8 ON BEHALF OF THE PETITIONER

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

11 This Court has asked us, of course, to brief and
12 argue an additional issue in this case, and with the leave
13 of the Court, I would like to begin with that issue.

14 QUESTION: We asked you to brief the additional
15 issue. I think you're perfectly free to argue it. We
16 didn't ask you to argue it.

17 MR. MALLEY: Thank you. Thank you, Your Honor.

18 The additional issue, of course, is whether a
19 private person has Article III standing to litigate claims
20 of fraud against the Government. And within the context
21 of the False Claims Act, we would submit not, Your Honor.

22 Taking the respondents' own view of this case
23 that all that has been asserted here are the injuries to
24 the United States -- and I would invite this Court's
25 attention to paragraph 44 of the -- of the relator's

1 complaint in this case at page 40 of the joint appendix -
2 - the claim is that the United States has been damaged.
3 There is no claim in this case that this relator has been
4 damaged.

5 So, in that circumstance, there is no standing,
6 for under this Court's determination in -- in the Lujan
7 case, the irreducible constitutional minimum of standing
8 is, of course, injury in fact, actual and particularized
9 to this plaintiff. And as Judge Weinstein indicated in
10 the dissenting opinion below, up to the moment he filed
11 this action, this relator had no greater interest than any
12 taxpayer. So, this complainant --

13 QUESTION: But I guess we've had some form of
14 qui tam suits authorized by Congress since the earliest
15 days, haven't we?

16 MR. MALLEY: We have, Your Honor, and I think,
17 Justice O'Connor, the --

18 QUESTION: And perhaps authorizing them in -- in
19 circumstances where the relator would not have an injury
20 in fact, as we know it.

21 MR. MALLEY: Some circumstances, and I think
22 that the key part of your question, Your Honor, was in
23 some form. Now, we of course are going to be filing our
24 brief on this tomorrow, and we've taken a look at all of
25 these -- these statutes --

1 QUESTION: The early statutes?

2 MR. MALLEY: The early statutes in the first
3 Congress, and if I've got my sort of head count correct, I
4 -- we've counted about 17 statutes. And of those, 14 fall
5 into situations which don't raise any -- any standing
6 issue whatsoever. We have --

7 QUESTION: Because the relator would have
8 suffered an injury in fact?

9 MR. MALLEY: Well, there's a couple of ways it
10 plays out. One -- one would be that -- that probably the
11 largest single category is where the individual just has a
12 bounty, doesn't have any right to bring the case into
13 court, but just gets a bounty at -- at the tail end. So,
14 that doesn't raise a standing issue. And then there's
15 about three or four where the -- the case can be brought
16 into court by a -- by an individual who's -- who is a
17 Federal official. Now, in that instance I think it's fair
18 to regard that as a case that's brought by the United
19 States by a Federal official notwithstanding the fact that
20 Federal official can also claim part of the bounty.

21 QUESTION: Is the fact that this qui tam relator
22 entitled to some portion of the recovery at the end of the
23 day -- does that make it a sort of bounty?

24 MR. MALLEY: The fact that this qui tam relator
25 is entitled to something I think that -- that that -- that

1 is a bounty which gives this relator an incentive to sue.
2 But, of course, under the Valley Forge decision of this
3 Court, that strong incentive and the fervor of the -- of
4 the litigant's convictions is not enough to grant
5 standing.

6 QUESTION: The bounty -- the bounty cases you
7 were referring to I take it are cases in which the -- the
8 suit may be initiated by the -- or was the suit initiated
9 by the bounty receiver or it's just that if he brought the
10 matter to the attention of the Government, the Government
11 would sue, and at the end of the suit he'd get a bounty?

12 MR. MALLEY: In that first group I was talking
13 about -- I think there's five in this category -- they
14 would bring the attention -- bring it to the attention of
15 the Government, the Government would sue, and there would
16 be a -- a bounty at -- at the tail end.

17 QUESTION: Right.

18 MR. MALLEY: There -- there were, of course, a
19 small number of cases --

20 QUESTION: There were some.

21 MR. MALLEY: -- and our count is three -- where
22 it would appear that -- that the individual could bring
23 the claim into court himself or herself. But of course,
24 one of those was actually a -- a criminal case in --

25 QUESTION: But there was a common law background

1 too. If -- if you -- if you -- we're trying to fathom
2 what was the original understanding of standing. The
3 common law suit could be initiated by the -- by the
4 private person.

5 MR. MALLEY: There is that common law
6 background. But of course, I think what's critical in
7 this -- in this instance, Your Honor, is -- is what the
8 Court has indicated in Marsh v. Chambers and that is it's
9 one thing where there's a -- a continuous and unambiguous
10 historic record which -- which creates a practice which -
11 - which has become a part of the fabric of our society.

12 But it's -- but that certainly is not even
13 remotely the case here where we have had some form of the
14 so-called qui tam actions in various permutations. They
15 were very popular at the time of the first Congress, of
16 course, fell into disuse, and -- and really wasn't revived
17 again until this formulation under the False Claims Act,
18 which in and of itself fell into -- into disuse between
19 1943 and 1986.

20 So, I don't think we have the situation here
21 where we can look back and get a clear message from the
22 historic record, whether it be from English common law or
23 from our own American jurisprudence.

24 QUESTION: Well, the common law doesn't --
25 doesn't necessarily prove anything. I mean, at common

1 law, I -- I suppose all sorts of things occurred which
2 would violate the new doctrine of separation of powers
3 that the Federal Government adopted. I presume at common
4 law you could have had the decision of -- of the Supreme
5 Court overruled by Congress.

6 MR. MALLEY: Certainly, Your Honor, and -- and
7 of course, obviously, we have to look at the time of the
8 Convention.

9 QUESTION: But if there actually was a qui tam
10 statute enacted by, say, the First Congress, that would be
11 some indication that the First Congress, which had a
12 number of members from the Constitutional Convention in
13 it, thought that a qui tam statute met the requirements of
14 Article III.

15 MR. MALLEY: No, Your Honor, I -- I don't think
16 that's the case, and this is -- this is the reason why. I
17 -- I think that -- Mr. Chief Justice, I think that if
18 these qui tam statutes were all of a kind where -- where
19 we could see a common thread there, then we might be able
20 to draw some inferences from that. But -- but that -- but
21 that is -- that is not the case. And of course, history
22 alone cannot -- cannot overcome the irreducible
23 constitutional minimum of -- of Article III standing.

24 QUESTION: Well, unless it shows that our
25 irreducible minimum isn't consistent with the

1 understanding of the Framers.

2 QUESTION: Maybe the Framers hadn't read Lujan.

3 (Laughter.)

4 MR. MALLEY: No, Your Honor, obviously they
5 hadn't. But -- but in fact, I think they had something
6 different on their mind at the time. I think what they
7 had on their mind at the time was a new republic. They
8 didn't have the institutions and the blessings of a new
9 republic that we have today. They do not have the -- did
10 not have the institutions of a Department of Justice which
11 was ready and available to prosecute the laws. They
12 needed help. And -- and they were certainly -- certainly
13 they were looking for -- for help. And I -- I -- there's
14 nothing in the historic record --

15 QUESTION: Didn't the First Congress also pass
16 the statute that was stricken down in Marbury v. Madison?

17 MR. MALLEY: Yes, Your Honor.

18 QUESTION: I guess they hadn't read Marbury v.
19 Madison either, had they?

20 (Laughter.)

21 MR. MALLEY: Absolutely, Your Honor, and that
22 was -- that was not the -- the only one.

23 And moreover, what is further absent from the
24 historic record is any debate that we could find on -- on
25 something to do with separation of powers or cases and

1 controversies in the context of -- of these so-called qui
2 tam actions.

3 QUESTION: Mr. Malley, may I just go back with a
4 technical question to your -- your point earlier that
5 until the action was filed, the qui tam plaintiff has no
6 greater interest than -- than any taxpayer? My technical
7 question is this.

8 If the qui tam plaintiff gives what I guess --
9 it's the 60-day notice of an intent to commence such a
10 suit and during that period, the United States decides
11 that -- the Justice Department decides that it in fact
12 will initiate the action, under those circumstances, if
13 the Government wins the case, does the qui tam plaintiff
14 get anything?

15 MR. MALLEY: Well, I think -- I think that not
16 without violating the Eleventh Amendment, Your Honor.

17 QUESTION: Well, what does the statute provide?

18 MR. OLSON: The statute -- the statute provides
19 that while the Government takes over the action, that --
20 that the -- the relators still can make a claim for the
21 portion of recovery.

22 QUESTION: Let me ask you another question.
23 Assuming the Government never intervenes, as it has a
24 right to do in one of these actions, would it be res
25 judicata on the Government afterwards?

1 MR. MALLEY: Yes, Your Honor.

2 QUESTION: Do you know?

3 MR. MALLEY: But the point -- the point really
4 that -- that I think is -- is urgent in this case -- that
5 is, that -- is that this relator cannot -- cannot have it
6 both ways. Either -- either they have standing and then
7 run headlong into the -- to the bar of the Eleventh
8 Amendment or --

9 QUESTION: Well, let's talk about that because I
10 think we've injected you into this whole issue that you've
11 been talking about after the -- the petition was filed.
12 Are you going to address those issues of whether the State
13 is a person and the Eleventh Amendment concerns?

14 MR. MALLEY: Absolutely, Your Honor. We believe
15 that -- that all three issues are in play in this case,
16 and both the statutory construction issue which, you know,
17 harkening back to Mr. Chief Justice's remarks in the last
18 case, that where there's a -- where there's a statutory
19 issue involved, then the Court normally does not go to the
20 constitutional issues. So, we feel the statutory
21 construction issue is in play and certainly the Eleventh
22 Amendment issue.

23 QUESTION: Okay, but this is -- this is on
24 interlocutory posture, is it?

25 MR. MALLEY: It is.

1 QUESTION: And normally we wouldn't take
2 jurisdiction over the interpretation of the statute I
3 guess.

4 MR. MALLEY: Normally you certainly wouldn't,
5 and particularly in the case where it's an unrelated
6 issue. But as the courses -- in -- in the Swint case, we
7 read the Swint case as having left the door open. If --
8 if the Court has before it a case that's --

9 QUESTION: We didn't answer it, but suggested
10 that we hadn't decided it.

11 MR. MALLEY: Exactly, Your Honor, and I think
12 that -- I think that -- that in all likelihood, if I can
13 just speculate, the reason for that was to leave open the
14 option in -- in those circumstances where the issues are
15 inextricably intertwined and where -- it might not be
16 meaningful to -- to answer the -- you know, the -- the
17 central question without answering the other.

18 And here, when we're dealing with the Eleventh
19 Amendment, I mean, what do you look to? You have to look
20 to, well, who -- who is suing and who can be sued. And -
21 - and examination of the statute is rather critical to
22 looking to that issue. So, I -- we believe it's -- it's
23 certainly fair game.

24 And even the Eleventh Amendment issue, as
25 compared to the -- to the Article III standing issue,

1 admitting the fact that this -- this Court has -- has
2 indicated a strong preference to go to the Article III
3 issue first, still the -- the Eleventh Amendment issue is
4 one that is a jurisdictional issue, and I think this Court
5 in the Shack case recognized that -- that it -- that it
6 enjoyed a status -- a jurisdictional status, perhaps
7 somewhere between subject matter jurisdiction and personal
8 jurisdiction.

9 And -- and so, we believe they're -- they're co-
10 equal and the Court could choose, particularly in the
11 aftermath of all Alden and Blatchford, which has really
12 developed the issue for this case -- could choose to go
13 straight to the Eleventh Amendment issue.

14 QUESTION: I -- I can -- I can accept that as a
15 possibility, but -- but not perhaps going to the statutory
16 issue. Why is it intertwined? Why do we have to resolve
17 the statutory issue in order to -- in order -- I mean, the
18 fact is you -- you have a State as a defendant. You have
19 a private party as -- as the plaintiff.

20 MR. MALLEY: No, certainly, Justice Scalia, I
21 did not mean to suggest that the Court has to go to that
22 issue. I was only suggesting the Swint case seems to have
23 left the door open should it -- should it choose to
24 address the statutory issue as a -- as a way -- as being
25 prior to the constitutional issue. I certainly don't

1 suggest that -- that this Court has tied its hands in any
2 way. That's all.

3 QUESTION: But certainly -- certainly we also
4 have a -- a practice we don't go to constitutional issues
5 if we don't have to. And as you suggest, there you can
6 argue that the statutory issue should come before the
7 Eleventh Amendment issue at any rate. If Congress didn't
8 intend to make States liable under qui tam, you don't get
9 the Eleventh Amendment issue I would think.

10 MR. MALLEY: And -- and we're -- I guess what
11 I'm saying, Your Honor, is we would be happy if the Court
12 addressed this case on any of the three issues.

13 (Laughter.)

14 QUESTION: I -- I understand that, but -- but
15 just -- just to get the record straight, do you know of
16 any case where, in order to avoid a constitutional issue,
17 we have ignored a jurisdictional question and jumped
18 straight to the statutory question in order to avoid the
19 constitutional question which was a jurisdictional one?

20 MR. MALLEY: No. I -- I cannot -- I cannot cite
21 one to the Court, and --

22 QUESTION: Because there is none.

23 MR. MALLEY: And I -- and I certainly wouldn't
24 suggest that, you know, the Court, you know, has -- has to
25 go that direction.

1 QUESTION: Many of our jurisdictional questions
2 are constitutional questions.

3 MR. MALLEY: Absolutely, Your Honor, and the
4 Eleventh Amendment --

5 QUESTION: Yes, but on Eleventh Amendment
6 jurisdiction, we usually ask whether there's a clear
7 statement or not first, and if no clear statement, then we
8 don't -- don't reach the Eleventh Amendment issue. Isn't
9 that our practice?

10 MR. MALLEY: That -- that has been the practice,
11 of course, as -- as stated in the -- in the Will case.

12 QUESTION: And this is much the same thing,
13 isn't it?

14 MR. MALLEY: And -- and --

15 QUESTION: The same kind of statutory question.
16 What's a person?

17 MR. MALLEY: On the other hand, this Court has
18 indicated its -- its preference to go to jurisdictional
19 issues as a threshold matter. So, I -- all I'm saying is
20 I think the choices are there.

21 QUESTION: One thing we know for sure is you
22 only have half an hour to argue.

23 (Laughter.)

24 MR. MALLEY: Thank -- thank you for that segue,
25 Your Honor, Mr. Chief Justice.

1 (Laughter.)

2 MR. MALLEY: The -- the critical -- the critical
3 portion of the Eleventh Amendment article, which --
4 argument which I really have not had a chance to -- to
5 speak much to, stems from the fact that we have a qui tam
6 relator, a private person of his own motivation, of his
7 own initiative, his own motivation, and under the Hughes
8 case, a motivation for personal gain and -- and perhaps
9 ill will and -- and not for the public good, has brought
10 the State of Vermont into court without its consent. And
11 we believe that violates the -- the Eleventh Amendment,
12 and most particularly, the interest as laid forth in -- in
13 this Court in the Alden and Blatchford cases where the
14 nature of the consent to suit by the United States in the
15 plan of the convention was a suit brought by responsible
16 Federal officials exercising political responsibility.

17 QUESTION: Is -- is there an argument here that
18 whatever the force of your position is, it has been -- it
19 has been waived contractually? Because as I understand
20 it, the State of Vermont, of course, had an express
21 contract with the United States and that contract provided
22 that it was -- that the United States, as a contracting
23 party, would have all the -- I think the phrase was all
24 the rights provided by law, which I suppose would be
25 enough to include the qui tam statute. Would that be

1 sufficient to effect a waiver of whatever Eleventh
2 Amendment defense the United -- the State of Vermont might
3 otherwise have?

4 MR. MALLEY: I -- I don't think so, Your Honor,
5 and -- and the reason for that is that -- that under the
6 Edelman decision, mere participation in a Federal program
7 is -- is not -- is not enough.

8 QUESTION: Well, but this is -- this is a step
9 beyond mere participation. I mean, it's -- it's an
10 agreement, as I understand it, to submit oneself to the -
11 - the State to submit itself to the remedial scheme of the
12 United States statutes and -- and the qui tam statute is
13 part of it.

14 MR. MALLEY: Well, of course, there wouldn't be
15 any -- just looking at it from a -- you know, a contract
16 standpoint, what was the meeting of the minds, well,
17 certainly in the context of a -- of a False Claims Act
18 statute which is -- is to be interpreted, which of course
19 doesn't define the term person, and much -- must be
20 interpreted --

21 QUESTION: Well, we assume -- we assume we've
22 got over the person issue in order to get to the Eleventh
23 Amendment issue.

24 MR. MALLEY: No, but --

25 QUESTION: So, we'll assume that person does

1 include the State.

2 MR. MALLEY: Well, even if we assume that, Your
3 Honor, the -- the -- how could there be a meeting of the
4 minds? I don't think there can be a meeting of the minds
5 if -- if the -- if the State goes into a contractual
6 relationship with the United States knowing that it is --
7 it consents to the remedies that the United States can
8 bring, those -- those kinds of suits that are authorized
9 by Alden and Blatchford but -- but does -- but is not
10 consenting to suits by private persons.

11 QUESTION: Yes, but I think the point of my
12 question was that the statute provides, in fact, for a --
13 a remedy at the behest of exactly the kind of plaintiff
14 that we have here. And if that is part of the remedial
15 scheme to which the individuals seem to agree in the
16 statute -- in the contract, why doesn't the contract
17 effect a waiver of whatever Eleventh Amendment immunity
18 might otherwise be asserted?

19 MR. MALLEY: Well, I would say, Justice Souter,
20 that -- that -- that if it was clear under the clear
21 statement rule and that that -- the False Claims Act --

22 QUESTION: Yes, but that's a -- that's a rule -
23 - that's a rule of legislation. We're talking here about
24 a contractual provision.

25 MR. MALLEY: But -- but under the Pennhurst

1 case, Your Honor, the -- the Congress must make its
2 intention clear and manifest if it -- if it intends to
3 impose a condition on the grant of Federal monies upon a
4 State.

5 QUESTION: And you say the -- the uncertainty
6 about what person means would -- would be, in effect, to
7 the failure to -- to make its position --

8 MR. MALLEY: Certainly -- certainly that and
9 also the effect that would -- that would -- that would be
10 involved in -- in the Eleventh Amendment.

11 QUESTION: Did -- did the respondent rely on --

12

13 QUESTION: Did the court of appeals rely on the
14 contractual ground?

15 MR. MALLEY: No, Your Honor. Of course, the --
16 the court of appeals merely -- merely felt that -- that
17 there was a -- the claim was --

18 QUESTION: Did the -- did the respondent raise
19 the contractual point as a alternate ground for
20 affirmance?

21 MR. MALLEY: No -- no, Your Honor.

22 QUESTION: What did the contract say, by the
23 way? I don't -- I don't even know what it said. Did it
24 say we -- we agree to all remedies that anybody may have
25 or to any remedies that the United States may have?

1 MR. MALLEY: The contract -- the agreement under
2 which we entered into this arrangement required that the
3 State of Vermont submit to a range of -- of remedies.
4 Most particularly are those under 40 C.F.R., part 31 which
5 require for a full range of supplying records to the
6 United States, submitting to performance reviews, the
7 possibility of withholding cash payments, the possibility
8 of disallowing part of prior costs, suspension of the
9 program, even -- even that the United States Environmental
10 Protection Agency could come in and -- and take over and
11 operate these Clean Water Act programs. And there was
12 nothing in there suggesting that -- that part of the deal
13 was that -- that the State of Vermont had to comply with a
14 False Claims Act and particularly one that -- that doesn't
15 -- doesn't apply to the States.

16 Your Honor --

17 QUESTION: Do you think that if the State can't
18 be a defendant, it also can't be a plaintiff, or would you
19 make a distinction between those two?

20 MR. MALLEY: I -- I think there is a distinction
21 between the two, Your Honor. If -- if there had been a
22 prior case that had found that States are persons-
23 plaintiffs, then obviously we would have to -- we would
24 have to get over the hurdle of, you know, the consistent
25 meaning doctrine. But in the context of this case where

1 the issue is whether the State can be a -- can be a
2 defendant person, then the -- the test is so different
3 that I don't think that they provide any real
4 comparability.

5 For example, under the Will case, it was the
6 fact that -- that defining the term person to include a
7 State implicated actions which upset the constitutional
8 balance between State and Federal governments, and for
9 that reason, it -- it implicated the clear statement rule.

10 And now here in this case where this statute
11 would purport to lay down huge penalties on the State,
12 treble damages and -- and civil penalties up to \$10,000 -
13 -

14 QUESTION: Mr. Malley, can I just interrupt for
15 a second? I understand that there is a difference. I
16 don't understand your answer to Justice Ginsburg's
17 question. Do you think Vermont could bring a suit as a
18 plaintiff, as you understand the statute today?

19 MR. MALLEY: We -- we do not -- we do not assert
20 that, Your Honor, and --

21 QUESTION: I know, but what's your answer to the
22 question?

23 (Laughter.)

24 QUESTION: Do you think Vermont could bring a
25 suit or not under this statute?

1 MR. MALLEY: We -- we do not -- we do not
2 believe, given the plain statement of -- of the meaning -
3 -

4 QUESTION: The answer is no?

5 MR. MALLEY: -- the State -- the State could
6 bring that.

7 QUESTION: The answer is no. Okay.

8 QUESTION: Has Vermont ever brought a -- a suit
9 under the False Claims Act?

10 MR. MALLEY: No, Your Honor, we have not. Other
11 States have, but -- but Vermont has not.

12 QUESTION: Do we have any indication of how many
13 of these False Claims Act suits the United States itself
14 has initiated against States, if any, as distinguished
15 from the qui tam?

16 MR. MALLEY: I do not have that number in mind,
17 Your Honor, but -- but my distinct impression is it is --
18 it is precious little. I think we cited the Graber case
19 where the United States was involved.

20 But I think the reason -- the reason that I
21 cannot name a single case is -- is that the -- the United
22 States has so many remedies involving the States with
23 regard to the carrying out of these -- these grant
24 programs that -- that the False Claims Act really is -- is
25 not necessary. I mean, it -- it -- for one thing, the EPA

1 officials in this instance are in our offices on a regular
2 basis working hand in hand to implement these programs.
3 They -- they know what's going on. They have the full
4 range of administrative remedies if necessary under 40
5 C.F.R., and even if it's necessary to get to issues
6 involving lawsuits, which -- which rarely is the case,
7 there, of course, are common law actions that are
8 available, such as unjust enrichment, common law fraud,
9 and so forth. But I think the reason that -- that these
10 cases are virtually nonexistent is that they are -- are
11 not necessary.

12 And for that reason, there's nothing really
13 anomalous about construing the False Claims Act as not
14 applying to the States. In fact, the 1980 -- the Congress
15 -- the 1986 Congress passed the Program Fraud Civil --
16 Civil Remedies Act which provided some additional
17 administrative remedies, but explicitly included
18 corporations and individuals and partnerships but not the
19 States. And the reason is, we submit, that it's because
20 they have all of the ammunition that they already need to
21 keep the -- the States squeaky clean.

22 If there are no further questions, I'd like to
23 retain my time.

24 QUESTION: Very well, Mr. Malley.

25 MR. MALLEY: Thank you.

1 QUESTION: Mr. Olson, we'll hear from you.

2 ORAL ARGUMENT OF THEODORE B. OLSON

3 ON BEHALF OF RESPONDENT STEVENS

4 MR. OLSON: Mr. Chief Justice, and may it please
5 the Court:

6 As the earlier segment of the argument has
7 already delved into, the qui tam mechanism has existed for
8 centuries. It was well known when our Constitution was
9 created. It was adopted 23 times by our count by the
10 first four Congresses of the United States. It has been
11 recognized by Congress and by this Court on various
12 occasions. Congress --

13 QUESTION: You're counting -- you're counting
14 those -- those situations where the suit is not brought by
15 the individual, but he just gets a bounty?

16 MR. OLSON: Yes, and this Court --

17 QUESTION: Well, I don't consider that qui tam.
18 I mean, that's -- that's --

19 MR. MALLEY: In *Marcus v. Hess*, this Court in
20 1943, construing the earlier 1805 case, said that those
21 cases that gave a common informer award were to be
22 construed as including the right to bring the action to
23 recover that reward by the qui tam relator. That's what
24 this Court said in 1943. So that those 23 statutes, which
25 included a number -- which created a direct right in the

1 statute itself, included a number that created the fund
2 for the common informer, and this Court has construed
3 those as allowing that kind of a right.

4 This Court has also recognized in *Marcus v.*
5 *Hess*, and Congress has recognized, that this is one of the
6 least expensive and most effective means of preventing
7 fraud on -- on the Treasury.

8 It's important to understand, in considering the
9 Eleventh Amendment issue, that this is -- a *qui tam* action
10 is brought under the statute in the name of the United
11 States to impose a liability owed to the United States.
12 It redresses injury to the United States.

13 QUESTION: Are you addressing the Eleventh
14 Amendment question or the statutory question right now?

15 MR. OLSON: We are addressing -- I'm addressing
16 the Eleventh Amendment issue because the -- because we're
17 -- our argument, as we've articulated in the brief, is
18 that the Eleventh Amendment issue has to be considered
19 based upon the fact that this is a claim that belongs to
20 the United States.

21 QUESTION: Well, I trust you will get to the
22 statutory question somewhere in your argument.

23 MR. OLSON: Well, I will do that at any time.
24 The -- in fact, I will do that now.

25 It is very clear under the statute that section

1 3733 defines the word false claim law to include sections
2 3729 through 3733. It -- it defines the term false claim
3 investigation as including an investigation as to whether
4 anyone has violated a false claims law, which was defined
5 to include 3729, and then it defines person to include a
6 State.

7 QUESTION: Well, but that could apply -- that
8 could apply in the case where there's a suit against a
9 private contractor and the State has some records.

10 MR. OLSON: No, but it -- it specifically
11 defines in those three terms -- in 3733, there's only one
12 way to read the conjunction of those three terms. False
13 claims investigation specifically defines false claims
14 investigation as including an investigation as to whether
15 any person violated the false claims law, which is
16 included --

17 QUESTION: But it just says in 3733,
18 definitions, for purposes of this section.

19 MR. OLSON: Yes, but --

20 QUESTION: I -- I didn't see that it extended to
21 the whole act.

22 MR. OLSON: But -- but section -- that same
23 definition section includes a definition of false claims
24 law to include section 3729 through 3722.

25 QUESTION: Well, that's anything but a clear

1 statement --

2 MR. OLSON: It seems to me it's a very clear
3 statement. There's only one way to read that section,
4 especially when you take it into -- into consideration
5 with the legislative history where it was quite clear in
6 the Senate Judiciary report that the Congress understood
7 at --

8 QUESTION: Well, are you saying then that
9 Congress extended it to the States sometime recently or in
10 1860, whenever it was passed?

11 MR. OLSON: We contend that it is -- it is
12 unclear with respect to the 1863 version, but it is quite
13 clear with respect to the 1966 amendment which removed the
14 first section which defined a person not in the service of
15 the military and -- and eliminated that section, put in a
16 new section which said --

17 QUESTION: It's only by virtue of the amendment
18 that your -- your position would prevail.

19 MR. OLSON: We think it's considerably stronger
20 with respect to the amendment in 1866.

21 QUESTION: Well, if there -- if --

22 MR. OLSON: And I think it's --

23 QUESTION: Just a minute, Mr. Olson.

24 If -- if there was no clear statement in 1863 -
25 - and I -- I have a feeling then that the States weren't

1 getting much from the Federal Government the way they are
2 today. There would be less reason for it -- then wouldn't
3 it be fair to say that without the amendment, your
4 position would -- would fail?

5 MR. OLSON: I think the case is quite weak,
6 Chief Justice Rehnquist.

7 QUESTION: Well, can you answer my question yes
8 or no?

9 MR. OLSON: I think that we could make a very
10 good argument, but possibly not persuasive to this Court.
11 But it's a very persuasive argument when you take into
12 consideration that the -- the definitional section was
13 stricken and replaced with the words any person. Any
14 person is defined in the statute to include States.
15 Section -- the provision can be also construed to give
16 States a right as plaintiffs under the statute, and this
17 Court said that it would be anomalous in -- in Marcus v.
18 Hess, the same case I meant before. The Court held that
19 the False Claims Act cannot have one meaning for actions
20 brought by public officials and quite a different meaning
21 when the same language is invoked by a qui tam plaintiff.

22 QUESTION: I don't understand how the CID
23 section -- I mean I see that it helps you, but it seems
24 far from conclusive. As I get it, it just says whenever
25 the AG has reason to believe any person -- that includes a

1 State -- may be in possession of any documentary
2 information, et cetera, relevant to a false claims law
3 investigation -- and that includes the sections you define
4 -- he has to turn it over. If States have information,
5 they have to turn it over. That doesn't mean they should
6 be defendants.

7 MR. OLSON: It -- I -- I thought that was a
8 difficult construction to make at first, Your Honor, until
9 I read the statutes carefully together, including all
10 three of the definitions, the definition of false claims
11 law, which is in (1)(1), the false claims law
12 investigation in (1)(2), and the definition of the word
13 person in (1)(4). If you put those together with the
14 provisions that appear to allow States to bring cases as
15 plaintiffs, if you put that together with the change in
16 the definition to include any person --

17 QUESTION: I see. It's in the --

18 MR. OLSON: -- and -- and if you -- and if you
19 put it together with the Senate Judiciary Committee report
20 which was quite clear that the Senate was assuming that
21 States were persons under the statute as it was -- being
22 adopted --

23 QUESTION: The -- the report they say, which is
24 I think correct, that that's in a background section and
25 that that report purports to be telling what the human

1 being who wrote that report thought the law was before
2 these amendments. Of course, that person was wrong. That
3 isn't what the law was, as you've said, or at least it
4 isn't very persuasive. And so, why would a statement in a
5 background section show that what Congress intends to do
6 is to change that substance rather than just show Congress
7 intends to pick up whatever the law was before?

8 MR. OLSON: It seems to me all of this put
9 together, including the Senate report, including the fact
10 that this is an action by the United States to protect the
11 property of the United States against fraud against the
12 United States, and you don't -- this Court has held you
13 don't need that so-called plain statement with respect to
14 whether or not claims by the United States can be brought
15 against States, and the interest of the United States in
16 protecting its property from fraud, all of those put
17 together, it strike me make a very persuasive case that
18 the statute intended to include States as persons.
19 Certainly the people reading this report in the Senate and
20 in -- in the Congress of the United States would have
21 assumed that that is what Congress was doing in 1966.

22 It is --

23 QUESTION: Wouldn't they -- if they had flagged
24 it as a change, they would have gotten a lot of testimony
25 from States I guess who might have been opposed to it.

1 MR. OLSON: Or States who might have been in
2 favor of it because --

3 QUESTION: Yes, they might have.

4 MR. OLSON: -- because States have been bringing
5 cases under the -- under the False Claims Act, as -- as
6 the discussion heretofore has indicated.

7 QUESTION: When -- when a person writes in a
8 background section this is the law, we're not making a
9 change, then it tends to pass unnoticed.

10 MR. OLSON: Well, it -- it -- if standing alone,
11 that might be the case, but standing in conjunction with
12 the fact that the Senate and the Congress of the United
13 States specifically defined the word person to include the
14 State in section 3733. And as I said, if one reads those
15 three provisions together, plus the provision in 3732 I
16 believe it was that makes it relatively clear that States
17 can be plaintiffs under these circumstances and can have
18 pendent jurisdiction with respect to a claim of fraud
19 against the State treasury, the package makes it
20 relatively clear.

21 QUESTION: Your position seems to require quite
22 a few props.

23 MR. OLSON: Well, the fact is it -- I don't
24 think it requires quite a few props, but it has quite a
25 few props, and that makes it doubly persuasive. The --

1 (Laughter.)

2 MR. OLSON: With -- with respect to the Eleventh
3 Amendment question, this Court has repeatedly, since the
4 late 19th century, determined that Eleventh Amendment
5 questions have to be determined based upon who is the real
6 party in interest, not who is the nominal party, but who
7 gets the benefit of the judgment, who -- upon whom will
8 the effect of the judgment be imposed. And in this case
9 it's quite clear. As I was saying, it is a case that's
10 brought for fraud against the United States imposing
11 liability to the United States for damage done to the
12 United States, a recovery based upon damages to the United
13 States --

14 QUESTION: Not all of which goes to the United
15 States. So, why can't you say it's a suit by the United
16 States insofar as the -- the reward that goes to the
17 United States is concerned? But it is not a suit against
18 -- brought by the United States to the extent that the
19 recovery goes to somebody else.

20 MR. OLSON: The -- we -- in the case of Arizona
21 v. California, the Court talked about whether an
22 intervenor who would not change the outcome of a case
23 would make any difference with respect to Eleventh
24 Amendment issues. And the Court said, since the
25 intervention of those parties, which were Indian tribes in

1 that case, would not make any different with respect to
2 the ultimate liability, Mr. Stevens' --

3 QUESTION: But this isn't an intervenor. I
4 mean, this -- this is the person who initiates the suit.

5 MR. OLSON: He initiates the suit.

6 QUESTION: And -- and it seems to me, when --
7 when all you have before you is that person, the question
8 is who is the real party in interest as to that person's
9 suit. I mean, it's obvious who the real party in interest
10 -- he's looking to get the reward.

11 MR. OLSON: There is only one cause of action,
12 Justice Scalia, under the statute and that's in favor of
13 the United States. If he participates by conducting the
14 case with the approval of the Attorney General, subject to
15 the Attorney General's power to dismiss the suit and to
16 settle the suit and to intervene at any time, then he's
17 entitled to recover a portion of the proceeds paid to the
18 United States.

19 QUESTION: Well, if -- if you say there is only
20 one cause of action, then I'm not sure that helps you. I
21 mean, if -- if -- it seems to me all of the one cause of
22 action has to be by the United States --

23 MR. OLSON: Because of --

24 QUESTION: -- and if any of -- if any of the
25 cause of action is not by the United States, it seems to

1 me maybe the whole thing falls. I can see you're
2 splitting into two and saying the United States' portion
3 is okay. But if it's all going to be one, why should I
4 accept your view that it's the United States who should be
5 deemed to be the only person there, even though there are
6 really two people in interest there? Why should I accept
7 your view that the United States should be deemed to be
8 the one rather than -- than the --

9 MR. OLSON: As I -- as I read this Court's
10 Eleventh Amendment decisions, the -- the party who
11 receives the primary benefit of the action is perceived to
12 be the real party in interest. And in fact, whether
13 certain of the proceeds that are payable to the United
14 States might subsequently be paid to Mr. Stevens as a
15 relator would not change the fundamental character of it
16 being an action in the name of the United States for a
17 liability --

18 QUESTION: What -- what cases -- maybe just one
19 or two -- do you rely on for that -- for that real party
20 in interest proposition that --

21 MR. OLSON: Well, there are several. In fact,
22 there's a long line of cases --

23 QUESTION: Yes. All I was asking was for one or
24 two.

25 MR. OLSON: One is Kansas v. the United States,

1 which is at 204 U.S. --

2 QUESTION: It involves who the defendant is,
3 who's the real party in interest as far as the State is
4 concerned.

5 QUESTION: Yes.

6 QUESTION: Right?

7 MR. OLSON: And there are other cases, and I
8 can't give you the name of the case, but there are cases
9 cited in the brief in which the same test was applied with
10 respect to questions of sovereignty irrespective of
11 whether --

12 QUESTION: Those -- those are original
13 jurisdiction cases that have nothing to do with the
14 Eleventh Amendment.

15 MR. OLSON: Some of the cases cited were
16 original jurisdiction cases. Some of them were not
17 original jurisdiction cases.

18 QUESTION: Well, what are the Eleventh Amendment
19 cases that -- that you rely on? You said that the
20 Eleventh Amendment jurisprudence provides.

21 MR. OLSON: Those are cited in the brief, Chief
22 Justice Rehnquist, and I can't give you the names of
23 those.

24 QUESTION: Why -- why is it that the United
25 States, under your rule, can bring an action on behalf of

1 an employee under the Fair Labor Standards Act without an
2 Eleventh Amendment violation? Isn't the employee under
3 your rule the real party in interest?

4 MR. OLSON: The fundamental difference in those
5 cases are those cases are brought by -- in the case where
6 it's brought by the United States, it is brought to
7 enforce the laws of the United States. In the cases -- in
8 the Alden case and in the Blatchford case, the Court was
9 -- the Court was dealing there with cases that were
10 brought by plaintiffs on their own behalf and not bringing
11 a claim on behalf of the United States.

12 QUESTION: If -- if the United States brings an
13 action for an employee under the Fair Labor Standards Act,
14 who is the real party in interest under your test?

15 MR. OLSON: The United States remains the real
16 party in interest because the United States' fundamental
17 interest in that case is to enforce the laws of the United
18 States.

19 QUESTION: But the whole name of actions comes
20 from the Latin which says who on his own behalf as well as
21 on the part of the king. I mean, in the very title of
22 these actions --

23 MR. OLSON: There is no --

24 QUESTION: -- it indicates that the suit is
25 brought on behalf of the individual bringing the suit.

1 MR. OLSON: There is no question, Justice
2 Scalia, and we're not denying the fact that the relator in
3 these cases has an interest in the outcome of the case.
4 And that is the nominal form --

5 QUESTION: I didn't say interest in the outcome.
6 I say he brought the suit on his own behalf.

7 MR. OLSON: In the name of the United States to
8 enforce a --

9 QUESTION: And also on behalf of the king.
10 That's the United States.

11 MR. OLSON: Well, that's correct.

12 QUESTION: That's what these actions are.
13 They're brought on behalf of the individual and on behalf
14 of -- of the sovereign.

15 MR. OLSON: To vindicate -- but to vindicate the
16 fundamental interests of the United States and to protect
17 the broader interest of the United States in deterring --
18 not just redressing, but also deterring fraud against the
19 United States. The purpose for this statute is to
20 vindicate the interests of the United States. And the
21 fact that Mr. Stevens brings the case under scrupulous
22 controls, considerable controls by the Attorney General
23 does not change the fundamental character as it being an
24 action being pursued for the benefit and to achieve the
25 interests of the United States.

1 QUESTION: The purpose of treble damage --

2 QUESTION: Thank you, Mr. Olson.

3 Mr. Kneedler, we'll hear from you.

4 ORAL ARGUMENT OF EDWIN S. KNEEDLER

5 ON BEHALF OF RESPONDENT UNITED STATES

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

8 Since Vermont has raised the question of Article
9 III standing, I would like to make a few brief responses.

10 A qui tam action, it seems to us, is precisely
11 what the Court had in mind in its decision in Lujan v.
12 Defenders of Wildlife in distinguishing the standing issue
13 there from a situation in which Congress has, quote,
14 created a concrete private interest in the outcome of a
15 suit for the Government's benefit by providing a cash
16 bounty for the victorious plaintiff. And the -- that
17 concrete interest in the outcome of the suit, the prospect
18 of recovering is sufficient to create an interest.

19 Of course, the United States was injured by the
20 -- or allegedly injured by the violation of the False
21 Claims Act. So, there was an injury in fact, and the
22 False Claims Act operates, in effect, as an assignment or
23 in the nature of an assignment. And under -- under
24 Vermont's theory, no assigned claim could be brought under
25 Article III because the assignor was the injured party,

1 but the person bringing the suit was not. But it is
2 commonplace under our system of justice for claims to be
3 able to be assigned.

4 QUESTION: Is it commonplace for the United
5 States to assign its claims?

6 MR. KNEEDLER: The United States does not
7 commonly assign its claims, but the qui tam mechanism has
8 been around since 1790 and operates in very much the same
9 way. So --

10 QUESTION: Let me ask this other question. Has
11 the United States often terminated actions brought by qui
12 tam plaintiffs?

13 MR. KNEEDLER: It has done it on a few
14 occasions. The Ninth Circuit's decision in Sequoia Orange
15 was an instance in which the United States intervened not
16 at the outset but -- but later down the road and dismissed
17 the case because of concern that the qui tam suit was
18 continuing to upset that -- that particular sector of the
19 agricultural economy in California. And the Ninth Circuit
20 held -- and the court below in this case agreed with the
21 proposition -- that the United States can intervene and
22 dismiss a case for any reason rationally related to a
23 legitimate governmental purpose, as that one was.

24 The other point I'd like to make about the
25 Article III --

1 QUESTION: Well, I mean, if it is a straight
2 assignment, suppose the United States just assigns a claim
3 to Smith, a claim against a State. Is it clear whether
4 Smith is or isn't barred by the Eleventh Amendment?

5 MR. KNEEDLER: I'm just -- my point here simply
6 goes to the Article III point not the -- not the
7 Eleventh --

8 QUESTION: Yes, but I mean, can you have it both
9 ways? That is, if --

10 MR. KNEEDLER: No. I think if there is a
11 complete assignment of a claim, taking it out of the -- of
12 the qui tam situation for a moment, but an assignment of a
13 commercial claim, I -- I think that the Eleventh Amendment
14 might well pose a bar.

15 QUESTION: All right. So, I do too. So, under
16 those circumstances then, how can you have it both ways?

17 MR. KNEEDLER: Well, because a qui tam action is
18 -- is a hybrid form of action that has been in existence
19 since the beginning of the Nation. The United States,
20 particularly under the False Claims Act, retains an
21 interest and retains the ability to come into the --

22 QUESTION: Your view would be for purposes of
23 standing, an assignment; for purposes of Eleventh
24 Amendment, not an assignment. It's the interest of the
25 United States. That isn't --

1 MR. KNEEDLER: Well, we're -- we're not -- we're
2 not saying it's literally an assignment. All we're saying
3 is that in response to the Article III argument, that the
4 Article III argument, taken to its logical conclusion,
5 would mean that an assigned claim could not be brought.
6 And while the United States has not often assigned its
7 claims outside of this area, it's important to recognize
8 that the Property Clause of the United States grants the
9 Congress the power to dispose of all property of the
10 United States, and that would include a show -- an action.
11 And this Court has held that that power exists without
12 limitation. So, Congress has to be able -- we think under
13 the Property Clause, to be able to assign a cause of
14 action just as any private litigate might.

15 QUESTION: Yes, but -- but that -- that would -
16 - that would only cover the situation where all the -- all
17 the qui tam plaintiff gets is -- is his own recovery and
18 nothing is -- is then credited to -- to the United States.

19 MR. KNEEDLER: No, I don't think that's correct.
20 I think as -- as long as the qui tam relator gets
21 something, he has a concrete stake in the outcome of the
22 case. The fact that the United States also gets something
23 -- in fact, the bulk of the recovery -- shows why the --
24 why the United States has a substantial interest in the
25 case, but it doesn't detract from the fact that the qui

1 tam relator has a concrete interest.

2 QUESTION: You need standing. I mean, the
3 concrete interest has to pertain to each element of relief
4 that you're -- that you're asking for. And what is
5 this --

6 MR. KNEEDLER: Well, there is only one -- there
7 is only one judgment in a qui tam case. There is one
8 judgment and the statute provides then that the relator
9 recovers his share out of the proceeds of that -- of that
10 action, in other words, out of the judgment that is
11 rendered in favor of the United States. There are not two
12 separate causes of action.

13 The other point I wanted to make before I move
14 on from Article III standing is that this Court's modern
15 standing jurisprudence has been an effort to apply the
16 case or controversy principles in the new context of
17 modern public law litigation. But the -- the ultimate
18 inquiry is what is a case or controversy. Those are the
19 constitutional terms. And on that point, we think it's
20 critical to look what the Founders meant by those terms.

21 And in fact, just several terms ago in the Steel
22 Company case, the Court said that a case or controversy
23 means cases and controversies of the sort traditionally
24 amenable to and resolved by the judicial process. And
25 that classically describes qui tam actions which were in

1 existence both before the adoption of the Constitution and
2 after.

3 And the case or controversy provision in Article
4 III was intended to have continuity. It is not, for
5 example, like Marbury v. Madison which involved a -- a new
6 structural feature of our Constitution. It -- it refers
7 to provisions of the Constitution in which the Framers
8 intended continuity.

9 On -- on the statutory point, I'd like to make
10 clear at the outset that there is no clear statement
11 requirement in a situation involving the relationship
12 between the United States and a State. This is not a
13 situation in which Congress has abrogated a State's
14 sovereign immunity on behalf of a private person. The
15 False Claims Act is fundamentally a statute that regulates
16 the relationship between the United States and a State. A
17 relator, in some circumstances, is permitted to bring an
18 action to invoke the United States' cause of action to
19 recover from the defendant.

20 QUESTION: Well, that's -- that's not quite as
21 clear as you make it I think. The -- the action can
22 proceed without the United States ever intervening, can it
23 not?

24 MR. KNEEDLER: Yes, if there is a qui tam
25 action. But my -- my point is that the -- that the

1 definition of person is -- is important first of all in
2 section 3729 of the act which is not the suit filing
3 provision of the act. That's 3730. 3729 of the act is
4 what defines the liability of a -- of any person to the
5 United States. And the legislative history of the 1986
6 amendment shows quite clearly -- clearly that Congress
7 anticipated that States would be proper defendants. While
8 it may have been described in the background section of
9 the -- of the committee report, as Justice Breyer
10 explained, the whole purpose of the 1986 amendments was to
11 round out and reinforce and to -- and to make effective
12 what -- what Congress understood the present regime to be.

13 QUESTION: Well, what -- what was the law before
14 those amendments as to States?

15 MR. KNEEDLER: We -- we think that the law
16 probably did apply to the States because there was no
17 clear statement requirement. Now, as you pointed out,
18 there may not have been many instances in which the States
19 at the time that the False Claims Act was enacted would be
20 getting grants of this sort, but of course that had become
21 commonplace by the time of *Marcus v. Hess*. It's very
22 commonplace today.

23 QUESTION: Well, *Marcus* against *Hess* didn't
24 amend the statute --

25 MR. KNEEDLER: No, no. I know.

1 QUESTION: -- at least not purportedly.

2 MR. KNEEDLER: Right. No, just descriptive ---
3 excuse me -- descriptively.

4 But in 19 -- in 1986, Congress was revamping the
5 statute at a time when Federal grants had become common.

6 QUESTION: Well, if it were revamping the
7 statute, why -- why are you so dependent on something
8 called a background report that, as Justice Breyer says,
9 can probably better be read for describing existing law?

10 MR. KNEEDLER: Well, this is the reason why I
11 think it's specific. What Congress, in fact, did to 3729,
12 it previously read a person not in the military is liable
13 for various things. Well, Congress repealed that
14 paragraph and enacted a new paragraph which said any
15 person, deleting the qualification of not in the military,
16 which might be an awkward way to describe a State --

17 QUESTION: It might.

18 (Laughter.)

19 MR. KNEEDLER: -- but -- but also said any
20 person. Any person is usually an expansive term, and
21 there's certainly no reason to think that it -- that it
22 wasn't to be expansive here. And two other
23 significant --

24 QUESTION: But we -- we've had cases saying that
25 person -- the use of the word person doesn't ordinarily

1 include States.

2 MR. KNEEDLER: But that's typically where there
3 is a private interest at stake. As far as I'm aware,
4 petitioner has cited no case where the -- where the term
5 person has not been held to involve a State where there's
6 a relationship between the United States and a State.

7 QUESTION: Well, but here -- well, let's --
8 let's get back to the -- the relator. What is the
9 relator's injury in fact --

10 MR. KNEEDLER: The --

11 QUESTION: -- until the time the suit is
12 filed --

13 MR. KNEEDLER: The relator -- there is --

14 QUESTION: -- that's different from the ordinary
15 taxpayer?

16 MR. KNEEDLER: There is no prior injury to the
17 relator, but there certainly is a prior injury to the
18 United States. And as I've said, the statute operates in
19 the nature of an assignment. The -- the relator is given
20 the opportunity to invoke -- to redress the United States'
21 injury, but also given his own standing, because once he
22 files the suit, he has in a sense distinguished himself
23 from every other taxpayer because the statute gives him
24 the exclusive right to see the case through to judgment.
25 He has reduced the -- this free-floating cause of action,

1 captured it, made it his own, and -- and the statute then
2 gives him a personal right and a personal --

3 QUESTION: Gives him a personal right to -- to
4 his portion of the recovery, but that's -- we don't do
5 standing in gross the way you're describing it. So long
6 as he has standing for something, he has standing for
7 everything. And there's -- there's no way to see how he
8 has standing to get the money that's going to go to
9 somebody else --

10 MR. KNEEDLER: Well --

11 QUESTION: -- namely the United States.

12 MR. KNEEDLER: Well, in citizen suit cases, it's
13 -- it's not at all unusual for the plaintiff to be able to
14 bring the suit because of a personal injury to the -- to
15 the -- to the private plaintiff, the private citizen. But
16 the relief in the case may well be that civil penalties
17 awarded to the United States.

18 So, the relief -- the relief in question -- and
19 it's often -- in *Brown v. Board of Education*, the relief
20 awarded went beyond relief that just benefitted the
21 individual who was seeking a desegregated school. It had
22 a broader ramification, and so too here. But the fact --
23 the fact that it had --

24 QUESTION: All of the relief awarded benefitted
25 that person. It may have benefitted other persons as

1 well.

2 MR. KNEEDLER: Well, again, there is a single,
3 unitary judgment out of which the -- the -- in a way the
4 United States and the relator in that way could be looked
5 at as joint tenants, and a -- and a joint tenant is
6 typically empowered to protect the interests on behalf of
7 both tenants.

8 QUESTION: Mr. Kneedler --

9 MR. KNEEDLER: These are just analogies, but I
10 think they show why a single judgment in which one person
11 has an interest was enough to give a -- a concrete stake.

12 I'm sorry.

13 QUESTION: Would you adopt in any way as a fall-
14 back position that the False Claims Act includes the State
15 as a person if the United States is bringing the suit, but
16 does not include the State as a person if a private
17 individual is bringing the suit?

18 MR. KNEEDLER: Well, we certainly think if the
19 Court were to conclude that -- that a clear statement is
20 required that's not for the relator -- that wouldn't be
21 true for the United States, and I -- but that would --
22 that would come under 3730, not the definition of person
23 but who could bring a cause of action under 3730(a) or (b)
24 which distinguished the Attorney General and -- and the
25 private relator. But with respect to the word person, we

1 don't think that that makes any logical sense.

2 QUESTION: Because you did say in your brief one
3 of the reasons the United States has a large stake in this
4 is that the United States itself couldn't sue under the
5 False Claims Act.

6 MR. KNEEDLER: Right, and we think that -- we
7 think that's a particular reason why the idea that the
8 statute should be saved by construing States not to be
9 persons, it would be an odd sort of saving of -- saving
10 construction to deprive the United States of suing States
11 when States receive \$250 billion a year now.

12 QUESTION: Well, but that's --

13 QUESTION: Well, presumably the United States
14 has an -- an array of additional remedies. It's not like
15 the State is going to get away with something, is it?

16 MR. KNEEDLER: No, but Congress specifically
17 determined in 1986 that those other remedies were
18 inadequate and that the False Claims Act measures,
19 including the provisions for informers to bring
20 information to the United States or to -- to file suit
21 were critical to ferret out and -- and redress.

22 QUESTION: But that's the very point. Hundreds
23 of billions of dollars of joint programs means that when
24 you bring the States in, it changes the nature of the
25 statute. It's one thing to have private people, you know,

1 going through technical violations and searching the books
2 of private companies. It's quite another to set loose an
3 army of people on the States who will find every technical
4 violation they can because they get money for it.

5 MR. KNEEDLER: But that -- that --

6 QUESTION: So, the latter should be left to the
7 political process or other methods, not this one. That's
8 the argument.

9 MR. KNEEDLER: But that -- that concern does not
10 go to the question of whether the United States itself
11 should be able to bring a False Claims Act --

12 QUESTION: No, no. It goes to the question of
13 whether you take the word person, which up till 1986 has
14 in practice been included not States, and then just say
15 that a background statement and a couple of other little
16 -- little things in the statute, maybe worth an ounce
17 each, should be taken to work what I would characterize
18 pejoratively -- I don't really mean it -- as a kind of
19 revolution in the way the States -- potentially a
20 revolution in the way that the States --

21 MR. KNEEDLER: But again, your concern goes I -
22 - I thought primarily to the question of the qui tam
23 provision. That's different from the United States. If
24 the United States is bringing the suit, it can -- it can
25 exercise all appropriate cautions.

1 I wanted to just -- several things on the
2 Eleventh Amendment, if I may.

3 New Hampshire v. Louisiana I think is the
4 principal case where the Court found that there was an
5 Eleventh Amendment bar because the State was not the real
6 party in interest, even though nominally the plaintiff.
7 The -- the claim was really being brought on behalf of
8 private individuals.

9 And here I think we have really the reverse
10 situation where the relator is really representing the
11 interests of the United States in a lawsuit, but the
12 United States is substantially a real party in interest in
13 the case. And --

14 QUESTION: There -- there the -- the finding was
15 that the plaintiff was -- was not the real party in
16 interest.

17 MR. KNEEDLER: But because there was a -- a
18 private party that stood behind the State that -- that
19 stood to benefit, and here we have very much the same
20 thing, that although the relator brings the suit, he first
21 of all brings it in the name of the United States to
22 recover for the United States. And the United States
23 stands behind the relator, although the relator has a
24 personal interest -- stands behind the relator as a real
25 party in interest in the lawsuit.

1 And the relator's interest in this case is
2 derivative. This is not a situation like Alden v. Maine
3 or Blatchford where the plaintiff was suing to vindicate
4 an injury to himself. The plaintiff's interest in this
5 lawsuit is entirely derivative of that of the United
6 States.

7 And the -- a False Claims Act suit, whether
8 brought by the relator or brought by the United States,
9 retains its public character throughout. The United
10 States -- the Attorney General is always able to intervene
11 in the case, to take it over, to get pleadings, to
12 intervene and dismiss it. Her settlement -- or her
13 approval is required for settlement. This is control over
14 the suit that preserves political accountability in the
15 United States in the -- in the Federal Government for the
16 processing of the suit, but if the Attorney General
17 decides not to take over the suit, the suit can proceed
18 within the parameters that Congress has prescribed and
19 that the Attorney General provides in --

20 QUESTION: It still remains a suit by the United
21 States in your view.

22 MR. KNEEDLER: It's a suit both by the -- it's a
23 hybrid by the United States and by the relator.

24 QUESTION: Thank you, Mr. Kneedler.

25 Mr. Malley, you have 4 minutes remaining.

1 REBUTTAL ARGUMENT OF J. WALLACE MALLEY, JR.

2 ON BEHALF OF THE PETITIONER

3 MR. MALLEY: Thank you, and may it please the
4 Court:

5 I'd just like to focus on the inconsistency
6 which I believe I just heard from the Government's case.
7 On the one hand, the Government admits that it has -- that
8 the relator has no prior injury in this case, no prior
9 injury prior to bringing this suit. Well, if that's the
10 case, there is no standing.

11 QUESTION: Why can't you assign a claim to
12 someone who has no prior injury and they can bring a --
13 they can bring the claim? Can't they? An assignee never
14 has a prior injury.

15 MR. MALLEY: Assignments -- assignments
16 certainly are a possibility, Your Honor. But that's
17 not --

18 QUESTION: Well, he said look at this like an
19 assignment.

20 MR. MALLEY: But this -- this is -- it's
21 certainly not like an -- an assignment. We don't have
22 anything to indicate, number one, that that's an
23 assignment. There's nothing to indicate there's been some
24 transfer of ownership of -- of -- of the -- of the injury
25 that's -- in fact -- in fact, the United States wants to

1 have it both ways. They want to both say that it's --
2 it's an assignment, and -- but -- but they still have it.

3 And that's exactly the problem here, is that --
4 is that on the one hand, they want to say it's only the
5 United States' claim that's being brought here, and in
6 that case there's a standing problem. On the other hand,
7 they want to say that once the case is filed, that -- that
8 the relator captures it and makes it his own. Well, if
9 that's the case, then it's an Eleventh Amendment problem.
10 We submit they cannot have it --

11 QUESTION: What about his example of a joint
12 tenancy where two parties both have an interest in a
13 unitary judgment? Isn't that possible?

14 MR. MALLEY: A joint -- a joint tenancy --

15 QUESTION: He said it's comparable to a joint
16 tenancy, yes.

17 MR. MALLEY: I don't think so, Your Honor.

18 QUESTION: A partial assignment.

19 MR. MALLEY: In -- in that -- in that instance
20 either joint tenant has his or her own specific property
21 interest, and when that's infringed upon --

22 QUESTION: That's right. The Government has 75
23 percent and the qui tam relator has 25 percent.

24 MR. MALLEY: But it -- but -- but up until the
25 time this suit was filed, there was -- there was no

1 injury. This -- this -- I mean, as -- as the Court has
2 observed in -- in the Sierra Club and Lujan, is that the
3 plaintiff must be among those who were injured, and there
4 is no injury. Admittedly they have procedural interests,
5 but these are not --

6 QUESTION: Well, you're not suggesting an
7 assignee could never sue if -- if the assignee had never
8 been injured.

9 MR. MALLEY: No, Your Honor. But I'm just
10 submitting this is not an assignee here.

11 QUESTION: Well, if the Government had assigned
12 the claim in toto to the relator, I suppose the relator
13 could sue without any trouble and clearly have standing.

14 MR. MALLEY: Well, except for the Eleventh
15 Amendment, yes, Your Honor.

16 QUESTION: I'm not sure you could partially
17 assign claims anyway. I mean, it would be a nice way to
18 harass somebody, you know, divvy up a claim against
19 somebody into 100 pieces and give them to 100 different
20 people. I don't think it is doable.

21 MR. MALLEY: Let me just underscore one -- one
22 other point and that's the need for the plain statement
23 rule here. This relator is claiming, just on civil
24 penalties alone, a claim for \$25 million. That -- that
25 exceeds the total annual outlay for the Department of

1 Environmental Conservation in the State of Vermont by
2 about \$7 million. Now, clearly if that's what was
3 implicated in this statute, there should be a plain
4 statement rule so that we can be on fair notice that that
5 is what has happened.

6 Your Honor, we submit that's not what happened.
7 We ask the Court to reverse and dismiss this case.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Malley.
9 The case is submitted.

10 (Whereupon, at 12:03 p.m., the case in the
11 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:

VERMONT AGENCY OF NATURAL RESOURCES, Petitioner v. UNITED STATES, EX REL., JONATHAN STEVENS.

CASE NO: 98-1828

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

BY: Jonathan M. May
(REPORTER)