IN THE SUPREME COURT OF THE UNITED STATES

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RANDALL C. SCARBOROUGH, :

Petitioner :

v. : No. 02-1657

ANTHONY J. PRINCIPI, :

SECRETARY OF VETERANS :

AFFAIRS. :

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Washington, D.C.

Monday, February 23, 2004

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

APPEARANCES:

BRIAN WOLFMAN, ESQ., Washington, D.C.; on behalf of the Petitioner.

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-1657, Randall Scarborough v. Anthony J. Principi.

Mr. Wolfman.

ORAL ARGUMENT OF BRIAN WOLFMAN

ON BEHALF OF THE PETITIONER

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

In 1999, Randall Scarborough won his disability appeal before the Veterans Court on the ground that the Government's position constituted clear and unmistakable error and that that position was, quote, not reasonably debatable. End quote.

He then immediately filed a fee application under the Equal Access to Justice Act that contained three of the elements called for by the act, but it did not initially allege that the Government's position lacked substantial justification.

The Government seized on that alleged omission and without any mention of this Court's path-marking decision in Irwin v. Veterans Affairs, both it and the Federal Circuit determined that this omission of this legal conclusion was jurisdictional, meaning in effect

that Mr. Scarborough's amendment to the application could not relate back to his timely filed application.

The Federal Circuit and the Government persisted in this view even after this Court remanded in light of Edelman v. Lynchburg College, which embraced the relation-back doctrine both in a judicial and an administrative law context.

The Federal Circuit's fundamental error here, the basic mistake, is that it perceived EAJA's limitations period as jurisdictional. As I said, that holding can't be squared with the decision in Irwin or as reiterated by this Court just two terms ago in Franconia Associates, and that principle is this: unless Congress has provided otherwise, limitations periods that run in favor of the Government like those involving private parties are not jurisdictional, but rather are subject to ordinary statute of limitations principles that provide exceptions under certain circumstances.

And so then the question is, what does EAJA say to this? There's nothing in EAJA that even hints that the statute creates the absolute --

QUESTION: EAJA is Equal Access to Justice.

MR. WOLFMAN: Equal Access to Justice Act. That's the acronym, Your Honor.

There -- there's nothing that even hints that

the Court -- that the Congress created that type of absolute time bar under EAJA. In fact, quite the contrary. The statute makes clear that a court entertaining an EAJA application already has jurisdiction over the action. Simply put, EAJA can't be jurisdictional in that sense, absolute in that sense, because as this Court just reiterated in Kontrick v. Ryan, EAJA doesn't serve to place a class of cases within a court's adjudicative authority.

QUESTION: Mr. Wolfman, if you're right about that it's not jurisdictional, so there should be equitable tolling, why should there be equitable -- what's equitable about allowing a lawyer to overcome his carelessness? I mean, the -- the case of a layperson not getting a verification is one thing. A lawyer reads a statute, it says, do this, that, and the other, and he doesn't do the other, and then it says, oh, but be equitable, court. Why should a lawyer's carelessness be an occasion for equitable tolling? Is there anything in it for the client if this is just the lawyer's fee?

MR. WOLFMAN: No. Well, I think there are several answers to that, but let me take the last part first, Your Honor.

First is that here actually the -- the client has much coming. These are the client's fees, and the

veterans statutes provide that the contingent fee, which cannot exceed 20 percent, would be reduced dollar for dollar by the EAJA recovery. So the client here, as all veterans claims, do have money at stake.

Let me turn to the question of equitable tolling that you asked.

QUESTION: Excuse me. Explain that again. The contingence fee would be reduced dollar for dollar by the recovery on --

MR. WOLFMAN: By the EAJA recovery, yes. The -- the statute -- the -- the veterans statutes provide that the lawyer can enter a contingency arrangement with the client, but that the fee can't -- can't exceed 20 percent of the claimant's back benefits if he or she prevails. But when --

QUESTION: That's the recovered back benefits?

MR. WOLFMAN: That is correct, Your Honor. So there -- there can be no fee taken unless there's victory. The statute also provides that.

However, a -- a statute also provides on what do we do about the interaction between EAJA and this statutory contingency fee. And what it provides is that for the same work, if there is an EAJA recovery, the client must benefit by that. There can't be a double recovery and that the contingent fee would be reduced

dollar for dollar for the EAJA recovery.

QUESTION: You could easily just reduce it if it was the lawyer's negligence and stopped him getting the contingency.

MR. WOLFMAN: That is correct, but the law does not provide.

QUESTION: So -- so then we're back to where Justice Ginsburg's question was. You say, really, the person who should suffer is the lawyer, if the lawyer is negligent, not the client. That would be pretty easy to arrange. And you really want a rule that says whenever the lawyer is negligent, well, the other side has to suffer the consequence rather than the lawyer.

MR. WOLFMAN: Your -- Your Honor, first, there could be such a rule if Congress so provided, and I suppose --

QUESTION: Why couldn't you do it under a rule of the court? Why couldn't you just say -- I mean, if I were sitting in that court, it wouldn't take me long to try to figure that out unless Congress thought of -- unless it forbid it somewhere. I mean, if it forbid it, you couldn't do it, but -- but I don't know -- what you've read me doesn't sound as if it forbids it.

MR. WOLFMAN: I think it is true that the -- the statutes that I've just talked about don't forbid that.

Whether rulemaking authority enters into that kind of substantive arena, I think that would be unusual because ordinarily that would be governed by State malpractice --

QUESTION: I don't know what we're talking about here. Whether -- whether the -- whether the client can resist the lawyer's request for the 20 percent contingent fee on the ground that it's the lawyer's own fault that I didn't get compensation that would enable me to pay that fee.

MR. WOLFMAN: I think that's -- that's what the --

QUESTION: I don't know if that --

MR. WOLFMAN: -- the question --

QUESTION: Well, anyway, okay, let's skip that because the question is --

MR. WOLFMAN: I would like to go back to the --

QUESTION: Let's go back to the main issue.

MR. WOLFMAN: -- question of equitable tolling, if I might. And -- and let me answer that in two ways.

First of all, there is a category of equitable tolling that's set out in the Irwin decision and others which if -- if a claimant filed -- timely files a -- an action, that -- that is properly filed but jurisdictionally defective in some way, that equitable tolling is a -- is a basis for allowing some forbearance

in that circumstance --

QUESTION: Mr. Wolfman, I -- I don't understand why we have to first address equitable tolling. I mean, why don't we look at the statute and see whether it is necessary that this allegation that the U.S. was not substantially justified has to be made within 30 days? I mean, if it doesn't, why do you get into equitable tolling at all? Why don't you start with what the statute requires? I thought that was what the split was about.

MR. WOLFMAN: We -- Your Honor, with all respect, no. The split was not on the question of what the -- this -- whether the statute requires the allegation of no substantial justification in the 30 days. The split was on the question --

QUESTION: Do you take -- do you take the position that under the statute, the Equal Access to Justice Act statute, subsection (B), that that allegation does not have to be made within the 30-day period?

MR. WOLFMAN: We do and we briefed that extensively both in our opening brief and our -- and our reply brief.

QUESTION: And do you plan to address it this morning with us?

MR. WOLFMAN: I'd be happy to address it right now if -- if Your Honor will allow, which is that --

QUESTION: Well, it just looks like a lot easier argument to me than equitable tolling.

MR. WOLFMAN: Let me answer that. The -- the answer is the plain language of the statute, the first -- the first sentence of (d) -- of section (d)(1)(A) -- (d)(1)(B) -- excuse me -- says that there shall be three things alleged and that they must be done within 30 days. The next sentence, which is the one that is at issue here, says that the -- the parties shall also allege that the position of the Government is not substantially justified, and that sentence does not include the 30-day time limit. That is one of our arguments in this case.

QUESTION: And that's similar to the kind of interpretation the Court had to face in Edelman, isn't it?

MR. WOLFMAN: It is.

QUESTION: I mean, you know --

MR. WOLFMAN: And that -- we make that argument directly in our brief.

QUESTION: In Edelman, it wasn't in the -- it didn't follow immediately as part of the same paragraph and the -- the what leaps to mind when you read a sentence that says the parties shall also allege, is where? Where shall the party allege this? Is he supposed to file a separate paper later? The logical answer to that question is found in the preceding sentence: shall within 30 days

submit to the court an application which shows that the party is a prevailing party and is eligible to receive an award stating the actual time, blah, blah. The party shall also allege. Surely it means where? In that application that is referred to in the preceding sentence.

It seems to me you're making a -- a -- just a mess of -- of that paragraph to say, you know, you can file a paper, who knows, 9 months later alleging that. That -- that's just not a -- that's not a reasonable reading of it, it seems to me.

MR. WOLFMAN: But, Your Honor, we disagree and the reason is it's in that separate sentence and there are subsequent proceedings in the case. There are subsequent filings made. There are sometimes hearings where that --

QUESTION: It doesn't matter at all when it's alleged? You can wait until, you know, the very end of the case?

MR. WOLFMAN: That -- that is --

QUESTION: The Government has to go along not even knowing whether you claim that the Government's position was substantially justified?

MR. WOLFMAN: Well, on that question, the -- the burden is on the Government to show that its position was substantially justified.

QUESTION: That's the point. The statute places

the burden on the Government to prove that its position was not substantially justified.

MR. WOLFMAN: That is correct, and that is our submission. So the question is why might Congress have parsed it in this way.

QUESTION: It's the burden of proof as opposed to the burden of making the allegation of -- of setting the -- the point in controversy.

MR. WOLFMAN: That -- that is correct in the sense that -- that the statute is unusual and that it -- it's -- it does say that the party seeking fees shall allege the position of the Government lacks substantial justification. But there's no question -- and it is conceded here that the Government has the burden of persuasion on that question. So in -- in this respect --

QUESTION: You mean, even if you don't allege it, the Government has to come in and show that its position was -- even though it's never alleged. Surely you don't say that.

MR. WOLFMAN: Your Honor, it --

QUESTION: What -- what if you have a lawyer that hasn't read the statute and he doesn't realize, that he thinks if he won the case, he gets his fees? And so he just files this without any allegation that the Government's case was not substantially justified.

MR. WOLFMAN: We --

QUESTION: The Government still has to come in and prove that its case was substantially justified?

MR. WOLFMAN: No. We -- we believe that at some point the statute makes clear that at some point the applicant will have to make that allegation.

QUESTION: What would be the logical point --

MR. WOLFMAN: I think the --

QUESTION: -- for that -- for that claim to be made?

MR. WOLFMAN: In all candor, Your Honor, the most logical point is at the outset.

QUESTION: Of course.

MR. WOLFMAN: We don't disagree with that. But our position is that if you look at the statute, the statute doesn't contain that 30-day limit within the second sentence, and following on Justice O'Connor's question, there is potentially good reason for that which is that the burden on that question is on the Government. We don't know why because it is not revealed entirely why the 30-day limit is not in the second sentence.

QUESTION: Well, that would be a good reason for omitting the requirement entirely, but I don't think it's a very good reason for saying that the 30-day rule doesn't apply.

MR. WOLFMAN: The 30-day -- well, that is our position, Your Honor, and I think -- I think we've exhausted the reasons why Congress might have done it.

May I go back to the initial question? Because I want to -- I want to clarify something. I initially got a question about equitable tolling, but our principal submission here and I think the easiest way to resolve this case is that this -- this provision is not jurisdictional. Mr. Scarborough filed on time, and so it's a perfect example of where the relation-back doctrine would apply.

This is a typical relation-back situation. The -- the application was filed. It was timely. There was an omission and Mr. Scarborough, immediately upon the omission being brought to his attention, filed an amendment that made this 10 -- this 10-word legal conclusion, and that should be the end of the matter.

QUESTION: Mr. Wolfman --

QUESTION: Will you just clarify one thing for me? I want -- I think I understood your answer, but -- to Justice Ginsburg, but if he has a contingent fee of 20 percent, he gets a $1,000 recovery and a $200 fee, and he goes -- now he gets -- files an EAJA position, if he recovers precisely $200, that goes to the client?

MR. WOLFMAN: That would be correct.

QUESTION: What if he recovered $300?

MR. WOLFMAN: Then the $100 -- then $200 would go to the client and $100 would go to the lawyer.

QUESTION: But in all events, the client would get a piece of the recovery under EAJA.

MR. WOLFMAN: That is correct unless, for some reason, there was not a contingency fee. That is correct.

QUESTION: Not a contingency fee.

MR. WOLFMAN: Right.

QUESTION: But you're saying --

MR. WOLFMAN: And -- and in almost all cases --

QUESTION: -- they are -- typically they are --

MR. WOLFMAN: -- there is. Yes.

QUESTION: -- contingent fee cases.

MR. WOLFMAN: In almost all cases there are. And as I say, the statute allows it up to but not in excess of 20 percent.

QUESTION: Am I right in thinking that your client did not file the allegation about the Government's position being unjustified until after the Government moved to dismiss?

MR. WOLFMAN: That is correct. That is correct, and that was approximately 33 days after the 30-day period expired.

QUESTION: But there -- there is an argument the

other side I'd like you to deal with. There's a -- you -- you look at the statute, and it looks like Congress was intending to have in front of the judge and in particular to have in front of the Government all the facts right there the first day. There are a lot of these things. They have to process them quickly and they want to decide whether to settle it or not settle it. And what they have, therefore, you say right in the application within 30 days. Did I win? It's not so clear sometimes because, you know, they're mixed claims. Explain it. Show that you're eligible and also say how much it's going to be. Right there, first from day one. And although this next part is a formality and is in a separate sentence, that doesn't matter. It happens to be really in the same two sentences and there's no reason to treat it differently. All right? So that's their argument.

And now I'd like to see what your response is.

MR. WOLFMAN: My response is -- and if I understand the question -- is take -- to take as a given that the -- that the statutes contemplates that the no-substantial-justification allegation be made within the 30 days. And then our response is that this is not a jurisdictional provision. The statute does not create an absolute bar, and then we look to the common law exceptions to statutes of limitations.

QUESTION: You could do that. You might do that. So that -- that's -- in other words, you're saying -- that's Irwin. I mean, you're arguing --

MR. WOLFMAN: It's Irwin. It's -- it's Edelman. It's Becker and so forth.

QUESTION: So you want to say that that would apply to every one of these four provisions.

MR. WOLFMAN: It would and the courts --

QUESTION: All right, and -- and treat them all alike and therefore the separate sentence is a kind of make-way.

MR. WOLFMAN: No. I'm not saying that. I'm saying that your question -- I -- I took your question to ask me to assume that all four allegations have to be made within the 30 days.

QUESTION: Okay. So --

MR. WOLFMAN: If I assume that, then yes, the answer to your question is yes, that we would apply those ordinary common law exceptions.

Now, judges --

QUESTION: Aside from that, now -- now take the other part of your argument and say, no, no, it's really different, this fourth one. This fourth one is really different. And I got it that it's in a separate sentence. I don't know how much to make of that. Is there -- is

there any other basis for saying -- I mean, maybe that's conclusive. I'm not saying it isn't, but I want to be sure I have everything in front of me that would make it different.

MR. WOLFMAN: I think the other thing that -- that I would like to put in front of you -- and this had to do with my colloquy with Justice O'Connor -- which is that there is a different character that -- to that allegation. It is a mere allegation and it simply notifies the Government about its substantial justification defense.

QUESTION: Well -- well, there's -- there's more than that to it. This -- this is always filed by an attorney, and as an officer of the court, I assume that he cannot just come in and say the Government's position was not substantially justified when it is very clear that it was substantially justified. I assume he'd be -- he'd be liable for a sanction from the court if he did that.

MR. WOLFMAN: I think that is a fair point, Your Honor, and let me answer that this way.

QUESTION: So to follow up, I mean, what -- what this means is we -- we want to be sure, when this thing is filed, that it's not just nuisance stuff. We want a lawyer, when the thing is filed within the 30 days, to be standing on his reputation as an officer of the court

that, in fact, the Government's position wasn't substantial.

MR. WOLFMAN: I got that, and let -- if -- if I might let me answer that. Because then I think if we conceive of the purpose of this allegation as making a lawyer think twice, then it puts the case in the realm of Edelman and Becker where in Becker you had a signature requirement, Edelman you had a verification requirement, and those -- those requirements are things that are supposed to make the filing party think a little bit before he or she does the filing.

But in both of those cases, the Court said, okay, we realize the purpose of it, but we will still allow supplication -- supplementation of the application, and we'll allow them to amend and to relate back unless the adverse party is prejudiced.

And it's hard to conceive of the prejudice here.

QUESTION: We -- we may not be as tender to attorneys who should know better as we are to -- to litigants who maybe had a bad attorney or didn't know better themselves.

MR. WOLFMAN: Well, with -- with all respect, Your Honor, I think that might in part, at least in part, explain Edelman. But I do not believe it explains Becker. Becker did involve a pro se applicant, but as we know,

most appellants in the courts are -- are parties that are represented by lawyers, and Becker held unequivocally that the failure to sign was not fatal and that, in fact, the -- the amended, signed notice of appeal could relate back. And that's all that's being requested here.

QUESTION: Mr. Wolfman, I was surprised that you didn't cite 1653 of title 28 which says defective allegations of jurisdiction may be amended upon terms. I mean, if you say, okay, even assuming it were jurisdictional, if it were jurisdictional -- even if it were jurisdictional, you could still amend with the court's permission.

MR. WOLFMAN: I think you're right, Your Honor, and that is neglectful on our part and we could have -- we could have cited 1653 as well. It stands for the same principle I think as the --

QUESTION: Well, excuse me. Nobody says that this is an allegation regarding jurisdiction.

MR. WOLFMAN: Well, that -- that is true too.

QUESTION: I mean, what -- what the issue is is whether the 30-day limit is a jurisdictional limit or not.

MR. WOLFMAN: Right. And -- and --

QUESTION: But I don't think any --

MR. WOLFMAN: -- it's not. And -- and I think that's the key point. It is not and the -- the Irwin and

Franconia Associates I think so clearly stand for that proposition. That is the argument that we went to first and most directly, that unless Congress explicitly provides otherwise, limitations periods will be governed by the same types of limitations principles that -- that govern private litigation.

QUESTION: I -- explain this relation-back theory. Anything can relate back? You can do any -- is there no limit to the -- to the sweep of that proposition?

MR. WOLFMAN: No. I think there are limits. For -- and -- and I think --

QUESTION: What are they?

MR. WOLFMAN: -- a court would look to rule 15 which codifies the relation-back doctrine and says, number one, does it -- does the matter arise out of the same transaction as occurrence -- as the original filing. Does it arise out of the same thing that the adverse party was given notice of?

And then I think the other thing that's quite -- that's quite apparent the courts would apply is, is the other side prejudiced by this? How long of a time period had gone by? How important or how new is the information? Here, there's never been any claim of prejudice nor could there be, I don't think, because the Government responds -- they point out that -- that this legal allegation was

not made. The other side comes in and immediately amends or -- and -- and that's all there is to it. This matter would have been resolved years ago if that had transpired.

QUESTION: Suppose you had a statute that -- that provided a -- I don't know -- 3-year statute of limitations for -- for negligence in a particular context, but it -- it went on to say, however, all causes of action claiming intentional wrong must be filed within 1 year. Do you think that after 2-and-a-half years you could revise a filing that did not allege intentional wrong and say it relates back? And -- and some States do have different statutes for intentional torts versus negligent torts. Do you think you could revise your --

MR. WOLFMAN: I think that would be a much more difficult claim for relation-back, and the reason is is because the court -- the State apparently has said, as a matter of our substantive policy, that we want to give notice of this type of claim much earlier.

QUESTION: Right.

MR. WOLFMAN: But let me answer that --

QUESTION: So it really does come down to whether this -- this allegation was -- whether there was some particular reason why it had to be --

MR. WOLFMAN: But might I extend my answer a little bit?

QUESTION: Sure, sure.

MR. WOLFMAN: Because -- because I -- I think your hypothetical stands in contradistinction from the ordinary rule, that if you've alleged the -- the relevant facts, you can -- actually amendment is freely given to -- to state the legal theory under which those facts arise. And I cite those cases in my brief.

QUESTION: Complaint -- in a complaint, you don't even have to state the legal theory. That would be in a brief opposing a motion to dismiss.

MR. WOLFMAN: That -- that is correct that -- that you have to state jurisdiction and you have to state the facts. And the -- the forms that appear at the end of the Federal Rules of Civil Procedure do say that the -- the pleader ought to state the -- the type of action, whether it be negligence or otherwise.

But I think it does stand in distinction to Justice Scalia's hypothetical where the State has made very clear that there is a substantive policy that we want to follow such that we want to give more notice and quicker notice of this type of action. That's not what we have here.

QUESTION: All right. The -- the problem with this -- and there is a problem maybe just for me, but there's a lot of legislative history here that says that,

for example, the deadline for filing the fee application is jurisdictional and cannot be waived. And then there are a lot of other stuff. The Administrative Conference has said you ought to make this subject to waiver for good cause, and that was rejected. And so there is a lot of history that says you just can't do an Irwin kind of thing. We don't mean that. We don't mean you can waive this.

Now, what am I supposed to do with that?

MR. WOLFMAN: Well --

QUESTION: Sort of parse the thing and say, well, this -- this portion of it is -- is subject to the equitable exception and the doctrine itself -- the -- the application itself is not subject to it? Or how am I supposed to handle that in your view?

MR. WOLFMAN: Well, we deal with the legislative history in quite some detail in our reply brief, but let me -- let me deal with it briefly here, which is that the -- the one line that you quoted about the jurisdiction -- the application is jurisdictional and cannot be waived was in a -- a committee report that was submitted with legislation that was vetoed by the President.

The next year when the legislation was actually enacted, very similar legislative history appears, and it's -- it drops that line and says as follows. The court

should avoid an overly technical construction of these terms, the terms being the 30-day rule. This section should not be used as a trap for the unwary resulting in the unwarranted denial of fees.

QUESTION: Who said -- who said that?

MR. WOLFMAN: That's in the legislative history cited in our brief.

QUESTION: Yes, what is it? I mean, just -- just --

MR. WOLFMAN: It's a House report No. 99-120 at -- at page 6, footnote 26.

But it -- what I'm -- what I'm getting at is the legislative history, from which this was taken, the one line that they rely on, was -- accompanied legislation that was actually vetoed. It was then replaced by other legislative history which supports our position.

I want to be clear. I'm not -- I'm not suggesting that this legislative history, either way, bears great weight, and we don't rely on it in our opening brief. But to respond to that question, I think the legislative history at best for -- for the Government is a wash.

Unless the Court has any further questions, I'll reserve the balance of my time.

QUESTION: Very well, Mr. Wolfman.

Mr. Minear, we'll hear from you.

ORAL ARGUMENT OF JEFFREY P. MINEAR

ON BEHALF OF THE RESPONDENT

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

Section 2412(d) requires that EAJA fee applicants submit an application within 30 days of a final judgment that includes an allegation that the Government's position was not substantially justified. Petitioner's lawyer failed to do so in this case and for that reason fails to qualify for fees.

This Court has no power to amend EAJA or to excuse lawyers from their carelessness in failing to follow its requirements.

QUESTION: Are there any instances in which the Government is liable for fees even if its position was substantially justified?

MR. MINEAR: Yes, under section 2412(b), EAJA subjects the United States to fees on the same basis as other parties in other legislation.

By contrast, section 2412(d) provides a special provision, distinct from those provisions that apply to private parties and the United States generally, that requires there be a showing that the Government's position was not substantially justified.

QUESTION: There are also some -- some other statutes besides EAJA in which the Government, when it loses, whether its position was substantially justified or not, is subject to -- to fees. Isn't that -- isn't that correct?

MR. MINEAR: Yes, if I can clarify. Section 2412(b) indicates the Government is waiving its sovereign immunity as to those other statutes.

QUESTION: Right.

MR. MINEAR: So in the case of 2412(b), it puts the United States on the same par as private parties, and in that sense, it's comparable to the situation that was faced in Irwin where the United States is subject to Title VII actions on the same basis as private parties.

QUESTION: Well, I -- I think you know where I was going. Was -- was the Government somehow puzzled or confused when it received this document or did it naturally assume that it would have to show that this position was substantially justified? In other words, would there have been some other theory in which the Government might have thought it would have been really liable for these fees?

MR. MINEAR: Justice Kennedy, I have two answers for that. First of all, the statute requires that these conditions be met, and these are conditions on the

Government's --

QUESTION: Well, that's the issue we're -- we're talking about.

MR. MINEAR: And these are conditions on the Government's waiver of sovereign immunity. So the Government has an obligation to insist that parties comply with those conditions --

QUESTION: Well, that's -- that's true. The question is whether this allegation has to be made within the 30 days or whether it can be offered subsequently as an amendment.

MR. MINEAR: That's --

QUESTION: Clearly it has to be made. And the Government certainly was not in doubt about the fact that its -- it wasn't going to be liable for the fees unless it was in due course made.

MR. MINEAR: I'd like to make two points with regard to this.

QUESTION: Yes.

MR. MINEAR: First of all, with regard to the 30-day time limit --

QUESTION: Right.

MR. MINEAR: -- this Court indicated in INS v. Jean, 496 U.S. at 160, that the 30-day requirement does apply to the allegation of no substantial justification.

As we explain in our brief, Jean indicates it's a 30-day requirement and at page 160 they say that the fee application has to include --

QUESTION: Mr. Minear, can I --

MR. MINEAR: -- this allegation.

QUESTION: Can I ask you sort of a basic question? Sometimes these things are negotiated I think, aren't they? After the fee application is filed, the counsel may meet and discuss whether they can settle the fee application?

MR. MINEAR: That is correct.

QUESTION: During -- if such a meeting took place 15 days after the application was filed, do you think the Government lawyer would have an ethical duty to tell the plaintiff's lawyer -- say, you goofed and forgot the no-substantial-justification allegation in your -- in your request?

MR. MINEAR: The Government -- the Government attorney might have that obligation in the course of settlement negotiations.

QUESTION: What would be the --

MR. MINEAR: But in adversary litigation, the United States certainly doesn't have the obligation --

QUESTION: What would be the basis of settlement -- of the obligation in settlement negotiations? I mean,

long ago the Court said that you didn't -- that opponents couldn't live by their adversaries' wits.

MR. MINEAR: Yes, that's -- and I agree with that, Mr. Chief Justice. But in the course of discussing these matters, there's a possibility that there could -- that the Government has to be careful not to mislead the party, and so that's where an ethical obligation could come forward.

But in this case, there were no negotiations of that type. Rather, there's simply the Government's obligation to respond to the fee application, and we responded appropriately.

QUESTION: But -- but in this -- in this case the application did say that it was pursuant to 2412. So as I indicated and Justice O'Connor said, the Government was under no -- no mistaken assumptions about the applicability of this section and this section only.

MR. MINEAR: But the United States was not on notice whether this party was contesting that the Government's position was not substantially justified.

QUESTION: Do you take the position that there is any point in requiring that allegation to be made other than the point that was described in the earlier half of the argument? And that is, to put the -- in effect, to -- to put the lawyer on notice that there is a responsibility

here to be serious before one goes forward with a -- with fee litigation under this act.

MR. MINEAR: There --

QUESTION: Is -- is there any other reason for it?

MR. MINEAR: There are three reasons. First of all, it's a condition that Congress placed on sovereign immunity. And by that alone, the courts and lawyers and the United States representing Congress' will must respect it.

Second, this obligation requires the party, as was articulated earlier, to examine the Government's position and make a determination of whether or not they wish to contest whether it is substantially justified or not. So that does put that additional obligation on counsel.

Third, it's of use to the United States in determining how to respond to a fee application. The United States --

QUESTION: Yes, but all the United States has to do, in the absence of an -- of the allegation, is what it does here and say, you didn't make the allegation. We move to dismiss. If the lawyer is really serious, the lawyer is going to come back and say, whoops, I -- I do make that allegation. At that point, the United States

knows where it stands and presumably it has the -- the benefit of the lawyer's sense of responsibility for going forward and you go forward.

MR. MINEAR: Except that the party did not comply with the condition that Congress imposed on its waiver of sovereign immunity.

QUESTION: Mr. Minear --

QUESTION: But other than that, the Government has not really been prejudiced in anyway. The Government knows of the substantial justification rule and it's either ready to defend or -- or acquiesce on that point.

MR. MINEAR: Well, the Government and the courts are both prejudiced by this because it requires two additional filings that otherwise would not need to be made if the lawyer had not been careless.

In this situation -- we face thousands of suits that potentially implicate EAJA claims, and Congress recognized that these are matters that need to be resolved quickly with minimal litigation in contradistinction to what's happened in this case. And --

QUESTION: Mr. Minear, the -- the Federal Circuit obviously doesn't agree entirely with the position you're now saying, you have to do everything up front.

And what struck me as curious is the Federal Circuit allows you to flesh out allegations. So, for

example, you say I -- I want a fee of $1,000 but you don't put in the itemization. As I understand the Federal Circuit's position, they allow you to flesh out something that -- that really seems to me is a lot more substantial, to document your fee. But this is a pro forma allegation. So it seems to me, if you're saying -- if you're taking the position you must do everything within 30 days, then you would have to say the Federal Circuit is wrong in saying you can flesh out allegations.

MR. MINEAR: Well, those issues are not before the Court at this time. The United States does have a different view on that.

But I must disagree that is a pro forma allegation. That -- that suggests that -- that we need not require the lawyers to comply with the letter of the law because we don't think they're going to comply with the spirit of the law. Rather --

QUESTION: No. They have to comply. The question is can they be excused if they're a little late.

MR. MINEAR: Yes, and in that respect, the parties have -- petitioner has -- the petitioner has made two arguments. One is the relation-back doctrine and the other is equitable tolling. I'd like to turn to each of those issue specifically.

QUESTION: Before you do that, could you finish

your answer before where you said you had two points and you raised a case with regard to point one, and then I never did hear point two because a question came up. You don't remember it either.

MR. MINEAR: This -- probably -- I'm not sure if it was --

QUESTION: Let's forget about it.

MR. MINEAR: On -- on the relation-back doctrine.

QUESTION: You said you'd give us some reasons why this is important to the Government.

MR. MINEAR: Yes, and the reasons were, first of all, our obligation to defend those conditions that Congress places on its waiver of sovereign immunity, and second, to ensure that there is efficient processing of attorney application fees. Justice Breyer made allusion to this in the first part of the argument, and as I said before, the Government faces thousands of these requests, and it's very important they be -- be resolved promptly. And they can only be resolved promptly if parties follow the rules that Congress has laid down. We believe that's why Congress set these rules, because they wanted to make sure that attorney claims would be resolved efficiently, and they cannot be resolved efficiently if parties don't play by the rules.

Now, the relation-back doctrine is really an exception to the rules that Congress set forward, at least the -- the relation-back doctrine, as the -- as petitioners are suggesting it ought to be applied here. As a general matter, the relation-back doctrine is a principle that's codified in rules, such as rule 15 of the Federal Rules of Civil Procedure. And it provides an exception for, in that case, pleadings being amended after the fact.

But this isn't a case of initiating civil litigation and this is not a case where rule 15 applies. Rather, the question is what did Congress intend. If Congress had wanted a relation-back doctrine, it could have specified that.

QUESTION: Wasn't there a relation-back doctrine that courts were applying before it was codified in 15(c)?

MR. MINEAR: The examples that petitioner points to are cases involving the Federal Employees Liability Act involving the injuries to interstate -- to railmen who are working in interstate commerce. And in several instances, the Court had applied that as a common law principle indicating, as in Keene, that those arguments on either side for that particular rule. But I don't think we can say that there's a general principle of relation-back. And certainly --

QUESTION: You wouldn't want to generalize from FELA cases, would you?

MR. MINEAR: No, I would not.

QUESTION: But there was in States -- some States also had a relation-back doctrine.

MR. MINEAR: And the note in rule 15(c), the 1937 note to the Federal rules talks about codifications of this, but we're talking here about a situation where Congress has set a time limit and has not provided for relation-back, a case where we're dealing with sovereign immunity, where this is a charge against the Federal fisc. And so we have --

QUESTION: Of course, the timeliness argument is somewhat strange in this case because he filed the application prematurely, as I remember the case, didn't he? And then said, no, you got to wait until the mandate comes down, and then after the mandate came down, he refiled it, and then the 30 days went by and the Government asked for an extension. It didn't -- to get it -- to get it disposed of. So the Government's argument that you've got to get this done as fast as possible seems a little strange in this particular case.

MR. MINEAR: Well, Your Honor, in this case there were two premature applications that were filed. The first application was filed prematurely. The court

returned it and said until the 60-day period runs.

QUESTION: Right.

MR. MINEAR: The parties then filed another premature application.

QUESTION: Which was identical to the first.

MR. MINEAR: That's right. And the court held it until the mandate issued and at that point asked the United States to file a response, a 30-day response.

So the Government acted quite appropriately. It acted --

QUESTION: Well, they took more than 30 days to respond.

MR. MINEAR: Yes, it did, but it could well be because we are dealing with --

QUESTION: Because they wanted to wait and see whether he'd catch his goof.

MR. MINEAR: No, not at all. At the time we filed our extension, the time had already run for that.

But the -- the problem that we face in the Government is that we have numerous cases and numerous fee applications. It could very well be --

QUESTION: But why doesn't all that fit within a -- an equitable exceptions doctrine because that's one of the things you take into account? My basic question is, why not read the statute of limitations -- say what this

Court said in Irwin and others -- as they're normally read subject to equitable exceptions? Or at least if the -- if the legislative history makes that impossible -- and I was just told it doesn't at all -- read the filing of the paper as absolute but the contents of the paper is subject to equitable exceptions? So you'll win 99 percent of the time. It's just the lawyer really had a heart attack on the way to the post office, you know. I mean, something awful came up and why not give him the advantage of that equitable exception?

MR. MINEAR: Your Honor, in this case the equitable tolling argument, I have to point out, was not raised before the court --

QUESTION: No, no, no, but I mean, we're trying to interpret this statute. And would it be -- is there any reason not to interpret the statute -- whether they win or they lose in this particular case is a matter of lesser importance perhaps, but not to them, but to -- to others.

But to get the statute right is important. And -- and therefore, do you think the correct interpretation of this statute is like other statutes, as I said, A, subject to equitable exceptions or, B, at least the content of the document is subject to equitable exceptions?

MR. MINEAR: Your Honor, we would say neither is subject to equitable exceptions.

QUESTION: I knew you would say that.

MR. MINEAR: Yes.

QUESTION: And I'm interested in why.

MR. MINEAR: Yes. First of all, the statute itself sets a strict 30-day time limit. It does not provide for relation-back. If Congress wanted relation-back, it could have. And to imply a relation-back doctrine is to negate Congress' specific intent in this case.

With regard to equitable tolling, this Court said in Irwin that equitable tolling will be presumed to apply in those cases involving Government waivers of sovereign immunity where the Government is held liable on the same basis as private parties as in title VII. But as my colloquy with Justice Stevens pointed out, this is not a situation where the United States is being held liable for attorneys fees on the same basis as other parties. That's what section 2412(b) applies -- provides, and perhaps equitable tolling should apply there, perhaps not. That's a different question.

Here --

QUESTION: Mr. Minear --

QUESTION: Let me ask you another question, if I

may. Supposing that a plaintiff's lawyer has trouble finishing his time sheets. It's a long, protracted case, and just before he filed the fee application, he called the Government lawyer and said, I don't think I can get my time statement in in 30 days. Will you agree to a 2-week extension? Would the Government lawyer have authority to grant that -- to -- to stipulate to such a 2-week extension?

MR. MINEAR: No, he would not. Under our reading, this is a 30-day time limit and the parties have to comply. After all, this litigation, as in this case, has been going on for several years. The attorneys have an obligation, if they want fees, if they want the Government to pay their fees, to keep good records and to avoid careless acts --

QUESTION: But is he -- is there any other reason? So far what I've registered in my mind is the statute says nothing about equitable exceptions one way or the other. The difference between this statute and a lot of other Government statutes of limitations is in the other ones, they're creating an equality between Government liability and private party liability, and in this one it's only the Government that would be liable for the fees.

MR. MINEAR: That's correct.

QUESTION: And is there anything else? That's quite a -- it's a formal reason but an important formal reason. Is there any other reason?

MR. MINEAR: That is our principal basis --

QUESTION: All right. So that's it.

MR. MINEAR: -- for distinguishing Irwin.

But I'd like to point out also that equitable tolling was not raised in the Court's own --

QUESTION: Well, Mr. Minear, is it -- could we possibly find for you in this case on the -- on the issue of relation-back while leaving open the question of whether equitable tolling can apply or not?

MR. MINEAR: Yes, you can.

QUESTION: Because as I understand the relation-back doctrine, it doesn't matter about the equities. Whether -- whether it's his fault or not, you can always relate back.

MR. MINEAR: That's correct.

QUESTION: Whereas, equitable tolling would generally be -- be eliminated if -- if fault is involved.

MR. MINEAR: That's correct. Now -- now, we think that you do not need to reach the equitable tolling issue, but if you do, there's no basis for equitable tolling in this case in any event because equitable tolling is a doctrine that developed with the -- based on

the concept of ameliorating or preventing unfairness to litigants. Now, there's nothing unfair in requiring an attorney to comply with Congress' --

QUESTION: Mr. Minear, can I ask you to go back? Because I don't think you -- in the relation-back, if it goes by rule 15(c), it's not just that you have an absolute right. 15(c)(3) makes it very clear that if there's prejudice to one side, it doesn't relate back. It isn't an automatic thing that, oh, you can always make up for not having --

MR. MINEAR: That's correct, Your Honor. If I could clarify. In answering Justice Scalia's question, I was indicating that there doesn't have to be inequitable conduct in order to qualify for relation-back. But it doesn't mean you would get it automatically.

QUESTION: But it isn't -- it isn't -- it isn't automatic. It has to be that the other side knew or should have known that but for a mistake, that you would have put this in.

MR. MINEAR: Yes. But again, rule 15(c) by its terms does not apply to this case. It applies to pleadings.

QUESTION: You made a distinction in your brief. You said, well, rule 15(c) is a pleading rule. This is not a pleading. This is an application for a fee. So I

say, yes, it is an application for a fee, not a pleading, but why should that make any difference to the concept of relation-back?

MR. MINEAR: Because rule 15(c) applies to litigation generally. In this case, we're dealing with a specific time requirement that only applies to Government applications -- to applications for fees against the Government when the Government's position is not substantially justified. There's simply no basis for applying rule 15(c) to this situation.

QUESTION: But that -- well, that answer does -- has nothing to do with whether it's labeled a pleading or an application.

MR. MINEAR: That's correct. That -- that may be correct. Ultimately 15(c) simply doesn't apply here is my point, and if we're going to look at the time limits, we have to look to what did Congress intend what it -- when it enacted 2412(d)(1)(B). It set a 30-day time limit. It didn't create any exceptions. It didn't provide for any relation-back. And imputing relation-back would destroy that 30-day time limit that Congress specified.

QUESTION: You're in the -- I mean, you've raised a number of -- of very good points that make this quite complicated, and I'm looking to try to simplify it

in my own mind.

Could we say -- and you'll -- could we say that in respect to the 30-day filing requirement, we don't have to decide whether it is absolute or not absolute, subject to equitable defenses of different kinds or not. In respect to the content parts of this, at least the fourth part, it's treated like any statute of limitations, any ordinary statute of limitations, and whatever they're subject to, Judge, you make this one subject to.

Now, there you'd meet me with the argument but this is the Government and -- the one we went through. Is there any other reason for not doing it?

MR. MINEAR: Well, this is as -- as you point out, this is a content limitation. It's like Torres and other cases where content does need to be included within the specified time limit. It's not simply a formality like a verification or a signature. Rather, we're talking about the threshold allegation that triggers the right for attorneys fees and triggers the obligation of the Government to respond and show that its position was substantially justified. Without that, you really don't have a fee application as Congress conceived of it.

When we look at what do we mean by a fee application, we have to look at 2412(d)(1)(B), and Congress indicated what it felt was essential in the fee

application. You have to show that you prevailed. You have to show that you're a qualifying party under EAJA. You have to provide your costs, including an itemized list of costs, and you have to make the threshold allegation the Government's position was not substantially justified. Those terms define what a fee application is. And this Court's decision in Jean indicates it all has to be done in that 30-day period.

Now, to apply any sort of relation-back doctrine simply negates the very careful, strict rules that Congress imposed on this charge against the treasury.

QUESTION: Can you -- can you give me any indication of how -- how many of these applications there are, how many times the Government contests the substantial justification, how many times the Government concedes that? Does the Government ever concede no substantial justification?

MR. MINEAR: Well, in many cases the Government will settle it because the costs of litigating aren't worth fighting over the matter.

But in terms of statistics, I was able to find this in a -- a quick review. And -- and this outside the record, so I am stepping outside the record and looking at Government files. But in the case of the Social Security Administration, between August 2001 and August 2002, the

Government paid 5,500, roughly, EAJA applications in a total amount of $18 million. Now, Social Security is only one small part. I shouldn't say small, but it's a significant part of the EAJA -- qualifying EAJA cases. But as that indicates there, at least in 5,000 cases the Government made a payment either by settlement or on the basis of a -- of a --

QUESTION: Any indication of what percentage that is out of the total?

MR. MINEAR: No, I do not have an indication of the total number of cases that are available.

But what we do know is that we face thousands of these cases, and efficiency is paramount unless fee litigation is going to become a second major litigation, which is something --

QUESTION: That second major litigation I don't see. I see you have to make the motion to dismiss, but beyond that -- and once the allegation is made, it, as Justice O'Connor pointed out, is the Government's burden to show that its position was substantially justified. So what is the satellite litigation beyond your filing the motion to dismiss because they didn't make the allegation?

MR. MINEAR: Your Honor, it's satellite litigation like this: over whether or not relation-back should apply, under what situations it should apply,

should equitable tolling apply, have the conditions for equitable tolling been met, all of that.

QUESTION: But if this -- but once the Court decides this case and suppose it should say that relation-back applies, well, that's -- that would be it and there wouldn't be any satellite litigation.

MR. MINEAR: Well, Your Honor, as -- as you pointed out, relation-back is not automatic. So there would be these questions of whether or not whatever criteria the Court decides to create for relation-back were satisfied.

And I have to point out the Court is going to be creating all of these rules. As it stands right now, we have a simple 30-day rule. Once we inject relation-back and equitable considerations, then we're at sea in terms of what's necessary to satisfy this requirement.

QUESTION: Well, that's -- that's true of the doctrine in the first place, isn't it? I mean, we don't get into relation-back because Congress originally passed a statute saying there's going to be relation-back. In every one of these instances I suppose in which there is a relaxation of -- of a stated rule, we got into it because a court recognized it.

And -- and it seems to me your argument about the satellite litigation at most means maybe we'll have a

half a dozen cases deciding exactly what exceptions to the -- to the literal statement in the statute book there may be, but as -- as against EAJA litigation in which there are at least 500 a year on -- in the courts around the country on Social Security alone, that seems to be rather a -- a minuscule percentage of -- of extra cases.

MR. MINEAR: Well, Your Honor, with respect to how the Court got involved in these matters, in many cases Congress simply deferred to -- to the courts to establish the appropriate procedural rules. It didn't set time limits.

QUESTION: Did it say we are deferring to the courts to -- to set procedural rules? I doubt it.

MR. MINEAR: Well --

QUESTION: Didn't Congress simply pass a statute and somebody says, well, gee, does -- does the 30 days -- is the 30 days absolute or not?

MR. MINEAR: Your Honor, the rule's enabling act I think is a -- a direct delegation to the courts to create rules to govern practice and procedure where Congress has not otherwise specified the controlling rules. In this case, we have a rule that Congress has set, a 30-day rule that makes a great amount of sense in these circumstances, where the object is to determine fee litigation quickly and efficiently. And if parties abide

by the rules and follow those rules, then we can be assured that these cases will progress and that we will -- the courts and the United States will be not burdened with this type of additional litigation.

These are, after all, charges against the treasury, the area where the Congress' sovereign immunity is paramount, and when Congress --

QUESTION: You -- Mr. Minear, I know you've said it's not before us, but would you make a distinction, the one that this Federal Circuit makes between you don't account for -- for the fees and so you want later to document what -- what supports your -- your requests for --

MR. MINEAR: Your Honor, our feeling is that these showings can be made very easily. You can show that you're a prevailing party by attaching a copy of your -- your judgment. You can show that you qualify for fees by attaching an affidavit showing you have a net worth of less than $2 million. Itemization is not all that difficult. Attorneys keep these records.

QUESTION: But the itemization is -- is what the Federal Circuit allows leeway on.

MR. MINEAR: Yes.

QUESTION: And I -- I wanted to see your fix on the statute. I suppose you would say the Federal Circuit

is wrong to allow any leeway on -- on that.

MR. MINEAR: We think that -- that the better rule is that itemization should be -- be complete at the time the application is -- is filed. However we deal with that issue, certainly the threshold allegation that's at issue here does need to be made, and this is the trigger that -- that determines whether or not the Government needs to respond to the fee application at all. And if the party has not made that basic determination --

QUESTION: You characterize it as a trigger. Do you defend the court of appeals' characterization of the requirement as a jurisdictional requirement?

MR. MINEAR: Your Honor, I think it can be described as jurisdictional in the sense that term is used in Sherwood v. United States, that sovereign immunity is a condition -- the conditions of -- that waive sovereign immunity are limitations defining the scope of the Court's jurisdiction. I think that's how that terminology has become applied.

QUESTION: So your answer is yes.

MR. MINEAR: Yes.

I think it might be more accurate to say it's a sovereign immunity-based limitation, but that carries with it the very same point. Namely, it needs to be strictly construed. Courts have no power to expand it beyond what

its normal confines would be.

So the term jurisdictional is just a label. What's important is the substance of conditions on sovereign immunity, and that is they need to be strictly construed and cannot be enlarged beyond what Congress has provided.

QUESTION: What -- what's your best case in support of your position of a strict interpretation of a requirement like this, other than cases about sovereign immunity being -- it can't be expanded?

MR. MINEAR: Cases such as -- some of these cases are not cited in the brief, but Brokamp, Locke, a number of these cases involving statutes of limitation where Congress has -- where this Court has ruled that the emphatic statute of limitation that Congress has set is determinative.

I'd also point out to Justice Frankfurter's statement in Holmberg v. Armbrecht where he said that when Congress sets a statute of limitation, there is the end of the matter. The statute of limitation that Congress set is definitive.

QUESTION: Of course, Locke was a case involving a total failure to file on time, not omitting an allegation in the filing.

MR. MINEAR: That's true, but again, I'm not

sure a real distinction can be made there because, as I said before, when we look at what is a fee application, we define a fee application by those things that Congress said are defined as content.

Ultimately I think the important point here is that strict adherence to these types of statutory rules is the best guarantee of fairness in these cases. This is a case where the burden that is placed on the attorneys is minimal and we believe that this Court should follow what Congress --

QUESTION: But the burden of the real result is placed on the client. I mean, the burden -- the -- the real loser here is not the lawyer. It's the client.

MR. MINEAR: Well, in the case where --

QUESTION: The lawyer gets the same amount in any event in many, many cases.

MR. MINEAR: Yes, and an attorney who is careless, I would say, might well have some obligation not to charge his -- his client for his carelessness.

If there are no further --

QUESTION: Why would he have that obligation? Because the statute is absolute. It says you can get 20 percent of the recovery.

MR. MINEAR: The statute is not so absolute actually. I believe the provision that we're talking

about here, which is 38 U.S.C. 5904, does allow the Court of Veterans Claims to adjust fee applications in the event that they're not fair, if there are some inequities that are involved in them. Now, I'm not sure to what's -- what extent the court has -- has exercised that authority, but it certainly has -- does have that authority under the statutory provisions that are at issue here.

QUESTION: Thank you, Mr. Minear.

Mr. Wolfman, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF BRIAN WOLFMAN

ON BEHALF OF THE PETITIONER

MR. WOLFMAN: I'd like to go immediately to Justice Kennedy's question. He asked about the best case. Well, the case that the Government relies on principally in its brief is Soriano v. the United States. The problem with that case is it was overruled by Irwin, and the problem here is that the principle we're now operating on, the problem with the Government, is that when we talk about statutes of limitations principles, you apply the same principles that apply among private parties unless Congress explicitly provides otherwise.

Now, I did want to, if I might, turn to the relation-back doctrine just briefly. And the -- the question arose in Mr. Minear's presentation, well, this case doesn't involve rule 15(c). But either did Edelman

v. Lynchburg College. Edelman is best read as a case that applied the common law doctrine of relation-back. The Court held, regardless of the EEOC's regulation, even if we were interpreting the statute from scratch, we would apply the relation doctrine back here because it has a common law pedigree. And that's all we're asking for here.

The other principal submission by Mr. Minear is the efficiency argument, that these matters have to be done promptly and efficiently and there's thousands of suits. I have two basic answers to that, the general and the specific.

The general is that the -- until the Federal Circuit ruled, this was the rule, the rule that we're asking for, in all of the circuits that had ruled on it. And the Government does not present an iota of evidence there were any problems in applying the relation-back principle in those circuits. It's the Third, the Sixth, and the Eleventh Circuit.

The specific answer is I think we know what would have happened in this case if my client's amendment had related back. The matter would have been resolved 3 or 4 years ago. There is no serious efficiency concern here. The reason we're here much later is both because the Government interposed this jurisdictional defense and

it asked for seven or eight extensions of time during the course of this litigation.

The final thing I would like to say is that the Government's arguments presuppose that there's no good reason for relaxing rules. But there is. We realize that litigants and lawyers make mistakes and rules such as relation-back serve important purposes so that litigants and lawyers don't get tripped up by technical rules such as the one the court -- that the court below and the Government is trying to impose here.

If the Court has no questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wolfman.

The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)