IN THE SUPREME COURT OF THE UNITED STATES

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BP AMERICAN PRODUCTION COMPANY, :

SUCCESSOR IN INTEREST TO AMOCO :

PRODUCTION COMPANY, ET AL., :

Petitioners, :

v. : No.05-669

REJANE BURTON, ACTING ASSISTANT :

SECRETARY, LAND AND MINERALS :

MANAGEMENT, DEPARTMENT OF THE :

INTERIOR, ET AL. :

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Washington, D.C.

Wednesday, October 4, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

JEFFREY A. LAMKEN, ESQ., Washington, D.C.; on behalf of the Petitioners.

DARYL JOSEFFER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

[11:06 a.m.]

JUSTICE STEVENS: We'll hear argument in BP America Production Company against the Secretary.

Mr. Lamken.

ORAL ARGUMENT OF JEFFREY A. LAMKEN

ON BEHALF OF PETITIONER

MR. LAMKEN: Thank you, Justice Stevens, and may it please the Court:

Section 2415(A) established a limitations period for every action for money damages by the Government which is founded on any contract. That provision, by its terms, applies to every contract action, every adversary adjudication seeking monetary compensation for breach, whether pursued before a court or an agency.

The contention that every action encompasses only civil actions or judicial actions is incorrect for three reasons. First, it is inconsistent with the broad language that Congress used. It is inconsistent with the statutory structure, in that it renders another provision, the exception for administrative offset, totally superfluous. It also creates an irrationality in the hierarchy of the Government's claims. Finally, it robs Section 2415(A) of its intended effect.

Turning to the text, Congress

and agencies regularly use the term "action" to refer to adversary adjudications before administrative agencies and before the judiciary. The term --

JUSTICE SOUTER: What --

MR. LAMKEN: -- denotes --

JUSTICE SOUTER: May I ask you, on that point -- I understand what you're saying, and I've looked at your authority, but, right in the provision itself, there is a verbal distinction made between actions for money damages, and what, at the end of the provision, they refer to as "administrative proceedings" in providing for the 1-year supplementary rule. Doesn't the statute, in effect, say, "We don't mean, by 'action,' what we would possibly -- what possibly might be included as an administrative proceeding"? If they had wanted an administrative proceeding to be a subset of the actions for money damages, wouldn't it have been sensible for Congress to say in -- to refer, instead of to "administrative proceedings," to "administrative actions"?

MR. LAMKEN: Well, in fact, the -- it refers to "administrative proceedings required by contract or law." And that clause applies in the particular circumstance where a law or a contract requires some sort of administrative proceeding as a condition precedent to the action for money damages. So, if you can bring your

money-damages action without any prior administrative proceeding, regardless of where you bring --

JUSTICE SCALIA: I think your point has to be that there are administrative proceedings that are not actions.

MR. LAMKEN: That is absolutely contract. Nonadversarial administrative proceedings would, themselves, not be actions.

JUSTICE SCALIA: Right.

MR. LAMKEN: And they also wouldn't be money-damages actions. So, the distinction the statute draws is not between money-damages actions in court and money-damages actions before agencies; it's before money-damages actions, wherever brought, and the administrative proceedings that have to be brought as a condition precedent.

JUSTICE SCALIA: You contend that what commenced the action here was the order demanding payment.

MR. LAMKEN: That is correct. That is the --

JUSTICE SCALIA: That's a very weird commencement of an action, where what then follows is what is referred to as an "appeal," within the agency.

MR. LAMKEN: For historical reasons, the denominations are quite strange, but for Grisa, quoted -- on subsections 1702 and 1724, quoted on pages 5 and 6 of

our reply brief, specifically state that the order to pay commences the proceedings. And so, since that is the --

JUSTICE SCALIA: Which says that?

MR. LAMKEN: It's on page 5-6 of our brief. It's Section 1702 of our --

JUSTICE SCALIA: What page of your brief?

MR. LAMKEN: 5 and 6 of the reply brief.

JUSTICE SCALIA: Of the reply.

MR. LAMKEN: Yes. And it's 13 U.S.C. 1724, and it talks -- or it defines the "demand" as the order to pay. And then, the definitional provisions, in turn -- when they're talking about what commences the action, it says that the order to pay "commences" the action. And so --

JUSTICE SCALIA: I'm not finding it. Where is it, again?

MR. LAMKEN: Page 6 of the reply, Your Honor, very top. The citation says "13 U.S.C. 1724(b), emphasis added." It defines "demand" to include an order to pay issued by the Secretary. And, in the next line down, we say, "For Grisa thus recognizes that the so-call order to pay, far from concluding the action, in fact, commences it," because the statute of limitations prepared -- uses the word "commenced" to describe what action -- the order to pay does.

JUSTICE SCALIA: Why is -- why doesn't it make much more sense -- as I understand the proceeding, this order doesn't come out of the blue. As required, there has to be a letter to the -- to the payee saying, "We think -- we think you owe so much money." He is allowed to respond, right?

MR. LAMKEN: That --

JUSTICE SCALIA: And then, after considering the response, the order issues. Now, I would consider that a -- you know, an -- that sounds to me like a complaint and an opportunity to respond to it. And then, finally, the first decision of the agency, which is then appealed -- and CFR provides for an -- what he calls an appeal. And it seems to me the final opinion of the agency is the opinion on the appeal.

MR. LAMKEN: In fact, that process, which isn't even mentioned in the regulations, doesn't have any legal operative effect. It's more like a demand letter. If the lessee doesn't respond to the letter, he doesn't waive any of his rights. If the Government fails to include a claim in its demand letter, in the -- well, in the audit letter -- it doesn't waive any of its rights. The --

JUSTICE SCALIA: Well, it doesn't --

MR. LAMKEN: -- first document --

JUSTICE SCALIA: -- waive it, but it can't issue

the order without having issued the letter first, giving --

MR. LAMKEN: I --

JUSTICE SCALIA: -- giving the party an opportunity to say why this amount isn't owed.

MR. LAMKEN: Well, in fact, there's nothing in the regulations -- and I think the Solicitor General would concede -- that actually requires this informal process. It happens to be typically done. And the SG uses the word "typically" in the brief. But there's nothing that requires it. And if you don't respond, there are no consequences to failure to respond.

JUSTICE SCALIA: Is there anything that requires the order?

MR. LAMKEN: The -- anything that requires the Secretary to proceed by order?

JUSTICE SCALIA: Yes.

MR. LAMKEN: That is the Secretary's traditional way of doing things --

JUSTICE SCALIA: Well --

MR. LAMKEN: -- yes, but --

JUSTICE SCALIA: So, you could say the same for the other.

MR. LAMKEN: Oh, but it -- but there is no liability if the order fails to issue. The order, if it were the first salvo, you still would be required to

respond. And so, your failure to respond is very much a default. The failure to respond to the letter, the audit letter, has no operative effect --

JUSTICE SCALIA: You don't -- you don't -- but you don't respond to the order; you take an appeal from the order.

MR. LAMKEN: That's correct. You file a --

JUSTICE SCALIA: It seems to me crazy to call that order a complaint. I -- even if I grant your other argument, that an administrative proceeding can be commenced by a complaint -- or that the term "complaint" can apply to administrative proceedings, I don't think that what you've hung your hat on here -- namely, the order -- seems to me to fit that description.

MR. LAMKEN: Well, Justice Scalia, it is the first document, which is recognized in the regulations, which provides the lessor of the notice of claims against it, the first one that's required by the regulations in order to commence the proceedings.

JUSTICE SOUTER: You mean --

MR. LAMKEN: It's recognized --

JUSTICE SOUTER: -- the regulations don't refer to the initial letter?

MR. LAMKEN: No. They don't -- the regulations don't require this informal process. It's typically done

--

JUSTICE SOUTER: So, they literally could start, absolutely out of the blue, by issuing the order?

MR. LAMKEN: I think that's correct. That is the way that it could be done. There's an informal process that's typically followed; but you could ignore it, and there's no legal operative effect. So, that --

JUSTICE SCALIA: I doubt whether --

MR. LAMKEN: -- informal process --

JUSTICE SCALIA: -- that would --

MR. LAMKEN: -- can't be a complaint.

JUSTICE SCALIA: I doubt whether that would conform with the Administrative Procedure Act. I mean, either -- even at the first level of agency decision --

MR. LAMKEN: Well --

JUSTICE SCALIA: -- it seems to me you have to give the individual an opportunity to reply.

MR. LAMKEN: Well, that is perhaps why the agency tries this -- to do the informal process. But, in fact, it does not have legal operative effect. There -- you could completely ignore that initial demand letter, and say, "Sorry, Agency, I'm not responding." The agency then files its order. And that's the first time you must register your defenses, upon failure or forfeiture --

JUSTICE SCALIA: Of course you can ignore it.

That doesn't prove anything. You could ignore an agency complaint, too --

MR. LAMKEN: Right.

JUSTICE SCALIA: -- I mean, a formal complaint, in which case you'll be found liable. What does --

MR. LAMKEN: That's the --

JUSTICE SCALIA: -- the fact that you don't have to respond have to do with anything?

MR. LAMKEN: The legal consequences. It's exactly right, Justice Scalia. If you don't respond to the demand letter, there are no legal consequences. If you don't respond to the letter by filing what's called an "appeal," you lose. And so, it's just like a complaint; you default if you fail to raise your defenses at that point. In addition, Section 2415 --

JUSTICE STEVENS: And it's also, I assume, true that the demand letter would not toll a statute.

MR. LAMKEN: No, we don't believe a demand letter would toll a statute, because it's not required by --

JUSTICE SCALIA: Well, you --

MR. LAMKEN: -- by law.

JUSTICE SCALIA: -- you'd win in this case even if it did. I don't think that the difference between the initial letter giving you an opportunity to reply, and the

-- what you call the "complaint," the order -- that time period doesn't put you out of -- out of the permissible period.

MR. LAMKEN: Oh, I certainly hope --

JUSTICE SCALIA: Right.

MR. LAMKEN: -- hope not.

JUSTICE SCALIA: Yes.

MR. LAMKEN: But, in fact, Section 2415(f), which is on page 4 and 5 of the appendix to our brief, makes it clear that whether something is denominated a complaint or not does not determine whether or not it's covered by the limitations period. 2415(f) is an exception for counterclaims and offsets by the Government where a private party brings an action against the Government. But counterclaims and offsets typically aren't brought by complaint; they're brought in the answer, they're submitted in the answer. Therefore, whether it's denominated an "order," an "answer," or something else, doesn't control whether or not 2415 applies. 2415 applies to any action for money damages founded on a contract, however you might denominate the initial filing which commences the proceedings. In --

JUSTICE GINSBURG: Mr. Lamken, the point has been made that there are many indications that what Congress had in mind was ordinary civil action in a court.

In addition to finding this provision solely in title 28, the judiciary code, and not in title 5, there's also, if you read the following provision, 2416, time for commencing actions brought by the United States. And then it tells us the tolling periods. And, in doing that, it refers twice to the "defendant," which is a term that's used in civil proceedings, not administrative proceedings.

MR. LAMKEN: Well, starting at 28 U.S.C., why it's there, it, in fact, applies both to administrative agency actions and actions in courts. And sometimes in 28 U.S.C. there are provisions that apply to both. The Federal Tort Claims Act, for example, is 28 U.S.C., and it has a provision for administrative adjustment of claims. People must file their claims before an agency first, and then the agency can do administrative adjustment. That's entirely separate from the attorney general's ability to compromise the claim once it's filed in court.

Section -- title 5 also contains things that apply to courts and agencies -- the right to judicial review of agency actions, the waiver of immunity that's necessary for those -- in addition to standards that govern judicial review of agency actions. Those were all in title 5, but they actually apply to courts. These --

JUSTICE SCALIA: Well, 2415(a), (i), we -- you, you cannot possibly say that that only applies to judicial

actions, can you?

MR. LAMKEN: Oh, no. That's --

JUSTICE SCALIA: Yes.

MR. LAMKEN: -- actually completely --

JUSTICE SCALIA: And that's in --

MR. LAMKEN: -- superfluous.

JUSTICE SCALIA: -- and that's in title 28.

MR. LAMKEN: And that's in -- yes, that's in title 28, as well.

And with respect to the term "defendants," Justice Ginsburg, Congress has often used the term "defendants" even in the context of administrative actions. The Stockyard and Packers Act of 1921 -- it's in 7 U.S.C. 210 -- actually talks about a complaint against a defendant for damages, all adjudicated before the Secretary of Agriculture, and that was 85 years ago. It seems a little late in the day now to debate whether one can be a defendant, the person who defends before an agency, as well as the defendant --

JUSTICE GINSBURG: It's not the typical term used in agency proceedings to designate the responding party.

MR. LAMKEN: Well, you can talk about the "responding party," or the "defendant," but the term "defendant" is sufficiently broad to include one who

defends or denies, and that would be a term -- and it's been used in the past, as long as 85 years ago -- to discuss the person who might be liable for damages in --

JUSTICE GINSBURG: And the content --

MR. LAMKEN: -- an adversary --

JUSTICE GINSBURG: -- the content of the tolling provision, as well, seems geared -- seems geared to a civil lawsuit. It talks about a person being outside the United States; therefore, they wouldn't be amenable to service of process.

MR. LAMKEN: That's certainly right. These are certainly all things that would apply, we would expect, both to a civil action in court and an administrative-agency action, as well. They may work better for one or the other in different particular circumstances, but they are all sufficiently broad that they can be used in both circumstances. And the one the Government, in the administrative context, would be most interested in would be subsection C. When the Government just doesn't know the facts, or the Government reasonably couldn't know the facts, it gets an exception, just tolling, until it reasonably could have known of the fact. And that's just as applicable in an action before an agency as it would be in an action before a court.

In addition, the Government's contrary

construction renders an entire provision superfluous. And that is the one that Justice Scalia mentioned, Section 2415(i), which is an exception for administrative offsets. That exception for administrative offsets would do no work at all if --

JUSTICE GINSBURG: That wasn't part of the original package, was it?

MR. LAMKEN: No, that was added about 16 years later, Your Honor. And it was added, but it clarifies the scope of the statute. And, as this Court admitted in -- pointed out in cases like Fausto and LaFranca, the later amendment to a statute can clarify its meaning; and, indeed, statutes are ordinarily read, once amended, as if they existed in their amended form from the offset.

JUSTICE GINSBURG: I thought that (i) was added because it's -- for a very specific reason, that there was a debate between the Department of Justice and -- I forgot the other agency --

MR. LAMKEN: The Comptroller, Your Honor.

JUSTICE SCALIA: Yes.

JUSTICE GINSBURG: -- yes -- about whether an offset would be subject to the time limit.

MR. LAMKEN: That's exactly right. And Congress resolved that debate by providing an exception for administrative offsets, and no other exception for any --

JUSTICE SCALIA: What --

MR. LAMKEN: -- sort of administrative proceeding. And that raises the strong inference that, in fact, this applies to administrative proceedings, and it simply doesn't apply to administrative offsets, because they're an exception.

JUSTICE SCALIA: They could have said -- if the other interpretation of 2415(a), as not applying to administrative proceedings, were correct, they could have said the provisions of this section do not apply to administrative proceedings --

MR. LAMKEN: That's --

JUSTICE SCALIA: -- which would have -- which would have handled the offset --

MR. LAMKEN: Yes. It would have --

JUSTICE SCALIA: -- but would have been well beyond the offset. And the fact --

MR. LAMKEN: That's exactly right.

JUSTICE SCALIA: -- that they only focus on the offset certainly suggests that when you're not talking about offset, it does apply to administrative proceedings.

MR. LAMKEN: I could not have said it better, and I will not attempt to. In fact, in addition, it raises another anomaly in the statute, the Government's contrary construction. And that is, it creates sort of an

irrationality in the hierarchy of claims for the Government. Offensive judicial actions to extract money from private individuals must be brought within 6 years. Administrative offsets for the Government to try and avoid paying money, those must be brought within 10 years, under the administrative offset provision that was enacted together with the exception in (i). However, offensive administrative actions to extract money may be brought in perpetuity, forever. It simply strains credulity to believe that Congress, at the same time it was saying the Government has only 10 years to assert administrative offsets to avoid paying money, instead intended administrative agencies to be able to extract money on that very same claim --

JUSTICE SCALIA: I can believe that they do --

MR. LAMKEN: -- in perpetuity.

JUSTICE SCALIA: -- I can -- I can believe that they do that.

[Laughter.]

JUSTICE SCALIA: But --

MR. LAMKEN: Well, Justice --

JUSTICE SCALIA: By mistake. But I would not assume a mistake unless it's very clear.

MR. LAMKEN: I think that's exactly right, Justice Scalia. And that's, again, going back to Fausto,

where there is a sensible hierarchy of claims, or a sensible hierarchy of preferences. The Court doesn't ordinarily presume that Congress put in a structure that doesn't respect that ordinary hierarchy. And the Government's construction here is inconsistent with the ordinary hierarchy which allows the Government to avoid making payment on more favorable terms; then the Government gets to go in and forcibly extract money from private individuals.

Finally, the Government's construction also undermines the intended effect of the statute. The effect of statute -- the purpose of statutes of limitations -- and this one, in particular -- is to provide repose -- to allow the individual to know that he will no longer confront Government claims, to dispose of his documents, and also to encourage the Government to be diligent in pursuing its claims. None of those purposes are achieved, all of those purposes are defeated, if -- once the statute of limitations period expires --

JUSTICE KENNEDY: Mr. Lamken --

MR. LAMKEN: Yes.

JUSTICE KENNEDY: -- could we go back to Section (i) for a second more? Is it also possible to say that there was this disagreement between the Department of Justice and the Comptroller General, and Congress decided

that the Comptroller General was right? And, if that's true, should we not accept the Controller General's reading of the entire statute?

MR. LAMKEN: Well, if Congress had decided the Comptroller General is right, and had done in subsection (i), it would have written subsection (i) the way Justice Scalia proposed, which is to say this doesn't apply to administrative claims at all. What it did is, it said, "Ooh, this appears to apply to administrative claims and the Comptroller thinks these administrative offsets are important, so we will give a special statute of limitations period in 31 U.S.C. for those, and exempt them from the more general statute of limitations period in section 28 U.S.C. 2415." So, I don't believe that it should be that way. Is it frivolous to suggest that that's the reading? No, the Government --

JUSTICE STEVENS: Does the --

MR. LAMKEN: -- got it's --

JUSTICE STEVENS: -- legislative history tell us how detailed the congressional examination of the particular issue was?

MR. LAMKEN: Well, indeed, the legislative history mentions -- and there is a battle of letters between --

JUSTICE STEVENS: That's about all --

MR. LAMKEN: -- the Office of Legal Counsel and the Comptroller on this issue. And Congress actually stepped into the fray and created an exception. But it created a limited exception --

JUSTICE STEVENS: Okay.

MR. LAMKEN: -- an exception that applies only to one context, and that's administrative offsets. And that certainly raises a very strong inference that, where there isn't such an exception, the statute applies to administrative proceedings, more generally.

JUSTICE ALITO: Isn't the most likely answer that they just -- they saw a small problem, and they rendered a decision on the small problem, and they didn't think about it any further than that?

MR. LAMKEN: Well, I have a hard time psychoanalyzing Congress, because it's sort of a corporate body, and I can't tell what Member of Member of Congress is saying what. But when the Court of these statutes, it generally reads them -- and it, in fact, avoids, whenever possible, superfluity. And if this provision applies to administrative proceedings from the outset, subsection (i) is superfluous, it's -- does no work whatsoever. And so, the -- when Congress amended this statute, it certainly clarified that, where there is no exemption, this statute applies to actions filed in administrative proceedings.

If there are no further questions, I'll reserve the remainder of my time for rebuttal.

JUSTICE STEVENS: Thank you.

Mr. Joseffer.

ORAL ARGUMENT OF DARYL JOSEFFER

ON BEHALF OF RESPONDENT

MR. JOSEFFER: Justice Stevens, and may it please the Court:

The presumption is that the Government is not bound by a statute of limitations. And, when read as a whole, Section 2415(a) does not overcome that presumption, but instead makes clear that it applies only to suits in court. There are several reasons for that. First, the ordinary meanings of all of the key statutory terms refer to suits in court. Second, the statute expressly distinguishes between administrative proceedings and actions. Third the statute's located in the judicial code. Fourth, the committee reports, for those who are inclined to consider them, strongly support the statute's ordinary meaning. And, fifth, even if some administrative proceedings were governed by Section 2415(a), these would not, because they do not involve a complaint.

Now, on the first of those points, the term "action" ordinarily refers to the pursuit of a right in court, which just is why, just 7 years ago, in West v.

Gibson, every member of this Court agreed that the term "action" often refers only to suits in court, and not to administrative proceedings.

JUSTICE SCALIA: It often does. It often does. But it does not, universally. And there are a number of instances cited by the Petitioner that -- where this Court and -- and statutes use the term in context where it clearly applies to administrative proceedings.

MR. JOSEFFER: Well --

JUSTICE SCALIA: So, the question is, How -- you know, how absurd is it not to read it to apply to administrative proceedings in this case? And I find it pretty absurd, because you assume, if you read that it way, that there is effectively no statute of limitations whatever for the Government in these cases.

MR. JOSEFFER: Well, the structure of the law here is that in those instances where Congress does authorize administrative recovery, it ordinarily provides a context-specific administrative limitations period, such as in the Contract Disputes Act, which governs almost all of the contract claims the Government can pursue administratively. Congress specifically enacted a 6-year limitations period for the submission of a claim to a contracting officer.

In this unique context, however, Congress had

very good reasons for not applying a limitations period until it prospective enacted a partial one in 1996. The reason is that what Congress found here, in context of mineral leasing, based on the findings of an independent commission, was that the companies were historically on an honors system and had abused that by underpaying royalties of up to half a billion dollars annually. So, what Congress directed the agency to do is to audit all current and past lease accounts. One of the committee reports said to focus on old accounts, because this was a Congress that was not concerned with repose, but with getting some of those vast underpayments back from the companies.

Now, when we fast-forward to 1996 --

JUSTICE SCALIA: Wait.

MR. JOSEFFER: -- at that point --

JUSTICE SCALIA: Excuse me. And this was the Congress that enacted what?

MR. JOSEFFER: No, I -- agreed. What I'm referring to now is the Congress that enacted the mineral leasing provisions.

JUSTICE SCALIA: Oh.

MR. JOSEFFER: -- which is not a good --

JUSTICE SCALIA: Which is not what we're talking about here.

MR. JOSEFFER: No, but -- well, we are, because

the structure of the law here is that Section 2415(a), as we see it, governs court suits. And that works, because, when Congress authorizes administrative recovery, it almost always provides a specific -- context-specific administrative limitations period.

Also, when Congress was telling the agency to focus on old accounts, it certainly wasn't thinking that a statute of limitations applied to that, and the agency, in that contemporary context, did not understand that there was a limitations period, either, because the orders that issued in the aftermath of the 1982 Act went back 7, 8, 9, sometimes more, years than that.

JUSTICE SCALIA: As late as 1978, the Justice Department didn't think that way, did it?

MR. JOSEFFER: No, the Justice Department--

JUSTICE SCALIA: The opinion of the Office of Legal Counsel, in '78, was exactly what the Petitioner here would urge.

MR. JOSEFFER: No, the OLC opinion was limited, by both its terms and its reasoning, to administrative offsets, not to administrative adjudications. And if I could explain that, an administrative offset occurs in the situation -- this is what OLC was looking at -- where the Government, by statute, owed retirement benefits to a person, and, because it thought that person owed it money,

what the Government did was to unilaterally reduce the retirement benefits. What OLC opined is that that is a -- nothing more than a prejudgment attachment. And OLC thought that if the Government is time-barred from obtaining a judgment, it should be time-barred from obtaining a prejudgment attachment.

An administrative adjudication is significantly different, because it does provide an actual judgment. So, there are a couple of important points from that.

First is that the dispute between OLC and the Comptroller General was limited by its terms to administrative offsets, although, Justice Stevens, the Comptroller General did opine beyond that, that the statute specifically applies only to suits in court. But the actual dispute was as to administrative offsets. So, when Congress addressed that specific dispute, as Justice Alito pointed out, it resolved only that specific dispute.

JUSTICE SCALIA: But -- excuse me -- how could OLC possibly think that it applied to administrative offsets if it didn't apply to administrative proceedings? I mean, it was a contradiction of the proposition, which you're urging here, which is that this statute applies only to judicial proceedings. I mean, that's the point. Whether they spoke just to offsets or not, the position taken by the Justice Department was that this statute

relates to administrative proceedings.

MR. JOSEFFER: No, the position of OLC was limited to administrative offsets, and it did not -- the important thing is, OLC opinion did not interpret the statutory term "action," or, frankly, any other statutory term. Instead, it had a theory, which was probably wrong, that administrative offsets are unique because they are prejudgment attachment devices. That's the dispute that went to Congress, and that's the dispute Congress actually resolved.

And, in any event, going forward --

JUSTICE SOUTER: Well, on that theory, then, there was -- there was no time issue with respect to the right to offset, then, in the OLC's position.

MR. JOSEFFER: No, the OLC's view is that if the Government was time-barred from obtaining a judgment under Section 2415(a), then it would be time-barred from obtaining a prejudgment attachment.

JUSTICE SOUTER: No, but I thought your -- in answer to Justice Scalia, you said what was essential to the -- to OLC's position was that the offset is like a prejudgment attachment, and, in effect, it's an attachment without process. If that's the case, then timing should have nothing to do with it. Conversely, as Justice Scalia said, if timing does have something to do with it, timing

presumably derives from this provision; this provision, therefore, must have been assumed to apply to administrative proceedings.

So, either there's no time question with respect to the offsets, or, if there is a time question with respect to the offsets, it implies an OLC position that this provision applies to administrative proceedings.

MR. JOSEFFER: Well --

JUSTICE SOUTER: What's wrong with that logic?

MR. JOSEFFER: I think what's wrong with the logic is what was wrong with the logic of the OLC opinion. We don't mean to defend the --

JUSTICE SOUTER: You put me --

MR. JOSEFFER: -- reasoning of the OLC opinion --

JUSTICE SOUTER: -- in good company, but --

MR. JOSEFFER: -- but what OLC really did say -- and Comptroller General and Congress promptly disagreed -- was that -- it didn't see a problem -- OLC didn't see a problem with procedurally imposing an administrative offset. What it saw a problem with was, it thought if an -- a judgment would be time-barred, then a prejudgment attachment should be time-barred, as well. I mean, that was the reasoning of the --

JUSTICE SOUTER: No, but if it was --

MR. JOSEFFER: -- OLC opinion, which --

JUSTICE SOUTER: -- a prejudgment --
MR. JOSEFFER: -- I agree was --
JUSTICE SOUTER: It was a prejudgment attachment in aid of what could be accomplished administratively by, ultimately, an administrative judgment.
MR. JOSEFFER: No, the -- I guess it was another point. The OLC opinion was -- arose in the context where a judgment could be obtained at all only in court.
JUSTICE SCALIA: Do we have --
MR. JOSEFFER: In the context of --
JUSTICE SCALIA: -- that opinion, by the way? Both sides cited it. The -- is it -- it was unpublished.
MR JOSEFFER: It was unpublished, and --
JUSTICE SCALIA: Does anybody give it to us?
MR. JOSEFFER: Petitioner offered to lodge it with --
JUSTICE SCALIA: Yes, I know they did offer, but nobody did it.
MR. JOSEFFER: I'll -- we'll do it this afternoon.
JUSTICE SCALIA: Good. I would like that.
MR. JOSEFFER: The point's just -- the OLC reasoning was admittedly somewhat odd, but that was the context in which Congress was responding to. And, going forward, it is not surplusage, because the issue still

arises. If the Government could pursue its suit only in court, it would be time-barred from pursuing a suit in court. The question would then still arise, under the OLC opinion, unless it had been overruled, whether the Government could, nonetheless, obtain a prejudgment attachment, even though it cannot obtain judgment. That's all that Congress was looking at there. And, as this Court's recognized in cases like O'Gilvie and Vonn, when Congress amends a statue to resolve a specific dispute, oftentimes its amendments should be read as doing no more than that.

We -- I agree, though, that terms -- to get back to the beginning of this discussion -- terms do not always have their ordinary meanings, but they presumptively do, especially when a statute must be strictly construed. And here, the context confirms that "action" does have its ordinary meaning, for several reasons.

First, the ordinary meanings of the other key statutory terms, such as "right of action," "complaint," and "defendant," as Justice Ginsberg pointed out, all ordinarily refer to aspects of suits in court. A "right of action" is the right to bring a suit in court; a "defendant" is the person defending in court ordinarily; and a "complaint" is the document that initiates proceedings by stating a claim that's seeking relief in a

civil action, which is a suit in court. Especially when those terms are used together, this Court recognized, in Unexcelled Chemical, that a reference to commencing a action by filing a complaint ordinarily refers to filing a suit in court, not a pleading before an administrative agency. The statute then goes on to expressly juxtapose an action against an administrative proceeding by saying that the time to file an action does not run until after the administrative proceedings have concluded, which certainly gives weight to the point that the action is -- an administrative proceeding is not an action.

JUSTICE SOUTER: Would the -- at the time that 4515 -- is that the --

MR. JOSEFFER: It's 2415.

JUSTICE SOUTER: 20- -- I'm sorry. At the time that was enacted, were there any limitations in other statutes on the commencement of administrative proceedings?

MR. JOSEFFER: The ones that we have found were -- I'm not 100-percent sure, but the ones that we -- that we have found and cited in our brief do appear to be enacted after that time. I think the reason is that -- I mean, historically, administrative -- obviously, court suits have been around a lot longer than administrative adjudications. And, as Congress has authorized

administrative adjudications, it's dealt with them on a case-by-case basis. And every time that it enacted a context-specific administrative adjudications period since 1966 -- in theory, it could have just done an across-the-board one for all agency adjudications, but, instead, it's chosen to deal with the context-specific; in part, because of the great variety of administrative procedure.

I mean, as this case illustrates, a statute of limitations that governs a complaint in an action is just not going to work in a lot of administrative contexts. Here, there's no complaint. An "order" is a legally binding order. It doesn't seek relief, it imposes it. And unless it is both appealed and stayed pending appeal --

JUSTICE SCALIA: How about the initial letter that, in the agency practice, precedes the order? I gather there's a letter to the --

MR. JOSEFFER: Right. There's -- there are basically three steps here. First, there's an audit. Then, if the audit reveals an apparent discrepancy, the agency or a State with delegate authority would send an issue letter requesting an explanation.

JUSTICE STEVENS: An issue letter.

MR. JOSEFFER: Yes. It's called an "issue

letter." And then would basically request an explanation of the apparent discrepancy. And then, if the agency then decides, after consideration of the audit and the issue letter, that it's appropriate to issue an order to pay it, will do so. It --

JUSTICE SCALIA: Sounds to me like a complaint, a response --

MR. JOSEFFER: An issue letter?

JUSTICE SCALIA: -- and an adjudication. I mean, you know --

MR. JOSEFFER: I don't know whether you mean the audit --

JUSTICE SCALIA: -- "We think you owe this."

MR. JOSEFFER: -- or the issue letter, but either way --

JUSTICE SCALIA: The response comes back, "I don't think we owe it, and here's why." And then there's a ruling, "You do owe it." And that's the order. And then you can appeal it. And the CFR refers to it as an appeal.

MR. JOSEFFER: Yes. Well, there are a few things. First, on the -- with respect to the issue letter -- I mean, a complaint, functionally, is a document that initiates proceedings, stating it -- by stating the claim for relief, is seeking relief in a civil action. With

respect to the second of those, an issue letter does not -- is not an allegation of wrongdoing, and it does not seek relief; it seeks information so that the agency can determine whether or not an apparent discrepancy raised by an audit is, in fact, a discrepancy. But there's --

JUSTICE SCALIA: It does not --

MR. JOSEFFER: -- no claim.

JUSTICE SCALIA: -- assert that there's a discrepancy?

MR. JOSEFFER: Well, what it -- what it asserts is that, "We've done an audit, and the audit has raised the following issues" -- that's why it's called an "issue letter" -- "Please provide an explanation." And it -- so, at that point, the agency has not decided yet whether it is, in fact, asserting a claim. It's not -- and it's not requesting relief, which a complaint definitely does. All it's requesting is information to help the agency assess the issue.

JUSTICE SCALIA: Do we have an example of issue letters anywhere? That's not in the materials either, is it? In the --

MR. JOSEFFER: No, in fact, it's not even -- in fact, it's not even in the administrative record --

JUSTICE SCALIA: Right.

MR. JOSEFFER: -- which is one of the reasons

it's not in the issue --

JUSTICE KENNEDY: Do we know --

MR. JOSEFFER: -- record of the case --

JUSTICE KENNEDY: -- what time lapse --

MR. JOSEFFER: -- which also reflects that it's not a formal complaint, or it would be in the record.

JUSTICE KENNEDY: Do we know, in this case, what time lapse there was between the issue letter and the order?

MR. JOSEFFER: I don't think it was more than a year or two.

JUSTICE KENNEDY: But --

MR. JOSEFFER: And there was --

JUSTICE KENNEDY: -- would that -- if you took the issue letter as the day, wouldn't all of the -- all of the Government's claims be timely? Because we're only talking about part of the claim, anyway, as I understand it. Is that correct?

MR. JOSEFFER: Here, I think if you ran --

JUSTICE SCALIA: I don't think so. I tried to figure that out. I think --

MR. JOSEFFER: Yes, if it ran from the --

JUSTICE SCALIA: I think --

MR. JOSEFFER: -- if it ran from the issue letter --

JUSTICE SCALIA: Okay.

MR. JOSEFFER: -- I think there would still be about a year in dispute here.

JUSTICE ALITO: Going forward, if we --

MR. JOSEFFER: But --

JUSTICE ALITO: -- if we agree with your position, the result will be that there will be a 7-year limitations period for oil and gas leases, but, for Indian claims and for minerals, there'll be no statute of limitations?

MR. JOSEFFER: Yes, and the reason is that that's what Congress chose to do. I mean, in the prospective 1996 Act, it --

JUSTICE ALITO: Did they --

MR. JOSEFFER: -- enacted the limitations --

JUSTICE ALITO: When they enacted the 7-year limitation period, did they explain why they would treat those two situations so differently?

MR. JOSEFFER: No, there's no explanation. As a practical matter, though, the prospective 1996 legislation governs a wide variety of aspects of the -- of the relationship between the Federal Government and the lessees. And, on balance, that package was pretty favorable to the oil companies, and I think Congress probably just decided not to -- to apply that to itself,

but not to the Indians.

Getting back to the order, though, it's not only that --

JUSTICE SCALIA: How do you defend against a claim for, you know, stuff that went on a hundred years ago?

MR. JOSEFFER: Well, as a --

JUSTICE SCALIA: I -- I'm really very reluctant to -- unless there is no possible other reading of the statute, to think that that's -- that that's what the law provides, that the Government can show up a hundred years later, and say, "Oh, by the way, you owe all this money."

MR. JOSEFFER: Well, first off, until --

JUSTICE SCALIA: The company says "Gee, I -- you know, I don't have records from a hundred years ago."

MR. JOSEFFER: Right. Well, there are a few points, both legal and practical. On the legal, until 1966 that absolutely was the law, because historically no limitations period ever applies against the Government. And that's the reason for the strict construction canon, that the statute applies here only if it clearly applies, and thereby bars the Government from forcing the law in the public interest.

JUSTICE SCALIA: Say that again. Until 1966, there were no statute of limitations against any

Government suits?

MR. JOSEFFER: Not contract. I mean, the historic rule is that the Government is not bound by statutes of limitations, because what it's doing is enforcing the law in the public interest. Now, in 1996, Congress enacted Section 2415(a) so that there would prospectively be a contract limitations period. But it's strictly construed, because of the historical backdrop and the importance of enforcing the law in the public interest. So that's why we do have a strict construction canon here. As a --

JUSTICE SCALIA: He didn't apply against the Government either.

MR. JOSEFFER: For the same reason laches is never applied against the Government.

JUSTICE GINSBURG: So, there's no limit at all, and you concede that that's the case. So, the Government could go back on these royalties as long as it likes.

MR. JOSEFFER: Well, as an abstract theoretical matter, the Government could reach back many, many decades. As a practical matter, though, that's never happened that -- we've gone back, say, 50 or 100 years -- and there are practical reasons for that. First is that the agency does not have enough resources to audit --

JUSTICE KENNEDY: Well, there's a case involving

the Oneida Indians, if you went back quite a ways --

MR. JOSEFFER: That's true. It's -- I meant in the --

JUSTICE KENNEDY: -- 200 years --

MR. JOSEFFER: -- leasing context here.

JUSTICE KENNEDY: Yes.

MR. JOSEFFER: I didn't mean in the leasing context here. But in the leasing context, one -- there are a couple of important points. One is that the Government does not have enough resources to audit all of the current accounts in all of the years, which is one of the reasons that we need to be able to go back farther when we catch the violation. As a -- but as a result, the notion that we're going to pull auditing resources off of today to do a frolicking detour into 50 years ago, there's a reason that's never happened.

In addition, the farther we try to go back, the greater the proof problems, because oftentimes only the companies have the information that shows what royalties they would owe, and if they lawfully destroy those records after 6 years, it makes it even harder for us to try to go back, because of proof problems.

JUSTICE SCALIA: That's another indication. Why would you allow them to destroy those records after 6 years if you -- if you thought -- if you thought that

there was no statute of limitations to claims for these things? I mean, that's just another inconsistency that -- in the statutory scheme that's created.

MR. JOSEFFER: Well, no, the --

JUSTICE SCALIA: You say, "You can destroy your records after 6 years." Well, why? It doesn't make any sense.

MR. JOSEFFER: Well, first, it's optional, not mandatory. If they want to keep them, they --

JUSTICE SCALIA: Yes.

MR. JOSEFFER: -- certainly can. But there's no -- and, as a practical matter -- I mean, because the Government bears the initial burden of going forward, if the company destroys the sources of proof, that's, on balance, going to be in its favor. But, in addition, there's not a strict congruence between the 6-year periods, because, first, the companies only have to keep records for 6 years, but, in some circumstances, the Secretary can require they be kept for longer. In addition, sometimes the statute of limitations, because of tolling, is much longer than 6 years; and so, the lawful destruction of records would still leave absence-of-proof issues in situations where the statute might, because of tolling, be much longer. So, there's not a strict congruence.

There is also no indication that Congress enacted the 6-year records-retention policy because it was thinking about a 6-year limitations period. There's never been any linkage between the two.

If I could briefly cover, then, also -- I mean, in addition to all the textual points, this is also located in the judicial code. And, although it's true that a couple stray provisions in the judicial code apply to administrative proceedings, they say that expressly. Every time the word "action" is used in the judicial code -- and Petitioners identified no examples -- every time the word "action" is used in the judicial code, it refers to a suit in court, and only a suit in court.

When a provision of the judicial code applies to something else, it will say so. For example, 28 U.S. Code 2462, which is a statute of limitations for penalty proceedings, refers to an "action, suit, or proceeding." The Federal Tort Claims Act was very clear that what it's talking about is submitting something to an agency.

So, if Congress was going to legislate against the backdrop of a strict construction canon with terms that ordinarily refer to suits in court, and put the provision in the judicial code, I mean, that just is a totally irrational way of expressing intent, especially clear -- especially a clear intent, when it's trying to

govern administrative proceedings.

The committee reports also strongly confirm that, because they not only say that the statute defines the time limitation for bringing an action in the U.S. courts, and not only use court terminology from front to back, they also say, like the statute, that they're aware of the administrative proceedings, but what they're saying is that the time to bring an action in the courts does not expire until after the conclusion of those proceedings.

The committee has explained that the reason for that provision was the great number and variety of administrative proceedings. So, in other words, Congress was saying, "There's a great variety of administrative procedure. We're just not going to deal with that here. We're taking it off the table by saying this limitations period does not expire until a year after those administrative proceedings, whatever they might be, have expired."

There's also some relevance to the fact that this legislation was proposed by the Justice Department as part of an overall package of reforms that would govern the civil litigation that the Department was handling in the courts. It was then referred to the Judiciary Committees, not to the House Government Reform Committees that might consider administrative procedure matters, and,

as I mentioned before, was enacted as part of the judicial code.

From start to finish, this legislation has never had anything to do with anything other than court suits, which is why Congress has expressly provided for context-specific administrative systems -- limitations periods -- which make sense in the context of the relevant administrative procedures.

JUSTICE SCALIA: Well, except when you -- when you say "this legislation," you limit it to the body of 2415(a) and you leave out (i), which -- -- or I guess it's "one." Is it? Little -- or --

MR. JOSEFFER: It's (i). It is (i).

JUSTICE SCALIA: It's (i). I mean, that clearly does apply to administrative proceedings. And I could understand the argument that Congress was just making things doubly clear -- okay? -- that (a) does not apply to administrative proceedings. I could understand that argument if the way (i) was written is, "The provisions of the section shall not apply to administrative proceedings." And then I would say, "You know, oh, well, that was always the case, and this is just making it clear."

It doesn't say that. It says that -- the only administrative proceeding that they cut out of it is these

offsets.

MR. JOSEFFER: I think the reason is that --

JUSTICE SCALIA: And, you know, the normal rule is inclusio unius, exclusio alterius. I would -- it means, to me, when I read the statute as a whole -- and that's the way I read statutes, I don't ask whether this section was adopted this year, and the other section was adopted next year -- I don't do it bite by bite; you look at the whole text -- and, when you read all this stuff together, it seems to me that the import of (i) is that administrative proceedings, despite the fact that "action" is not a very common word to use for them, are covered.

MR. JOSEFFER: I mean, it's -- there's no doubt the statute should be read as a whole. But, as this Court has explained in cases like the O'Gilvie and Vonn cases cited in our brief, when a court's trying to make sense of a statute read as a whole, oftentimes it will find that when Congress faces a specific dispute and amends a statute to resolve that specific dispute, that's all it resolves, and there's no reason to draw further negative inference, especially here, as the Court of Appeals pointed out, where a strict construction canon applies.

JUSTICE SCALIA: That's the best thing you have going for you, really, the strict construction canon.

MR. JOSEFFER: Well, because -- I mean, and it

is an important point, that the statute applies only if it clearly applies by its terms. And it seems to me, the best that Petitioners can do is to say that some of the statutory terms, in isolation, are ambiguous. But that -- all that means, as I said, is that, under the strict construction canon, we would prevail. And even if the statute governs some administrative proceedings, but not others, it would not govern these, for the reason I gave earlier, which is that there's no complaint here. We talked, before, about the ways in which an order is not a complaint. It's another important point, though, that in order not only -- it is -- not only does it not begin the proceedings, it normally ends them, because appeals are only taken about a quarter of the time. And in some limited circumstances there's not even a right of appeal, if the Assistant Secretary issued the order. So --

JUSTICE SCALIA: What if I didn't think the order was a complaint, but I thought the initial letter was a complaint? Would the Petitioner lose? Because they never made that argument.

MR. JOSEFFER: Correct. It's -- the only argument they've ever made --

JUSTICE SCALIA: Yes.

MR. JOSEFFER: -- is that an "order" is a complaint. So, they haven't preserved the point.

JUSTICE GINSBURG: Because you're --
MR. JOSEFFER: But --
JUSTICE GINSBURG: -- you made the point that the issue letter is just raising the issues, and it's not charging, as a complaint would allege, "You owe us," but this is, "Maybe you owe us."
MR. JOSEFFER: Correct. There's no -- in an issue letter, there's no claim for relief, just a claim for the request for information, and there's no allegation of wrongdoing. So, it's just not a complaint in those ways. Also, it doesn't -- it's not really fair to say that it begins proceedings, because it comes between an audit and an order to pay. So it doesn't -- and plus, it's, of course, not filed in a civil action. And, in that respect, it doesn't satisfy any of the -- any of the elements of the -- of the ordinary definition of "complaints."
JUSTICE ALITO: Are you saying that this doesn't apply to any administrative proceeding, or just those that are structured like this one, where you don't have anything that's labeled a "complaint"?
MR. JOSEFFER: We -- well, our primary submission is that it does not apply to any administrative proceedings, for the reason -- reasons I've given, that the ordinary meanings of all of the key statutory terms

are for suits in court. A "complaint" itself is ordinarily defined to be --

JUSTICE SCALIA: Even if you have an administrative proceeding which is called a "complaint"? You know, I mean -- and some are, I think.

MR. JOSEFFER: There are -- there are some contexts in administrative procedure in which the word "complaint" is used.

JUSTICE SCALIA: And that would not be covered by 2415(a).

MR. JOSEFFER: Because it's not filed in an "action," which refers to a suit in court, following occurral of a right of action, which refers to the right to bring suit in court, in a statute which then juxtaposes the terms "action" against "administrative proceedings" --

JUSTICE SCALIA: And let's assume all those terms are used in the agency procedure. They're talking about "action," "right of action." All those terms are used in the agency's procedural rules. Would they then come under this thing?

MR. JOSEFFER: No.

JUSTICE SCALIA: I think you have to say no --

MR. JOSEFFER: Yes.

JUSTICE SCALIA: -- because, otherwise, it would be up to the agency, just by renaming their things, to

come in or out, right?

MR. JOSEFFER: Well, and it's much more --

JUSTICE SCALIA: Yes.

MR. JOSEFFER: -- fundamental point than that, too, is that what Congress was doing here was, when using these terms in the ordinary sense, to lay out an across-the-board rule that applies to suits in court.

And, finally, one thing I should also emphasize is that what we have in this context is a comprehensive administrative scheme. Petitioners like to say that, "Well, we could just as easily be in court." There's a reason that no administrative royalty proceeding has ever been brought by the Government in a court. And that's, first, that Congress directed the agency to establish a comprehensive auditing and collection system, and then gave the agency administrative authority to enforce its administrative orders. The only way the agency could administer thousands of leases with something like $9 billion in royalties every year is to do this in an efficient administrative manner.

Congress has not only authorized that, and ratified it, it has strengthened that scheme and told the agency, as I said, in 1982, to go back and look at old leases, precisely because Congress knew that is a standalone administrative scheme, and it's never provided

the administrative limitations period for the standalone administrative scheme.

If there are no more questions --

JUSTICE STEVENS: Thank you, Mr. Joseffer.

Mr. Lamken, as I understand it, you have about 11 minutes left. You don't have to use them all.

[Laughter.]

REBUTTAL ARGUMENT OF JEFFREY A. LAMKEN

ON BEHALF OF PETITIONERS

MR. LAMKEN: I will endeavor not to. Thank you, Justice Stevens.

I wanted to start with the ordinary meaning of the term "action." I was somewhat bemused by the Government's insistence that had -- the term "action" in West v. Gibson was construed -- it must mean an action before a court, and has that as its ordinary meaning.

The Solicitor General's own position in West versus Gibson, on page 25 and -6 of its brief was, "Section 1981(a) does not, however, define the term 'action' as being limited to judicial proceedings. The statutory language, read in context, suggests that no such limitation was intended."

Page 6 of the Government's reply, "The term 'action,' in Section 1981, can reasonably be construed as encompassing both administrative and judicial

proceedings."

The term 'action' is a term that's used for adversary adjudicative proceedings, whether those are in court or before an agency. It is not limited to administrative agency proceedings, as the Government itself recognized in West versus Gibson.

There are more general terms here. There's also "complaint," there's also "defendant." There's a number of those. But those general terms are also the terms of adversary adjudication. And Congress uses them, as far back as 1921, for adversary adjudications before agencies.

JUSTICE STEVENS: Mr. Lamken, have you had any second thoughts about your position that it's the order, rather than the issue letter, that we should look at?

MR. LAMKEN: Well, in fact -- no. But the -- the answer is that we didn't -- no issue was engaged as to what was the functional equivalent of the complaint below. That raised -- was raised for the first time by the Solicitor General in its merits brief, saying, "No, no, no, there's actually some stuff that comes before the order."

But if -- I would encourage the Court to look at the definitions in FOGRSFA, 1724 and 1702(A), which tell you what, under -- in Congress's view, commences the proceedings here. And, in Congress's view, what commences

the proceedings, what triggers the new statute of limitations and stops it from running, is the order to pay, which Congress defines as a "demand."

JUSTICE SCALIA: Well, that's true. That's true. But the provision you're arguing that you come under does talk about a complaint.

MR. LAMKEN: That's --

JUSTICE SCALIA: And that's what -- you know, that's what starts the 6 years running. And it's -- seems to me odd to call something a "complaint" which is, in fact, an order. They're not complaining about anything; they're saying, "Pay the money."

MR. LAMKEN: Actually, Justice Scalia --

JUSTICE SCALIA: You know, usually a complaint, you're -- you make your point, and say, "What do you say? What's your answer?"

MR. LAMKEN: Well --

JUSTICE SCALIA: And this is an order. "You're -- boom, "Pay."

MR. LAMKEN: It certainly has a hybrid quality, Justice Scalia. And it's not a hybrid quality that the industry particularly likes. But it is the first time that the Government asserts its state -- its claims as to what's wrong, in a binding legally operative document, where the failure to respond results in default. It has

that function as complaint. It is the first salvo in official, formal administrative proceedings.

JUSTICE SCALIA: Well, that's only true if you consider an appeal to be the response. And that's rather weird, that --

MR. LAMKEN: It is --

JUSTICE SCALIA: -- that the response to a complaint is an appeal.

MR. LAMKEN: The language that has been used, and -- as a result of very odd historical anomalies and attempts to introduce a sense of due process to these proceedings over time -- is odd, and it is awkward. But it's clear that when Congress wrote the scope of this statute, it said it applies to "every action for money damages by the Government which is founded in contract." It doesn't say "actions that are begun by complaint."

Now, the complaint is what Congress assumes will stop the provision from running. And there is always, in an adversary adjudication, some document that functions like a complaint, that provides the defendant the notice of what the claims are against it, and to which failure to respond will result in default.

We believe that the most likely thing to be the complaint here is, the thing that provided us with notice, is that -- "Boys, you've got to respond; otherwise, you're

in trouble" -- was the order to pay. And Congress came to that same conclusion when it enacted -- when it enacted FOGRSFA and established a 7-year statute of limitations provision. But if we lose 2 hears of the claim, and only get 1 because it is the agency letter, in the Court's view, well, that's fine, but there's some document here that started these agency proceedings, and it is that document which is a complaint.

JUSTICE SCALIA: Could you get us -- we're going to have supplemental material filed, the OLC opinion. Could you -- could you get us a -- you know, a sample of an agency letter? Or, if you can't, maybe the Government can?

MR. LAMKEN: Yeah, I -- that's true. And in terms of the OLC letter, we offered to lodge it in our brief. Unfortunately, by the Court's rules, we're not allowed to lodge it, unless the Court specifically requests it. And so, that's why it's not there. But we will get that to you, or the Government will get it to you, as soon as possible.

The actual agency letter, in this case, isn't in the administrative record. And it turns out that we haven't been able to find it, and the Government hasn't been able to find it. And so, it's a letter. It's a demand letter, but it is a letter, and that -- the order

to pay is actually the opening salvo in these proceedings. And again, what opens the proceedings in -- to the Justice Department regulations and other regulations --

JUSTICE KENNEDY: May I suggest --

MR. LAMKEN: -- to try to define --

JUSTICE KENNEDY: -- this, Mr. Lamken, that when the -- when the filing is made giving us the OLC opinion, you include a -- an example of such a letter?

MR. LAMKEN: Yes. Yes. Of course.

JUSTICE KENNEDY: And so, we'll get a notion of what it looks like.

MR. LAMKEN: Right. It may have to be from some other proceeding; it wouldn't necessarily be from this case.

JUSTICE GINSBURG: Your position is, this would apply to the universe of administrative proceedings. Now, this particular lease arrangement is taken care of by an express statute of limitations. So, what we're talking about, for the future -- what would change under your interpretation? Not gas leases, because -- there's a 7-year limitation for both administrative orders to pay and --

MR. LAMKEN: Right.

JUSTICE GINSBURG: -- court actions.

MR. LAMKEN: Right. It would be all leases on

Indian lands. It would be all leases which involve minerals other than oil and gas, whether it be coal, gold, silver, anything like that. It would also be all claims before September -- all production before September of 1996. That introduces something of an oddity, if one accepts the Government's position. It will be that, for all claims going forward from September of 1996, the Government has 7 years, but, for the prior 200 years, those claims persist in perpetuity. When Section 2415(a) itself was enacted, Congress avoided precisely that result by deeming all prior claims to have accrued on the date the statute of limitations was enacted. And the very fact that Congress didn't do that here is evidence that Congress -- to the extent it has anything to do with it at all -- is evidence that Congress, in fact, understood that there already was a statute of limitations applicable. And, in fact --

JUSTICE SCALIA: What --

MR. LAMKEN: -- it also --

JUSTICE SCALIA: What other areas would we be messing up by finding for you? I mean, here, you know, if we don't find that this administrative action is covered by this statute of limitations, there's no statute of limitations. But there may -- there are other -- may be other areas covered by this text -- namely, a suit by the

United States -- founded upon any contract expressly or implied in law or in fact, where there is some kind of a statute of limitations.

MR. LAMKEN: Right. There are -- there are some contexts in which there already is a separate administrative regime which would have its own statute of limitations. The Contract Disputes Act, as the Government points out, is one of those.

JUSTICE SCALIA: And that would prevail over this --

MR. LAMKEN: Yes, because the --

JUSTICE SCALIA: -- because it's more --

MR. LAMKEN: -- Contract Disputes --

JUSTICE SCALIA: -- specific.

MR. LAMKEN: -- Act has an exception at the front and says "notwithstanding 2415." It's its own animal to itself. And there is a clause at the front of 2415 that says "except as otherwise provided by Congress." And so, Congress often takes exceptions. And when it modified the Mineral Leasing Act of 1996, that was an exception to the 2415 regime. So, Congress knows how to conduct specialized situations and take things outside of 2415 when it needs to. But it enacted Section 2415 as a catchall for all of those situations where Congress hadn't managed to anticipate the circumstances. And the

Government's premise of the whole provision is that Congress botched it. Congress provided a catchall that catches judicial actions, but leaves the Government free, in perpetuity, to persist -- to proceed on precisely the same claims for precisely the same relief, plus interest. And, because interest is calculated at a relatively high rate, that makes those old claims much, much more valuable than the relatively more recent claims. And it seems implausible to think that Congress enacted a catchall limitations period with a loophole so large that it deprives the statute of limitations period of effect almost entirely.

Finally, I'd like to say, one moment about the statute -- the canon of strict construction. And that is that it doesn't always require the court to narrow otherwise broad statutory language, particularly where doing so would have the effect of rendering another provision -- here, subsection (i) is superfluous -- introducing anomalies into the statutory structure and depriving the statute of its intended effect, as the Bowers case we cite in our reply brief on page 16 makes clear. And the Bowers case was virtually on point. It was the case where the -- it was a statute of limitations that could have applied to administrative agency actions, or it could not have. And the Court declined to accept a

narrowing construction proffered by the Government under statute of strict construction because it would have rendered one of the provisions -- one for consent proceedings -- superfluous, because it would have resulted in anomaly, and because it would have undermined the premise of repose which undergirded the statute of limitations in that case. Precisely the same things are true here. And, for those reasons, the Court should reach precisely the same result.

If there are no further questions, thank you very much.

JUSTICE STEVENS: Thank you, Mr. Lamken.

The case is taken -- is -- as submitted.

[Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.]