

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BP AMERICAN PRODUCTION COMPANY, :
4 SUCCESSOR IN INTEREST TO AMOCO :
5 PRODUCTION COMPANY, ET AL., :
6 Petitioners, :

7 v. : No.05-669

8 REJANE BURTON, ACTING ASSISTANT :
9 SECRETARY, LAND AND MINERALS :
10 MANAGEMENT, DEPARTMENT OF THE :
11 INTERIOR, ET AL. :

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13 Washington, D.C.

14 Wednesday, October 4, 2006

15

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

19 APPEARANCES:

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

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

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Official

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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

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

4 JUSTICE SOUTER: What --

5 MR. LAMKEN: -- denotes --

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

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

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

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

6 MR. LAMKEN: That is absolutely correct.
7 Nonadversarial administrative proceedings would,
8 themselves, not be actions.

9 JUSTICE SCALIA: Right.

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

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

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

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

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

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

3 JUSTICE SCALIA: Which says that?

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

5 It's Section 1702 of our --

6 JUSTICE SCALIA: What page of your brief?

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

8 JUSTICE SCALIA: Of the reply.

9 MR. LAMKEN: Yes. And it's 13 U.S.C. 1724, and
10 it talks -- or it defines the "demand" as the order to
11 pay. And then, the definitional provisions, in turn --
12 when they're talking about what commences the action, it
13 says that the order to pay "commences" the action. And so
14 --

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

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

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

7 MR. LAMKEN: That --

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

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

23 JUSTICE SCALIA: Well, it doesn't --

24 MR. LAMKEN: -- first document --

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

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

2 MR. LAMKEN: I --

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

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

12 JUSTICE SCALIA: Is there anything that requires
13 the order?

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

16 JUSTICE SCALIA: Yes.

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

19 JUSTICE SCALIA: Well --

20 MR. LAMKEN: -- yes, but --

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

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

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

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

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

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

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

20 JUSTICE SOUTER: You mean --

21 MR. LAMKEN: It's recognized --

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

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

1 --

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

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

8 JUSTICE SCALIA: I doubt whether --

9 MR. LAMKEN: -- informal process --

10 JUSTICE SCALIA: -- that would --

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

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

15 MR. LAMKEN: Well --

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

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

25 JUSTICE SCALIA: Of course you can ignore it.

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

3 MR. LAMKEN: Right.

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

6 MR. LAMKEN: That's the --

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

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

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

18 MR. LAMKEN: No, we don't believe a demand
19 letter would toll a statute, because it's not required by
20 --

21 JUSTICE SCALIA: Well, you --

22 MR. LAMKEN: -- by law.

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

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

4 MR. LAMKEN: Oh, I certainly hope --

5 JUSTICE SCALIA: Right.

6 MR. LAMKEN: -- hope not.

7 JUSTICE SCALIA: Yes.

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

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

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

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

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

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

1 actions, can you?

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

3 JUSTICE SCALIA: Yes.

4 MR. LAMKEN: -- actually completely --

5 JUSTICE SCALIA: And that's in --

6 MR. LAMKEN: -- superfluous.

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

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

10 And with respect to the term "defendants,"
11 Justice Ginsburg, Congress has often used the term
12 "defendants" even in the context of administrative
13 actions. The Stockyard and Packers Act of 1921 -- it's in
14 7 U.S.C. 210 -- actually talks about a complaint against a
15 defendant for damages, all adjudicated before the
16 Secretary of Agriculture, and that was 85 years ago. It
17 seems a little late in the day now to debate whether one
18 can be a defendant, the person who defends before an
19 agency, as well as the defendant --

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

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

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

4 JUSTICE GINSBURG: And the content --

5 MR. LAMKEN: -- an adversary --

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

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

25 In addition, the Government's contrary

1 construction renders an entire provision superfluous. And
2 that is the one that Justice Scalia mentioned, Section
3 2415(i), which is an exception for administrative offsets.
4 That exception for administrative offsets would do no work
5 at all if --

6 JUSTICE GINSBURG: That wasn't part of the
7 original statute, was it?

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

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

19 MR. LAMKEN: The Comptroller, Your Honor.

20 JUSTICE SCALIA: Yes.

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

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

1 JUSTICE SCALIA: What --

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

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

12 MR. LAMKEN: That's --

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

15 MR. LAMKEN: Yes. It would have --

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

18 MR. LAMKEN: That's exactly right.

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

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

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

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

16 MR. LAMKEN: -- in perpetuity.

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

19 [Laughter.]

20 JUSTICE SCALIA: But --

21 MR. LAMKEN: Well, Justice --

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

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

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

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

20 JUSTICE KENNEDY: Mr. Lamken --

21 MR. LAMKEN: Yes.

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

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

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

17 JUSTICE STEVENS: Does the --

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

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

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

25 JUSTICE STEVENS: That's about all --

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

5 JUSTICE STEVENS: Okay.

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

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

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

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

3 JUSTICE STEVENS: Thank you.

4 Mr. Joseffer.

5 ORAL ARGUMENT OF DARYL JOSEFFER

6 ON BEHALF OF RESPONDENT

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

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

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

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

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

9 MR. JOSEFFER: Well --

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

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

25 In this unique context, however, Congress had

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

13 Now, when we fast-forward to 1996 --

14 JUSTICE SCALIA: Wait.

15 MR. JOSEFFER: -- at that point --

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

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

21 JUSTICE SCALIA: Oh.

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

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

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

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

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

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

15 MR. JOSEFFER: No, the Justice Department--

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

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

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

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

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

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

1 relates to administrative proceedings.

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

11 And, in any event, going forward --

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

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

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

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

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

8 MR. JOSEFFER: Well --

9 JUSTICE SOUTER: What's wrong with that logic?

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

13 JUSTICE SOUTER: You put me --

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

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

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

24 JUSTICE SOUTER: No, but if it was --

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

1 JUSTICE SOUTER: -- a prejudgment --

2 MR. JOSEFFER: -- I agree was --

3 JUSTICE SOUTER: It was a prejudgment attachment
4 in aid of what could be accomplished administratively by,
5 ultimately, an administrative judgment.

6 MR. JOSEFFER: No, the -- I guess it was another
7 point. The OLC opinion was -- arose in the context where
8 a judgment could be obtained at all only in court.

9 JUSTICE SCALIA: Do we have --

10 MR. JOSEFFER: In the context of --

11 JUSTICE SCALIA: -- that opinion, by the way?
12 Both sides cited it. The -- is it -- it was unpublished.

13 MR JOSEFFER: It was unpublished, and --

14 JUSTICE SCALIA: Does anybody give it to us?

15 MR. JOSEFFER: Petitioners offered to lodge it
16 with the Court--

17 JUSTICE SCALIA: Yes, I know they did offer, but
18 nobody did it.

19 MR. JOSEFFER: I'll -- we'll do it this
20 afternoon.

21 JUSTICE SCALIA: Good. I would like that.

22 MR. JOSEFFER: The point's just -- the OLC
23 reasoning was admittedly somewhat odd, but that was the
24 context in which Congress was responding to. And, going
25 forward, it is not surplusage, because the issue still

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

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

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

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

12 JUSTICE SOUTER: Would the -- at the time that
13 4515 -- is that the --

14 MR. JOSEFFER: It's 2415.

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

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

1 administrative adjudications, it's dealt with them on a
2 case-by-case basis. And every time that it enacted a
3 context-specific administrative adjudications period since
4 1966 -- in theory, it could have just done an
5 across-the-board one for all agency adjudications, but,
6 instead, it's chosen to deal with the context-specific; in
7 part, because of the great variety of administrative
8 procedure.

9 I mean, as this case illustrates, a statute of
10 limitations that governs a complaint in an action is just
11 not going to work in a lot of administrative contexts.
12 Here, there's no complaint. An "order" is a legally
13 binding order. It doesn't seek relief, it imposes it.
14 And unless it is both appealed and stayed pending appeal
15 --

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

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

24 JUSTICE STEVENS: An issue letter.

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

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

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

8 MR. JOSEFFER: An issue letter?

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

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

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

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

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

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

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

6 JUSTICE SCALIA: It does not --

7 MR. JOSEFFER: -- no claim.

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

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

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

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

24 JUSTICE SCALIA: Right.

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

1 it's not in the issue --

2 JUSTICE STEVENS: Do we know --

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

4 JUSTICE STEVENS: -- what time lapse --

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

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

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

12 JUSTICE STEVENS: But --

13 MR. JOSEFFER: And there was --

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

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

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

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

23 JUSTICE SCALIA: I think --

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

1 JUSTICE SCALIA: Okay.

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

4 JUSTICE STEVENS: There would be some in dispute.

5 JUSTICE ALITO: Going forward, if we --

6 MR. JOSEFFER: But --

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

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

15 JUSTICE ALITO: Did they --

16 MR. JOSEFFER: -- enacted the limitations --

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

20 MR. JOSEFFER: No, there's no explanation. As a
21 practical matter, though, the prospective 1996 legislation
22 governs a wide variety of aspects of the -- of the
23 relationship between the Federal Government and the
24 lessees. And, on balance, that package was pretty
25 favorable to the oil companies, and I think Congress

1 probably just decided not to -- to apply that to itself,
2 but not to the Indians.

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

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

8 MR. JOSEFFER: Well, as a --

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

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

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

17 MR. JOSEFFER: Right. Well, there are a few
18 points, both legal and practical. On the legal, until
19 1966 that absolutely was the law, because historically no
20 limitations period ever applies against the Government.
21 And that's the reason for the strict construction canon,
22 that the statute applies here only if it clearly applies,
23 and thereby bars the Government from forcing the law in
24 the public interest.

25 JUSTICE SCALIA: Say that again. Until 1966,

1 there were no statute of limitations against any
2 Government suits?

3 MR. JOSEFFER: Not contract. I mean, the
4 historic rule is that the Government is not bound by
5 statutes of limitations, because what it's doing is
6 enforcing the law in the public interest. Now, in 1966,
7 Congress enacted Section 2415(a) so that there would
8 prospectively be a contract limitations period. But it's
9 strictly construed, because of the historical backdrop and
10 the importance of enforcing the law in the public
11 interest. So that's why we do have a strict construction
12 canon here. As a --

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

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

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

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

1 JUSTICE KENNEDY: Well, there's a case involving
2 the Oneida Indians, that went back quite a ways --

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

5 JUSTICE KENNEDY: -- 200 years --

6 MR. JOSEFFER: -- leasing context here.

7 JUSTICE KENNEDY: Yes.

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

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

24 JUSTICE SCALIA: That's another indication. Why
25 would you allow them to destroy those records after 6

1 years if you -- if you thought -- if you thought that
2 there was no statute of limitations to claims for these
3 things? I mean, that's just another inconsistency that --
4 in the statutory scheme that's created.

5 MR. JOSEFFER: Well, no, the --

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

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

11 JUSTICE SCALIA: Yes.

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

1 congruence.

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

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

15 When a provision of the judicial code applies to
16 something else, it will say so. For example, 28 U.S. Code
17 2462, which is a statute of limitations for penalty
18 proceedings, refers to an "action, suit, or proceeding."
19 The Federal Tort Claims Act is very clear that what
20 it's talking about is submitting something to an agency.

21 So, if Congress was going to legislate against
22 the backdrop of a strict construction canon with terms
23 that ordinarily refer to suits in court, and put the
24 provision in the judicial code, I mean, that just is a
25 totally irrational way of expressing intent, especially

1 clear -- especially a clear intent, when it's trying to
2 govern administrative proceedings.

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

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

20 There's also some relevance in the fact that
21 this legislation was proposed by the Justice Department as
22 part of an overall package of reforms that would govern
23 the civil litigation that the Department was handling in
24 the courts. It was then referred to the Judiciary
25 Committees, not to the House Government Reform Committees

1 that might consider administrative procedure matters, and,
2 as I mentioned before, was enacted as part of the judicial
3 code.

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

10 JUSTICE SCALIA: Well, except when you -- when
11 you say "this legislation," you limit it to the body of
12 2415(a) and you leave out (i), which -- -- or I guess it's
13 "one." Is it? Little -- or --

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

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

25 It doesn't say that. It says that -- the only

1 administrative proceeding that they cut out of it is these
2 offsets.

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

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

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

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

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

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

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

24 JUSTICE SCALIA: Yes.

25 MR. JOSEFFER: -- is that an "order" is a

1 complaint. So, they haven't preserved the point.

2 JUSTICE GINSBURG: Because you're --

3 MR. JOSEFFER: But --

4 JUSTICE GINSBURG: -- you made the point that
5 the issue letter is just raising the issues, and it's not
6 charging, as a complaint would allege, "You owe us," but
7 this is, "Maybe you owe us."

8 MR. JOSEFFER: Correct. There's no -- in an
9 issue letter, there's no claim for relief, just a claim
10 for the request for information, and there's no allegation
11 of wrongdoing. So, it's just not a complaint in those
12 ways. Also, it doesn't -- it's not really fair to say
13 that it begins proceedings, because it comes between an
14 audit and an order to pay. So it doesn't -- and plus,
15 it's, of course, not filed in a civil action. And, in
16 that respect, it doesn't satisfy any of the -- any of the
17 elements of the -- of the ordinary definition of
18 "complaints."

19 JUSTICE ALITO: Are you saying that this doesn't
20 apply to any administrative proceeding, or just those that
21 are structured like this one, where you don't have
22 anything that's labeled a "complaint"?

23 MR. JOSEFFER: We -- well, our primary
24 submission is that it does not apply to any administrative
25 proceedings, for the reason -- reasons I've given, that

1 the ordinary meanings of all of the key statutory terms
2 are for suits in court. A "complaint" itself is
3 ordinarily defined to be --

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

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

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

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

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

22 MR. JOSEFFER: No.

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

24 MR. JOSEFFER: Yes.

25 JUSTICE SCALIA: -- because, otherwise, it would

1 be up to the agency, just by renaming their things, to
2 come in or out, right?

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

4 JUSTICE SCALIA: Yes.

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

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

22 Congress has not only authorized that, and
23 ratified it, it has strengthened that scheme and told the
24 agency, as I said, in 1982, to go back and look at old
25 leases, precisely because Congress knew that is a

1 standalone administrative scheme, and it's never provided
2 the administrative limitations period for the standalone
3 administrative scheme.

4 If there are no more questions --

5 JUSTICE STEVENS: Thank you, Mr. Joseffer.

6 Mr. Lamken, as I understand it, you have about
7 11 minutes left. You don't have to use them all.

8 [Laughter.]

9 REBUTTAL ARGUMENT OF JEFFREY A. LAMKEN

10 ON BEHALF OF PETITIONERS

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

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

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

24 Page 6 of the Government's reply, "The term
25 'action,' in Section 1981, can reasonably be construed as

1 encompassing both administrative and judicial
2 proceedings."

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

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

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

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

23 But if -- I would encourage the Court to look at
24 the definitions in *FOGRSFA*, 1724 and 1702(A), which tell
25 you what, under -- in Congress's view, commences the

1 proceedings here. And, in Congress's view, what commences
2 the proceedings, what triggers the new statute of
3 limitations and stops it from running, is the order to
4 pay, which Congress defines as a "demand."

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

8 MR. LAMKEN: That's --

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

14 MR. LAMKEN: Actually, Justice Scalia --

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

18 MR. LAMKEN: Well --

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

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

1 where the failure to respond results in default. It has
2 that function as complaint. It is the first salvo in
3 official, formal administrative proceedings.

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

7 MR. LAMKEN: It is --

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

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

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

24 We believe that the most likely thing to be the
25 complaint here is, the thing that provided us with notice,

1 is that -- "Boys, you've got to respond; otherwise, you're
2 in trouble" -- was the order to pay. And Congress came to
3 that same conclusion when it enacted -- when it enacted
4 FOGRSFA and established a 7-year statute of limitations
5 provision. But if we lose 2 years of the claim, and only
6 get 1 because it is the agency letter, in the Court's
7 view, well, that's fine, but there's some document here
8 that started these agency proceedings, and it is that
9 document which is a complaint.

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

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

22 The actual agency letter, in this case, isn't in
23 the administrative record. And it turns out that we
24 haven't been able to find it, and the Government hasn't
25 been able to find it. And so, it's a letter. It's a

1 demand letter, but it is a letter, and that -- the order
2 to pay is actually the opening salvo in these proceedings.
3 And again, what opens the proceedings in -- the Justice
4 Department regulations and other regulations --

5 JUSTICE STEVENS: May I suggest --

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

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

10 MR. LAMKEN: Yes. Yes. Of course.

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

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

16 JUSTICE GINSBURG: Your position is, this would
17 apply to the universe of administrative proceedings. Now,
18 this particular lease arrangement is taken care of by an
19 express statute of limitations. So, what we're talking
20 about, for the future -- what would change under your
21 interpretation? Not gas leases, because -- there's a 7-
22 year limitation for both administrative orders to pay and
23 --

24 MR. LAMKEN: Right.

25 JUSTICE GINSBURG: -- court actions.

1 MR. LAMKEN: Right. It would be all leases on
2 Indian lands. It would be all leases which involve
3 minerals other than oil and gas, whether it be coal, gold,
4 silver, anything like that. It would also be all claims
5 before September -- all production before September of
6 1996. That introduces something of an oddity, if one
7 accepts the Government's position. It would be that, for
8 all claims going forward from September of 1996, the
9 Government has 7 years, but, for the prior 200 years,
10 those claims persist in perpetuity. When Section 2415(a)
11 itself was enacted, Congress avoided precisely that result
12 by deeming all prior claims to have accrued on the date
13 the statute of limitations was enacted. And the very fact
14 that Congress didn't do that here is evidence that
15 Congress -- to the extent it has anything to do with it at
16 all -- is evidence that Congress, in fact, understood that
17 there already was a statute of limitations applicable.
18 And, in fact --

19 JUSTICE SCALIA: What --

20 MR. LAMKEN: -- it also --

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

1 other areas covered by this text -- namely, a suit by the
2 United States -- founded upon any contract expressly or
3 implied in law or in fact, where there is some kind of a
4 statute of limitations.

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

10 JUSTICE SCALIA: And that would prevail over
11 this --

12 MR. LAMKEN: Yes, because the --

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

14 MR. LAMKEN: -- Contract Disputes --

15 JUSTICE SCALIA: -- specific.

16 MR. LAMKEN: -- Act has an exception at the
17 front and says "notwithstanding 2415." It's its own
18 animal to itself. And there is a clause at the front of
19 2415 that says "except as otherwise provided by Congress."
20 And so, Congress often takes exceptions. And when it
21 modified the Mineral Leasing Act of 1996, that was an
22 exception to the 2415 regime. So, Congress knows how to
23 conduct specialized situations and take things outside of
24 2415 when it needs to. But it enacted Section 2415 as a
25 catchall for all of those situations where Congress hadn't

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

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

1 or it could not have. And the Court declined to accept a
2 narrowing construction proffered by the Government under
3 statute of strict construction because it would have
4 rendered one of the provisions -- one for consent
5 proceedings -- superfluous, because it would have resulted
6 in anomaly, and because it would have undermined the
7 premise of repose which undergirded the statute of
8 limitations in that case. Precisely the same things are
9 true here. And, for those reasons, the Court should reach
10 precisely the same result.

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

13 JUSTICE STEVENS: Thank you, Mr. Lamken.

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

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

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