

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KELLOGG BROWN & ROOT :

4 SERVICES, INC., ET AL., :

5 Petitioners : No. 12-1497

6 v. :

7 UNITED STATES, EX REL. :

8 BENJAMIN CARTER. :

9 - - - - - x

10 Washington, D.C.

11 Tuesday, January 13, 2015

12

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

16 APPEARANCES:

17 JOHN P. ELWOOD, ESQ., Washington, D.C.; on behalf of
18 Petitioners.

19 DAVID S. STONE, ESQ., Short Hills, N.J.; on behalf of
20 Respondent.

21 MALCOLM L. STEWART, ESQ., Deputy Solicitor General,
22 Department of Justice, Washington, D.C.; on behalf of
23 United States, as amicus curiae, supporting
24 Respondent.

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

2 (11:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 12-1497, Kellogg Brown & Root Services v.
5 United States, Ex Rel. Benjamin Carter.

6 Mr. Elwood.

7 ORAL ARGUMENT OF JOHN P. ELWOOD

8 ON BEHALF OF THE PETITIONER

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

11 By clearing the way for relator to file a
12 fifth identical False Claims Act complaint against KBR,
13 raising allegations the government had long known from
14 other sources, the court below erred in two respects.

15 First, the plain text and -- and history of
16 the Wartime Suspension of Limitations Act confirmed that
17 it applies exclusively to crimes. The language of the
18 provision tolls limitations -- tolls limitations periods
19 for offenses at the -- on the very day that that
20 provision went into effect.

21 A neighboring provision, a nearby provision,
22 of Title 18 divided offenses into two categories,
23 felonies and misdemeanors, both plainly applying to
24 crimes. A neighboring provision, also of Title 18,
25 divided offenses between capital offenses and noncapital

1 offenses, again, referring solely to crimes. And it was
2 very telling that in 857 dual-column pages of Title 18,
3 neither the government nor relator has been able to
4 identify any provision that uses the word "offense" to
5 refer to a civil violation.

6 JUSTICE KENNEDY: Is it unusual that a
7 criminal statute of limitations would be much longer
8 than a civil statute of limitations, which is the effect
9 of your argument?

10 MR. ELWOOD: I don't think it is
11 necessarily. I mean, it depends on what exactly
12 Congress is trying to attempt. And it reflects some of
13 the differences between how criminal law is prosecuted
14 and civil law is prosecuted, because recall that
15 Congress did -- it has its separate provision for
16 recognizing that the False Claims Act may be hard to
17 investigate at times, and it provided a discovery
18 mechanism there that doesn't apply to relators, it only
19 applies to the government, a three-year discovery period
20 with a ten-year backstop.

21 JUSTICE SCALIA: Didn't some states used to
22 have no statute for -- for murder, and yet had a statute
23 of limitations on wrongful death claims? I think
24 that's -- that's the case, with respect to state law,
25 anyway.

1 MR. ELWOOD: But I think it all kind of
2 reflects the kind of differences between criminal law
3 and civil law, because the minute a complaint is filed
4 -- I mean, most of the investigation, especially for
5 relators -- they don't have any legal status to conduct
6 investigations. They don't -- they can't bring
7 subpoenas. So usually it's based on their own
8 knowledge. They file a complaint, they come into court,
9 and then they have the Federal rules. Also at that
10 point, the government gets a 60-day period to
11 investigate, which is, on average, 13 months, according
12 to the Chamber of Commerce brief. It cites a letter
13 from the DOJ to the Senate. And in our own experience,
14 and in this case, it is usually a couple of years.

15 And during that time they have, you know,
16 all the time they want to investigate. So I think it
17 just reflects the fact that criminal litigation and
18 civil litigation are conducted differently.

19 But clearly Congress already contemplated
20 how to handle delays under the False Claims Act, and it
21 enacted a civil provision for that under the FCA. And
22 so I don't think the Court needs to import in this
23 general provision which applies only to offenses to
24 address the False Claims Act situation that Congress has
25 already specifically addressed.

1 Now, all parties agree that the Wartime
2 Suspension Act began its life as a criminal provision,
3 an exclusively and explicitly criminal provision. The
4 only question is whether Congress changed it along the
5 way to make it civil.

6 The thing that the relators point to is the
7 deletion in 1944 of the words "now indictable," but that
8 went unremarked in Congress, and you would expect
9 somebody to say something if they were fundamentally
10 transforming the nature of the statute. And that's not
11 what people understood those words "now indictable" to
12 mean at that time, if you look at -- if you look at the
13 other things that were around it at the time.

14 Like, for example, 47 days after the first
15 Wartime Suspension Act was enacted, Congress -- for
16 crimes, and all agreed it was for crimes -- they also
17 enacted an antitrust suspension act which didn't use the
18 word "offenses." It used the word "violations." And it
19 said "now indictable" or "subject to civil proceedings,"
20 which shows that what was going on in that clause was
21 about the "now." The -- it was to tell you that it
22 applies to things that came before this. And --

23 JUSTICE SOTOMAYOR: Were you adopting the
24 argument of the New England Foundation, the amici brief?

25 MR. ELWOOD: That is -- yes, we made that

1 argument, I think, in our brief as well, but they did a
2 more full-throated version. And also, the NDIA did a
3 more full-throated version of that. But yes, I think
4 that it was -- the purpose of that was to say that it
5 was applied to things before the date of enactment and
6 hadn't yet been barred.

7 And that was one of the other things -- I
8 mean, if you look at what this Court said about that
9 language in McElvain, it said that that was to -- to say
10 that the statute of limitations hadn't run, but that's
11 what that "now indictable" language did. This Court's
12 McElvain --

13 JUSTICE KAGAN: Mr. Elwood, I take the
14 point, and that seems like a fair understanding of why
15 that term came out. But it wasn't the only change that
16 they made at that point. And taking that term out may
17 have had more than one reason, of course.

18 So two other changes they make are, they put
19 in the word "any." So the old statute just says
20 "offense" and now it's "any offense," which suggests
21 breadth and expansiveness. And the other thing, of
22 course, is that they do all of this in connection with
23 this Contract Settlement Act, which presumably refers
24 both to civil and to criminal matters. And it follows
25 right after this Contract Settlement Act and suggests

1 that it's following on it.

2 So, you know, put all those three things
3 together: The taking out of the indictment language,
4 the putting in the word "any," and the passage in
5 conjunction with the Contract Settlement Act. I think
6 that that would be an argument on the other side.

7 MR. ELWOOD: Sure. I'll try to address each
8 of those. I have a pretty terrible memory, so just
9 bring me back if I forget.

10 I think "now indictable" is just to make it
11 forward-facing, because they were now not worrying about
12 just those cases. They wanted to make it
13 forward-looking for the rest of the war.

14 With respect to "any offenses," it wasn't
15 just any offense simpliciter. It was any offenses
16 against the laws of the United States. And Congress
17 meant -- thought that was so unequivocally applied to
18 criminal law that that is the exact phrase they used in
19 enacting the statute giving district courts exclusive
20 jurisdiction over crimes. They didn't say "crimes,"
21 they said "offenses against the laws of the
22 United States" in 1948.

23 And what was the third point?

24 JUSTICE KAGAN: Contract settlement.

25 MR. ELWOOD: I told you I was a terrible

1 memory -- pardon me?

2 JUSTICE KAGAN: Contract settlement.

3 MR. ELWOOD: Oh, and the Contract Settlement
4 Act.

5 I mean, they say it was, you know,
6 predominantly a civil statute, and it did create a big
7 administrative state, or an administrative apparatus.
8 But the provisions that they -- the causes of action
9 they created are actually -- the primary ones it created
10 were not actually subject to a statute of limitations,
11 so it would have been curious to try to toll them.

12 For example, the thing -- and this Court
13 said in Kohler that 26(b)(1) of the -- of the Surplus
14 Property Act wasn't subject to any statute of
15 limitations. There was an analogous provision in that,
16 19(c), which is the one that the relator and the
17 government both pick out and say, aha, look at this, a
18 new civil cause of action. They were probably trying to
19 toll that.

20 But as the Solicitor General said in
21 footnote 3 of their Kohler brief to this Court, the
22 remedy in that is substantially like the remedy in 20(b)
23 -- in 26(b)(1), with the suggestion being that it was
24 not itself subject to a statute of limitations, which is
25 what the district courts that have addressed 19(c) have

1 said, that it wasn't subject to a statute of limitations
2 as they -- as the brief points out, the court of claims
3 applied a statute of limitations to both 26(b)(1), which
4 this Court overruled, and to 19(c). But I think that
5 the district courts had a better -- had the better of
6 that argument.

7 But the overall impression is it was still
8 -- at the end of the day, it was still applying to
9 offenses, that is, crimes.

10 JUSTICE GINSBURG: And that goes for the
11 government as -- I mean, suppose the government, not a
12 relator, brings a False Claims case against a
13 contractor. The government wouldn't get the -- the --
14 under your view, the government doesn't get the
15 suspension?

16 MR. ELWOOD: That's right. It doesn't get
17 the wartime suspension. It would, however, get the
18 specific three-year tolling provision, or three-year
19 discovery period, under the False Claims Act itself.

20 And a couple other notes that I think are
21 worthwhile. I mean, we've already said a lot about the
22 fact that the solicitor general said in 1959, at a time
23 when it had been litigating these cases continuously,
24 that it was subject to criminal laws only. But I think
25 it's also significant that the office created by the

1 Settlement Contract Act, or the Office of Contract
2 Settlements, said in 1947 that this tolling provision
3 only applied to crimes. And I think that's significant
4 because, I mean, it was within -- I'm not saying it's a
5 Chevron deference thing, but it was within their duty.
6 As the government points out, they had to investigate
7 and report it to the government to do what they will
8 with it. But the end result of it was that you have to
9 know whether that's subject to tolling or not when
10 you're deciding how to prioritize what you're going to
11 be investigating and reporting.

12 I think one final thing, and then I'll move
13 on to the other element, or the other error that the
14 court made, was that neighboring provisions in Title 18
15 simply wouldn't make sense if "offense" also applied to
16 violations of the civil laws. Like, for example,
17 3282(a), it says, "No person may be tried for an offense
18 unless indicted within five years of when the offense
19 arose." And, obviously, can be tried for a civil crime
20 without being indicted within five years. And under
21 *Cowart v. Nichols* that is, you know, something the Court
22 takes into consideration in trying to determine the
23 meaning of something.

24 Now, even though it would be mostly a
25 complete remedy if we won on the wartime suspension

1 grounds, if the Court also gets to the first-to-file
2 issue, it could save the --

3 JUSTICE SOTOMAYOR: And we --

4 MR. ELWOOD: I'm sorry?

5 JUSTICE SOTOMAYOR: Assuming we agree with
6 you on the first question --

7 MR. ELWOOD: Yeah, I'm assuming you agree
8 with me on the first question.

9 JUSTICE SOTOMAYOR: -- should we -- should
10 we get to the second? And how would we if we believe --
11 if you were right on the first?

12 MR. ELWOOD: Well, you should, because among
13 other things it will take care of, on remand the Court
14 won't have to address the equitable tolling argument
15 that we think is waived and also meritless.

16 And also, of course, there is the same issue
17 already behind us in the Purdue Pharma case, and in the
18 Shea case as well. And so I think the Court may as well
19 -- I -- it would be the most efficient thing to do. But
20 I think it will be -- it will be a complete remedy on us
21 if we won on the wartime suspension grounds.

22 Now, the second error that the court below
23 made was to -- well, if Congress had meant the
24 first-to-file bar to be a one-case-at-a-time rule
25 allowing an -- you know, an unending or an infinite

1 series of related lawsuits, they would have said so in
2 plain terms.

3 JUSTICE KENNEDY: The only problem -- the
4 problem you have with this argument -- and it's -- has
5 substantial force to it -- but you give no significance
6 of the word "pending." You almost write that out of the
7 statute.

8 MR. ELWOOD: I don't -- I disagree, Justice
9 Kennedy, because, I mean, you have to have some sort of
10 word there, because otherwise it would be kind of
11 confusing between the two -- between the two actions.

12 JUSTICE SCALIA: How about "former"?

13 MR. ELWOOD: Well, there are a lot of ways
14 --

15 JUSTICE SCALIA: "Pending" is a very strange
16 word to pick.

17 MR. ELWOOD: For a first -- well, but the
18 thing is -- well, let me begin by saying that under each
19 --

20 JUSTICE KENNEDY: Or "said action" or "that
21 action."

22 MR. ELWOOD: Yeah. But I think under each
23 of the parties here, it could have been written better
24 to follow up, you know, what -- to embody the reading
25 that we want to give it.

1 But I think that ours is the one that makes
2 the most sense, because if you just look at the
3 provision from the moment when the bar arises, it makes
4 perfect sense. It is the pending action at that point.
5 And --

6 JUSTICE SOTOMAYOR: Well, aren't you going
7 to -- besides the problem that you're -- you're talking
8 about, your not giving "pending" any meaning, you're
9 also destroying the force of an original source. I
10 mean, the -- the public disclosure bar doesn't apply to
11 an original source. And you're sort of blocking
12 original sources from bringing suits, when a prior case
13 involved a dismissal for a technicality, or a dismissal
14 because this was in the public domain. But that's not
15 true for an original source.

16 MR. ELWOOD: Right. But I think -- to begin
17 with, there's nothing in the public disclosure bar that
18 suggests that it was supposed to prevent the original
19 source from being subject to all of the other bars that
20 are out -- are out there still, like the -- you know,
21 like the government knowledge bar that still exists in a
22 tiny little corner, or the first-to-file bar.

23 And original source makes a lot of sense for
24 public disclosure, but it doesn't make any sense for
25 first-to-file for this reason: When it's public

1 disclosure, when it's something that's said in a
2 committee report, you have no idea whether or not it's
3 gotten to either the person at the Justice Department
4 who needs -- needs to know about it, who knows what
5 needs to be done about it. And first-to-file, however,
6 means not only do they have to file an action in
7 district court, they have to give all the material
8 evidence they have to the Attorney General of the
9 United States, who is under a statutory obligation to
10 investigate it and who has to decide whether to
11 intervene or not.

12 Now, that is something that guarantees that,
13 you know, by hook or by crook, somebody at the Justice
14 Department with responsibility for these things knows it
15 and has the information that they need to take action on
16 this. And after you've done that once, it doesn't make
17 a lot of sense for you to be able to just keep coming
18 into court and filing a lawsuit telling the government,
19 hey, you know that stuff that you already know? Let me
20 tell it to you again.

21 JUSTICE SOTOMAYOR: Well, the reality is you
22 don't need the qui tam unless the government doesn't
23 want to waste resources on something, but that doesn't
24 mean that they didn't find that there might be something
25 there.

1 MR. ELWOOD: But once the -- I mean, once
2 the government has -- once the original first-to-file
3 bar -- once the original relator reports this
4 information to the government, if the other actions that
5 are barred are related, the government has the
6 information it needs to investigate all of them. But
7 what does --

8 JUSTICE SOTOMAYOR: But it may not want to
9 prosecute it.

10 MR. ELWOOD: It may decide there is --

11 JUSTICE SOTOMAYOR: You have to assume that
12 what the intent is, is not to force the government to
13 prosecute but to get recovery, for -- for the
14 government.

15 MR. ELWOOD: I think it is -- the point of
16 the first-to-file bar is to do two things -- and this is
17 kind of widely accepted -- that first, it is to give
18 incentives for people to come forward. And I think that
19 basically it's requiring it to stop at one is a much
20 more powerful incentive to come forward promptly with
21 the information you have. And secondly, it is to make
22 sure that the government doesn't dilute its recoveries
23 by paying subsequent relators for information the
24 government already has. And if the first relator gave
25 you enough information to investigate the whole breadth

1 of the crime, you won't have to pay that initial
2 relator, you're -- you know, depending on whether you're
3 -- I guess if you intervene by presumption it would be
4 15 to 25 percent. But if that person can file and the
5 next person can file and the next person can file --

6 JUSTICE SOTOMAYOR: Do you have any idea how
7 collateral estoppel works in this area? I actually
8 don't know. But let's assume that you -- that you're,
9 that the adversary won a claim against you. Could
10 someone else come in and you've now won for the
11 government, essentially, could anyone else file a suit
12 or would they be stopped because --

13 MR. ELWOOD: Well, at that point it would be
14 already -- I mean, I guess it would depend on the scope
15 and how related. You're talking about KBR loss in this
16 hypothetical, correct?

17 JUSTICE SOTOMAYOR: Exactly.

18 MR. ELWOOD: Because they're the mutuality.
19 I mean, it gives more -- you know, because it had
20 already been defined and the KBR had done certain
21 things, that might apply to other relators. But I think
22 the thing that kind of matters more is what about the
23 non-mutuality in the other direction? Because if KBR
24 beats relator number 1 and they say there was no problem
25 here, what about relator 2 through X?

1 JUSTICE GINSBURG: The relator is treated as
2 the government for preclusion purposes.

3 MR. ELWOOD: Well --

4 JUSTICE GINSBURG: And that was at least, at
5 least sole judge after verdict.

6 MR. ELWOOD: I don't -- I don't think that
7 it's clear that that's the case.

8 JUSTICE GINSBURG: Well, there is -- there
9 is good authority, at least in the court of appeals, for
10 that position.

11 MR. ELWOOD: I disagree, Justice Ginsburg.
12 We've -- we've been looking for it and we have not found
13 anything that clearly says relator 2 is bound by relator
14 1 having lost in an action. There is the -- the -- the
15 language, which I think is dicta in Eisen -- Eisenstein
16 to say that the United States itself is barred.

17 But I think that any -- well, any defendant
18 is going to have to establish that law anew if it's
19 going to apply to further relators down the road --

20 JUSTICE KENNEDY: But is it your -- your --
21 is it your position suit number 1 is filed, it's
22 dismissed within weeks without prejudice, that no other
23 relator can file?

24 MR. ELWOOD: It depends on what the basis of
25 the dismissal was, because if it was dismissed on 9(b)

1 grounds, routinely they can amend. And it's not
2 dismissing the whole action. It's just dismissing that
3 complaint and they can come right back in with an
4 amended complaint. And that's the same action --

5 JUSTICE GINSBURG: The question is whether
6 somebody else could come in. So you have somebody who
7 is the first filer and comes in with a sloppy complaint
8 and it's not stated with sufficient specificity;
9 dismissed. And that person goes way. You're saying
10 nobody else can ever come in.

11 MR. ELWOOD: No. I think it's -- the
12 protection there comes from the word "related." Because
13 courts of appeals apply a same material facts test. If
14 you come in with a sloppy mess of a complaint that
15 doesn't allege -- it just says KBR is bad, it committed
16 fraud --

17 JUSTICE KENNEDY: What if it was a
18 perfect -- a perfect complaint, but he sued in the wrong
19 court, or there was no personal jurisdiction?

20 MR. ELWOOD: Well --

21 JUSTICE KENNEDY: Dismissed without juris-
22 -- dismissed without prejudice.

23 MR. ELWOOD: I mean, if it's -- if it's in
24 the wrong jurisdiction, you can transfer it. I mean,
25 that's a very hard thing to say because that nationwide

1 service --

2 JUSTICE KENNEDY: No. My hypothetical is
3 dismissed without prejudice, but it's a beautifully
4 drawn complaint.

5 MR. ELWOOD: Well, I'm going to resist --
6 I'm going to resist for a little while before we get to
7 the -- to the meat of the issue just to say that it's
8 not going to happen because personal jurisdiction has
9 nationwide service of process, and so it's very hard to
10 invoke a personal --

11 JUSTICE SCALIA: It's dismissed for failure
12 to prosecute.

13 MR. ELWOOD: Well, if it's --

14 JUSTICE SCALIA: For nonmerits ground, and
15 so nobody else can come in?

16 MR. ELWOOD: Well, if it's dismissed for
17 failure to prosecute -- well, first of all, let me
18 resist the hypothetical a little bit more. If it's
19 under our rule, that's an incredibly valuable lawsuit
20 because there are no more mulligans. And so there'll be
21 somebody who comes in there and is willing to
22 underwrite, a new set of lawyers who will be willing to
23 take the case.

24 But even if it is, I think that we would say
25 it has been barred. If somebody came forward and

1 provided all material information, then everything that
2 is related to that would be barred.

3 I'd like to get back to Justice Ginsburg's
4 hypothetical because it's an important one, and that is
5 if somebody files -- the relator says, oh, well,
6 somebody files a terrible complaint, it's going to bar
7 all the good ones. And I don't think that's the case
8 because they're going to compare, under that test, the
9 same material of facts test, you compare. And if this
10 one just says KBR is bad, they commit a lot of fraud,
11 and this one says at these three camps they were
12 requiring people to build 12 hours a day, 84 hours a
13 week regardless of how much they -- they worked, those
14 aren't the same material facts and you get the
15 protection that way.

16 JUSTICE GINSBURG: I thought that first file
17 rule was meant to protect the first filer in that --
18 well, one aspect of it is the first filer doesn't have
19 to worry about a race to judgment. Somebody else files
20 second and gets the judgment first.

21 So I thought that that was -- one of the
22 chief things was to protect the first filer and also to
23 protect that filer's recovery so he doesn't have to
24 split up whatever the qui tam plaintiff gets.

25 MR. ELWOOD: The phrase "race to judgment"

1 is not anything that I have found in the courts of
2 appeals. I've only found it in the government's brief.
3 I think that the court says that they want to create --
4 the first-to-file bar was meant to create a race to the
5 courthouse, not a race to judgment. And --

6 JUSTICE GINSBURG: The first filer is a race
7 to the courthouse.

8 MR. ELWOOD: Yes. It's meant to create a
9 race to the courthouse. And there's less of an
10 incentive to race to the courthouse under the relator's
11 rule because even if you aren't the first to file, you
12 can still bring a claim; you've just got to wait for a
13 break in the traffic to jump in. And under that, you --
14 if you are the first to file, you don't even get a
15 better settlement because when, you know, most of these
16 cases are settled, they aren't litigated to judgment.
17 And a defendant is not going to give you, you know,
18 everything you're asking for if they know that they're
19 going to have to settle this case again and again and
20 again. And, in fact, it discourages settlements because
21 you would be a fool to settle it right away because it
22 just means more people are going to be able to sue you.

23 The relator's rule is as many lawsuits as
24 you can fit into 6 years or 10 years or an infinite
25 period of time because, you know, there -- there's

1 nothing particular to stop them. Whereas under our
2 rule, you have much more of an incentive to settle and
3 settle for the full amount, because by settling with
4 that first relator, you are buying peace with respect to
5 all related lawsuits.

6 JUSTICE GINSBURG: Do we know in this
7 case -- there were three suits. Thorpe, I think, was
8 the first. Do we know why those suits dropped out?

9 MR. ELWOOD: The first one was just
10 dismissed. The lawyers dropped out and they couldn't --
11 or they didn't find other lawyers.

12 JUSTICE KENNEDY: The first Carter, the
13 first Carter suit.

14 MR. ELWOOD: No, I'm sorry, the first Thorpe
15 lawsuit --

16 JUSTICE KENNEDY: The first Thorpe.

17 MR. ELWOOD: -- under the related lawsuits
18 was just dropped for failure to prosecute when lawyer --
19 new lawyers didn't step in to take over for the old
20 ones.

21 JUSTICE GINSBURG: And you say that kills it
22 for every -- anybody else.

23 MR. ELWOOD: Right. Right. That they made
24 the full disclosure. The government investigated that
25 case and they knew the 12-hour-a-day, 84-hour-a-week

1 claim, and they were able to investigate it and if they
2 had wanted to bring it, they could have brought it and
3 recovered the whole thing and only paid the Thorpe
4 relators. And I don't know why the other ones dropped
5 out, but they were voluntarily dismissed, I believe, all
6 of them.

7 And as I said, I think this is the more
8 natural --

9 JUSTICE SOTOMAYOR: Were any of them filed
10 by original sources?

11 MR. ELWOOD: Pardon me?

12 JUSTICE SOTOMAYOR: Were any of them filed
13 by original sources?

14 MR. ELWOOD: I think -- I think all of them
15 were original sources. They were all people who would
16 have qualified as original sources and -- under the --
17 under the statute.

18 And as I say, I think that this is a more
19 reasonable reading of it, because if you look at this
20 from the point of view of when the bar arises, when it
21 is the pending action, it does everything, no word of
22 surplusage. Everything fits.

23 But I have yet to see a one-case-at-a-time
24 rule that works the way that this statute does, that
25 uses just an adjective, which, I mean, if you look at

1 it, it's an adjective that is only describing what is a
2 related case and usually --

3 JUSTICE SCALIA: But it's -- it's not a
4 pending action later. I mean, when that action's been
5 dismissed or been completed, you say that a later action
6 is prohibited even though there is no pending action,
7 right?

8 MR. ELWOOD: But that's -- that's because I
9 think that if you -- as I say, if you look at this from
10 the point of view of when the action is filed, it makes
11 complete sense and it is a pending action. And there's
12 a reason for doing that. If you'll look at pages 8A to
13 9A, this is the mirror image. The language used in
14 (b) (5) is the mirror image of the language used to
15 create the cause of action in (b) (1). It says in
16 (b) (1), a person may bring a civil action for violation
17 of Section 3729, and then you find out what happens when
18 they do that and the bar arises. (5), when a person
19 brings an action under this subsection for that
20 violation of 3729, no person other than the government
21 may bring a related action. So it's a -- it's a
22 parallelism between a person may bring and no person may
23 bring, which suggests that you look at it then going
24 forward. And looking at it forward indefinitely, just
25 says, (b) (1), you look forward for 6 years or 10 years,

1 or if there's no statute of limitations, forever. And
2 by the same token, I think (5) is a looking-forward
3 provision, that the bar arises and that's it, no person
4 may bring.

5 And when you contrast that to saying that
6 this is a temporal limitation, you know, I defy you to
7 find another provision that uses just the word "pending"
8 with no verb, no nothing, to give it some sort of effect
9 like that. You know, we cite a couple of -- of --

10 JUSTICE BREYER: Since you're getting into
11 that event, to me, it makes perfect sense to apply it
12 just to the pending action. The action goes away.
13 Number 2 person -- and that means there isn't going to
14 be the problem that Justice Ginsburg suggested, so we
15 don't have that problem. And now we have a new person
16 who can bring a suit if and only if he is the original
17 source. Well, if he's the original source, let him
18 recover. Why not? And your answer to that is, well, he
19 didn't tell the government all this stuff, the first guy
20 did.

21 Well, see, but that's not the only purpose
22 of the qui tam action. It has other purposes. It's to
23 reward the person who, in fact, did discover this thing
24 and -- and made every effort to bring it to public
25 attention.

1 MR. ELWOOD: But there's -- there's
2 nothing --

3 JUSTICE BREYER: Or not.

4 MR. ELWOOD: -- in the first-to-file bar
5 that says anything about an original source. Original
6 source is a carveout for the public disclosure bar.

7 JUSTICE BREYER: I know. But he can't --
8 but other -- other things prevent him from bringing it
9 unless he's the original source. Am I not right? I
10 mean, it's all been disclosed, you know.

11 MR. ELWOOD: I think that's the principal
12 ones. I think that's the principal ones.

13 JUSTICE BREYER: Everything's been
14 disclosed by number 1 --

15 MR. ELWOOD: Well, it may or may not have
16 been --

17 JUSTICE BREYER: What?

18 MR. ELWOOD: -- because it frequently -- it
19 may or may not have been because the --

20 JUSTICE BREYER: Let's take the mine run --

21 MR. ELWOOD: Sure. Right, right.

22 JUSTICE BREYER: I don't want to interrupt.
23 I don't want to interrupt your reserving your time.

24 MR. ELWOOD: Okay. I would -- I would like
25 to reserve the remainder of my time for rebuttal,

1 please.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Stone.

4 ORAL ARGUMENT OF DAVID S. STONE

5 ON BEHALF OF RESPONDENT

6 MR. STONE: Mr. Chief Justice, and may it

7 please the Court:

8 This civil FCA war fraud case is told under
9 the plain language of the WSLA because it is an offense
10 involving fraud against the United States under
11 subsection 1 and is also an offense committed in
12 connection with the payment or performance of a war
13 contract under subsection 3.

14 If we look at -- if we look at the text of
15 the law which applies here, which is at our appendix at
16 page 1, there is nothing in that text which limits --
17 which limits offenses to criminal offense. There's not
18 a single word in that text.

19 JUSTICE GINSBURG: But it's placed -- placed
20 in the Criminal Code. It's placed in Title 18.

21 MR. STONE: That's true. That's true,
22 Justice Ginsburg. But as the government has identified,
23 I believe it's in Note 3 of their brief, there are at
24 least seven civil offenses in the Criminal Code,
25 including RICO, civil RICO. And, in fact, I would -- I

1 would direct the Court to Section 1034, which says
2 specifically, "The attorney general may bring a civil
3 action in the appropriate United States District Court
4 against any person who engages in conduct, constituting
5 an offense under Section 1033 upon proof of such conduct
6 by preponderance of the evidence."

7 That is a civil offense. That is not a
8 criminal offense. And I believe if you look, if -- the
9 Justices -- if you look at --

10 JUSTICE SOTOMAYOR: Is there any civil
11 offense in Title 18?

12 MR. STONE: Yes, I just -- I just listed
13 one.

14 JUSTICE SOTOMAYOR: That's in 18.

15 MR. STONE: That's Title 18, Section 1034.
16 There in --

17 JUSTICE BREYER: Is that about fraud?

18 MR. STONE: That's about fraud, yes.

19 JUSTICE SCALIA: And what does the word
20 "offense" --

21 MR. STONE: Insurance.

22 JUSTICE SCALIA: What does the word
23 "offense" mean in that provision?

24 MR. STONE: The word "offense" as this
25 Court --

1 JUSTICE SCALIA: In that provision, what --
2 what does the word --

3 MR. STONE: The word "offense" means a
4 transgression of law, which may be punishable --

5 JUSTICE SCALIA: It's a criminal offense,
6 right?

7 MR. STONE: I disagree, Your Honor. I
8 believe "offense" --

9 JUSTICE SCALIA: It wouldn't make any sense
10 in Title 18 unless the offense they're referring to is
11 one -- one of the criminal offenses of Title 18.

12 MR. STONE: I don't agree, Justice Scalia,
13 because --

14 JUSTICE SCALIA: Read the provision again,
15 would you?

16 MR. STONE: Certainly. "The attorney
17 general may bring a civil action in the appropriate
18 United States District Court against any person who
19 engages in conduct constituting an offense under Section
20 1033 and upon proof of such conduct by a preponderance
21 of the evidence."

22 JUSTICE KENNEDY: Yes. But 1033 is a
23 criminal provision.

24 MR. STONE: 1033 is -- the way a number of
25 provisions in the criminal code are written, the

1 offenses or the conduct which is punishable are in --

2 JUSTICE BREYER: I think the point --

3 MR. STONE: -- subsection (a).

4 JUSTICE BREYER: I think -- I think the
5 point these people are trying to make, perhaps --

6 MR. STONE: Right.

7 JUSTICE BREYER: -- is that that provision
8 you've read provides for a civil action by the attorney
9 general --

10 MR. STONE: Right.

11 JUSTICE BREYER: -- against a person who has
12 committed an offense. What offense? An offense
13 elsewhere defined in 18. Is that offense defined
14 elsewhere criminal or civil? It is criminal.

15 MR. STONE: And I --

16 JUSTICE BREYER: That's the point, I think.

17 MR. STONE: And I disagree, Justice Breyer.

18 JUSTICE BREYER: I know you disagree, but --
19 so let's turn to the other offense it
20 cross-references --

21 MR. STONE: If we read --

22 JUSTICE BREYER: -- and why don't you read
23 that.

24 MR. STONE: If we read the language
25 carefully, which I have done --

1 JUSTICE BREYER: I've got the language of
2 that.

3 MR. STONE: If we read the language of a
4 number of the statutes -- a number of the statutes in
5 Title 18, they have punishments that are criminal.
6 Everything in Title 18 has punishments that are
7 criminal. There are a number of statutes within Title
8 18 that also have civil remedies or create civil private
9 rights of action. Nobody believes by using the term
10 "offense" that Congress intended to turn those into
11 criminal statutes. That is --

12 JUSTICE BREYER: I -- I agree with -- the
13 word "offense" appears and it provides for a civil
14 action. What I wonder is, when you turn to the
15 particular provisions that do that, and look at the word
16 "offense," is that word "offense" in those civil remedy
17 provisions referring to a civil or criminal behavior?

18 MR. STONE: It is referring to --

19 JUSTICE BREYER: To civil you say. So let's
20 read --

21 MR. STONE: It is referring to conduct which
22 can constitute a crime which is punishable by criminal
23 punishment, but is also punishable by civil -- by civil
24 remedies.

25 JUSTICE BREYER: And the word "offense"

1 refers to the civil behavior.

2 MR. STONE: Yes, because they're saying --

3 JUSTICE BREYER: Okay. Good. Read me the
4 example because I must have missed it.

5 MR. STONE: Because it says it must have
6 proved by a preponderance of the evidence, which means
7 it's not proved by, you know, beyond a reasonable doubt.
8 So it can't be a crime. It has to be a civil offense.
9 And that language appears in a number of places in Title
10 18. But may I --

11 JUSTICE KAGAN: Mr. Stone, don't take this
12 for more than it's worth because I think there are
13 plenty of arguments against you, but I'm actually not
14 sure I understand this one. I mean, it seems to me if
15 your view is it applies to both criminal and civil
16 offenses --

17 MR. STONE: Right.

18 JUSTICE KAGAN: -- well, Congress had to put
19 the thing someplace.

20 MR. STONE: Exactly.

21 JUSTICE KAGAN: It could have put it in the
22 criminal code or it could have put it with all the other
23 civil --

24 MR. STONE: And in fact --

25 JUSTICE KAGAN: Either way, there'd be kind

1 of a mismatch. And presumably, this started out as
2 criminal and it refers largely to criminal, and so
3 that's where it goes.

4 MR. STONE: Right. And -- and there's no
5 dispute that there was a limitation in 1921 and in 1942
6 on the statute because it said now indictable. It said
7 now indictable, so that referred to criminal.

8 Well, they took that limitation out, as I
9 believe one of the Justices made the point earlier, not
10 only did they take out that limitation, so there's no
11 limitation on the word "offense," they added the word
12 "any," which this Court has held in Gonzalez should be
13 read broadly, any offense. And this Court has said both
14 in Moore, this Court said that an offense is -- is an
15 infraction of the law which may be punishable either
16 civilly or criminally.

17 And, again, this Court said in National
18 Gypsum that Congress knows the difference between the
19 elements of a criminal offense and a civil offense. So
20 obviously --

21 JUSTICE ALITO: What is your -- what is
22 your --

23 MR. STONE: -- "offense" can be civil. It
24 is a textually permissible reading of this text that
25 "offense" can be civil --

1 JUSTICE ALITO: What is your answer to the
2 argument that this would be a big change if it
3 previously applied only to crimes and then, according to
4 you, it was changed so that it applied to civil claims
5 as well. That would be a big change. What is your
6 response to the argument that we might find a little --
7 a bit of evidence here or there that that's what was
8 intended, but Mr. Elwood says there's nothing?

9 MR. STONE: There is much evidence, Justice
10 Alito. First of all, this was -- historically, you have
11 to look at when the statute was being passed. In 1942,
12 they were concerned about -- they were in the middle of
13 a war that was consuming the entire nation. In 1944,
14 they were concerned with wrapping up that war. They
15 were passing Contract Settlement Act, primarily a civil
16 act. This was passed, this amendment was passed as part
17 of this Contract Settlements Act. They were passing the
18 Surplus Property Act. How are we going to deal with all
19 this property? They created civil offenses for surplus
20 property.

21 They did say, this same Congress, the 1944
22 Congress said in a report that this will allow, because
23 the bulk of the offenses under this Act will not be
24 cognizable and investigated until after the war, this
25 will allow for that -- for the litigation to occur. So

1 they used the term "litigation," again, suggesting
2 that's not a term you normally use when you're talking
3 about crimes. They used that term.

4 So -- so they clearly --

5 JUSTICE ALITO: Is that your -- that's your
6 best evidence, that there was a reference to litigation?

7 MR. STONE: That's -- that's the best
8 reference because there's not -- there's virtually --

9 JUSTICE SCALIA: Where -- where did that
10 appear?

11 MR. STONE: That appeared in a Senate report
12 when they passed --

13 JUSTICE SCALIA: Okay. That's all I needed
14 to know.

15 MR. STONE: -- when they passed the Surplus
16 Property Act.

17 (Laughter.)

18 MR. STONE: But I -- I think you need to
19 look -- you need to look at the historical reference of
20 when this was occurring. This was occurring when they
21 were creating all these civil remedies. It made sense
22 for them to expand. They added the word "any" to
23 offense. They had no need to add the word "any" to
24 offense. They did that because they wanted to make it
25 clear that it could -- it covered any offense, including

1 civil or criminal offenses. And they took out -- and I
2 agree there could be more than one reason why you take
3 this language out -- but they took out the now
4 indictable language, which was the only limitation that
5 could be read in the text that would limit it to crimes.
6 And there's nothing in the text as it now occurs.

7 I would also point out that the 2008
8 Congress, when they strengthened this obviously
9 believing that Wartime Suspension of Limitations Act
10 should continue to be enforced, mentioned twice
11 litigation, they mentioned the fact that -- that this
12 was in order to allow courts, prosecutors, and litigants
13 to know when the statute --

14 JUSTICE SCALIA: What Congress was that?

15 MR. STONE: The 2008 Congress.

16 JUSTICE SCALIA: And that's -- where does
17 that appear?

18 MR. STONE: That appears in a Senate report
19 as well.

20 JUSTICE SCALIA: Two -- two Senate
21 committees or just one Senate committee?

22 MR. STONE: One Senate committee report.
23 It's cited in --

24 JUSTICE SCALIA: And that's the Congress.

25 MR. STONE: Cited in our red brief, yes.

1 Yes, Your Honor.

2 I would point out, though, that the meaning
3 of "offense" in 1921 and the meaning of "offense" in
4 1942 was a transgression of law as this Court said in
5 Moore v. Illinois. It's a transgression of law which
6 could be punished civilly. It could be punished
7 criminally. We need more context. We need something in
8 the statute to limit it. There's nothing in the
9 statute.

10 And it makes sense that Congress wouldn't
11 have wanted to limit it because they would have wanted
12 to give the government the option of pursuing a criminal
13 remedy --

14 JUSTICE SCALIA: I mean, all that's true
15 except --

16 MR. STONE: -- or a civil remedy.

17 JUSTICE SCALIA: -- except when you're
18 dealing with an old statute that used to be clearly
19 criminal, and it seems to me that at that point the
20 burden -- when that statute is expanded -- the burden is
21 on you to show that it's been changed from the criminal
22 to the civil --

23 MR. STONE: Well, Judge, I would point
24 out --

25 JUSTICE SCALIA: -- to include the civil.

1 And, you know, that's a different burden from what you
2 expect.

3 MR. STONE: Justice Scalia, I would point
4 out that nine of ten courts that considered this in the
5 aftermath of the 1944 amendment held that it did apply
6 civilly, and five of those were False Claims -- Civil
7 False Claims Act cases. And those courts and that
8 judicial precedent was in place -- for four years,
9 Congress never changed that language, never went back --
10 they could easily have written the word "criminal" in in
11 1944, they chose not to do that. And --

12 JUSTICE SCALIA: Well, were they --

13 MR. STONE: -- they could have written it in
14 --

15 JUSTICE SCALIA: Were they district courts?
16 Four district courts? Is that it?

17 MR. STONE: They were district courts, yes.

18 JUSTICE SCALIA: And did Congress know about
19 those?

20 MR. STONE: Congress is presumed to know
21 about them.

22 JUSTICE SCALIA: Ah, ah.

23 MR. STONE: But I would also point out that
24 the people in the courts that were operating at the time
25 that this amendment was made understood it to change the

1 law. Nine of the ten courts understood it to change the
2 law. So it goes to what people believed at the time the
3 meaning of that word was. Because --

4 JUSTICE GINSBURG: Changed the law to do
5 what? They changed it to --

6 MR. STONE: To allow civil defenses --

7 JUSTICE GINSBURG: -- operating
8 prospectively, not just to crimes that had already
9 occurred?

10 MR. STONE: Right.

11 JUSTICE GINSBURG: So that's one change that
12 everybody agrees.

13 MR. STONE: Right. Changed the law to
14 include any offense, we would say, that was related to
15 the war, which would include our civil FCA war fraud
16 offense in this case. It's specifically consistent with
17 Congress' intent that -- that a fraud such as occurred
18 in this case, that the government would be able to
19 pursue it. It's a fraud on the troops in wartime. It's
20 exactly why this statute was passed and exactly why the
21 False Claims Act was passed.

22 JUSTICE GINSBURG: The government can pursue
23 it in a criminal case. The question is whether --

24 MR. STONE: Right, and --

25 JUSTICE GINSBURG: -- the civil --

1 MR. STONE: And the question is whether it's
2 appropriate and -- and based on the language -- Justice
3 Scalia, based on the language of this statute, which
4 nowhere in it contains a limitation -- the only
5 limitation was taken out in 1944, and instead they added
6 the word "any" and they added two subsections that could
7 be read --

8 JUSTICE SCALIA: Who urges the word
9 "offense"? That's the limitation that is urged, which
10 is normally used to connote a crime.

11 MR. STONE: What?

12 Well, the two --

13 JUSTICE SCALIA: And I don't think that
14 changes --

15 MR. STONE: The terms --

16 JUSTICE SCALIA: -- if you put the word
17 "any" in front of it.

18 MR. STONE: But, Your Honor, in Moore v.
19 Illinois, the Court said that "offense" means a
20 transgression of law that could be punished either
21 criminally or civilly. And presumably Congress was
22 aware of this Court's holding in Moore, or is presumed
23 to be. And then this Court again, on a number of
24 occasions, including in National Gypsum, referred to
25 Congress as being familiar with the difference between

1 criminal and civil offenses. There would be no need for
2 the term "civil offense" or the term "criminal offense"
3 if "offense" meant "crime."

4 "Offense" doesn't mean "crime." There would
5 be no need for the word "criminal offense" if that's
6 the --

7 JUSTICE GINSBURG: The problem is that --

8 MR. STONE: By the way, the word "criminal
9 offense" occurs a number of times --

10 CHIEF JUSTICE ROBERTS: Justice Ginsburg.

11 MR. STONE: I'm sorry.

12 JUSTICE GINSBURG: Everyone agrees that from
13 1921 on, it was understood that this was a criminal
14 statute and I think the point has been made before. If
15 Congress really was going to change it, to vote it all
16 onto the excision of two words which can be explained on
17 other grounds, it's a bit much. Wouldn't Congress have
18 said, now we're going to make it -- we want it to be
19 civil, so we're going to make it clear that it's civil?

20 MR. STONE: Justice Ginsburg, I -- I would
21 point out a couple of things about that.

22 First of all, the surplusage language
23 which -- which Petitioner points to which they claim was
24 the reason that this was taken out, was in the statute
25 since 1921. So they have no historical reason why all

1 of a sudden, in 1944, it was taken out. It was there --

2 JUSTICE GINSBURG: Well, there was a reason.

3 MR. STONE: -- the entire time.

4 JUSTICE GINSBURG: The statute acted
5 retrospectively for the first part of its history, and
6 then they took it out when it was going to operate
7 prospectively.

8 MR. STONE: But Judge -- Judge Ginsburg,
9 that's not correct, because the language at the end of
10 the Wartime Suspension of Limitations Act holds that --
11 provides that the statute does apply retrospectively.
12 It applies to any statute of limitation which has not
13 yet run. And that's been in the statute since -- since
14 1942.

15 I would also point out that the 1921 statute
16 had nothing to do with the war. There's not much we can
17 glean from the 1921 statute. All that it did was to
18 increase the statute of limitations from three years to
19 six years for fraud. It didn't mention the war at all.
20 And in 1942, all that the statute did was extend until
21 1945 the provision that was in in 1942. It also did not
22 refer to the wars. The first statute that actually
23 referred to the war was the 1944 statute.

24 So, yes, it's true that some language was
25 used, but I believe, you know, as -- as we set forth in

1 our -- our brief, that "offense" can mean criminal or
2 civil. It's a textually permissible interpretation.
3 There's nothing in -- that limits it in the current law.
4 It's consistent with what Congress intended when they
5 passed these statutes. And I urge the Court to
6 seriously consider that, because it would be
7 inappropriate for the government to be limited to
8 pursuing cases only criminally against defendants who
9 are war profiteers and not have that civil -- civil
10 remedy.

11 If I may move on to the False Claims Act --

12 CHIEF JUSTICE ROBERTS: Well, you can either
13 reserve time or move on. It's up to you.

14 MR. STONE: I'd like to move on, if I may.

15 CHIEF JUSTICE ROBERTS: Go ahead.

16 MR. STONE: The False Claims Act -- as
17 Justice Scalia pointed out, "pending" in the False
18 Claims Act, it's a word that was chosen in the
19 first-to-file provision. It's a word that Congress
20 chose to use. It makes sense, because if you look at
21 the statutory scheme in which that provision is found,
22 it's talking about while that action is pending, what
23 the government can do. It talks about -- the previous
24 provisions talk about the government making a decision
25 about intervening. The next provision talks about the

1 government can dismiss that case, which -- which
2 protects all the concerns that -- that Mr. Elwood has
3 pointed out because the government has the ability to
4 dismiss a case any time that it wants to if it isn't in
5 the interest of the government for that case to be
6 there.

7 So it also uses the term "intervention."
8 You cannot intervene in a non-pending case. Congress
9 specifically chose to put these in the same sentence to
10 say, no person shall intervene or file a related case
11 while the -- the case is pending.

12 So for that reason, I believe, "pending" is
13 clearly the most reasonable interpretation, but it's
14 also the most consistent with the statutory scheme,
15 which as Justice Kagan pointed out, provides that
16 original sources can go forward even if the government
17 has knowledge of a fraud and even if the government is
18 investigating that fraud as this Court found in Graham
19 County.

20 JUSTICE GINSBURG: What happens -- what
21 happens if you have a first filer who brings a claim,
22 it's successful, either gets a judgment or gets a
23 settlement, and the case is over? It's no longer
24 pending.

25 MR. STONE: We -- we would argue, and I

1 believe the government will agree, that claim
2 preclusion, res judicata, all the typical doctrines
3 would apply. I would point the Court to Stephens, where
4 the Court held that the relator was an assignee of the
5 government, and if an assignee of the government brings
6 a case and either settles it or it's decided on the
7 merits, that would bar any future case, and I believe
8 the government will agree with that.

9 But to allow the defendants to say that a
10 case that is brought that may never be pursued -- like
11 in this case, Thorp, where they alleged everywhere in
12 the world there was fraudulent billing. This person had
13 never been to the base where the fraudulent billing was
14 occurring in our case, had no personal knowledge of it.
15 No relator, other relator, was found to be an original
16 source. They didn't reach that issue.

17 JUSTICE SCALIA: I'm not sure the government
18 will agree with that, as you confidently predict, but I
19 guess we'll ask the government. But I think --

20 MR. STONE: Right. Well, that would be my
21 -- that would be our position.

22 JUSTICE SCALIA: I think you're saying that
23 if somebody brings a suit and is -- and loses, the
24 government is -- is thereby precluded from joining a
25 later suit. Right? The government is.

1 MR. STONE: I am saying that if somebody
2 brings a lawsuit --

3 JUSTICE SCALIA: Yeah.

4 MR. STONE: -- and on the merits, there is a
5 decision on the merits --

6 JUSTICE SCALIA: Right.

7 MR. STONE: -- the government has chosen not
8 to intervene in that case.

9 JUSTICE SCALIA: Right.

10 MR. STONE: They've had the opportunity to
11 intervene at any point --

12 JUSTICE SCALIA: But they didn't intervene.

13 MR. STONE: Then they are bound.

14 JUSTICE SCALIA: Then they are bound.

15 MR. STONE: Yes.

16 JUSTICE SCALIA: Okay.

17 MR. STONE: And furthermore --

18 JUSTICE SCALIA: We'll see what the
19 government thinks of that.

20 MR. STONE: And furthermore, I just want --
21 I want to make the point that Congress, in the False
22 Claims Act -- I've been doing this for a while -- that
23 Congress inextricably intertwined the government and
24 relators. You can't tear them apart, because the whole
25 point of the False Claims Act is to incentivize people

1 with knowledge, with evidence, with witnesses, to come
2 forward. Because even if the government knows -- and
3 Congress understood this -- even if the government has
4 knowledge of the fraud, that doesn't mean they can prove
5 the fraud. That doesn't mean that they're going to be
6 able to find out about the fraud by investigating it.
7 What helps them prove the fraud is somebody who has
8 personal knowledge, an original source who can testify,
9 here's the evidence, I saw this happen. And Congress
10 knew that was very important, and that's why they
11 created the original source provision and provided that
12 original sources can pursue cases even if the government
13 doesn't intervene. Because there may be cases where the
14 government doesn't intervene for various reasons where
15 it's valuable for those cases, for the taxpayers and for
16 the government, for those cases to be pursued.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Mr. Stone.

19 MR. STONE: Thank you very much.

20 CHIEF JUSTICE ROBERTS: I'm sorry for my
21 confusion about the time reservation. Thank you.

22 Mr. Stewart.

23 ORAL ARGUMENT OF MALCOLM L. STEWART

24 ON BEHALF OF UNITED STATES,

25 AS AMICUS CURIAE, SUPPORTING RESPONDENT

1 MR. STEWART: Mr. Chief Justice, and may it
2 please the Court:

3 When Congress enacted the 1942 version of
4 the Wartime Suspension of Limitations Act, it was acting
5 against the backdrop of this Court's 1921 decision in
6 United States v. Hutto. And the Court in Hutto was
7 construing the general Federal criminal conspiracy
8 statute. And that statute made it a crime, among other
9 things, to conspire to commit an offense against the
10 United States. And the question before the Court was
11 whether that criminal statute covered conspiracies to
12 commit civil violations.

13 And the Court held that it did. The Court
14 held that there was no necessity in the statute for the
15 offense, the object of which is the conspiracy, to be a
16 criminal offense, and that the criminal statute could be
17 violated by a conspiracy to commit a civil wrong.

18 And there are certainly a great many
19 provisions in Title 18 that use the word "offense" in
20 which there are other contextual clues within the
21 provision that make clear that only crimes are covered.

22 JUSTICE BREYER: Is there -- is there a
23 provision that uses the word "offense" even though it
24 may be civil, where that word "offense" in that
25 provision refers to something other than a criminal

1 offense?

2 MR. STEWART: Not other than a criminal
3 offense. As Mr. Stone has --

4 JUSTICE BREYER: Every use of the word
5 "offense" in Title 18 is in reference to a criminal
6 offense.

7 MR. STEWART: It refers to conduct with
8 criminal -- that -- to which criminal penalties attach.

9 As Mr. Stone was explaining, there are
10 provisions in Title 18 that use the word "offense" to
11 describe conduct that is subject to both criminal and
12 civil sanctions; and those are criminal offenses.

13 JUSTICE BREYER: But the answer to my
14 question was yes?

15 MR. STEWART: They are still crimes, yes.

16 JUSTICE BREYER: Yes.

17 MR. STEWART: But what we would say about
18 3287 is the word "offense" is being used something in
19 the same way, as a hybrid. There is no dispute that the
20 current version of the WSLA does cover crimes. It tolls
21 the limitations period for criminal prosecutions, but it
22 also applies to civil offenses.

23 That -- the next thing I would ask the Court
24 to look at is on page 1A of the government's brief.
25 We've reproduced the original 1942 version of the

1 Wartime Suspension of Limitations Act.

2 And the provision begins: "The running of
3 any existing statute of limitations applicable to
4 offenses involving the defrauding or attempts to defraud
5 the United States or any agency thereof, whether by
6 conspiracy or not, and in any manner, and now indictable
7 under any existing statutes."

8 And if you look even to the rest of that
9 provision, the only clear evidence you would find that
10 this version of the statute was limited to crimes was
11 the phrase "now indictable."

12 Now, it's possible that the phrase "now
13 indictable" did other work as well; but it was the only
14 language in the statute that limited the provision to
15 crimes.

16 And so part -- part of the questioning by
17 the Court, understandably, has been to the effect of, if
18 Congress meant to change this in 1944, why didn't it do
19 something more direct to manifest that intent?

20 And part of our point is, in some sense,
21 removal of "now indictable" is indirect, but in some
22 sense removing the only language that previously limited
23 the -- the provision to crimes is the most way -- direct
24 way to go about it. If the statute had originally --

25 JUSTICE SCALIA: Well, whoa, whoa. You can

1 say that it limited it or you can say that it -- it
2 showed -- it showed that the word "offense" in that
3 statute was being used to mean a criminal offense,
4 right?

5 MR. STEWART: I don't think --

6 JUSTICE SCALIA: It could. I acknowledge
7 that sometimes you can say "offense" and it means civil,
8 sometimes you can say that it means criminal, and
9 sometimes you can say it means both.

10 But what that language did in the original
11 statute was to make it clear that the word "offense" in
12 this statute was being used in a criminal sense. And I
13 don't think that that implication is eliminated by
14 simply taking out the -- taking out the "now indictable"
15 language, which could have been eliminated for a very
16 different reason; and that is, to show that it -- it
17 operates prospectively.

18 MR. STEWART: I guess part of the point I
19 would make is if the initial version of the statute had
20 referred to existing -- statutes of limitations on
21 criminal offenses and Congress had then excised the word
22 "criminal," we would say -- I think that would be viewed
23 as very powerful evidence that Congress intended an
24 expansion.

25 JUSTICE SCALIA: But there would be no other

1 reason for eliminating the word "criminal"; whereas,
2 there is a very good other reason for eliminating the
3 phrase "now indictable."

4 MR. STEWART: Well, the reason that has been
5 postulated is that "now indictable" originally served
6 the purpose of making clear that the WSLA would not
7 revive expired prosecutions, and that this was no longer
8 necessary in 1944 because the statute was amended to
9 make that point clear separately.

10 But, in fact, the 1942 version of the
11 statute said: "This Act shall apply to acts, offenses,
12 or transactions where the existing statute of
13 limitations has not yet fully run, but..." it shall not
14 apply to acts that would otherwise be -- be barred.

15 CHIEF JUSTICE ROBERTS: Counsel.

16 MR. STEWART: Yes.

17 CHIEF JUSTICE ROBERTS: Is the Korean War
18 covered by the WSLA?

19 MR. STEWART: I think the general
20 understanding at that time was that only declared wars
21 were covered; and so, likely, the Korean War would not
22 have been covered. I don't know the --

23 CHIEF JUSTICE ROBERTS: Is that your -- is
24 that your position now, that only declared wars are
25 covered?

1 MR. STEWART: Well, the statute was amended
2 in 2008; and it now provides -- and the current version
3 of the statute is at page 4-A. This is current 3287.

4 It says: "When the United States is at war
5 or Congress has enacted a specific authorization for the
6 use of the Armed Forces --"

7 CHIEF JUSTICE ROBERTS: Was there such an
8 authorization in the Korean War?

9 MR. STEWART: Not -- not pursuant to --

10 CHIEF JUSTICE ROBERTS: No, no. I mean at
11 the time.

12 MR. STEWART: Right.

13 CHIEF JUSTICE ROBERTS: I don't think there
14 was, right?

15 MR. STEWART: I don't -- I don't --

16 CHIEF JUSTICE ROBERTS: I'm trying to get at
17 the question of the breadth of your position. As I --
18 as I understand it, you're now saying "at war" doesn't
19 necessarily have to have a declared war.

20 MR. STEWART: I think what we would say is
21 at -- up under the current version of the -- the current
22 wording of the statute implies that "at war" does
23 require a declaration of war, but Congress has added an
24 additional category when there has been a UMF pursuant
25 to the War Powers Resolution.

1 CHIEF JUSTICE ROBERTS: So if -- so if the
2 current version were effect -- were in effect in 1950,
3 the Korean War would not be covered, because there
4 wasn't a declared war? And my understanding is there
5 wasn't a specific authorization for the use of forces.

6 MR. STEWART: That would be my understanding
7 as well, that Congress seems to have acted to extend the
8 statute beyond declared wars but not to anything that
9 could be considered military operations if they have not
10 been authorized in a particular manner.

11 JUSTICE SCALIA: Mr. Stewart, before your
12 time runs out, what -- what is the Government's position
13 on the -- on the point raised by counsel for Respondent;
14 namely, if there is a dismissal of -- on the merits of
15 a -- a civil action, is the government barred from later
16 bringing a different action on the same claim?

17 MR. STEWART: Yes, we would think we would
18 be barred. We think that was Congress's expectation in
19 1986 and that's the understanding of the statute that
20 we've been operating under; that is, our protection
21 under the statute is that when a qui tam suit is filed,
22 we have an initial opportunity to decide whether to
23 intervene or not. Even if we initially decide not to
24 intervene, we can move later to intervene for good cause
25 shown and so if we initially think the relator can do a

1 capable job but then we decide later, no, he can't, our
2 protection against the claim being badly litigated is
3 that we can take over the suit, and if we don't avail
4 ourselves of that protection and the case is decided
5 against us on the merits, then claim preclusion would
6 apply.

7 And I think in Taylor v. Sturgell, the Court
8 identified a number of categories of cases in which
9 nonparties can be barred in subsequent litigation. One
10 of them is when a litigant allows his claim to be
11 litigated by a representative, and the Court in Stevens
12 described qui tam suits as a species of representational
13 standing.

14 And I think the same principle would apply
15 to a suit brought by a second relator as well, that is
16 an additional category of nonparty preclusion that the
17 Court in Stevens -- I'm sorry, that the Court in
18 Taylor v. Sturgell identified was that when one party is
19 barred from litigating himself, he can't relitigate the
20 same claim through a proxy. And if the United States
21 would be barred by the judgment in the first qui tam
22 suit from filing its own suit, then to allow a second
23 relator to go forward on the same claim would, in
24 essence, be allowing the United States to relitigate
25 through a proxy. And to us, it makes perfect sense that

1 Congress drafted the first-to-file bar specifically with
2 reference to pending actions because --

3 JUSTICE KENNEDY: If the case is not -- the
4 first case is not dismissed on the merits, dismissed
5 without prejudice and then relator 2 files, your
6 position is that that suit may be maintained?

7 MR. STEWART: It would not be -- our
8 position is it would not be barred by the first-to-file
9 provision.

10 Now, if -- the Court may want to look at --

11 JUSTICE KENNEDY: I'm curious to know, just
12 because of background, would the first suit toll the
13 statute of limitations as to the second relator?

14 MR. STEWART: I -- probably -- we believe
15 probably not. That is, I think typically the -- the
16 rule is that if the first suit is ultimately dismissed,
17 then the second suit proceeds as though nothing had
18 happened. But that time wouldn't be tolled. But the
19 Court may look at page 5a of the brief, which reproduces
20 the current version of the public disclosure bar, and it
21 says, this is about halfway down the page: "The court
22 shall dismiss an action or claim under this section,
23 unless opposed by the government, if substantially the
24 same allegations or transactions as alleged in the
25 action or claim were publicly disclosed in a Federal

1 criminal, civil, or administrative hearing in which the
2 Government or its agent is a party."

3 So often the effect of the
4 first suit may be to bar second relators from suing
5 under the public disclosure bar unless they qualify as
6 original sources.

7 CHIEF JUSTICE ROBERTS: Thank you, Mr.
8 Stewart.

9 Mr. Elwood, you have reserved 4 minutes.

10 REBUTTAL ARGUMENT OF JOHN P. ELWOOD

11 ON BEHALF OF THE PETITIONERS

12 MR. ELWOOD: Mr. Stewart said that the only
13 language in the provision in the Wartime Suspension of
14 Limitations Act which limited it to criminal -- limited
15 it to crimes, was the phrase "now indictable, and I
16 disagree with that. If you look at the Antitrust
17 Suspension Act that's reproduced in our brief, it said
18 -- what the Congress said there was "any violation."
19 It's very telling that 47 days after enacting the
20 Wartime Suspension of Limitations Act which used
21 "offense" to apply only to crimes, it said "any
22 violation which is now indictable or subject to a civil
23 proceeding." So it was the word "offense" there that
24 was limiting it to crimes, not the word -- not "now
25 indictable."

1 In addition, I want to be perfectly clear
2 about this, and at page 5 of our reply brief in note 3,
3 we go through all of the claimed criminal code
4 provisions which supposedly used the word "offense" to
5 mean a civil violation and they do not. Every time the
6 word "offense" appears, it is to describe the crime in
7 the statute, not something else. They may say the
8 conduct underlying the offense or something like that,
9 but every time they use the word "offense," it is to
10 refer to a crime and nothing else.

11 Mr. Stewart also mentioned this -- the Hutto
12 case, and to decide it against the backdrop of Hutto. I
13 want to point out that that -- the crime at issue in
14 Hutto is the last criminal code provision which they
15 have identified which used the word "offense" they say
16 to include a civil violation. And the Government there
17 said that that was taken care of, it's now no longer
18 a -- no longer applies to civil violations because
19 Congress amended it, 371, the conspiracy statute, to say
20 that a minor offense is a misdemeanor.

21 Well, that has exactly the same effect of
22 the statute that I talked about earlier that was in
23 force the day this provision of the Wartime Suspension
24 Act was enacted. It says that offenses are either
25 felonies or misdemeanors. Nobody has said a word about

1 that yet.

2 And it has exactly the same provision as the
3 amendment that Mr. Stewart says overruled Hutto. Also,
4 I think Hutto has to be viewed in light of the case it
5 cited, a five-page opinion that relied heavily on the
6 1893 case of Pettibone, which has said there can be
7 conspiracies to violate the civilian laws. So I think
8 Hutto is a conspiracy case and nothing more.

9 Oh, and with respect to the -- the res
10 judicata, I want to point out that at this point, still
11 no one has cited a case in which relator two is bound by
12 the loss of relator one. Taylor v. Sturgill talks about
13 representative litigation, and I think that that maybe
14 works in one direction, and that the government can be
15 bound by relator one's loss. But it's hard to say that
16 relator one -- I mean, at least, I will be more than
17 happy to argue this position, but I can expect there
18 will be some pushback, probably including from the
19 Government at that time, if I say that relator two was
20 the representative of relator one when relator two was a
21 stranger to relator one.

22 JUSTICE GINSBURG: Relator two is treated as
23 the Government for this purpose.

24 MR. ELWOOD: But in any event, no one has
25 yet cited to me a case where this has already been

1 determined, so it's all litigation risk to my client
2 now. And Finally, I want to point out one final thing,
3 which is that Mr. Stewart said that an undeclared war
4 under the pre-amendment Wartime Suspension Act did not
5 apply to undeclared wars. The Fourth Circuit said
6 differently, and the Government has now confessed error,
7 or at least they said that the Fourth Circuit erred in
8 that position. I just wanted to bring that to the
9 Court's attention, even though it is at most a tertiary
10 issue before this Court.

11 And if there are no further questions, we'll
12 rely on our submission.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 The case is submitted.

15 (Whereupon, at 12:11 p.m., the case in the
16 above-entitled matter was submitted.)

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