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IN THE SUPREME COURT OF THE UNITED STATES

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CORNELIUS P. YOUNG, ET UX., :  
Petitioners :  
v. : No. 00-1567  
UNITED STATES. :  
- - - - -X

Washington, D.C.  
Wednesday, January 9, 2002

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:11 a.m.

APPEARANCES:  
GRENVILLE CLARK, III, ESQ., Manchester, New Hampshire; on  
behalf of the Petitioners.  
PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the United States.

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On behalf of the United States	26

P R O C E E D I N G S

(10:11 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 00-1567, Cornelius P. Young v. the United States.

Mr. Clark.

ORAL ARGUMENT OF GRENVILLE CLARK, III

ON BEHALF OF THE PETITIONERS

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

This is a case about discharging taxes in a bankruptcy proceeding.

The Bankruptcy Code provides that income taxes that are more than 3 years old are discharged in a bankruptcy proceeding. In the petitioner's case, the Youngs filed a Chapter 7 bankruptcy proceeding in March of 1997, some 3 years, 5 months after they had filed their 1992 income tax return in October of 1993. The Bankruptcy Code provides, on this simple set of facts, that the Youngs' 1992 income tax obligation is discharged. The operative code sections are 727, 523, and 507, which I set out at pages 10 and 11 of my brief.

QUESTION: Well, they also filed an earlier bankruptcy petition, didn't they?

MR. CLARK: They did indeed, Your Honor. That

1 was filed in May of 1996. It was a Chapter 13 proceeding.  
2 It lasted just short of 6 months, and the -- the argument  
3 that the IRS has tendered in this case and below is that  
4 you subtract out the 6 months they are in the prior  
5 proceeding from the calculation of the 3 years, 5 months,  
6 and when you do that, you come out with the Youngs ending  
7 up with being only 2 years 11 months away from the 3-year  
8 mark --

9 QUESTION: Well, why was the first Chapter 13  
10 petition dismissed?

11 MR. CLARK: It was dismissed at the behest of  
12 the Youngs for a variety of reasons that did not appear in  
13 the record. During the Chapter 13 proceeding, they had  
14 succeeded in selling their house and paying off mortgages  
15 on the house that had -- they had placed on there. Later  
16 on in the proceeding, they had gone through the trouble of  
17 engaging special counsel, an attorney Noreen Farr, to do  
18 something which does not appear in the record. But they  
19 finally decided that they would dismiss the case rather  
20 than go forward with it. The reasons that they did not --  
21 do not appear in the record.

22 They dismissed the case about 3 weeks before  
23 they would have gotten to confirmation of their plan,  
24 which they had submitted earlier in the case.

25 QUESTION: But there was also the fact that they

1 -- in addition to dismissing the Chapter 13, the day  
2 before that order was entered granting the dismissal at  
3 their request, they started a new bankruptcy proceeding.  
4 They started a Chapter 7 proceeding, and that way they  
5 were able to stretch out the stay of any effort the  
6 Government might have made to collect the tax.

7 MR. CLARK: The -- the bankruptcy -- the Chapter  
8 13 bankruptcy proceeding was dismissed. The final closing  
9 order in the case was entered in March of 1997. The  
10 motion that -- or the request, I think, that the Youngs  
11 had filed was in October of 1996, October 23, 1996. It is  
12 our position that the automatic stay expired as soon as  
13 the case was dismissed and not later when the case was  
14 closed a number of months later. And I think that is  
15 significant because in our view the IRS was entitled to  
16 restart their enforced collection efforts against the  
17 Youngs --

18 QUESTION: Do you have authority for that, for  
19 saying that -- that it's not the date that the bankruptcy  
20 was closed, but some -- the earlier date when they -- when  
21 they made that motion?

22 MR. CLARK: Yes. It's in the Bankruptcy Code  
23 itself, section 320 -- yes -- I'll have to get the --

24 QUESTION: Is the filing of the notice of  
25 dismissal, which was October 23?

1 MR. CLARK: Yes. It's the filing of the notice  
2 of dismissal, and that we contend is the dismissal.

3 What happened subsequent to the -- the filing of  
4 that notice is the Chapter 13 trustee held some funds that  
5 had been paid in. He sought to apply for an  
6 administrative expense, and that was put on for a hearing  
7 and eventually it was granted. And then thereafter the  
8 clerk's office closed the case in March of 1997.

9 QUESTION: Did anyone object to the notice of  
10 dismissal?

11 MR. CLARK: Not in a -- not in a Chapter 13  
12 where the debtor seeks dismissal. The debtor has the  
13 absolute right to seek dismissal of his Chapter 13 case  
14 because it's a voluntary proceeding.

15 QUESTION: You used the term seek dismissal,  
16 move to dismiss in October, and then the proceeding was  
17 actually dismissed in March. Are you saying that your  
18 simple motion to dismiss is the same thing as having it  
19 dismissed?

20 MR. CLARK: Yes, I am in this situation, Mr.  
21 Chief Justice, because of -- the bankruptcy rules are a  
22 little -- were a little vague at that point in time.  
23 Whether you seek a dismissal by simply filing a, quote,  
24 request or moving for a dismissal, the rule says that upon  
25 a request for dismissal, the judge shall dismiss it. In

1 this particular case, the judge did not actually enter an  
2 order of dismissal. It simply accepted the dismissal as  
3 entered or requested in October of 1996.

4 QUESTION: Well, this whole sequence of events  
5 seems a bit gimmicky.

6 MR. CLARK: Well, if -- if there are gimmicks,  
7 if somebody is trying to manipulate the system, to game  
8 the system, certainly the Government -- any party in  
9 interest who was affected by the gaming, the manipulation  
10 -- can object, can take -- can move to dismiss -- to  
11 convert the case, for example, which --

12 QUESTION: I thought there was a finding of good  
13 faith here, wasn't there?

14 MR. CLARK: Yes, there was, Your Honor.

15 QUESTION: Was it a finding of good faith or --  
16 or a finding that he was making no finding of bad faith?

17 MR. CLARK: No. The -- the judge below, Judge  
18 Vaughn in the Bankruptcy Court, found in favor of the  
19 Government, suggesting that there was a potential, in  
20 similar cases such as this, for abuse or manipulation by  
21 debtors in general. But in this case, Judge Vaughn had  
22 found that he attributes no bad faith to the Youngs in  
23 this particular situation, and I think that's an important  
24 fact.

25 The Government, when it objected to --

1 QUESTION: Is it bad faith to look for a tax  
2 loophole? I think thought that's what all the tax  
3 attorneys always did.

4 MR. CLARK: It's certainly not in our view bad  
5 faith to look for a tax -- for a way to get a grant of a  
6 discharge of an obligation that you formerly owed.

7 QUESTION: Do you think that that's what the  
8 judge meant -- meant by not attributing bad faith? He  
9 didn't even think that your client was legitimately trying  
10 to take advantage of a tax loophole? That -- that's what  
11 I took it to mean.

12 MR. CLARK: The case -- Justice Scalia, the case  
13 came before the court, before the Bankruptcy Court, on a  
14 motion for summary judgment by the motion -- by the  
15 Government. The -- there was no findings of fact as such  
16 other than those that were on summary judgment. The --  
17 what the -- I see Judge Vaughn has -- as finding is that  
18 he sees no evidence before the court from which he would  
19 infer any manipulative or abusive scheme.

20 QUESTION: Well, would it be manipulative or  
21 abusive just to take advantage of the provision of the  
22 statute?

23 MR. CLARK: No, Your Honor, it would not be.

24 QUESTION: So, the finding doesn't make any  
25 difference one way or the other, does it?



1 MR. CLARK: When bankruptcy -- bankruptcy  
2 debtors take advantage --

3 QUESTION: You're just saying you have a  
4 statutory right to do what you did.

5 MR. CLARK: That's exactly right, Justice --

6 QUESTION: Why should we read the statute  
7 regardless, when it's good faith or bad faith, as allowing  
8 the following? We look back 3 years to see how much money  
9 a bankrupt filer owes the Government. He's going to have  
10 to pay it. Let's say it's \$100,000. He dismisses that  
11 after a number of years, the first bankruptcy, then brings  
12 the second bankruptcy proceeding and says, well, if we  
13 look back 3 years from the second one, this \$100,000 I  
14 owned -- I owed falls outside that period. It's simply a  
15 windfall to him because he brought two bankruptcy  
16 proceedings rather than one, and it's a loss to the  
17 Government for no reason other than his having brought two  
18 bankruptcy proceedings rather than one. It serves no  
19 purpose whatsoever that I can fathom in the bankruptcy  
20 statute, and what purpose is there in reading the statute  
21 to permit such a result?

22 MR. CLARK: Justice Breyer, you would have to  
23 look at what happened in the prior bankruptcy I think to  
24 see why the debtor was able to stay in bankruptcy for the  
25 length of time that the debtor did and thereby supposedly

1 prevent the Government from collecting taxes from the  
2 debtor.

3 A chapter -- usually the prior bankruptcy is a  
4 reorganization bankruptcy, a Chapter 13, possibly a  
5 Chapter 11. During the Chapter 13 proceeding, that had --  
6 had a long life, the debtor had to propose a plan that had  
7 to pay the taxes that the debtor owed in full over the  
8 life of a plan, whether that be 3 years, 4 years, 5 years,  
9 whatever it was. The plan has to go to confirmation. If  
10 the plan is confirmed, all the plan payments that have  
11 accumulated to that point are now paid out to the  
12 Government and to other creditors in accordance with the  
13 plan. Plan payments that follow on still go to the  
14 Government and to other creditors as designated in the  
15 plan. The Government is getting money here during the --  
16 during the prior bankruptcy proceeding.

17 Yes, a person can file for bankruptcy, submit a  
18 plan. It might be a 5-year plan. They get the plan  
19 confirmed. They make payments for 3 years and then they  
20 elect to dismiss. That is their right to -- to dismiss.

21 QUESTION: Do they get the payments back if  
22 they --

23 MR. CLARK: No. No, Your Honor, they do not.  
24 The -- the plan payments have been paid to the Government  
25 all throughout the 3-year period. They have a confirmed

1 plan. Once you have confirmation, the confirmation order  
2 releases the money to the -- the payees, the creditors,  
3 including the Government.

4 QUESTION: How much of the -- how much of the  
5 tax liability did the Government receive during the course  
6 of the first bankruptcy?

7 MR. CLARK: In the Youngs' case, the Government  
8 did not receive any payments whatsoever. The Youngs'  
9 Chapter 13 lasted about -- just short of 6 months. They  
10 had not filed that tax case, that Chapter 13 until 2 and a  
11 half years after they had filed their tax return. They --  
12 but they did not receive any payment because we did not  
13 get to confirmation in the Youngs' case.

14 QUESTION: Did you -- did you seek confirmation?

15 MR. CLARK: The confirmation hearing had been  
16 set by the court at the outset of the case, and it was  
17 scheduled for November 15 of --

18 QUESTION: But it was -- it was the debtors'  
19 voluntary action that stopped the Government from getting  
20 any payments under that plan.

21 MR. CLARK: It was -- in this particular case,  
22 yes, Your Honor --

23 QUESTION: Could the judge --

24 MR. CLARK: -- for the -- because they had not  
25 gotten to confirmation.

1           QUESTION:  When the debtor asked to have the  
2 Chapter 13 dismissed, could the judge have said, I will  
3 enter the dismissal order, the closure order, but only on  
4 condition that you do not attempt to assert a time bar,  
5 should you -- as everybody knew was -- that was going to  
6 happen, go into a successive bankruptcy proceeding?  Did  
7 -- would the judge have any authority to do that?

8           MR. CLARK:  Yes, Justice Ginsburg.  Under, I  
9 think it's section 349 of the Bankruptcy Code which  
10 governs dismissals, the judge certainly has the authority  
11 to put conditions upon the issuance of the dismissal.

12          QUESTION:  Well, then why is the dismissal  
13 automatic, which is what we talked about at the very  
14 first?

15          MR. CLARK:  Well, because the debtor -- I think  
16 the procedural problem here is because the request -- the  
17 rules, at least at the point of this request for dismissal  
18 was -- was made, were a little vague as to how you request  
19 or move for a dismissal.

20          QUESTION:  All right.

21          MR. CLARK:  But the debtor has the absolute  
22 right to request the dismissal.

23          The effect of the dismissal the judge can impose  
24 a condition on to say, well, yes, we're going to dismiss  
25 the case, but we're going to enter an order that says you

1 cannot count the 6 months that the Youngs were in  
2 bankruptcy.

3 QUESTION: Well, the debtor -- the debtor has a  
4 right to reject that condition and say, if that's the  
5 condition, I don't want to dismiss, I assume. And if  
6 that's so, then the dismissal is not automatic. I mean,  
7 you can't have it both ways.

8 MR. CLARK: I don't -- I think the --

9 QUESTION: If he has a right to reject that  
10 condition, then once you say the judge may impose a  
11 condition, you have to say that -- that dismissal does not  
12 occur automatically once you request it.

13 MR. CLARK: I think in that --

14 QUESTION: You can't have it both ways.

15 MR. CLARK: I -- I'm not saying it's -- I think  
16 what I'm saying is that the court has the ability to put a  
17 condition on it. If the judge -- if the debtor doesn't  
18 wish to accept it, it's going to have to withdraw the  
19 motion to dismiss.

20 QUESTION: Right, and we don't know, until the  
21 judge enters an order of dismissal, whether he's going to  
22 put a condition on it. So, how can you say the dismissal  
23 is automatic as soon as you request it?

24 MR. CLARK: I'm saying it's -- Justice Scalia,  
25 I'm saying it's automatic in the sense that the -- the

1 debtor has an absolute right, quote/unquote -- and that's  
2 not an absolutely absolute, but the debtor has a right  
3 under Chapter 13 to have his case dismissed.

4 QUESTION: No, but -- no, but you say he doesn't  
5 because the judge can say, I'll let you dismiss it if.  
6 Whereupon, the debtor can say no -- no deal. So, it's not  
7 an absolute right.

8 MR. CLARK: Well, it's -- I think it is an  
9 absolute right or nearly so. I don't think that putting a  
10 condition on it makes it less of -- of an absolute right  
11 to dismiss.

12 QUESTION: But it doesn't mean that you can't  
13 equate the date that you file the motion to dismiss with  
14 the termination of the Chapter 13. It can't be. If the  
15 judge could put a condition on it, then the -- the 13  
16 proceeding doesn't terminate until the closure order is  
17 entered.

18 MR. CLARK: I think the -- well, I don't know  
19 that the judge could withhold or -- or delay the entry of  
20 a dismissal order. It could put a condition on it that  
21 the time in Chapter 13 won't count against the --

22 QUESTION: Let's say we disagree with you and we  
23 find --

24 QUESTION: Have you cited any cases in which  
25 this kind of condition was imposed?

1 MR. CLARK: I do not know of any cases where, in  
2 a Chapter 13, a condition has been imposed.

3 QUESTION: So, this is totally speculative,  
4 really, I think. I would assume if the -- if this problem  
5 has occurred as many times as the Government says it has,  
6 and if the solution that you suggest is available, I would  
7 have thought some judge would have thought of it.

8 MR. CLARK: Well, I think no -- no judge is  
9 going to impose the condition I think under section 349  
10 unless the IRS comes in and makes a motion or brings it to  
11 the attention of the court that --

12 QUESTION: But then the lawyers have never had  
13 enough sense to do this, as I understand it.

14 (Laughter.)

15 MR. CLARK: Well, they've gone a -- the  
16 Government I think has gone on a different track on -- on  
17 this issue.

18 QUESTION: The answer is no.

19 MR. CLARK: The answer is no, Your Honor.

20 QUESTION: In -- in all events, let's assume  
21 that we think that the dismissal occurs in -- it would be  
22 March 13. Does the difference between October and March  
23 make a difference in this case?

24 MR. CLARK: No, it does not, Your Honor.

25 QUESTION: All right. So, it doesn't make any

1 difference.

2 MR. CLARK: This -- we got into this in the  
3 court of appeals a little bit, but it really makes no  
4 difference whatsoever in the computation.

5 QUESTION: Mr. Clark, can I get your  
6 understanding of what you think would be manipulation?  
7 Because it may have something to do with my view of -- of  
8 this case. You don't assert that -- that somebody can go  
9 into a Chapter 13 proceeding with the -- with the avowed  
10 intent of not carrying it through to completion and of  
11 dismissing it in order to get the benefit of -- of the --  
12 the shorter lookback.

13 Suppose -- suppose I open a 13 proceeding and I  
14 have no intention -- I propose a plan. I have no  
15 intention of completing that plan. I ask the court to  
16 approve it. From the beginning, I have no intention of --  
17 of going through to the end of it. Isn't that a fraud on  
18 the court?

19 MR. CLARK: I would -- I would never -- I would  
20 -- I agree with you, Judge Scalia. It would be a -- an  
21 abuse of the bankruptcy process.

22 QUESTION: And if that were shown, I suppose  
23 there's no doubt that the -- that the Bankruptcy Court in  
24 the later proceeding could disallow the -- the shortening  
25 of the lookback period because of that fraud.



1 MR. CLARK: Yes, Your Honor.

2 QUESTION: Okay. So, we're talking here only  
3 about cases in which someone in good faith, at least as  
4 far as the IRS can approve, commences a 13 proceeding, and  
5 then for -- for some -- some plausible, good reason,  
6 before it is concluded, dismisses. Is that how you --

7 MR. CLARK: Yes.

8 QUESTION: -- understand the situation?

9 MR. CLARK: Yes, it is.

10 QUESTION: Whose burden is it to show that there  
11 was some reason other than just getting advantage of the  
12 automatic stay? Do you have to put in any evidence to  
13 show that? I mean, you're suggesting -- I guess Justice  
14 Scalia's question -- that there should be a fact question  
15 in every case as just what was the motivation of the  
16 petitioner who file the Chapter 13 proceeding.

17 MR. CLARK: I think there has to be -- if -- if  
18 somebody is charging that there is an abuse, there has to  
19 be some factual determination that there's an abuse. The  
20 -- under section 105, even the bankruptcy judge himself,  
21 sua sponte, can look at this and enter orders if he  
22 detects abuse. And bankruptcy judges happen to be rather  
23 good at this. They -- they see cases that emit an odor,  
24 if you will, and they are not reluctant to get involved in  
25 that.

1           QUESTION: So, suppose the bankruptcy proceeding  
2 is commenced with the intent ultimately of getting the  
3 discharge, but there's also the intent to do it in two  
4 steps. You say, I'm going to -- I want -- I want to get  
5 Chapter 13 or Chapter 13 -- 11, but I'm just going to do  
6 it in two steps. Is -- is that -- that abuse of process?

7           MR. CLARK: No, I don't believe so, Justice  
8 Kennedy. Here's what happened --

9           QUESTION: I don't understand the question.

10          QUESTION: The hypothetical is I -- the bankrupt  
11 intends to get a bankruptcy discharge, but he also intends  
12 to do it in two steps. He intends to have a Chapter 13,  
13 wait for 3 years, and then after a very short interval,  
14 refile under 7. And then hypo two is under 13.

15          I take it you can do it under 13? Couldn't you  
16 have two successive 13?

17          MR. CLARK: You could have -- you could have --

18          QUESTION: And your argument would be the same.

19          MR. CLARK: Yes, Your Honor, it would --

20          QUESTION: In either of those cases, would that  
21 -- would that be abuse of process in your view?

22          MR. CLARK: Not in my view, Justice Kennedy, and  
23 here -- here is why. If you're going to go -- if you're  
24 going to go into Chapter 13 and stay there for 3 years,  
25 you're going to get a plan confirmed during the course of

1     those 3 years.  You better, sure as heck, get a plan  
2     confirmed during those 3 years.  And you will be -- once  
3     the plan is confirmed, payments are going to be made to  
4     the IRS for those 3 years.  It may or may not pay off the  
5     debt to the IRS in full during the 3 years, but it is the  
6     debtor's best effort, according to the Chapter 13, to be  
7     paying those dollars.  So, it's not as though the IRS is  
8     getting nothing in this -- in that hypothetical situation.

9             QUESTION:  But if -- if taxes had been paid  
10    during the Chapter 13 proceeding, wouldn't they have to  
11    have been returned on the dismissal of that proceeding?

12            MR. CLARK:  If there -- Justice O'Connor, if  
13    there were no confirmation order entered prior to the  
14    dismissal --

15            QUESTION:  Right, as was the case here.

16            MR. CLARK:  -- which was the Youngs' case.  Yes.

17            QUESTION:  As was the case here.  So, presumably  
18    even if something had been paid in for the taxes, they  
19    would have been given back on the dismissal.

20            MR. CLARK:  Yes.  The magic moment in Chapter 13  
21    is the entry of the confirmation order, and once the  
22    confirmation order is entered, whatever plan payments the  
23    trustee has already accumulated, because the --

24            QUESTION:  Well, why -- why do you think it's  
25    improper to equitably toll that lookback period for this

1 situation?

2 MR. CLARK: I -- I do not think it is proper at  
3 all to -- I -- there are several reasons why I think it's  
4 improper.

5 First of all, the language of the statute itself  
6 is very plain and straightforward and has no provision for  
7 equitable tolling or any tolling.

8 QUESTION: We have held that equitable tolling  
9 applies in similar statutes which have no provision for  
10 equitable tolling.

11 MR. CLARK: Yes, I'm -- I -- I know that the --  
12 I know that you have, Mr. Chief Justice.

13 QUESTION: Well, I -- I thought your point is --  
14 one of your points was that statutes of limitations are  
15 different from this, that this is not a statute of  
16 limitations.

17 MR. CLARK: It's -- my point is that it is --  
18 this is a part of the definition of which taxes can be  
19 discharged in bankruptcy. There are several time elements  
20 to defining which taxes can be discharged in bankruptcy.  
21 There is this 3-year lookback period. There is a 2-year  
22 period where a taxpayer has filed a return late and then  
23 we go to a 2-year lookback. And then there's a third 240-  
24 day period that the taxpayer/debtor must satisfy and that  
25 is 240 days from the date of assessment. Now, the debtor

1 must meet all three of these to be able to discharge the  
2 taxes.

3 In the Youngs' case, the taxes were assessed  
4 promptly, about 2 and a half months after they filed their  
5 tax return. They clearly met that one. The -- they did  
6 not file a late return because they got extensions to file  
7 their return in October of 1993. So, they -- that one  
8 doesn't apply. And the only one in question in this  
9 particular case then is the 3-year, and how do you measure  
10 3 years and do you toll the 3 years for the period of the  
11 prior Chapter 13.

12 QUESTION: Mr. Clark, is the Government correct  
13 in -- in pointing out that the debtor here could, instead  
14 of seeking dismissal of the 13 and starting a 7, simply  
15 have moved to convert the 13 into a 7? Is that correct?

16 MR. CLARK: That is correct, Your Honor.

17 QUESTION: If -- if the debtor had done that,  
18 the 3-year period would continue to have been calculated  
19 as it originally was under the Chapter 13 proceeding.

20 MR. CLARK: Yes, Justice Souter, that is  
21 correct.

22 QUESTION: Would -- would it have been error if  
23 -- if the judge or any judge in a case like this, when --  
24 when confronted with a motion or a request to dismiss,  
25 simply questioned the debtor whether it was the debtor's

1 intent to start a Chapter 7 proceeding, and if the answer  
2 was yes, for the judge simply to say, well, I will treat  
3 your motion as a motion for a conversion and we'll grant  
4 that? Would that have been error on the judge's part?

5 MR. CLARK: I think it would be error for a  
6 judge to take a motion to dismiss a Chapter 13 and make it  
7 a chapter -- and say, we are going to make it instead a  
8 Chapter 7 case.

9 QUESTION: Even when the debtor says, yes, my  
10 plan, my intent is to -- is to initiate Chapter 7  
11 proceedings.

12 MR. CLARK: Yes. Justice Souter --

13 QUESTION: The -- I take it the only harm to the  
14 debtor in that case would simply be the -- the argument  
15 about the 3-year lookback because the debtor would be  
16 getting exactly otherwise exactly what the debtor wanted,  
17 i.e., a Chapter 7 filing.

18 MR. CLARK: Yes, Justice Souter. But keep in  
19 mind in the -- in the case of either dismissal or  
20 conversion, in the example in the Government's brief, the  
21 -- it does not do any good to seek conversion -- I'm sorry  
22 -- to dismiss and then refile unless you're toward the end  
23 of the 3-year period in any event. So that when the case  
24 is dismissed, now the 3-year period has expired, and now  
25 you go the next day and you file your Chapter 7, saying,

1 well, I've been -- it's been now more than 3 years since  
2 the filing of the return.

3 QUESTION: Yes.

4 MR. CLARK: But in the meantime, of course, the  
5 plan payments are being made, hopefully, to the Government  
6 and to other creditors for the 2 years and however many  
7 months.

8 QUESTION: Well, that -- that's so. But, I  
9 mean, even in the case in which there has been a  
10 confirmation under -- under the Chapter 13 and plan  
11 payments have been made, it may very well be that the  
12 amount of tax liability that has actually been paid could  
13 be minuscule, so that it would be very much in the  
14 debtor's interest to -- to start a new Chapter 7 and save  
15 whatever the balance due is on the taxes.

16 MR. CLARK: Well, except that, Justice Souter,  
17 the problem is that the tax payments are not going to be  
18 minuscule during the Chapter 13.

19 QUESTION: Well, whether they're minuscule or  
20 not, if they're not 100 percent, the debtor still gains  
21 something by going -- so far as the Federal taxes are  
22 concerned, by dismissing and starting a Chapter 7 because  
23 whatever the balance due is, in -- on the facts of a case  
24 like this, the -- the debtor is going to -- going to  
25 obtain.

1 MR. CLARK: That is correct, Justice Souter.  
2 But again, I would point to the fact that the Government  
3 is getting something. It may not get the whole amount.  
4 And in tax collection in general, apart from bankruptcy,  
5 even when bankruptcy is not in the picture at all, the way  
6 the Government is trying to collect taxes is through  
7 installment payments as the Youngs --

8 QUESTION: Well, that's right. But I think the  
9 Government's answer to that is unless we, in fact, make a  
10 compromise agreement, we're entitled to 100 cents on the  
11 dollar. And the -- the fact that -- that the Government  
12 may get 50 cents on the dollar before you go from 13 to 7  
13 I -- I don't think really disparages the Government's  
14 argument any.

15 QUESTION: Or it can be, as it was here, the  
16 Government got nothing.

17 QUESTION: The Government got nothing.

18 MR. CLARK: The Government did get nothing in  
19 this situation, Justice Ginsburg, for the 6 months.

20 QUESTION: And would there -- in -- in this very  
21 case where the Chapter 7 was started the day before the  
22 Chapter 13 was closed, was there any advantage, other than  
23 wiping out the lookback period, to instituting two  
24 proceedings rather than having the 13 converted to a 7?

25 MR. CLARK: Well, the reason the Chapter 7 was



1 filed was because I think other creditors were descending  
2 upon the Youngs. They had dismissed their Chapter 13 back  
3 in October, and that, of course, put everybody back into  
4 the status quo ante, except with respect to the sale of  
5 their house, of course. But the creditors now were free,  
6 once the case has been dismissed, to come forward again.

7 QUESTION: Well, we're getting into filing  
8 versus dismissal.

9 MR. CLARK: Yes.

10 QUESTION: But if -- if we take the order of the  
11 court as what counts, there wouldn't have been any period  
12 in which other creditors could have jumped in because the  
13 Chapter 13 hadn't yet been closed.

14 So, from the point of view of the debtors here,  
15 was there any advantage that they gained other than wiping  
16 out the lookback period?

17 MR. CLARK: With -- with the filing of the  
18 Chapter 13, they obviously gained the advantage also of  
19 eliminating their other debts.

20 QUESTION: I mean, when they got to the point of  
21 saying we're not going to make it under this plan, so  
22 we're going to have to quit the 13, at that point they  
23 could have done -- either asked for conversion to 7 or  
24 started a new proceeding. Is there any difference from  
25 their viewpoint other than they'd get the benefit under a

1 reading of the statute of putting the Government out of  
2 the picture because the 3-year lookback has run?

3 MR. CLARK: I'm not quite sure I understand the  
4 question, that they -- Justice Ginsburg. I think they --  
5 they get the -- when they -- when they dismiss and then  
6 refile, they obviously get the benefit of discharging  
7 their other taxes in -- their other debts, non-tax debts.

8 QUESTION: Thank you, Mr. Clark.

9 Ms. Millett, we'll hear from you.

10 ORAL ARGUMENT OF PATRICIA A. MILLETT

11 ON BEHALF OF THE UNITED STATES

12 MS. MILLETT: Mr. Chief Justice, and may it  
13 please the Court:

14 I would like to address first the -- there's  
15 been some discussion about protections that maybe or maybe  
16 could not occur in a Chapter 13 proceeding to prevent the  
17 -- the Government from losing its claim. And in fact,  
18 that rarely, if ever, is capable of happening because we  
19 don't know -- debtors don't telegraph to us at the time  
20 they're in Chapter 13 or dismissing their Chapter 13 --  
21 that they plan to file a second bankruptcy. And if you  
22 don't know that's going to happen, you can't prove bad  
23 faith. You can't ask for conditions, or it would be  
24 virtually impossible to do that.

25 QUESTION: Well, sure you can. You can ask the

1 bankruptcy judge to inquire and -- and say if -- if that  
2 is the plan, Your Honor, we -- we request that it not be  
3 dismissed but rather converted.

4 MS. MILLETT: I think --

5 QUESTION: Or that that be a condition of -- of  
6 the dismissal that you not -- that you not refile.

7 MS. MILLETT: I think there's two difficulties  
8 with that approach, and the first that it would be an  
9 enormous burden in every Chapter 13 case that is filed and  
10 then sought to be dismissed -- and an awful lot -- the  
11 vast majority are -- to have that inquiry undertaken.

12 And secondly, there is -- there is no authority  
13 under the code that we're aware of that allows a court to  
14 condition -- a voluntary dismissal, which they have as of  
15 right, on willingness to forego a discharge in a future  
16 bankruptcy proceeding.

17 QUESTION: But, I mean, let's assume someone has  
18 in all good faith commenced a Chapter 13 and has in all  
19 good faith dismissed it because, part the way through it,  
20 said, you know, I think I can make it on my own now, and  
21 -- and then, you know, sometime after that, decides, no, I  
22 can't make it and -- and files another bankruptcy  
23 proceeding under 7. No bad faith. You would still want  
24 to alter the 3-year lookback in the statute to make it --  
25 to make it what? 5 years or whatever.

1 MS. MILLETT: We would -- we would want the  
2 3-year lookback period to tolled during the time the  
3 automatic stay prevented us --

4 QUESTION: That's not what the statute says.  
5 There's no fraud here. There's -- there's nothing going  
6 on. You're just saying here's a loophole in the tax law  
7 or the bankruptcy law, that aspect of the bankruptcy law  
8 dealing with taxes. I'll call it a tax loophole. And  
9 you're saying, you know, courts, repair this loophole.  
10 That's not what courts normally do.

11 MS. MILLETT: Well, as the Chief --

12 QUESTION: I mean, that's the fun of practicing  
13 tax law.

14 (Laughter.)

15 QUESTION: Bankruptcy law.

16 QUESTION: You take all the joy out of it.

17 (Laughter.)

18 MS. MILLETT: That's what we do.

19 As the Chief -- as the Chief Justice pointed  
20 out, in fact, equitable tolling -- in virtually every case  
21 that I'm aware of, equitable tolling is applied when the  
22 statute is silent, and in fact when it may provide  
23 specifically for tolling in other circumstances, as  
24 occurred in *Bowen v. City of New York* and *American*  
25 *Pipefitters v. Utah*. And equitable tolling has not --

1 never been held to turn upon the existence of bad faith.

2 QUESTION: This is not equitable tolling in --  
3 in the statute of limitations sense. What is involved  
4 here is not the termination period for bringing a cause of  
5 action, but rather the quite different question of when  
6 taxes will be discharged and when they don't. Congress  
7 provided for, you know, a 3-year lookback. In some  
8 circumstances, they get the benefit of -- of less than  
9 that if -- if they brought the two -- but at least, where  
10 there's been no fraud, at least where you haven't been  
11 able to show that -- that they were gaming the system  
12 intentionally, I don't see why equity should -- should  
13 come -- there is legislation pending to close this gap,  
14 isn't there?

15 MS. MILLETT: There is and there has been for a  
16 number of --

17 QUESTION: Well, I don't know why we don't leave  
18 it to Congress.

19 MS. MILLETT: Well, Your Honor, there's --  
20 there's a number of responses to that. And the first is  
21 we would respectfully disagree that this is not  
22 sufficiently analogous or akin to a statute of limitations  
23 that the First Circuit described in this case to merit  
24 equitable tolling. A time period does not have to be a  
25 statute of limitations to be tolled. In *Zipes v. TWA*, in

1 Honda v. Clark, this Court has applied equitable tolling  
2 to other types of time limitations, and within the  
3 bankruptcy context, which is a specialized context, this  
4 lookback period has the same operation and effect as a  
5 traditional statute of limitations. It prevents the  
6 assertion of stale claims, stale claims defined as ones  
7 that the Government has allowed to linger. It -- it  
8 extinguishes a claim if the period does lapse as  
9 effectively as a bar on the time limitations.

10 QUESTION: It doesn't extinguish it. The -- the  
11 Government is just thrown in with the other -- with the  
12 other creditors, isn't it? I mean --

13 MS. MILLETT: Well, this --

14 QUESTION: -- they may come out without any  
15 money, but it's just -- the -- the question is whether the  
16 Government is going to have the preferred position of not  
17 having its debt discharged. It will be thrown in with the  
18 other general creditors.

19 MS. MILLETT: That's not entirely correct,  
20 Justice Scalia, for -- for -- in two ways. First of all,  
21 there are two -- there are two aspects to the priority.  
22 There's a priority as against other creditors, but what is  
23 at issue here, and again what is at issue in virtually all  
24 of these Chapter 7 cases, or these no -- no-asset Chapter  
25 7 cases, is the discharge. That's what's at issue here,

1 and the discharge is -- does extinguish a claim as much as  
2 a bar on -- on filing.

3 QUESTION: Well, I know, but it -- but it  
4 discharges the Government's claim just the way it  
5 discharges the general creditors' claims. The Government  
6 is thrown into that pot instead of having the preferred  
7 position that you can pay off everybody else 3 cents on  
8 the dollar, but not the Government. All that happens is  
9 the Government goes in with the other creditors. Isn't  
10 that --

11 MS. MILLETT: Taxes have always been different.  
12 And the -- the treatment of this is simply a 3-year --  
13 3-year period that -- that the debtor has to run out, and  
14 it doesn't afford the Government any capacity to enforce  
15 the claim would be, I think, an extraordinary assumption  
16 on the part of Congress.

17 QUESTION: Well, what is your -- what is your  
18 main argument? Is it to ask us to apply the principle of  
19 equitable tolling to this section 105 lookback provision?

20 MS. MILLETT: Section 507.

21 QUESTION: Yes.

22 MS. MILLETT: Yes, that is -- that is our --  
23 that is our submission. The Congress --

24 QUESTION: And what's your best case for that?

25 MS. MILLETT: The body of equitable tolling

1 cases, but the most analogous one I think is Honda v.  
2 Clark -- Clark and Burnett v. New York Central Railroad,  
3 both of which are cited in our brief. Honda v. Clark  
4 involved not a traditional statute of limitations, but the  
5 time for filing proofs of claim under the Trading with the  
6 Enemy Act, which was specifically modeled on the  
7 Bankruptcy Act. And there -- there the Court held that it  
8 would be equitably -- equitably -- the time period would  
9 be equitably tolled --

10 QUESTION: Why isn't that a traditional statute  
11 of limitations?

12 MS. MILLETT: I'm sorry?

13 QUESTION: Why isn't that a traditional statute  
14 of limitations? Your claim is invalid unless you file it  
15 within a certain period.

16 MS. MILLETT: Well, within the bankruptcy  
17 context, in fact a claim can still be paid as long as it's  
18 on the schedules. The filing of a proof of claim does  
19 not --

20 QUESTION: No, I'm not talking about this case.  
21 I'm talking about the case you're citing us as -- as being  
22 analogous to this one. You said it didn't involve a  
23 traditional statute of limitations. Why did that not  
24 involve a traditional --

25 MS. MILLETT: The -- the reasoning of the Court



1 in Honda v. Clark was -- was that Congress modeled -- the  
2 proof of claim there may have been closer to an actual  
3 statute of limitations, but the rationale the Court  
4 applied was looking to the treatment of proofs of claim in  
5 the Bankruptcy Code, and that was the analogy that  
6 Congress was drawing at the time it enacted the Trading  
7 with the Enemy statute, and that those proofs of claim --  
8 it was in the bankruptcy context --

9 QUESTION: Maybe, but Trading with the Enemy  
10 statute itself contained what was a statute of  
11 limitations, and in the case at hand, we were equitably  
12 tolling what was effectively a statute of limitations.

13 What's your other best case?

14 MS. MILLETT: And Nassau Smelting v. Refining  
15 Works, which is discussed in Honda v. Clark, was a  
16 bankruptcy case where the proof of claim was not filed  
17 until a year after the deadline and the Court allowed  
18 participation nonetheless. And again, it's the nature of  
19 the proof of claim that's --

20 QUESTION: Those are also -- the difficult issue  
21 I think in this case is exactly what Justice Scalia has  
22 been saying, that this isn't a traditional statute of  
23 limitations. You have to do one of two things. You  
24 either have to say the word 3 years shall be read 3 years  
25 plus days tolled. That's one thing you could do. Or the

1 second thing you could do is you could look to 105(a) and  
2 you could say that the order that can be issued is an  
3 order pay money -- this is in the section 7 -- pay money  
4 as if this were the section 13 that hadn't been dismissed.

5 Now, both of those, the question would be, does  
6 -- does the judge have the authority to do that? And  
7 looking simply to statute of limitations provisions  
8 doesn't answer that question. It -- it provokes the  
9 question. It proves you might be right, but -- but the  
10 worrying thing is whether you can just stick those words  
11 in, either plus days tolled, or read 105(a) in so broad a  
12 manner.

13 So, those are the -- I'd like to know what  
14 should we do and what's the authority for that.

15 MS. MILLETT: To take the first -- the first --  
16 first scenario first, the proposition for reading the  
17 3-year lookback period as 3 years plus --

18 QUESTION: Plus days tolled.

19 MS. MILLETT: 3 years plus. In deciding what  
20 the character of the lookback period is, whether it's akin  
21 to the statute of --

22 QUESTION: Could you speak up a little bit, Ms.  
23 Millett?

24 MS. MILLETT: In deciding what the -- the  
25 character of the lookback period is, equitable tolling

1 does apply in Zipes in filing a proof of -- filing of a  
2 claim with the Equal Employment Opportunity Commission.  
3 There the Court described it as similar to a statute of  
4 limitations, but it was not a statute of limitations. So,  
5 equitable tolling does not require --

6 QUESTION: Which case was that?

7 MS. MILLETT: Zipes v. TW -- Trans World  
8 Airlines.

9 That does not require the presence in the actual  
10 statute of limitations. It has to be a time limit. If  
11 the question is whether Congress would have intended that  
12 type of time limit to be subject to tolling principles.  
13 And the -- we can either assume the lookback period would  
14 have for many of the policy reasons that have been  
15 discussed -- the -- the conclusion that results if we  
16 decide that it is not something that Congress would have  
17 intended to be subject to equitable tolling is that the  
18 3-year lookback period is an empty gesture as far as  
19 protecting the Government. The Congress --

20 QUESTION: You have no problem convincing me  
21 about what I'd call the equitable merits of your side.  
22 The problem you have, as far as I'm concerned, is how to  
23 work, which route do we take and what's the authority for  
24 doing it, just what I asked in the first place.

25 MS. MILLETT: And that is I think -- and it's

1 both prongs of your -- of your question. It is -- we  
2 think that the nature of the time limitation is  
3 sufficiently similar within the bankruptcy context. This  
4 is how you enforce claims within the bankruptcy context.

5 QUESTION: Well, I don't think it is similar. I  
6 -- I -- I mean, the only thing -- the only respect in  
7 which it's similar is that it involves time, but all of  
8 the other cases that -- that you refer us to, the statute  
9 of limitations proper, Zipes, they're all cases in which  
10 action by the party seeking to enforce something is  
11 limited by a period of time. He has to do it within a  
12 certain time or else it's no good. Now, whether you call  
13 it proof of claim or anything else, that's -- that's the  
14 scenario.

15 In this case, it's -- it's not a matter of  
16 whether the Government has filed in time at all. This  
17 lookback is quite a -- quite a different animal. It's how  
18 far back you -- you can go in -- in deciding which claims  
19 cannot be discharged in bankruptcy.

20 Now, it involves time. I guess, if you think  
21 that's enough of a commonality, then -- then I'd agree,  
22 but gee, I -- I don't think that's enough to -- to make me  
23 think that we have the -- the authority by long tradition  
24 to rewrite a statute so that where it says 3 months, it's  
25 going to be 3 months -- 3 years, it's going to be on our

1 authority 3 years plus some other period of time.

2 MS. MILLETT: I think this is exactly the  
3 situation that you described. It's like a typical statute  
4 of limitations, and that is unless the Government takes  
5 action within 3 years to enforce its claim, unless it acts  
6 within those 3 years, it will, for all intents and  
7 purposes and all practical purposes, within the unique  
8 context of bankruptcy proceedings, have no claim left. It  
9 will be discharged. There's nothing --

10 QUESTION: But it's not a limitation on the  
11 Government's action within 3 -- it doesn't say the  
12 Government has to act within 3 years. It says when you  
13 have a bankruptcy proceeding, you look back only 3 years.  
14 It has nothing to do with how soon the Government has to  
15 come forward. The Government has absolutely no control  
16 over that lookback.

17 QUESTION: If the Government comes forward after  
18 3 years, it loses.

19 MS. MILLETT: That's right. It eliminates --  
20 and the legislative history describes this quite -- from  
21 Congress' vantage point that this was an enforcement  
22 period, a collection time, and that -- that if the -- it  
23 would eliminate stale claims, which this Court said in  
24 Zipes is one of the purposes of a statute of limitations.  
25 It would -- it would extinguish liability if the

1 Government doesn't act within the particular period of  
2 time, which again is akin to a traditional statute of  
3 limitations. The --

4 QUESTION: I have one -- one technical question.  
5 I should know the answer. Suppose before the Chapter 13  
6 proceeding is commenced, the Government says, oh, we've  
7 got a lot of taxes here and this debtor may file Chapter  
8 13. Can you file a lien against his property which  
9 somehow protects you?

10 MS. MILLETT: If we -- if we have assessed the  
11 taxes, which in itself requires a 90-day period as a  
12 matter of law, but if we have assessed the taxes, which we  
13 had here, we can go file a notice of federal tax lien  
14 which would protect us.

15 What happened in this case --

16 QUESTION: And that would protect you.

17 MS. MILLETT: That would protect us, but it's  
18 important to keep in mind how tax collection works. The  
19 IRS, as a matter of policy and as a matter of some  
20 statutory provisions, tends not to descend immediately  
21 upon taxpayers the second there's a liability.

22 In this case, we had been working with the  
23 Youngs, and they had been making some payments. And it's  
24 routine for us to try voluntary compliance. It's good  
25 policy and that's what we do, and it wasn't -- we tried

1 to --

2 QUESTION: If you -- if you imposed a lien,  
3 could you still work with the taxpayer? The lien doesn't  
4 prohibit you from trying to work it out, does it?

5 MS. MILLETT: We -- we could have, but it  
6 certainly has some consequences for -- for the taxpayer.  
7 And -- and again we -- we try -- we try to work these  
8 things out without going to that sort of adversarial level  
9 of proceedings. And there had been payments being made  
10 here.

11 But if I could get back to Justice Breyer's --

12 QUESTION: And just -- just so I get the  
13 technical --

14 MS. MILLETT: Sure.

15 QUESTION: But once the Chapter 13 proceeding  
16 commences, you --

17 MS. MILLETT: We cannot impose --

18 QUESTION: -- cannot impose a lien.

19 MS. MILLETT: Absolutely not. That's part of  
20 the automatic stay.

21 If I could get back to Justice Breyer's  
22 question. What we think is important here is -- is the --  
23 the combination of the two factors that you discussed is  
24 that this is sufficiently like a statute of limitations,  
25 and Congress intended it to operate like a statute of

1 limitations, and it does operate like a statute of  
2 limitations within the bankruptcy context. And we've  
3 combined that with the unique equitable powers the  
4 bankruptcy courts have and the unique operation of  
5 equitable principles within the bankruptcy context. So,  
6 it's not an either/or. I think the combination of those  
7 is a sufficient reason as to why tolling of this lookback  
8 period would be appropriate.

9 QUESTION: Ms. Millett, Mr. Clark said in his  
10 brief that, well, if you're going to do this for taxes,  
11 the same logic would apply to wage claims that have a  
12 priority. What else did he say? Employee benefit claims.  
13 Is that -- is that so?

14 MS. MILLETT: Those are the only two nontax  
15 provisions that have these type of --

16 QUESTION: So, could you --

17 MS. MILLETT: -- lookback periods. And I -- I'm  
18 assuming that it would, in fact, apply. I -- I haven't  
19 analyzed -- the same analysis would apply and assuming  
20 that the same congressional purpose would be shown and the  
21 consistency of congressional purpose to apply equitable  
22 tolling -- it would apply there.

23 It doesn't actually happen to be a problem in  
24 that area because those -- for two reasons. Those types  
25 of -- those two claims involve very, very short time



1 limits, 90 and 180 days, not 3 years. And so, in order to  
2 avail themselves of this procedural roundabout, they would  
3 have to file two bankruptcy proceedings very closely on  
4 top of each other, and that just doesn't happen.

5 QUESTION: Well, as they did here.

6 MS. MILLETT: No. I mean, they would have to  
7 file their first one, and then within 3 months to get out  
8 of the 90 days, you'd have to file another one. This --  
9 the first one lasted I guess approximately 6 months.

10 QUESTION: Ms. Millett, there is legislation  
11 pending to do what? How is it drafted?

12 MS. MILLETT: It -- it is drafted to provide for  
13 tolling of the lookback period during the pendency of --  
14 during the time an automatic stay in a prior bankruptcy  
15 case.

16 QUESTION: As an amendment to section 105 or  
17 what?

18 MS. MILLETT: I think it's to section 507, which  
19 is -- 507(a)(8), which is what provides the lookback  
20 period itself. But that legislation --

21 QUESTION: Is it part of the overall Bankruptcy  
22 Code revision?

23 MS. MILLETT: It is. It has not been --

24 QUESTION: You know, the big bill.

25 MS. MILLETT: The big bill.

1 QUESTION: Which may or may not go anywhere.

2 MS. MILLETT: Which may or may not go. There  
3 are -- there is -- there are, you know, different bills  
4 before Congress. They've both been passed. Conferees  
5 have been appointed. They aren't fighting over this  
6 provision, but there are lots of other provisions that  
7 they are in disagreement over.

8 I also think it's important to keep in mind what  
9 -- what we would have to assume Congress intended were we  
10 to read the lookback period as something not subject to  
11 tolling. Now, there have been some suggestions that  
12 people like to avail themselves of tax loopholes. That's  
13 usually done to decide how much taxes you owe.

14 What we're talking about here is an admitted  
15 acknowledged tax liability that they want to get out of  
16 paying and that -- that we want to hold that -- that  
17 debtor --

18 QUESTION: Well, if you were the lawyer for the  
19 Government faced with a taxpayer that had a big tax  
20 liability and it looked like bankruptcy might be looming,  
21 what would you advise the Government to do?

22 MS. MILLETT: Depending on this Court's holding,  
23 there -- I have to say in all candor the volume -- the  
24 sheer volume of cases that the IRS handles in bankruptcy  
25 makes much -- and it's handled often at the initial

1 stages, as it was here, not by lawyers, but by special  
2 agents in the bankruptcy proceeding. I think we would  
3 have to go to a system where we would go to the tax liens  
4 immediately, but that's not what --

5 QUESTION: No doubt, but absence that, what is  
6 the best way for the Government to protect itself, do you  
7 think?

8 MS. MILLETT: To immediately as soon -- as soon  
9 as they assess, immediately file a tax lien. And -- and  
10 that's -- normally we go -- there are administrative --  
11 other administrative means of collection. We try to work  
12 things out. We have offers in compromise, and there's no  
13 reason that Congress would have intended our tax system to  
14 go that way and to be driven by these bankruptcy  
15 procedures.

16 Again, to get back, we're talking about whether  
17 the lookback period --

18 QUESTION: Well, that's how they wrote it. I --  
19 I mean, you say -- Congress often does not enact perfect  
20 statutes. It -- it leaves some holes that it should have  
21 thought about and -- and we don't normally think it's our  
22 job to patch it up. I -- I agree with you. I -- I find  
23 it unlikely that Congress intended this to work this way,  
24 but it is just one of the eventualities that they didn't  
25 have in mind, and that's why we have things called

1 statutory amendments. We -- we don't run to the courts  
2 and ask the courts to fix them.

3 And -- and I'm just very leery of extending our  
4 -- our powers, the equitable powers that we've used in the  
5 past, for extending statute of limitations, tolling  
6 statute of limitations to this quite different situation  
7 of a lookback. I -- and there are other lookbacks in the  
8 Internal Revenue Code and there are other time provisions,  
9 and I -- I'm not willing to say whenever there's a time  
10 provision, it's an invitation to us, if -- if Congress  
11 hasn't foreseen every problem, to adjust it.

12 MS. MILLETT: I think -- I think that given the  
13 equitable powers of bankruptcy courts, most of those --  
14 many of those time limits are in fact considered to be  
15 subject to equitable tolling that are in the Bankruptcy  
16 Code, although I don't know that this Court, other than  
17 the proof of claim context, has ruled on the question.

18 But in deciding -- Congress legislated against  
19 backdrop principles of equitable tolling. In deciding  
20 whether this is the type of thing that should be subjected  
21 to equitable tolling, this Court made clear in American  
22 Pipe & Construction v. Utah that it's a question of -- of  
23 congressional intent, not whether you think the provision  
24 is substantive or procedural.

25 And we think congressional intent drawn from the

1 structure of the statute, the network of tolling  
2 provisions, limitations on filings, conversion rules, to  
3 think that all of those were put in by Congress not to  
4 protect the Government's enforcement period but simply to  
5 channel debtors into one particular procedural route for  
6 not paying taxes is a highly unlikely assumption.

7 And to think that Congress would -- to read the  
8 lookback period as intentionally empowering debtors not to  
9 fight about how much taxes they owe, but to take an  
10 admitted tax liability and say that because of what we do  
11 in bankruptcy, not because of anything the Government did  
12 in becoming a creditor or in enforcing its claim, we get  
13 to decide that you will not have prioritized status. You  
14 will have, in some cases, not a minute of enforcement  
15 activity, and we don't have to pay our taxes. That makes  
16 the Government not like other creditors at all, not at the  
17 same level, but in the -- the States and Federal  
18 Governments will be in the worst position of anyone in  
19 bankruptcy. We don't get to choose our debtors. We don't  
20 get to seek the security in advance, and we will have no  
21 capacity to enforce, other than at the mercy of the debtor  
22 who initiates these proceedings.

23 And I think -- I understand this isn't a perfect  
24 fit with the statute of limitations, but I think taking  
25 those considerations and the -- the consequences of

1 accepting the alternative view of the lookback period, the  
2 implausible assumptions that would assume Congress made  
3 and the implausibility of this operation of the statute as  
4 a whole combined with the traditional equitable powers of  
5 Bankruptcy Court and the role of equity in these  
6 proceedings, all of that packaged together is sufficient  
7 to allow this Court to toll a lookback period and  
8 effectuate Congress' intent, which -- which is --

9 QUESTION: May I ask you a question about your  
10 view of the automatic tolling statute? As I understand  
11 this case, the notice of dismissal of the Chapter 13  
12 proceeding was filed in October, and the actual dismissal  
13 was not until March 13 of the following year. And it was  
14 the day before that that they filed the Chapter 7 so there  
15 --

16 MS. MILLETT: That's right.

17 QUESTION: -- was the base of their changing  
18 their mind or something like that.

19 Is it your view that the automatic stay was in  
20 effect between October and March?

21 MS. MILLETT: Absolutely, and --

22 QUESTION: Because I think your opponent seemed  
23 to suggest maybe that wasn't so.

24 MS. MILLETT: Right. In 1307(b), which is the  
25 provision that allows automatic -- it's 11 U.S.C. -- that

1 allows voluntary dismissal by the debtor, provides that  
2 the -- that the debtor may -- may ask the court, but that  
3 the court shall dismiss the case. And so, until a case  
4 has been dismissed or closed, neither of which would have  
5 happened under this provision until March, or a discharge  
6 has been granted, which obviously did not happen in this  
7 case, the automatic stay remains in effect. And we were  
8 unable to do any -- take any steps to enforce our claim.

9 QUESTION: And is it true that in this case  
10 there was some kind of report filed on February 2? So,  
11 there was activity in the case.

12 MS. MILLETT: There was. A trustee had filed a  
13 report, and there had been -- the court set time when it  
14 got the -- the notice, it set the time for the hearing on  
15 this or time for action on this. So, it was in fact --  
16 and again, if -- if we're going to suppose that courts can  
17 impose conditions on these dismissals, that would again  
18 require -- assume that the case is alive and is still  
19 before the court.

20 But I think the statute is quite clear that it  
21 -- that the debtor does not dismiss the case; the court  
22 does. And that didn't happen until March.

23 And again --

24 QUESTION: Are you aware of any cases of this  
25 kind in which the court has imposed a condition relating

1 to this problem?

2 MS. MILLETT: No, and again because I think the  
3 statute doesn't --

4 QUESTION: Doesn't authorize.

5 MS. MILLETT: I don't want to say it doesn't in  
6 case we get to some situation where we might want to try,  
7 but it doesn't seem to -- clearly to allow that and I  
8 think it would be extraordinary reading of the Bankruptcy  
9 Code to think that a court can impose, as a condition on a  
10 voluntary dismissal that's entirely within the discretion  
11 of the debtor to seek.

12 QUESTION: Well, that --

13 MS. MILLETT: We do not accept --

14 QUESTION: That -- that brings me to this  
15 question. Suppose I thought that section 105(a) was the  
16 best basis for an authority for a tolling rule under the  
17 abuse of process. Would it follow that the tolling rule  
18 has to be on a case-by-case basis to determine if they're  
19 good faith, or can I say because of abuse of process,  
20 we're going to have a general tolling rule?

21 MS. MILLETT: The Court has the authority to  
22 impose uniform rules of equitable tolling. It did that in  
23 the Burnett v. New York transportation case. That was a  
24 Federal employer liability action --

25 QUESTION: But is that consistent with my



1 assumed approach of just hinging the rule on the abuse of  
2 process?

3 MS. MILLETT: I think what it would be  
4 consistent -- equitable tolling as -- equitable estoppel  
5 tends on the behavior of bad faith of the person who's --

6 QUESTION: Yes.

7 MS. MILLETT: -- here the -- the debtor.  
8 Equitable tolling turns upon the legal disabilities  
9 imposed on the person who wants to enforce their claim.  
10 And that isn't going to change from case to case, as in  
11 Bowen v. City of New York where this Court again applied a  
12 class-wide rule of tolling because the Government's  
13 actions with the Social Security plaintiffs in that case  
14 had been the same.

15 QUESTION: Your argument doesn't hinge on bad  
16 faith, anyway, as I understand it.

17 MS. MILLETT: No. No, it doesn't.

18 QUESTION: You -- you assert that -- that  
19 without the tolling, we would frustrate Congress' intent  
20 even where there has been no bad faith, that Congress  
21 would not have intended where there's good faith to give  
22 the person an added -- an added couple of years of -- of  
23 no taxes.

24 MS. MILLETT: Of no taxes or to get out of  
25 paying their taxes or to relegate the Government to this

1 lowest subsidiary position within the bankruptcy process.

2 But uniform rules have been applied by this  
3 Court when that circumstance doesn't change, and in this  
4 case for purposes of equitable tolling, what's not going  
5 to change is that the Government hasn't had the time  
6 Congress gave it in the statute. That's going to be the  
7 same.

8 Beyond that, amount of tax liability shouldn't  
9 matter. That's a judgment for -- for Congress and the  
10 Government to take. It's not -- it shouldn't -- equitable  
11 tolling shouldn't turn upon that, and the bad faith or  
12 good faith of the taxpayer wouldn't be determinative.

13 And in that regard, I think it's important to  
14 keep in mind that if we had a test where we had to show  
15 bad faith in every one of these cases, again we're talking  
16 about an enormous volume of bankruptcy cases. And -- and  
17 showing -- in those -- in those circuits where they have  
18 applied this sort of case-by-case equitable tolling, the  
19 Government has had to be very selective in which cases it  
20 decides to make that showing, giving a lot of people a  
21 pass on taxes. And those proceedings can take 9 to 12  
22 months. You have to have discovery and full-blown  
23 hearings on people's faith and intentions and that really  
24 is not what the purpose of the Bankruptcy Code is for.

25 QUESTION: Ms. Millett, would you remind me? I

1 think that Congress wanted the Government to have 3 years,  
2 and that was a cutting back on what the Government had  
3 before. Right?

4 MS. MILLETT: Absolutely.

5 QUESTION: They said, we gave you too much.  
6 We're now giving you 3 years.

7 MS. MILLETT: Absolutely, and that's why I think  
8 it -- it's extraordinary to think that Congress --  
9 Congress went to the steps that you would have to decide,  
10 if you decide this is not a collection period and akin to  
11 a statute of limitations, because prior to 1966, these tax  
12 claims, regardless of age, were all entitled to priority  
13 and were all nondischargeable. And what Congress did in  
14 1966 was decide it was going to balance competing  
15 interests within the bankruptcy process and condition the  
16 Government's entitlement to that special status on its  
17 diligent enforcement of those tax claims. And that is why  
18 it's like a statute of limitations.

19 But to hold otherwise is to say that what  
20 Congress went to in 1966 was a situation where everything  
21 was protected to where nothing is protected except at the  
22 sole discretion and choice of the debtor proceeding in  
23 bankruptcy. The Government will be left with no capacity.  
24 We can't choose our -- we can't choose our debtors, and we  
25 will -- and they have the entire authority to prevent any

1 enforcement. And we're not just talking about enforcement  
2 of claims that arose before they filed bankruptcy. If you  
3 have bankruptcy proceedings that go on for more than 3  
4 years, as many do, this -- this rule would apply to tax  
5 claims that arose while the case was in bankruptcy and the  
6 3 years ran.

7 And that in fact is what has happened in a case  
8 we have pending in the Fifth Circuit. If they can  
9 discharge not just the things that you may have had a few  
10 months before -- or a year before the bankruptcy was  
11 filed, tax claims that we have never had a millisecond  
12 outside the freedom of the automatic stay to enforce will  
13 be extinguished, not because of anything the Government  
14 did or did not do, but solely because of the procedural  
15 steps taken by the debtor in Bankruptcy Court.

16 And we think it's extraordinary to think that  
17 that's what Congress did and intended to do in 1966. The  
18 -- it went for that transformation. And statutes aren't  
19 to be construed to assume that Congress would imperil  
20 State or Federal revenues.

21 QUESTION: Of course, I don't think anybody  
22 suggests that Congress intended the result. The question  
23 really is whether -- assume we know exactly what Congress  
24 intended. Do we have the authority to fill a gap in the  
25 statute anyway without, you know, the express text?

1 MS. MILLETT: And I think equitable tolling,  
2 particularly in the context of traditional equity courts  
3 like bankruptcy and traditional equity proceedings, is  
4 appropriate. Again, in American Pipe, this -- thank you.

5 CHIEF JUSTICE REHNQUIST: Thank you, Ms.  
6 Millett.

7 The case is submitted.

8 (Whereupon, at 11:11 a.m., the case in the  
9 above-entitled matter was submitted.)  
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