

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL PARK HOSPITALITY :

4 ASSOCIATION, :

5 Petitioner :

6 v. : No. 02- 196

7 DEPARTMENT OF THE INTERIOR, :

8 ET AL. :

9 - - - - -X

10 Washington, D. C.

11 Tuesday, March 4, 2003

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 10: 22 a. m

15 APPEARANCES:

16 KENNETH S. GELLER, ESQ., Washington, D. C. ; on behalf of

17 the Petitioner.

18 JOHN P. ELWOOD, ESQ., Assistant to the Solicitor General,

19 Department of Justice, Washington, D. C. ; on behalf

20 of the Respondent.

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P R O C E E D I N G S

(10:22 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in Number 02-196, the National Park Hospitality
Association versus the Department of the Interior.

Mr. Geller.

ORAL ARGUMENT OF KENNETH S. GELLER
ON BEHALF OF THE PETITIONER

MR. GELLER: Thank you, Mr. Chief Justice, and
may it please the Court:

This case concerns the applicability of the
Contract Disputes Act to contracts between National Park
Service and the private concessioners who contract to
provide visitor services and to operate and maintain
facilities in more than 100 of our national parks.

QUESTION: Mr. Geller, I have a couple of
preliminary questions.

First of all, this is a facial challenge made by
the National Park Hospitality Association, I take it. How
is the claim ripe for adjudication? Has the association
been injured actually? There's no case pending.

MR. GELLER: Your Honor, to begin with, let me
say that as to this facial challenge point, this -- this
was an argument that was never made below. It was not
made in the district court. It was not made in the court

1 of appeals. It was not made in the opposition to
2 certiorari.

3 QUESTION: Is it one that we're precluded from
4 concerning ourselves with?

5 MR. GELLER: Well, I'm not sure it's a
6 jurisdictional issue.

7 QUESTION: Right.

8 MR. GELLER: So it -- it may well be waived.

9 But let me also say quickly that I think this
10 whole --

11 QUESTION: Mr. Geller, I think that -- I think
12 the ripeness issue --

13 MR. GELLER: Yes, I was going to address
14 ripeness.

15 QUESTION: -- subsists whether or not it's a
16 facial challenge.

17 MR. GELLER: Right. I was going to address
18 ripeness separately, Justice Scalia. In terms of this
19 facial/as-applied, this is an APA challenge to a
20 regulation. I'm not aware that the Court has really used
21 this facial/as-applied nomenclature --

22 QUESTION: Okay.

23 MR. GELLER: -- in that -- in that context.
24 After all, under the APA, the question is whether a --
25 an -- a regulation is arbitrary or capricious or contrary

1 to law. Here we have a regulation that categorically
2 states no NPS -- no National Park Service concession
3 contracts are subject to the CDA. If there -- there are,
4 in fact, some such contracts that are subject to the CDA,
5 as we believe there are, then that regulation is arbitrary
6 and capricious. The agency should have to go back and
7 draft a more refined regulation.

8 QUESTION: Is that -- is that the standard for
9 ripeness --

10 MR. GELLER: I --

11 QUESTION: -- whether the regulation is arbitrary
12 or --

13 MR. GELLER: No, no, no. I --

14 QUESTION: Why is this any different -- you
15 contend that the agency has no authority to speak
16 authoritatively on this -- on this issue anyway. And
17 therefore, this regulation, as I understand your -- your
18 position, is -- is of no more effect than the agency's
19 announcement of what its litigating position will be.

20 MR. GELLER: Not quite, Justice Scalia.

21 QUESTION: All right.

22 MR. GELLER: I'm trying to -- I'm trying to
23 distinguish the facial/as-applied point that Justice
24 O'Connor raised from the ripeness question, which I'll get
25 to in just a minute.

1 This is not a -- a -- there was an as-applied
2 challenge, to begin with, made in the district court.
3 This is not a facial challenge in the sense that we're
4 asking the Court to strike down the regulation based on
5 hypotheticals or on factual situations that may never
6 arise. We know what these concessions contracts look
7 like. The NPS has issued standard concessions contracts.
8 It seems to us rather easy to determine whether the
9 services that are called for in those contracts bring the
10 contracts within the -- within the CDA. So I don't think
11 there's anything to this facial challenge.

12 QUESTION: Well, presumably there are many
13 different kinds of concession contracts. Some might be
14 covered; some might not.

15 MR. GELLER: Well, I don't think so, Justice
16 O'Connor, because there are standard concessions
17 contracts. They're in the record and it's clear that they
18 call for certain types of services. And we think it's
19 clear that the Court, as the two lower courts did, can
20 determine whether those contracts call for the procurement
21 of services that would bring them within the CDA or call
22 for the repair or maintenance of real property.

23 Now --

24 QUESTION: How many -- what are there? 10
25 standard concession contracts?

1 MR. GELLER: Three. There are, I think, three.

2 QUESTION: Three?

3 MR. GELLER: And they all call for the same
4 types of services at national parks. There are -- there
5 are copies in the -- in the record.

6 Now, in terms of your ripeness argument, Justice
7 Scalia, once again, the -- the Government never made any
8 suggestion that this case was not ripe below. The reason
9 it's not unripe is that the standard concession contracts
10 and the contracts that, in fact, the NPS is putting out
11 for bid incorporate within them the statement that these
12 contracts are not subject to the CDA. The NPHA and its
13 members need to know now, in terms of deciding whether to
14 bid on certain contracts, what their rights are under
15 those contracts, and therefore --

16 QUESTION: But how -- how does it hurt you to --
17 in the present posture, as I understand it, the
18 contracts -- whatever it's called -- the ICBA decides
19 these cases in your favor. So in the -- in the setting of
20 a concrete dispute, the contracting officer rules against
21 one of the concessionaires. The concessionaires goes to
22 that board if they want to and the board will rule, at
23 least on the jurisdictional point, that -- that the
24 Contracts Dispute Act does apply. So how are you hurting
25 by --

1 MR. GELLER: We are harmed, Justice Ginsburg,
2 because it is important for the concessioners to know, at
3 the time that they're deciding whether to bid on a
4 contract and -- and the time they're deciding how much to
5 bid on a contract, what their rights are under that
6 contract. It's a pre-bid -- it's a solicitation in which
7 the --

8 QUESTION: That would be the same case if the
9 agency simply announced, our litigating position in these
10 contracts is going to be that they are not covered by the
11 Contract Disputes Act.

12 MR. GELLER: Yes, but the --

13 QUESTION: You'd be in exactly the same
14 position.

15 MR. GELLER: And we would be -- .

16 QUESTION: Would -- would you have the ability
17 to sue?

18 MR. GELLER: We would be -- because it is a
19 provision of these contracts, Your Honor, that
20 incorporates the regulation that states that they are not
21 subject to the CDA. So this is a proper challenge to the
22 solicitation as including an illegal term. The contracts,
23 on their face by incorporating this regulation, say you
24 have no rights under the CDA. It seems to us -- and we
25 think the law is clear, although the Government never made

1 this challenge, so it's not been briefed -- that the
2 concessioners have a right to know at the outset, in
3 deciding whether or not to bid, whether the Government is
4 right in asserting that they have no rights under the CDA
5 if they enter into these --

6 QUESTION: Well, if it's an invalid provision,
7 could the contracting party simply contract and then go
8 into court later on and say, well, this clause is
9 unenforceable?

10 MR. GELLER: Well, I don't know, Justice
11 Kennedy. You would be signing a contract that agrees to
12 the provision in the contract that says that you have no
13 rights enforceable under the CDA.

14 But beyond that, the Government has taken the
15 position you have no rights enforceable under the CDA. So
16 it's not clear how you would follow through on your rights
17 under that --

18 QUESTION: Well --

19 QUESTION: If you're -- if you're right,
20 Mr. Geller, I suppose your client could go into court and
21 ask for a declaratory judgment, even though there's
22 nothing in the contract saying, we want to find out which
23 provision of -- as to review applies to us.

24 MR. GELLER: But this is a pre-enforcement
25 challenge to a regulation --

1 QUESTION: But that's -- that's the problem
2 MR. GELLER: But --
3 QUESTION: In the case that I put, I don't think
4 you could get declaratory relief until you've alleged that
5 there was going to be a dispute. You can say, yes, I --
6 MR. GELLER: But there is a --
7 QUESTION: -- I might have an argument down the
8 line and I want to know where I want to go. That seems to
9 me --
10 MR. GELLER: But -- but, Justice Kennedy, the --
11 QUESTION: -- speculative. I just don't see the
12 harm to your client in waiting.
13 MR. GELLER: The harm, Your Honor, is in not
14 knowing, at the time you're being asked to bid on
15 contracts, what your rights are under those contracts.
16 QUESTION: So it's --
17 MR. GELLER: It's like any other provision.
18 QUESTION: Is it established -- I mean, my -- my
19 guess is it is, but -- but if the Government, the Defense
20 Department, any other Department, presents a -- a private
21 individual with a contract with 14 conditions and one of
22 those conditions, in the view of the private person, is
23 unlawful, not authorized by statute, contrary to statute,
24 that that person, before bidding on the contract, can go
25 to court and say, I would like this set aside as unlawful.

1 MR. GELLER: I think that there is a --
2 QUESTION: Is there authority on that?
3 MR. GELLER: I think that there's --
4 QUESTION: If there is authority on that, I
5 guess that's the end of it. You're right.
6 MR. GELLER: Yes, I think there is authority
7 under -- under the -- under the Tucker Act, which is one
8 of the provisions of -- that we cited in the complaint,
9 that allows you to bring challenges to bid solicitations
10 on the ground that they --
11 QUESTION: And these regulations are
12 incorporated into the contract.
13 MR. GELLER: And these -- these are --
14 absolutely regulations are incorporated into the contract.
15 QUESTION: What is the authority, Mr. Geller?
16 You said there is --
17 MR. GELLER: I think it's section 1491. I mean,
18 it -- it is one of the provisions that we relied on in
19 the -- in the complaint in this case to bring this
20 challenge.
21 And I might say to the Court --
22 QUESTION: Is there -- is there any case that
23 supports this particular --
24 MR. GELLER: Yes, there are, but -- but I was
25 about to say, Mr. Chief Justice, that this -- that the

1 Government has never challenged ripeness, and that's not
2 suggest -- it is not to suggest that it's not something
3 that this Court can consider, but I think it's unfair to
4 decide that issue on the -- when it hasn't been fully
5 briefed by the parties. It's never been challenged at any
6 time in this case.

7 QUESTION: Unless it force -- unless the failure
8 to consider it forces us to decide a case on -- on facts
9 that we find, you know, rather amorphous.

10 MR. GELLER: But they're not amorphous, Justice
11 Scalia --

12 QUESTION: That's the purpose of the ripeness
13 doctrine --

14 MR. GELLER: -- because --

15 QUESTION: -- to make it easier for us to decide
16 the case.

17 MR. GELLER: I'm not suggesting the Court
18 doesn't have the authority to do it. I'm suggesting the
19 issue has not been briefed, that we did present the Tucker
20 Act as the basis for jurisdiction in the Court --

21 QUESTION: Then is the issue before us --

22 MR. GELLER: Excuse me?

23 QUESTION: Is the issue before us whether the
24 three contracts that are in the record are procurement
25 contracts within the meaning of the statute?

1 MR. GELLER: Yes.

2 QUESTION: And that's ripe because --

3 MR. GELLER: Yes.

4 QUESTION: -- you have members of your

5 association who are considering bidding on contracts

6 that contain -- that those three contracts, which are

7 universal -- and they don't want to do it if -- or may or

8 may not want to if that -- that term is lawful. But they

9 might do it if it's --

10 MR. GELLER: That's precisely -- that's

11 precisely right.

12 QUESTION: And may I ask one other -- other

13 question? The -- court of appeals addressed this part

14 of -- of the case under its Roman III -- Roman III, I

15 think, the Contract Disputes Act. Did the Contract

16 Disputes Act issue -- question have anything to do with

17 the other argument about whether or not these concessions

18 are renewed? In other words, if a -- if it's not a --

19 these are just freestanding --

20 MR. GELLER: Yes.

21 QUESTION: -- issues unrelated.

22 MR. GELLER: Yes, yes.

23 QUESTION: All right. Thank you.

24 MR. GELLER: Yes, they are.

25 QUESTION: Mr. Geller, one other thing that I'm

1 curious about. Why does it matter? Why do you care --

2 MR. GELLER: It --

3 QUESTION: -- whether it's covered by the CDA?

4 MR. GELLER: Because the --

5 QUESTION: What's at stake here --

6 MR. GELLER: That's important --

7 QUESTION: -- in the real world?

8 MR. GELLER: That's a very important question,

9 Justice O'Connor. What is at stake are the rights --

10 the -- the rights, the substantive and the procedural

11 rights, that are available to -- to a Government

12 contractor if it -- it gets into a dispute with the --

13 with the contracting agency.

14 Now, under the CDA, there are very important

15 procedural and substantive rights that are available that

16 would not be available under other law, and that's -- that

17 was --

18 QUESTION: Well, like what? I mean, what --

19 MR. GELLER: For example --

20 QUESTION: -- what's at stake?

21 MR. GELLER: What's at stake principally is,

22 first of all, an administrative mechanism, which is these

23 boards of contract appeals, that would -- are available to

24 decide these matters expeditiously and particularly with

25 small claims without having to go to court.

1 QUESTION: As opposed to what?

2 MR. GELLER: As opposed to having to go to
3 court, as opposed to having to go to the Court of Federal
4 Claims where it's not even clear what the standard of
5 review would be. The standard of review under the CDA is
6 de novo. So that's a very important substantive and
7 procedural right, in addition to --

8 QUESTION: De novo for who? For the contract
9 board or for the court if you go --

10 MR. GELLER: Both. After the contracting
11 officer decides an issue adversely to the contractor under
12 the CDA, the contractor has the choice either to go to the
13 Board of Contract Appeals or to file a lawsuit in the
14 Court of Federal Claims. In either event, the review is
15 de novo.

16 QUESTION: And if he chooses the contract board,
17 then the -- the next step, the court step will be --

18 MR. GELLER: In the Federal Circuit.

19 QUESTION: Directly to the circuit.

20 MR. GELLER: Right.

21 QUESTION: You wouldn't go to the --

22 MR. GELLER: Right.

23 QUESTION: And that wouldn't be de novo, I take
24 it.

25 MR. GELLER: No, it wouldn't be de novo. That

1 would be appellate.

2 QUESTION: But the main thing, as I understood
3 it, was that you're trying to get out of the agency
4 appeals. You don't want to have to go through the agency.
5 This gets you right into court after the --

6 MR. GELLER: No.

7 QUESTION: -- contracting officer. Am I right
8 about that?

9 MR. GELLER: No, and it's not right, Justice
10 Breyer. Actually what we want to be able to do is to
11 avoid having to follow whatever procedures the agency sets
12 up in its contract for -- for seeking review if there's a
13 dispute. We want to go --

14 QUESTION: But why can't you do that? That's
15 what you've been doing all along. That's why you -- you
16 have the several decisions of the IBCA. Every time you go
17 to the IBCA, they say, yes.

18 MR. GELLER: Yes, but the Interior Department
19 and the NPS has not acceded to those decisions, and it has
20 issued a regulation that is --

21 QUESTION: But then isn't -- isn't the
22 appropriate thing to go? You go to the IBCA. If the
23 Government wants to challenge the jurisdiction that they
24 will exercise, the resolution that they make, then it's up
25 to the Government. But you can go to the IBCA. They have

1 been welcomi ng you.

2 MR. GELLER: Well, those were all prior to the
3 Government's issuance of the regulation in this case, a
4 regulation that's now been upheld by the D.C. Circuit.

5 QUESTION: Well, but you -- you say the
6 Government's issuance of a --

7 MR. GELLER: The NPS.

8 QUESTION: It's the National Park Service.

9 MR. GELLER: Yes, yes. Well, that's what we're
10 dealing with here.

11 QUESTION: There's some dispute as to whether
12 they even have the authority to issue it.

13 MR. GELLER: They don't, in fact, administer the
14 CDA, Your Honor, so we don't think this is a regulation
15 that's entitled to any deference. Nonetheless, it's their
16 position.

17 QUESTION: They -- they seem to agree with you
18 on this point. I mean, they've -- they've agreed in their
19 terms that it's not a legislative regulation in that --

20 MR. GELLER: Right.

21 QUESTION: -- footnote 5 or 6 --

22 MR. GELLER: Right.

23 QUESTION: -- whatever it is. What does that do
24 to -- to our jurisdiction? I mean, is -- is -- are -- are
25 you now both --

1 MR. GELLER: I don't think --

2 QUESTION: -- in effect, claiming that this

3 so-called regulation is nothing but the Government's

4 statement of the intention to take a position when and

5 if --

6 MR. GELLER: Well, the --

7 QUESTION: -- the time comes?

8 MR. GELLER: Our view is that this is a

9 regulation that represents the views of the NPS. It's not

10 entitled to any deference because it's not a statute that

11 they administer. The Government would have to give you

12 its view of how much deference it is entitled to.

13 QUESTION: Well, how do you read the --

14 MR. GELLER: But this is still an APA --

15 QUESTION: How do you read their concession in

16 the footnote? Because apparently --

17 MR. GELLER: I find that --

18 QUESTION: -- I -- I take it that is new, by the

19 way.

20 MR. GELLER: I find that --

21 QUESTION: Am I correct?

22 MR. GELLER: -- footnote very confusing.

23 QUESTION: So you -- you're recalling

24 challenging not the -- not the ineffective regulation, but

25 rather the inclusion of what the regulation says --

1 MR. GELLER: We're challenging both.

2 QUESTION: -- in the contracts. Is that --

3 MR. GELLER: We're challenging both. We brought
4 an APA challenge to the regulation, as well as a Tucker
5 Act challenge and a pre-bid solicitation challenge to the
6 inclusion of these -- this -- this illegal term in the --
7 in the contracts.

8 QUESTION: But isn't it the case that unless you
9 have an -- an APA issue, there's nothing else that you can
10 litigate at this point? I mean, if the only thing that
11 you have to complain about is that they want to put a term
12 in a contract that you think they shouldn't be putting in,
13 it's up to you to decide whether you want to contract it
14 on those terms or not.

15 MR. GELLER: No, because I think under the law
16 we're entitled to challenge that solicitation as illegal.
17 We have to bid on these contracts, we're entitled to
18 know --

19 QUESTION: No, but at this stage of the game,
20 they're not claiming that their regulation is -- is what
21 they call a legislative regulation.

22 MR. GELLER: They are claiming that that is the
23 position that they're going to take and that it is
24 entitled to some level of deference.

25 QUESTION: Well --

1 MR. GELLER: That footnote clearly says that it
2 is entitled to some level of deference.

3 QUESTION: And --

4 MR. GELLER: This is clearly the position, and
5 it's been upheld by the D.C. Circuit. There's no reason
6 to suggest they're not going to adamantly enforce their --
7 their views.

8 QUESTION: But then -- but if the case isn't
9 ripe and we should so hold, I assume the appropriate thing
10 to do would be to vacate the D.C. Circuit's decision to
11 that extent.

12 MR. GELLER: Yes.

13 QUESTION: So then you'll be -- what you would
14 be -- have is the Government has told you in advance what
15 its litigating position would be and it has no more
16 meaning than a -- a statement of what the Government's --

17 MR. GELLER: But it is --

18 QUESTION: -- position is with no -- no --

19 MR. GELLER: But, Justice Ginsburg, as I said,
20 there's still this provision in all of the contracts.

21 QUESTION: The Government would still be asking
22 you to enter a contract --

23 MR. GELLER: The Government would still be
24 asking us to accede to a position and sign a contract that
25 contains a term which we believe is illegal that says we

1 have no rights under the CDA.

2 QUESTION: Well, what -- what if the Government
3 contract had a term that simply said, you know, there
4 would be damages for delay, double damages depending on
5 the amount of delay? And you say, well, I -- we don't
6 think the Government is authorized to put that in a
7 contract. Could you challenge that?

8 MR. GELLER: Yes. I believe so, Mr. Chief
9 Justice. There is a very large body of Government
10 contracting law -- it's not in the briefs because it
11 wasn't raised -- allowing --

12 QUESTION: Well, is it --

13 MR. GELLER: -- allowing these sorts of
14 challenges to illegal terms in contracts.

15 QUESTION: But where is the law? I mean, is it
16 in the cases of this Court?

17 MR. GELLER: Well, obviously, these -- these
18 cases are generally litigated in the -- in the Court of
19 Federal Claims and in the district courts.

20 QUESTION: Is -- is that where the law is, in
21 the Court of Federal Claims?

22 MR. GELLER: Yes. Well, there are probably some
23 appellate decisions as well, but the law is fairly
24 well-settled in this area. As I say, the Government has
25 never challenged the ripeness of the CDA --

1 QUESTION: Mr. Geller, you say -- you say it's
2 settled, and please correct me if I'm wrong if -- if
3 Abbott Laboratories has been overtaken. But my notion was
4 that in order to have a pre-enforcement challenge, you had
5 to have a pretty strong claim that you are hurting now, as
6 they were, if they didn't -- if they spent all that money.

7 MR. GELLER: Yes. Abbott Laboratories is -- is
8 obviously an APA case. I think we could meet that
9 standard because we need to know now whether we should bid
10 on these contracts.

11 But there's a separate body of law involving
12 solicitations for Government contracts is what I'm saying
13 to the Court.

14 QUESTION: And does that get you --

15 QUESTION: That -- that's your stronger card I
16 think.

17 MR. GELLER: Yes.

18 QUESTION: And does that give you an APA cause
19 of action?

20 MR. GELLER: Well, we brought both an APA cause
21 of action and a challenge under the -- under the Tucker
22 Act, and you know, we would maintain that we can challenge
23 this regulation, and in addition, we can challenge this
24 bid solicitation. The two really overlap because the
25 regulation is incorporated into the contract.

1 QUESTION: Was there any finding in the district
2 court that the inclusion of this provision was critical as
3 to whether or not you'd go ahead with the contract?

4 MR. GELLER: There was no such --

5 QUESTION: I mean, I --

6 MR. GELLER: There -- there was no such --

7 QUESTION: -- I find it a little hard -- if it's
8 a -- if it's a really good contract, you I suppose intend
9 to comply with it and you don't think there's going to be
10 any litigation at all.

11 MR. GELLER: Well, Your -- there was -- there
12 was no finding by the district court, Your Honor, because
13 there was not -- there was no challenge to the ripeness by
14 the Government, but the -- the complaint, as I recall, did
15 make that allegation. The complaint made the allegation
16 that the contractors needed to know whether these
17 contracts were covered by the CDA.

18 QUESTION: When you say these --

19 QUESTION: Well, could it make the further
20 allegation that if it -- if it were not -- that if it
21 were -- were not covered, it would not engage in the
22 negotiations at all?

23 MR. GELLER: I don't specifically recall that
24 allegation.

25 QUESTION: It's a commercial matter. It's hard

1 for me to see it if there's an advantageous contract, but
2 you're not going to execute it --

3 MR. GELLER: Well, but it's a question of how --

4 QUESTION: -- if you go through one form of
5 remedy or the other in the event of a breach.

6 MR. GELLER: But it's not binary, Justice
7 Kennedy. Maybe you would still enter into the contract
8 negotiations. It's one factor in deciding how much you'll
9 bid on the contract.

10 QUESTION: Mr. Geller, you -- when you say these
11 contracts --

12 MR. GELLER: Yes.

13 QUESTION: -- you keep referring to these
14 contracts. They're -- actually you're talking about three
15 contract forms. You're -- you're not discussing any
16 particular --

17 MR. GELLER: Well, there are --

18 QUESTION: -- bid solicitation. You -- you have
19 no particular bid solicitation, do you?

20 MR. GELLER: Well, no. Well, that's not
21 precisely true, Justice Scalia, because there were bid
22 solicitations. In the district court, there were -- there
23 were lawsuits brought both by the National Park
24 Hospitality Association on behalf of its members, as well
25 as -- as lawsuits brought by several concessioners

1 challenging specific bid solicitations as to them And --
2 and therefore, there was both facial and as-applied, in
3 effect, challenges to the -- to the CDA point in the -- in
4 the --

5 QUESTION: What they say then is the
6 Government -- as far as I understand it, the basic point
7 is that this is not a procurement contract regardless of
8 who's entitled to what deference. And the reason that it
9 isn't is because we are not buying anything, and that
10 isn't a technical point. That is an important point
11 because you and us -- you, the private, and we, the
12 Government -- are both in the business of selling things
13 to the Government. We need somewhat more control over the
14 interpretation of these contracts. And that's why the
15 number of procedures you have to go through in the parks
16 department is greater, and all the things that you don't
17 like about it are things we do like about it. Namely, we
18 get a little bit added control. But that's why
19 legitimately these are not procurement contracts.

20 Now, your point in response to roughly that,
21 or --

22 MR. GELLER: Well --

23 QUESTION: I'm just trying to get you to the
24 merits, so I thought I'd --

25 MR. GELLER: Yes. I'd like to turn to the

1 merits. Thank you, Justice Breyer.

2 Can I -- I'd like to begin by saying it's purely
3 a matter of statutory construction, and we think that the
4 statute on its face unambiguously answers the question
5 before the Court. And I think it would be helpful if the
6 Court could look at section 3(a) of the Contract Disputes
7 Act which -- which appears in many places, including
8 page 1 of the blue brief, because you'll see that section
9 3(a) states that unless specifically excluded therein, the
10 CDA applies to, quote, any express or implied contract
11 entered into by an executive agency for, among other
12 things, the procurement of services or the procurement of
13 construction, repair, or maintenance of real property.

14 QUESTION: The reason that doesn't help you is
15 because --

16 MR. GELLER: The --

17 QUESTION: -- the question is what's
18 procurement.

19 MR. GELLER: Well, I'm not sure that that's
20 necessarily the question, but let me address it this way,
21 Your Honor.

22 The National Park Service does not contend that
23 its concessions contracts are not contracts within the
24 meaning of the CDA. It doesn't contend that it's not an
25 executive agency. And the NPS doesn't contend that any

1 provision of the CDA or, for that matter, any other
2 Federal statute specifically excludes these contracts from
3 the -- from the CDA. And, Justice Breyer, the NPS really
4 doesn't even take issue with the fact that these
5 concessions contracts procure services and procure the
6 construction, repair, and maintenance of real property.
7 In other words, every single statutory requirement on the
8 face of the statute would seem to be satisfied --

9 QUESTION: But I thought they did challenge that
10 these are -- that it's procurement.

11 MR. GELLER: They do not challenge, Your Honor,
12 that -- that these contracts procure services --

13 QUESTION: In the -- in the sense of procurement
14 as used in Government contracting?

15 MR. GELLER: Well, I think that's the issue in
16 the case. The Government claims --

17 QUESTION: That's -- that's the issue in the
18 case.

19 MR. GELLER: The Government --

20 QUESTION: I tried to --

21 MR. GELLER: And I would like to turn to that
22 now because the Government claims that these contracts are
23 not within the protection of the CDA. And why? Its
24 entire argument amounts to the following.

25 The Government says that the word procurement

1 and the phrase, procurement contract, we are told, have a
2 universally understood and well-settled meaning. And they
3 tell us that to qualify as a procurement contract, the
4 Government says, an acquisition must be for the direct use
5 and benefit of the Government and it must be paid for with
6 what the Government calls Government funds.

7 Now, the first thing to be said, Justice Breyer,
8 about the Government's argument is that it is a complete
9 invention. It is a complete invention. No Federal
10 statute defines the word procurement or the word,
11 procurement contract, to include the two requirements that
12 the Government tells us are essential. In fact, the
13 Office of Federal Procurement Policy Act -- the Government
14 cites lots and lots of --

15 QUESTION: Well, the word procurement has a
16 natural meaning. If they -- if they have a concessionaire
17 to come and sell balloons on the Fourth of July, they
18 don't say they've procured some balloons. They say
19 they've arranged for some balloons.

20 MR. GELLER: Well, you'd say arranged. You
21 could say they procured having someone sell balloons at
22 the Fourth of July.

23 The -- the Office of Federal Procurement Policy
24 Act --

25 QUESTION: No, but that -- that -- that's not

1 the usual meaning of -- of procure, I should think.

2 MR. GELLER: But the -- but there is no statute
3 that -- the Office of Federal Procurement Policy Act,
4 which is a companion statute to the CDA, actually has a
5 definition of the word procurement. You wouldn't know it
6 from reading the Government's brief because in their -- it
7 doesn't refer to that, but it contains a definition of the
8 word procurement that does not contain either of the two
9 requirements that the Government tells us are essential to
10 a Government procurement.

11 No court has ever construed the word procurement
12 to include the two requirements that the Government tells
13 us are clearly established and well-settled by Federal
14 procurement --

15 QUESTION: Mr. Geller --

16 QUESTION: What about acquiring --

17 QUESTION: -- I'm looking at page 19 of the
18 Government's brief, and they -- they define procurement.
19 They're taking it from the -- the Federal acquisition
20 regulations to say acquiring by contract with appropriated
21 funds supplies or services by and for the use of the
22 Federal Government. So --

23 MR. GELLER: Yes. That's -- that's not a
24 statute, but let me address that, Justice Ginsburg.

25 First of all, appropriated funds. It is

1 clear -- and the Government has not challenged the fact --
2 that the CDA applies to contracts even when appropriated
3 funds are not used. That's clear on the face of the CDA.
4 So the Government is forced to come -- come up with this
5 new phrase, Government funds, which has, as far as we can
6 tell, no basis at all in any prior statute or any Federal
7 procurement law. And the fact --

8 QUESTION: It does have a basis in just what
9 Justice Ginsburg was quoting, 48 C.F.R. 2.101. So they
10 say it's not without foundation in the law. What -- what
11 that's from is, I take it, it's a memo that -- or a policy
12 issued jointly by the Secretary of Defense, the
13 Administrator of General Services, and the NPS
14 Administrator. So when they have a reg like that, I'd --
15 I'd think that it's not so that it isn't somewhere in
16 Federal law. It's right there.

17 Now, there are some other things there --

18 MR. GELLER: But --

19 QUESTION: -- that you say are not necessarily
20 part of procurement. But that fact that there are other
21 things that overstate it doesn't mean this does.

22 MR. GELLER: But, Your Honor, there are many
23 other -- the Government principally relies on other
24 statutes that have the -- have certain provisions like the
25 ones they would like to introduce into the CDA in them

1 But I think it's quite significant that Congress didn't
2 put these provisions in the CDA.

3 QUESTION: But what about -- he put one in -- in
4 the CDA, 41 U.S.C., section 612(c). It's discussed at the
5 bottom of page 18 and the top of page 19 of -- of the
6 Government's brief. And what it says is that the monetary
7 awards in favor of a contractor will be paid out of the
8 judgment fund and in turn provides for the reimbursement
9 to the judgment fund, quote, by the agency whose
10 appropriations were used for the contract, which would
11 suggest that in all cases --

12 MR. GELLER: I don't think it -- it does not --

13 QUESTION: -- where there's been a judgment --

14 MR. GELLER: It doesn't suggest that at all,
15 Justice Scalia. First of all, they only quote that
16 incompletely. It also --

17 QUESTION: Yes, well, tell me why. I -- I know
18 that your --

19 MR. GELLER: In -- in our --

20 QUESTION: -- reply brief -- I don't see how
21 the -- the --

22 MR. GELLER: In our reply brief, it says, by
23 such appropriated -- by -- by the appropriations of that
24 agency or such other appropriations as the agency has to
25 get.

1 Now, the NPS is a -- a --

2 QUESTION: But -- but it clearly envisions
3 appropriations, whether they have it already or they have
4 to get it later.

5 MR. GELLER: But the -- the CDA on its face --
6 and the Government concedes this -- applies to contracts
7 that don't involve appropriated funds agencies.

8 QUESTION: Well, we'll ask the Government about
9 that. That's a -- that's a much more serious point.

10 MR. GELLER: Yes. I think it's clear there's
11 no -- there's no doubt that the CDA applies to any
12 contract whether or not it's an appropriated funds agency
13 or not.

14 Let me just say that in addition to being, I
15 think, totally unsupported as a matter of law, the
16 limitations that the NPS asks this Court to read into the
17 CDA would be completely unworkable as a matter of
18 practice. I think we've already talked about the
19 Government funds point which is, I think, a phrase that
20 they have dreamt up. It has no basis in law, unlike
21 appropriated funds, which is not the case of the CDA.

22 But I think it's also the case that this use or
23 benefit to the Government notion is completely unworkable.
24 If, for example, the NPS were to go out and procure water
25 coolers for use in the Department of Interior building,

1 the NPS would concede that those would be within the
2 Contract Disputes Act because they're -- they're for the
3 use and benefit of the Government. If the Government were
4 to go out and procure the same water coolers for use on
5 the Mall during the Fourth of July, the Court -- the NPS
6 would say, well, that's not for the use or benefit of the
7 Government. I don't know how you could decide what is for
8 the use or benefit of the Government.

9 When -- if the Government -- if the NPS issues a
10 contract to build a -- the World War II Memorial on the
11 Mall, which is now being -- is now happening, is that for
12 the use of the public or it is used for the Government?
13 We don't think this is a defensible position, and it
14 certainly finds no basis in the CDA. We think it's an
15 irrational reading of the act that has no support in the
16 language or the legislative history or the purpose of the
17 statute.

18 And I want to say that even if there was a use
19 or benefit to the Government limitation in the CDA, we
20 think it would -- these contracts would still clearly
21 satisfy it because these concessions contracts are being
22 let in part to help the Department of Interior, the NPS
23 fulfill its statutory mission. If these concessions were
24 not there operating these restaurants or guest facilities,
25 the NPS would have to operate them themselves in order to

1 satisfy its -- the statutory requirement that they provide
2 for the use and enjoyment of the national parks. So we
3 don't think it's possible to say that these concession
4 contracts the -- that the NPS is completely indifferent to
5 these concession contracts. They are clearly for the use
6 and benefit not only of the public, but also of the NPS.

7 If the Court has no further questions, I'd like
8 to reserve the balance of my time.

9 QUESTION: Very well, Mr. Geller.

10 Mr. Elwood, we'll hear from you.

11 ORAL ARGUMENT OF JOHN P. ELWOOD

12 ON BEHALF OF THE RESPONDENT

13 MR. ELWOOD: Thank you, Mr. Chief Justice, and
14 may it please the Court:

15 QUESTION: Will you tell us why the Government
16 doesn't want the CDA applicable here? I mean, what's --
17 what's at stake for the Government in not applying it?

18 MR. ELWOOD: Justice -- Justice O'Connor, the
19 reason why the Government doesn't want this applicable
20 here is that the Contract Dispute Act was passed to
21 address specific shortcomings in the remedial scheme that
22 was available for procurement contracts, and because it
23 was designed specifically for those purposes, it have --
24 has terms that we don't think are appropriate in this
25 context. For example --

1 QUESTION: But that just doesn't tell me, as a
2 practical matter, why the Government doesn't want it
3 applicable here.

4 MR. ELWOOD: For example, the pre-judgment
5 interest remedy. Congress --

6 QUESTION: You don't want to pay pre-judgment
7 interest.

8 MR. ELWOOD: Right, and we don't think it's
9 appropriate. Congress provided pre-judgment interest in
10 the procurement context because procurement contractors
11 would be required to perform under the contract even
12 during the pendency of a dispute when they weren't being
13 paid. And it was because of that unique position where
14 they were both being required to make outlays without
15 getting any income that Congress thought that because
16 there was a --

17 QUESTION: Okay. So at bottom, that's it, the
18 pre-judgment interest feature.

19 MR. ELWOOD: I -- I think that and because --
20 there are other things as well. For example, the purpose
21 of the -- one of the purposes of the CDA was to cut
22 through all of these requirements that you exhaust
23 administrative remedies, but those simply aren't present
24 in the concessions context. Traditionally concessioners
25 had a direct right of access to courts, and Congress has

1 never indicated that they thought the remedial scheme was
2 inadequate for concessioners. And --

3 QUESTION: Is this -- is this claim ripe? And
4 why didn't you ever talk about it below? What's going on?
5 It's -- it comes in such an odd posture. What is the
6 Government's view on that?

7 MR. ELWOOD: The reason why we did not raise
8 this -- why we did not raise this is because we did not
9 raise it below. And as you can tell from the pleadings --

10 QUESTION: Why not?

11 MR. ELWOOD: -- is -- because the CDA was kind
12 of a side show below. It was a relatively small issue and
13 it was just not the focus of the proceedings, as you can
14 tell by the opinion.

15 But I think that the Court has raised valid
16 concerns about the ripeness in this sense. The Court has
17 traditionally said in a pre-enforcement challenge to a
18 regulation that a claim is ripe if it affects primary
19 conduct so that -- so that if they don't comply, they
20 might be held liable. That's the Abbott Labs line of
21 cases.

22 And here this doesn't affect primary conduct.
23 It -- it predominantly just says whether or not -- which
24 forum you're going to have a remedy in.

25 QUESTION: Well, I -- I would agree --

1 QUESTION: What about this -- what about the --
2 the reply? I came in thinking ripeness was a problem, and
3 your brother on the other side gave to me what was a very
4 convincing answer. What's wrong with that answer?

5 MR. ELWOOD: And that is -- the thing is because
6 it predominantly just determines which forum you have --
7 which forum you bring your claim in, I don't know --

8 QUESTION: I know it doesn't affect -- but what
9 they're saying is that where the Government offers general
10 contracts to the industry and there is a term in all of
11 those contracts which, in the view of the industry, is
12 unlawful, they -- it's ripe for them to challenge that.
13 Now, what I'm afraid here would be that we or you or
14 somebody, in deciding whether that's an incorrect
15 argument, would upset what could be -- I have no idea if
16 it is -- a practice of contractors objecting to terms in
17 offered contracts as contrary to law.

18 So are you saying now that that is not ripe?
19 Are you saying that a contractor who comes into a court
20 and objects to a term in a proposed contract as contrary
21 to law does not have a claim because it is not ripe? Is
22 that the Government's position?

23 MR. ELWOOD: No, I don't think that would be our
24 position. If it affects their primary --

25 QUESTION: No. I would think probably you would

1 at least want to brief it.

2 MR. ELWOOD: Right.

3 I think that if it affects their primary
4 conduct, if affects what their obligations would be under
5 the contract, I think that that claim would be ripe for
6 pre-enforcement review. But where it simply determines
7 which forum they'll bring the claim in, I don't think it
8 would be covered.

9 QUESTION: But they said it's the first that's
10 at issue here. Now, is it not because -- you heard what
11 he said. So --

12 MR. ELWOOD: That -- that's correct. But I
13 think simply because it determines which forum you bring
14 your claim in, I don't think it would be covered. If I
15 were --

16 QUESTION: So you -- so there's a dispute
17 between the two sides on what the case law says as to
18 whether -- and it isn't even a general -- a general attack
19 upon the form of -- upon a form contract. But as we
20 understand from petitioners, there were particular bids
21 outstanding that were challenged because -- because of a
22 term in them that -- that was claimed to be unlawful. And
23 it is your position that you cannot challenge a particular
24 bid because of an unlawful term unless that unlawful term
25 affects your primary conduct.

1 MR. ELWOOD: No. If it affects something other,
2 I think, than the forum in which it was brought, I mean,
3 if it affects what you think your obligations will be,
4 if -- if it affects the price that you think you should
5 pay or that you should bid on a contract, I think that
6 that would be --

7 QUESTION: Well, it -- it does on your analysis.

8 MR. ELWOOD: -- subject to pre-enforcement
9 review.

10 QUESTION: Doesn't it? I mean, you said one of
11 the things that is important is pre-judgment interest. So
12 I -- I suppose their liability under the contract is going
13 to be affected by -- by the correctness of the reg.

14 MR. ELWOOD: I don't think their liability --

15 QUESTION: Their primary conduct won't be, but
16 their potential liability, if there is a contract dispute,
17 would be.

18 MR. ELWOOD: Your Honor, I confess that I am not
19 sure if the Government gets pre-judgment interest under
20 the CDA or not. But if it were -- if -- if it simply ran
21 to the contractors, I think that -- that the prospective
22 interest on a claim that has not even arisen yet seems a
23 little vague --

24 QUESTION: Why is that vague? I mean, they --
25 they have to make a bid. They have accountants. These

1 are big companies. They calculate everything down to the
2 finest penny, and -- and they say, you know, we take into
3 account whether we're going to get pre-judgment interest,
4 which we -- if we have a dispute. And by the way, we have
5 one dispute every 3 hours, and so it's a lot of money to
6 us. And we will bid \$42.36 less if we're not getting
7 the -- whatever. All right? So they work it all out.
8 They have accountants who do it.

9 And so, if that's so -- of course, if it isn't
10 so, it's a different story. But they've said something
11 like that's so.

12 MR. ELWOOD: I think it -- it would turn on --
13 in that case I just don't think that in advance you can
14 say with enough sort of concreteness and specificity that
15 you know how much a particular claim -- the -- the as-yet
16 unfiled, unrealized contract claims would be worth. You
17 could say --

18 QUESTION: But, Mr. Elwood, isn't it really --
19 isn't a waiver of pre-judgment interest comparable to a
20 waiver of punitive damages, for example, which if you
21 insist on it, would affect the -- the amount one would bid
22 for a contract? I don't understand why you say it's worth
23 nothing.

24 MR. ELWOOD: I mean --

25 QUESTION: I mean, it's something -- if the

1 Government is willing to fight about it here and insist --
2 and put it in every contract, it must be of value to the
3 Government.

4 MR. ELWOOD: What is actually -- just if I could
5 clarify this. What is put into the contract is just a
6 general term that applicable law will apply and because
7 applicable law includes all regulations, it is
8 incorporated that way. It doesn't specifically include a
9 CDA waiver or anything of that sort.

10 QUESTION: So the contract itself does not
11 specify that the CDA does not apply.

12 MR. ELWOOD: No. It just says applicable law
13 governs the contract.

14 But I think it's just a matter --

15 QUESTION: And is it -- is it your view, since
16 you said your -- your interpretation now of the -- the
17 position that the Park Service is taking that it -- it
18 doesn't constitute law? How can it constitute law? First
19 of all, the Contract Dispute Act is not within the Park
20 Service bailiwick. It isn't -- as you concede, it isn't
21 the -- doesn't administer this act. So does that
22 regulation constitute any kind of law?

23 MR. ELWOOD: I think that that's a valid concern
24 because our position is that this is basically just an
25 interpretive rule announcing the position that the Park

1 Service will take and the Park -- and the position that
2 the Park Service employees will take in administering it.

3 QUESTION: So you're saying -- you -- you claim
4 that this provision is not incorporated in the contracts.
5 Is that the position the Government is taking?

6 MR. ELWOOD: I think -- honestly, Justice
7 Scalia, I think it's just -- it's a -- it's a new
8 proposition for me, and I think that a good argument could
9 be made that it does not include it because it -- it
10 really just represents the position of the National Park
11 Service.

12 QUESTION: Even leaving aside the question of
13 inclusion, what is -- what do you understand your
14 difference to be from the petitioners with respect to the
15 status of the regulation itself? Is there any difference
16 at all?

17 MR. ELWOOD: I don't know that there is a -- a
18 difference with respect to the petitioner's view. It's an
19 interpretive rule that the Park Service has --

20 QUESTION: Have we got any jurisdiction left?

21 MR. ELWOOD: I believe so because it is the
22 announced position. It's not just a policy statement. It
23 is basically a directive to the --

24 QUESTION: Yes, but what's the difference
25 between a policy statement and an announced position?

1 The -- the point at which each one is going to have
2 practical effect is the point at which there is a claimed
3 breach and an argument, if there is one, over what the
4 remedial process is.

5 MR. ELWOOD: Yes, but I think that the only
6 difference would be the -- the principal difference would
7 be policy statements are more -- involve more variance in
8 that they say as a general policy we will do this, whereas
9 the -- as an interpretive rule, it just says that we do
10 not believe that concession contracts are procurement
11 contracts.

12 QUESTION: What -- what is the position of the
13 Government? Now, I know this is hitting you cold, but I
14 think it would be helpful.

15 Position one. We have not thought of ripeness
16 before, and the case has been argued and submitted on the
17 assumption that, for example, the bidding would be
18 affected by this term which is incorporated into the
19 contract. That's been the assumption, and we see no
20 reason to depart from it. It's not jurisdictional. So
21 decide the issue we briefed. That's position one.

22 Position two. We haven't thought of ripeness
23 before, but now that we think about it, we think it's
24 quite a serious problem and we're not certain what the --
25 what the -- what the issue is in ordinary contracts, and

1 we're not certain whether it's incorporated. So we think
2 you should say that this case is not ripe.

3 Now, do you take position one, which will mean
4 we perhaps could go to decide the issue for which it was
5 granted, or do you take position two, which means you see
6 ripeness as a big problem here that we ought to look at
7 further?

8 MR. ELWOOD: Well, Justice Breyer, it's clearly
9 been the position of the Court that it is not bound by the
10 failure of the parties to raise it. That's in Reno versus
11 Catholic Social Services, and of course, you can raise
12 it --

13 QUESTION: I'm not asking you what the law is
14 exactly. I'm asking you what's the Government's position.

15 MR. ELWOOD: I -- I think our position would
16 be -- I mean, we -- we filed a brief in opposition and I
17 think, you know, if -- if we can win on ripeness grounds,
18 that's great too.

19 QUESTION: Well, you wouldn't necessarily --
20 (Laughter.)

21 QUESTION: You wouldn't necessarily win. I
22 mean, I -- I don't know if you would win. I mean --

23 MR. ELWOOD: Right. We might lose the -- the
24 judgment of the D.C. Circuit as well, but --

25 QUESTION: You -- you would have to. If it's

1 not ripe, we'd have to vacate it to that extent. But
2 this -- in the D.C. Circuit --

3 QUESTION: Put you back to square one. No --

4 QUESTION: In the D.C. Circuit, this was a
5 giant, one of those typical wholesale attacks on many,
6 many regulations, on the whole -- on the whole rulemaking.
7 Is that correct?

8 MR. ELWOOD: That's correct, Your Honor.

9 QUESTION: And this was just a tiny, tiny piece
10 of a long, long opinion --

11 MR. ELWOOD: That's correct, Your Honor.

12 QUESTION: -- treating -- so maybe just nobody
13 noticed.

14 QUESTION: It seems unfair to pick it apart in
15 this way. Just a little part of a major opinion.

16 MR. ELWOOD: Well, I think that it -- it just
17 points out the fact that, I mean, they -- they had an
18 awful lot on their plate, and it perhaps eluded them for
19 that reason.

20 QUESTION: Now, the as-applied/facial. Was the
21 as-applied challenges -- did those center on this issue or
22 did they relate to the -- to another issue?

23 MR. ELWOOD: They related to other claims,
24 Justice Ginsburg. Xanterra has characterized their claim
25 as an as-applied claim although they're -- they're not

1 asking for as-applied review in this case. But if you
2 look at their -- their complaint, their complaint involved
3 their intention to bid on an as-yet unreleased prospectus.
4 And so, in that sense, I don't think that is an as-applied
5 change for two -- for two reasons. Not only is there no
6 contract dispute, but at the time that the complaint was
7 filed, there was no contract. So we think that it would
8 be a facial challenge.

9 QUESTION: Mr. Elwood, if I can assist you in
10 giving the merits here, is it -- is it the case, as the
11 petitioners contend, that the Government concedes that not
12 all contracts covered by the CDA are contracts in which
13 appropriated funds are used?

14 MR. ELWOOD: That's correct. To the extent that
15 it covers non-appropriated fund instrumentalities, it
16 covers contracts that would involve the expenditure of
17 non-appropriated funds. Those are, however, Government
18 funds, funds of Government entities known as non-
19 appropriated fund instrumentalities.

20 QUESTION: Well, once you slip off from
21 appropriated into -- into Government funds, you don't put
22 any -- you don't have any statutory text you can appeal to
23 as -- as separating out the CDA from -- from your Park
24 Service concessions.

25 MR. ELWOOD: I -- I don't agree, Justice Scalia.

1 Both the -- well, to begin with, just in terms of giving
2 an indication of what the commonly accepted meaning of the
3 term was at the time, the Commission on Government
4 Procurement Reform, which was the -- which was the impetus
5 for all of these reforms, defined procurement as purchase
6 of product or service for Federal use, which incorporates
7 both a -- a notion of expenditure and Federal use. And
8 both the -- the 1969 act --

9 QUESTION: Yes, but Federal use, of course -- it
10 is of use to the Park Service to have facilities available
11 to the public. So that doesn't really answer the
12 question. The parks -- the Park Service wants parks
13 available to the public with services in them, restrooms
14 and buildings and restaurants and so forth. Doesn't it?
15 So in a sense, it is for the use of the Park Service and
16 the Government as well as for the public.

17 MR. ELWOOD: It is for the use -- well, it is
18 not for the direct use of the National Park Service, and
19 that is where the Federal grant and cooperative agreement
20 comes in. 8 months before passage of the CDA, Congress
21 explained its understanding of what different types of
22 instruments would be used for, and it explained in that
23 that a procurement contract would be an instrument whose
24 principal purpose is the acquisition by purchase, lease,
25 or barter of goods or services for the direct use and

1 benefit of the Government. And --

2 QUESTION: Well, it doesn't really say that.
3 And the language in the CDA is broad, and presumably this
4 was a -- an act that was presumed to have broad
5 application.

6 MR. ELWOOD: It was presumed to have broad
7 application among procurement contracts. There's no
8 indication that they did not intend the word procurement
9 to have the ordinary meaning that it does in that sense,
10 as indicated in the Commission on Government Procurement
11 Reform and the way it was used there, as indicated in the
12 1969 act creating the commission and the OFPP Act where
13 the simple use -- word procurement was understood to
14 mean --

15 QUESTION: Was -- was there ever any amendment
16 offered in Congress to make clear that it didn't apply to
17 concession contracts?

18 MR. ELWOOD: There was no -- no, there was no
19 indication in the entire legislative history that the --
20 that concessions came up, and in 1,200 pages of reports on
21 both procurement and non-appropriated fund procurement,
22 there was not a single mention of -- of -- national parks
23 concessions.

24 QUESTION: And how long -- at -- at any point
25 did the CDA -- was it applied or followed with any

1 concession contracts, or is this something that has arisen
2 recently? Was it used at one point?

3 MR. ELWOOD: There are a number of Armed Service
4 Board of Contract Appeals that assume CDA jurisdiction,
5 and the Board of Contract Appeals of the Department of
6 Interior started using it in 1989. But I'm not familiar
7 with usage prior to that --

8 QUESTION: These are for what concessions?
9 PS -- PX concessions, for example?

10 MR. ELWOOD: Yes, Justice Scalia.

11 QUESTION: Well, why isn't that -- I mean --
12 because I was about to ask that question because I thought
13 you're drawing the distinction between a concession to
14 provide food and hot dogs and amusement to visitors to the
15 park, which you say is not covered by the CDA, and it
16 seems to me, a contract to provide food and hot dogs
17 and -- I don't know -- maybe amusement -- I don't know
18 what they have at PX's -- to members of the armed forces.
19 Why isn't at least the latter, although it's a concession
20 contract, why isn't that clearly for the benefit of the
21 Government even -- even in the narrow sense in which you
22 use that term?

23 MR. ELWOOD: No, Justice Scalia. We would -- we
24 would agree that that is for the benefit of the
25 Government. It's -- it doesn't involve the expenditure of

1 Government funds, but it's for the benefit of the
2 Government. And for this reason --

3 QUESTION: So that would be covered by the CDA.

4 MR. ELWOOD: I -- I don't believe it necessarily
5 would because it doesn't involve the expenditure of
6 Government funds. It's still private contractors coming
7 in and being -- and paying the Government for the
8 opportunity to do that.

9 But as far as the benefit goes, I think agencies
10 have a direct interest in providing benefits to their
11 employees and especially in the PX example because PX's,
12 for example, are basically a fringe benefit for servicemen
13 and women and their dependents in that it's -- it's --
14 basically access is limited to them. And salary and
15 fringe benefits of that sort are how agencies procure
16 employees. That is how they attract and retain qualified
17 personnel. And in fact, agencies have drawn a distinction
18 between benefits provided to employees and benefits
19 provided to the entire public --

20 QUESTION: But isn't that the --

21 QUESTION: You'd say -- it still isn't covered,
22 you say, unless the Government pays out cash. Is that
23 right?

24 MR. ELWOOD: I think that that would be the
25 better view, but I think obviously a stronger argument

1 could be made for concessioners.

2 QUESTION: Well, why did you say it was not in
3 the legislative history in that respect? What -- what is
4 this? You -- you quote in your brief -- I just want a
5 little clarification. There's a committee report. The
6 Senate report says that, quote, concessions contracts do
7 not constitute contracts for the procurement of goods and
8 services for the benefit of the Government or otherwise.
9 And -- and there's something odd about that statement, but
10 I got it out of -- you quoted it. And that seems to be
11 the legislative history of the act, and apparently it
12 isn't. Where -- what's -- what's the status of that
13 particular remark?

14 MR. ELWOOD: No. Those are both the -- those
15 are committee reports --

16 QUESTION: Yes.

17 MR. ELWOOD: -- for the 1998 act. So it's part
18 of the legislative history.

19 QUESTION: So why isn't that legislative
20 history?

21 MR. ELWOOD: Oh, it is -- it is -- I don't
22 know that I understand your question.

23 QUESTION: It says concessions contracts are not
24 contracts for procurement of goods and services.

25 MR. ELWOOD: Oh. I was addressing the -- the

1 legislative history of the CDA, not the 1998 act.

2 QUESTION: Well, is -- aren't we concerned --
3 oh, the 1998 act is which? That's the --

4 MR. ELWOOD: That is the act -- the current
5 concession authority, the current authority under which
6 the National Park Service issues concession contracts.

7 QUESTION: So what we have is in that act --

8 QUESTION: That was an act that said they're --

9 QUESTION: Yes, I see. I see.

10 QUESTION: -- they're not continuously renewed
11 with the same --

12 MR. ELWOOD: That's correct. It eliminated
13 the --

14 QUESTION: -- provider. It was the act that
15 said, but we're going to terminate these things.

16 MR. ELWOOD: That's correct.

17 QUESTION: When did the Park Service first
18 install this -- when did it first take this position? It
19 wasn't just under the regulations, as I understand it.
20 When did the Park Service take the position that
21 concession contracts were not procurement contracts?

22 MR. ELWOOD: The first time they took that
23 position publicly was in 1979 in a Board of Contract
24 Appeals case, Yosemite Park & Curry Company. The court --
25 the IBCA, rather, did not address it, though, because it

1 was actually before the effective date of the CDA, and
2 they took it specifically with respect to the CDA there.
3 But traditionally -- although it's impossible because of
4 absence of institutional memory, traditionally concession
5 contracts have not been viewed as procurement contracts by
6 the National Park Service.

7 QUESTION: But they --

8 QUESTION: You indicated that there's a stronger
9 argument in some instances than in others for the fact
10 that it's a concession. A concession contract can be a
11 procurement contract. Does that go back to our basic
12 question about ripeness and we don't know what we're
13 involved with here? Or can we take these contracts where,
14 I take it, they did involve the construction of facilities
15 at national parks, et cetera, which does benefit the
16 Government in the long term?

17 MR. ELWOOD: Well, to the extent that the Court
18 thinks that the specific terms of concession contracts and
19 what is accomplished under them affects the determination
20 of whether or not they're procurements, I think that the
21 Court would have some difficulty in saying authoritatively
22 whether they all are or an unacceptably high portion of
23 them are procurement contracts without having a better
24 idea of what is included with them.

25 If I could --

1 QUESTION: But if -- on a case-by-case basis,
2 then that would indicate the regulation is deficient
3 because the regulation doesn't purport to -- to use
4 this -- this kind of fine distinction.

5 MR. ELWOOD: But still it -- it's something that
6 could be addressed in as-applied challenges where you
7 could say, in my particular case, where it requires me to
8 build a lodge or whatever, this is a procurement contract,
9 and under those circumstances it would be very clear
10 exactly what was required of the procurement contractor.
11 And they could -- they could -- of the concessions
12 contractor and they could determine whether or not that
13 particular contract was a procurement.

14 QUESTION: The regulation -- the regulation
15 would then be invalid to that extent.

16 MR. ELWOOD: Yes, but the Court has held -- this
17 Court has indicated in INS versus National Center for
18 Immigrants' Rights, Babbitt versus Sweet Home, and cases
19 like that that -- that merely because a regulation is
20 invalid in some applications, it will not be invalidated
21 on a facial basis.

22 If I could just address specifically --

23 QUESTION: Mr. Elwood, is there anyplace we
24 could look to see how much pre-judgment interest the Park
25 Service has had to pay each year? Is it a big-ticket

1 item?

2 MR. ELWOOD: It's not a big-ticket item. The
3 only three cases in which the -- the CDA has been applied
4 to national park concessions are the three IBCA cases
5 mentioned, and in two of those, the Government wound up
6 winning on the merits, so there was no pre-judgment
7 interest paid. So it's only in that R&R Enterprises case
8 that the Government would have paid any pre-judgment
9 interest in this case.

10 If I could just go to your example, Justice
11 Kennedy, about the building of buildings on national
12 parklands. I believe that is not a procurement for -- for
13 a variety of reasons. First, just as a statistical
14 matter, 78 percent of concessions contracts do not involve
15 any capital improvements. And that is a very broad term.
16 It's much broader than just structures. It's structures,
17 unremovable property, and fixtures.

18 But on the merits, many concessions contractors
19 have been required, since the very beginning of the --
20 of -- of concessions, 1872, to require -- they've been
21 required to build their own buildings. And historically
22 that has not been considered something that the Government
23 gets. It doesn't get the benefit of those services
24 because it enters the contracts not for purposes of
25 getting a building, but because it wishes to have

1 concessioners provide services to park visitors. And in
2 order to do that, it tolerates the building. The National
3 Park Service doesn't want buildings in the parks. It
4 wants nature in the parks, and it tolerates the buildings
5 to the extent that they are used to provide visitor
6 services. And I think this comes across in the way these
7 are treated by the contract.

8 Even though the Government has bare title in
9 these buildings, in a very real sense it doesn't buy them
10 Every concessioner who builds a building in the national
11 parks under a concessions agreement will have a leasehold
12 surrender interest equal to the construction cost of the
13 building plus inflation minus depreciation. And they
14 cannot be put out of that building by anyone until they
15 are paid that leasehold surrender interest; that is, until
16 the building essentially is bought. As long as a
17 concessioner is operating out of that building, a
18 concessioner will hold the leasehold surrender interest,
19 not the Government.

20 Also, I think it's telling that the form
21 contract indicates that if the concessioner ever leaves
22 the -- ever abandons the building, ever -- that they have
23 constructed, that the Government can require them to knock
24 it down and restore the site to its natural -- its natural
25 state. That's section 9b of the standard contract and in

1 the contract that it's in the joint appendix. So again,
2 that's an indication that they're not interested really in
3 procuring the construction services. They're interested
4 in authorizing a concessioner to provide services to
5 visitors to the national parks.

6 Finally, I think it's noteworthy that Congress
7 obviously knew that concessioners would be building
8 buildings under the 1998 act, which was enacted against
9 the backdrop of this regulation setting forth the Park
10 Service's consistently held view that concessions
11 contracts are not procurement contracts. And far from
12 displacing that view, they actually seem to embrace it
13 both in the text of the act and in the legislative history
14 that Justice Breyer mentioned.

15 As far as the text of the act goes, I think it's
16 telling that -- the different types of language they use
17 for both the concessions side of the house and the
18 procurement side of the house. On the concessions side,
19 they use distinct language that I don't think you're going
20 to find in any procurement statute anywhere. Instead of
21 saying procure or purchase, they say they -- the -- the
22 Park Service can authorize concessioners to provide
23 services, and it even specifies that the services will not
24 be provided to the Government. It says they're provided
25 to visitors, which is obviously very different from

1 procurement statutes, many of which specifically state
2 that the service will be provided to the agency.

3 QUESTION: Maybe the Park Service wrote that
4 portion of the committee report.

5 MR. ELWOOD: No. That -- Justice -- Justice
6 Scalia, that's the actual text of the statute.

7 QUESTION: Okay.

8 MR. ELWOOD: And by contrast with that, the
9 actual text of the procurement provisions of the 1998 --
10 section 5959, used typical procurement language and
11 specified that the Park Service will be benefitting from
12 it. It says that the -- that the service can enter into
13 management consultant agreements whereby management
14 consultants provide services to assist the Secretary in
15 administering the program. So it's a contrast both -- I
16 think in both ways.

17 Finally, one other thing that I think is telling
18 is that Congress specifically provided that some of the
19 most likely to arise disputes under the act, including
20 specifically franchise-free disputes, which I think people
21 would think would -- would arise frequently, would be
22 subject to mandatory arbitration. And if Congress had
23 thought there was an administrative remedy for this under
24 the CDA, I just don't think there would be any need for
25 them to provide for an -- a mandatory arbitral remedy.

1 QUESTION: Mr. Elwood, is the petitioner right
2 in saying that -- that when the Government sell goods --
3 sells goods, that comes under the CDA?

4 MR. ELWOOD: That is correct. Under 602(a)(4),
5 the -- when the Government disposes of property that is
6 not -- when the Government -- Government disposes of
7 personal property, those sales are covered by the CDA.
8 However, petitioner has never raised that theory in this
9 Court -- in any court.

10 QUESTION: Those are not procurement contracts,
11 are they?

12 MR. ELWOOD: No, but they -- they don't purport
13 to be. If you look at the CDA, the word procurement is
14 always used in the clause for procurement of services,
15 procurement of construction, repair. And -- and that was
16 tacked on at the end basically because GSA at the time
17 subjected sales contracts to the same dispute clause, that
18 was problematic, that procurement contracts were. But
19 that still -- in order to get coverage under the CDA under
20 petitioner's theory, they still must be a procurement
21 contract or must involve the procurement of services.

22 If there are no further questions from the
23 Court.

24 QUESTION: Thank you, Mr. Elwood.

25 Mr. Geller, you have 2 minutes remaining.

1 REBUTTAL ARGUMENT OF KENNETH S. GELLER

2 ON BEHALF OF THE PETITIONER

3 MR. GELLER: Thank you, Mr. Chief Justice.

4 The complaint -- the complaint in this case was
5 filed under the authority of 28 U.S.C. 1491(b). The Court
6 will find that at page 13 of the joint appendix. And
7 that -- that statute provides for district court
8 jurisdiction to adjudicate challenges to the terms of
9 proposed Government contracts. And I think if you look at
10 paragraph 62 and 114 of the joint -- of the complaint,
11 which is in the joint appendix, you'll see the allegations
12 that were made in the complaint to fall within that
13 provision of -- of title 28.

14 As to the substance of the CDA claim, the
15 Government makes much of the fact that no, quote,
16 Government funds were used here. And I cannot stress
17 enough that that is a phrase that they've invented for the
18 purposes of this case. It makes much of the fact that the
19 concessioners received monies here from the visitors to
20 the national park, remit some of it to the NPS as a
21 franchise fee, and keep the rest of it. But these
22 contracts could just have easily been structured so that
23 the NPS got all the money in the first instance, kept some
24 of it as a franchise fee, and paid the rest of it back to
25 the concessioners. And in fact, some Government

1 concessions contracts are written that way. In that case,
2 even the Government, I think, would have to concede that
3 Government funds were used. We can't believe that the CDA
4 coverage of the CDA, these important procedural and
5 substantive protections, turns on such flimsy
6 determinations as to who gets the money in the first
7 instance.

8 Now, secondly, we -- we've already talked about
9 the fact that so many services are being provided here
10 that are for the use and benefit of the Government, as
11 well as for the visitors of the national parks.

12 But I also want to point out that the Government
13 is the sole beneficiary of the contractual provisions in
14 virtually every concessions contract requiring the
15 construction, repair, and maintenance of facilities in the
16 national parks. You know, if the Court will look, for
17 example, at page 96 of the joint appendix, which is a -- a
18 provision of the Grand Canyon contract that's in the
19 record, you'll see there that this contract -- under this
20 the contract, the NPS is there procuring maintenance,
21 repair, housekeeping, and groundskeeping for all
22 concessions facilities. It seems to us if you look at the
23 language of that -- of that procurement and compare it to
24 section 3(a)(3) of the CDA, which -- which provides that
25 CDA coverage for contracts for the procurement of

1 construction or repair or maintenance of real property,
2 it's impossible to conclude, I think, that this
3 procurement contract doesn't fall within the CDA.

4 Thank you.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Geller.

6 The Court wishes supplemental briefs on the
7 issue of ripeness, simultaneous briefs, due 3:00 p.m.
8 Friday.

9 The case is submitted.

10 (Whereupon, at 11:18 a.m., the case in the
11 above-entitled matter was submitted.)

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