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The *Aviall* Case: Will the Supreme Court Deny Recovery Under CERCLA to PRPs Who Voluntarily Incur Response Costs?

by John M. Hyson

The U.S. Supreme Court's decision to grant review of the en banc decision of the U.S. Court of Appeals for the Fifth Circuit in the *Aviall Services, Inc. v. Cooper Industries, Inc.*[1] case was something of a surprise. After all, in the view of many Superfund lawyers, the en banc decision had gotten it right, vacating a panel decision[2] that was contrary to the general understanding of the Superfund bar. Every Superfund lawyer knew—or at least assumed—that a potentially responsible party (PRP) under the §107 liability provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) who incurred response costs in cleaning up a contaminated site could seek recovery of its response costs in a contribution action under §113(f)(1) and that such an action could be brought irrespective of the circumstances under which the PRP had incurred the response costs—whether pursuant to a consent decree, a U.S. Environmental Protection Agency (EPA) or state administrative order, or even if the costs had been incurred voluntarily. Or so it seemed until the panel decision in *Aviall*. But then the en banc decision of the Fifth Circuit set things straight. And, since the en banc decision, several courts have followed the decision[3]; only a single district court has expressed disagreement.[4]

The question presented in *Aviall* involves the interpretation of §113(f)(1), which provides:

> Any person may seek contribution from any other person who is liable or potentially liable under [§]9607(a) of this title, during or following any civil action under [§]9606 of this title or under [§]9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by [f]ederal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§]9606 of this title or [§]9607 of this title.[5]

Before the panel decision in *Aviall*, it was recognized that, standing by itself, the first sentence could be interpreted as either permissive—defining some, but not all, of the circumstances in which a contribution claim could be brought—or restrictive—defining the only circumstances in which a contribution claim could be brought. But it was generally believed that the fourth sentence made it clear that the first sentence was permissive in that the fourth sentence states that the right of a person "to bring an action for contribution" is not limited to the circumstances set forth in the first sentence. Furthermore, it was generally believed—indeed, numerous courts of appeal had held—that a PRP who had incurred response costs in cleaning up a contaminated site could recover such costs by way of a contribution claim under §113(f)(1). This interpretation of §113(f)(1) was so generally accepted that courts routinely reached and resolved the merits of cases in which a plaintiff had asserted a §113(f)(1) contribution claim in the absence of any prior or existing claim against the plaintiff under §106 or §107.[6] In such cases—often involving millions of dollars in response costs—sophisticated defense counsel had not raised the argument that the first sentence of §113(f)(1) limited the circumstances in which a plaintiff could assert a contribution claim under that section.

On January 9, 2004, the Court granted review of the Fifth Circuit's decision in *Aviall* in order to consider the following question:

> Whether a private party who has not been the subject of an underlying civil action pursuant to CERCLA [§§]106 or 107, 42 U.S.C. §§9606 or 9607, may bring an action seeking contribution pursuant to CERCLA [§]113(f)(1), 42 U.S.C. §9613(f)(1), to recover costs

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1. 312 F.3d 677, 33 ELR 20101 (5th Cir. 2002) (en banc), *cert. granted sub nom.* Cooper Indus., Inc. v. Aviall Servs., Inc., No. 02-1192.
2. Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F.3d 134, 32 ELR 20069 (5th Cir. 2001).
3. Niagara Mohawk Power Corp. v. Consolidated Rail Corp., 291 F. Supp. 2d 105 (N.D.N.Y. 2003); Western Properties Serv. Corp. v. Shell Oil Co. 358 F.3d 678 (9th Cir. 2004); Pfohl Bros. Steering Comm. v. Allied Waste Sys., Inc., 255 F. Supp. 2d (W.D.N.Y. 2003); 1325 "G" St. Assocs. Ltd. Partnership v. Rockwood Pigments NA, Inc., 235 F. Supp. 2d 458 (D. Md. 2003); City of Waukesha v. Viacom, Inc., 221 F. Supp. 2d 975 (E.D. Wis. 2002).
4. E.I. DuPont de Nemours & Co. v. United States, 297 F. Supp. 2d 740 (D.N.J. 2003). In this decision, the court concluded that the holding by an en banc majority in *Aviall* was contrary to In re Reading Co., 115 F.3d 1111, 27 ELR 21075 (3d Cir. 1997), a conclusion that is, at the least, questionable.
5. 42 U.S.C. §9613(f)(1).
6. Sections 106 and 107 authorize different types of civil actions by government entities. Section 106(a) authorizes the president to instruct the U.S. Attorney General "to secure such relief as may be necessary" in a district court of the United States when the president "determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." *Id.* §9606(a).

   Section 107(a)(4)(A) imposes liability upon various categories of entities for "all costs of removal or remedial action incurred by the [U.S. g]overnment or a [s]tate or an Indian tribe not inconsistent with the national contingency plan." *Id.* §9607(a)(4)(A). The first sentence of §113(f)(1) thus authorizes a person to seek contribution when that person has been named as a defendant in either a §106(a) action for injunctive relief by the United States or a §107(a)(4)(A) for response costs by the United States, a state, or an Indian tribe.

spent voluntarily to clean up properties contaminated by hazardous substances.[7]

The importance of the question is reflected in the number of amicus briefs that have been filed in the Court.[8] The briefs supporting affirmance emphasize the importance of contribution claims under CERCLA as a means for encouraging private parties to incur substantial response costs in cleaning up contaminated sites; they assert that private parties would not incur such costs—and thereby further the cleanup objectives of CERCLA—if they could not recoup a portion of such costs by way of a contribution action under §113(f)(1).

Because the Fifth Circuit's decision was consistent with the general understanding of the lower courts and of the Superfund bar and because the decision furthered the objective of encouraging voluntary private cleanups, the Court's decision to review the decision raises a couple of related questions: Why did the Court grant review of the Fifth Circuit's decision in *Aviall*? How likely is it that the Court will reverse that decision and hold that a PRP who has voluntarily incurred response costs is not entitled to seek reimbursement of its costs in a contribution action under CERCLA?

The Facts and the Lower Court Decisions in *Aviall*

The Facts

Aviall Services, Inc. (Aviall) incurred response costs in cleaning up property that it had purchased from Cooper Industries, Inc. (Cooper). When Aviall discovered hazardous substances on its property, it reported the discovery to a state environmental agency, as required by state law.[9] The state agency directed Aviall to clean up the property, under threat of the issuance of an administrative cleanup order.[10] After incurring "millions of dollars" in cleanup costs,[11] Aviall brought an action in a federal district court in which it sought to recover its cleanup costs. Aviall's complaint initially contained two distinct claims under CERCLA: (1) a private cost recovery claim under §107; and (2) a contribution claim under §113(f)(1).[12] Aviall later amended its complaint to eliminate its separate CERCLA counts and to assert one CERCLA claim under §113(f)(1).[13]

The Lower Court Decisions

The district court granted summary judgment for Cooper on Aviall's claim under §113(f)(1) and declined to exercise supplemental jurisdiction over Aviall's state-law claims. In granting summary judgment with respect to Aviall's claim under §113(f)(1), the district court held that the first sentence of §113(f)(1) limited the circumstances in which a plaintiff PRP could bring a contribution claim under that section and that Aviall's claim had to be dismissed because it had not been subjected to an action under §106 or §107 of CERCLA.

A divided panel of the Fifth Circuit affirmed.[14] The panel majority's opinion is described in the following excerpt from the en banc majority opinion:

> The panel [majority] read the first sentence of §113(f)(1) to "require[ ] a PRP seeking contribution from other PRPs to have filed a §113(f)(1) claim 'during or following' a federal CERCLA action against it." *Aviall* [*Services*]*, Inc.*, 263 F.3d at 138. The term "contribution" was understood to "require[ ] a tortfeasor to first face judgment before it can seek contribution from other parties," *id*., and the term "may" in the first sentence of §113(f)(1) was viewed by the majority as creating "an exclusive cause of action and mean[ing] 'shall' or 'must.'" *Id*. at 138-39. . . . As for the final sentence of §113(f)(1)—sometimes referred to as the "savings clause"—the panel [majority] read this "to mean that the statute does not affect a party's ability to bring contribution actions based on *state* law." *Id*. at 139. (emphasis in original). The panel majority believed that interpreting the savings clause "to allow contribution suits, regardless of whether the parties are CERCLA defendants in a §106 or §107(a) action," would "render superfluous the first sentence of §113(f)(1), the enabling clause," *id*., and thus, would violate the canon of statutory construction that a specific provision governs over a general provision. *Id*. at 140.[15]

On rehearing en banc, the Fifth Circuit adopted the interpretation of the panel dissent and reversed the district court.[16] Although the court stated that "[r]easonable minds can differ over the interpretation of [§]113(f)(1), because its syntax is confused, its grammar inexact and its relationship to other CERCLA provisions ambiguous,"[17] the court concluded that the "most reasonable interpretation" of §113(f)(1) was that it "does not constrain a PRP . . . from suing other PRPs for contribution only 'during or following' litigation commenced under [§§]106 or 107(a) of CERCLA."[18] Rather, "a PRP may sue at any time for contribution under federal law to recover costs that it has incurred in remediating a CERCLA site."[19] The court emphasized

7. Petition for Certiorari at 1, *Aviall* (No. 02-1192).
8. Four amicus briefs, in support of affirmance of the Fifth Circuit's decision, have been filed on behalf of various private industries. Also supporting affirmance is an amicus brief filed by the state of New York, joined by 28 other states. At the request of the Court, the Solicitor General has filed an amicus brief on behalf of the United States. The Solicitor General's brief argues that the Fifth Circuit's decision should be reversed.
9. Presumably, Aviall also made a report to the National Response Center (and thus to EPA), as required by §103(a). However, according to the en banc decision, EPA "never contacted Aviall or designated the property as contaminated." 312 F.3d at 679.
10. The state agency sent four letters to Aviall. According to the en banc decision, the "fourth letter promised enforcement action if Aviall failed to pursue one of two suggested remediation options." *Id*. at 679 n.2.
11. Aviall states in its brief that it "spent in excess of five million dollars to conduct its investigation and remediation activities." Brief of Respondent at 6, *Aviall* (No. 02-1192).
12. The complaint also sought relief under various state-law theories.
13. Aviall explains in its brief that it dropped the count grounded entirely upon §107 because of case law that holds that a PRP seeking to recover its response costs under CERCLA is limited to a contribution claim under §113(f)(1) and may not assert a claim that is grounded only upon §107. Brief of Respondent at n.4, *Aviall* (No. 02-1192). In its brief, Aviall asserts that, in accordance with case law, its claim is a "joint claim" under both §107 and §113(f)(1).
14. Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F.3d 134, 32 ELR 20069 (5th Cir. 2001).
15. Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 679, 33 ELR 20101 (5th Cir. 2002) (emphasis in original).
16. Thirteen judges participated in the en banc decision. Ten judges concurred in the majority opinion. Three judges dissented in an opinion written by Judge Emilio M. Garza, the author of the panel majority opinion.
17. 312 F.3d at 679.
18. *Id*. at 681.
19. *Id*.

that the last sentence of §113(f)(1) "states without qualification that 'nothing' in the section shall 'diminish' any person's right to bring a contribution action in the absence of a [§]106 or [§]107(a) action."[20]

After these introductory statements, the court, in accordance with stated principles of interpretation,[21] discussed in Part I of its opinion the "background," or "why [§]113(f) was enacted."[22] The court noted that "[a]s enacted, . . . CERCLA contained no explicit provision allowing recovery through contribution" but that "[f]ederal courts soon began articulating a federal common-law right of contribution to resolve claims among PRPs."[23] The court further observed that pre-Superfund Amendment and Reauthorization Act (SARA) of 1986 "federal decisions allowed CERCLA actions for recovery in the nature of contribution to proceed even though the plaintiff had not been sued under §106 or §107."[24] Finally, the court stated that the Court "expressly acknowledged this development of federal common law" in *Key Tronic Corp. v. United States*[25] when the Court stated that "§107 of CERCLA 'impliedly authorizes' a cause of action for contribution."[26] The court summed up its "background" discussion with the following observation:

> As the [Court] explained it, CERCLA, as amended by SARA, authorizes two kinds of contribution actions among PRPs, one that is explicit under §113(f) and another that is an "implied," "similar and somewhat overlapping" action pursuant to §107.[27]

Part II of the court's opinion focused upon the "statutory text"—in particular, the "inter-relationship of the first and last sentences of §113(f)(1)."[28] The court asserted that the sentences were "logically complementary" in the following way:

> Thus, in addition to affording a particular right of contribution in the first sentence, the provision emphasizes in its last sentence that "nothing" shall "diminish" any other contribution right available to the parties. This so-called "savings provision" takes on added meaning in light of the pre-SARA [case law], which did not restrict common[-]law contribution actions until during or after proceedings or civil actions against the party who had incurred disproportionate remediation and response costs.[29]

The court then contrasted the dissent's reading of the interrelationship between the first and last sentences of §113(f)(1): "The dissent reads the 'savings provision' [i.e., the last sentence of §113(f)(1),] to refer to actions for contribution under *state* law, implicitly rejecting a construction that would preserve contribution actions arising by federal common law under §107."[30] The court stated that the dissent's interpretation "is at least in tension" with the Court's statement in *Key Tronic* that, after SARA, "the statute now expressly authorizes a cause of action for contribution in §113 and impliedly authorizes a similar and somewhat overlapping remedy in §107."[31] The court concluded with the observation that "[i]t is not clear that the dissent's holding permits an implied §107 contribution right to coexist."[32]

In Part III of its opinion, the court discussed "Decisions of This Court and Other Courts of Appeals After Enactment of SARA."[33] The court noted that "[i]n numerous cases decided after the enactment of SARA in 1986, this and other courts of appeals have ruled on CERCLA claims for contribution where no action had been brought under §106 or §107 of CERCLA."[34] The court emphasized that, in all these cases, "talented attorneys" had "sufficient incentive" to advocate a "cramped reading of §113(f)(1)" but declined to do so.[35]

Finally, in Part IV of its opinion, the court discussed the "policy considerations" that supported its interpretation of §113(f)(1).[36] The court asserted that the dissent's interpretation of §113(f)(1)—limiting the right to assert contribution claims under CERCLA to circumstances in which a plaintiff PRP has been subjected to an action under §106 or §107—"would create substantial obstacles to achieving the

20. *Id*.

21. At the beginning of its analysis, the Fifth Circuit set forth the following general principles of interpretation:

> Statutory construction begins with the plain language of a statute, but "plain" does not always mean "indisputable" or "pellucid." Consequently, sound interpretation reconciles the text of a disputed provision with the structure of the law of which it is a part; may draw strength from the history of enactment of the provision; and acknowledges the legislature's general policies so that the interpretation does not become absurd.

Id. at 680 (footnote omitted).

22. *Id*. at 681-85.

23. *Id*. at 682. The court identified City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 12 ELR 20915 (E.D. Pa. 1982) as the "seminal decision." Although the court stated that the pre-Superfund Amendment and Reauthorization Act (SARA) of 1986 decisions establishing a right of contribution were grounded upon "federal common law," it failed to recognize that the pre-SARA decisions dealt with two distinct types of "contribution" actions. One type involved a claim by a PRP who had been named as a defendant in a government action under §106 or §107 in which it was asserted that the defendant PRP was jointly and severally liable for any response costs incurred by the government. The defendant PRP then sought, by way of third-party claim or an independent action, to obtain contribution from other PRPs in the event that the defendant PRP should be determined to be liable in the action brought by the government. In such situations, courts, in numerous decisions, decided as a matter of federal common law the principles of joint and several liability that applied to the original defendant PRP and the right of that PRP to obtain contribution from other PRPs.

City of Philadelphia was the "seminal decision" in a distinct line of pre-SARA cases. In these cases, a PRP who had not been named as a defendant in a government-initiated action under §106 or §107 sought to recover response costs that it had directly incurred. In such cases, the courts held that a PRP's right to bring such an action was grounded, expressly or impliedly, upon the language of §107(a)(4)(B). The right was not, in other words, a creation of federal common law. For further discussion of these distinct types of actions, see *infra*.

24. *Id*. The court identified and described various decisions, including *City of Philadelphia* (*see supra* note 23) in note 7 of its opinion. 312 F.3d at 682 n.7. All of the cited decisions are, like *City of Philadelphia*, actions in which PRPs, who had not been named as defendants in a government-initiated action under §106 or §107, sought to recover response costs that they had directly incurred.

25. 511 U.S. 809, 24 ELR 20955 (1994). The *Key Tronic* decision is discussed *infra*.

26. 312 F.3d at 683 (quoting *Key Tronic Corp*., 511 U.S. at 816).

27. *Id*. at 685 (quoting *Key Tronic Corp*., 511 U.S. at 816).

28. *Id*. at 687.

29. *Id*.

30. *Id*. (emphasis in original).

31. *Id*. (quoting *Key Tronic Corp*., 511 U.S. at 816).

32. *Id*.

33. *Id*. at 688-89.

34. *Id*. at 688. The court identified and described these decisions in footnote 21 of its opinion. *Id*.

35. *Id*. at 689.

36. *Id*. at 689-91.

purposes of CERCLA."[37] Specifically, the court stated that the dissent's restrictive interpretation of §113(f)(1) would "discourag[e] the voluntary expenditure of PRP funds on cleanup activities."[38] The court acknowledged that "[p]olicy considerations cannot change the interpretation of [the U.S. Congress'] language" but it stated that such considerations "can contribute to an understanding of the language."[39] The court concluded with the assertion that its interpretation of §113(f)(1) "better fulfills the statutory purposes" than the dissent's.[40]

In sum, the Fifth Circuit's en banc majority opinion held that the first sentence of §113(f)(1) does not set forth the only circumstances in which a contribution action may be brought under §113(f)(1). Rather, the first sentence sets forth the circumstances in which a "particular right of contribution" action may be asserted. The last sentence makes it clear that nothing in §113(f)(1) diminishes other contribution rights. The impact of the last sentence "takes on added meaning" in light of pre-SARA case law. That case law included decisions that allowed "CERCLA actions for recovery in the nature of contribution"—that is, actions in which a PRP sought to recover against other PRPs response costs that the plaintiff PRP had directly incurred. The Court, in *Key Tronic*, expressly acknowledged this latter caselaw when it stated, according to the Fifth Circuit, that "§107 'impliedly authorizes' a cause of action for contribution." This implied cause of action for contribution—implied from the language of §107(a)(4)(B)—is, by operation of the last sentence of §113(f)(1), not diminished by that provision. And this implied cause of action for contribution is not subject to the limiting language in the first sentence of §113(f)(1). Rather, the implied cause of action for contribution under §107 can be brought irrespective of whether the person bringing such action has been named as a defendant in a government action under §106 or §107. Thus, Aviall's action is authorized under §113(f)(1) because it is a contribution claim which, though not within the language of the first sentence, is a pre-SARA contribution claim that is saved under the last sentence.

The Court's Decision to Grant Certiorari

As previously stated, the Court's decision to grant certiorari was something of a surprise. The issue presented in the petition for certiorari is certainly important[41]—but the en banc decision of the Fifth Circuit is not inconsistent with the holding of any other court of appeals[42] and is consistent with the general understanding of the Superfund bar. Furthermore, other federal courts have been almost unanimous in rejecting the panel decision in *Aviall*[43] and in expressing agreement with the en banc decision.[44]

Why, then, did the Court grant review? Answers to this question are suggested by the arguments presented in Cooper's Petition for a Writ of Certiorari and in the Brief for the United States in support of Cooper's petition.

Cooper offered several reasons why the Court should grant its petition.[45] Cooper asserted that the issue presented was of "recognized importance" and that "[t]he courts of appeals have expressed and the district courts have expressed divergent and conflicting views as to when and under what circumstances a private party may seek contribution from other parties for clean-up costs under CERCLA."[46] Though the petition acknowledged that the Fifth Circuit (in its *Aviall* decision) "is the first federal appeals court to have ruled directly on the interplay between [§]113(f)(1)'s enabling and saving clauses," it asserted that "other circuits have addressed the availability of contribution under this provision of CERCLA in related circumstances, and have offered contradictory understandings of what Congress intended."[47] Based upon the preceding, the petition asserted that "[a] definitive ruling from this Court is, therefore, needed to reconcile these disparate and competing views on this important issue of statutory interpretation, and therefore remove the existing confusion over when and under what circumstances the federal right of contribution in [§]113(f)(1) is available."[48]

After submission of Cooper's petition and Aviall's opposition, the Court invited the U.S. Solicitor General to file a brief submitting the views of the United States with respect to whether the Court should grant the petition. The Solicitor General's brief asserted that "[b]ecause the issue is important and recurring, and the court of appeals' decision endorses an unauthorized invocation of federal court jurisdiction, this Court should grant the petition for a writ of certiorari."[49] Although the brief acknowledged that there was no conflict in the courts of appeals with respect to the precise issue presented, it asserted that "in view of the inevitably recurring nature of the issue, the prospects are high that a circuit split will emerge."[50] And the brief warned about the consequences if the Court were to deny the writ and allow the issue to "percolate" in the lower courts:

> The ensuing percolation is likely to impose a substantial cost on an already overtaxed federal judiciary. Not only are there a substantial number of potential plaintiffs who may have an incentive to bring such suits, but those suits,

37. *Id*. at 689-90.

38. *Id*. at 690.

39. *Id*. at 691.

40. *Id*. The dissenting opinion adopted the rationale of the panel majority opinion.

41. The perceived importance of the issue is reflected in the number of amicus briefs. *See supra* note 8.

42. In dicta, the U.S. Court of Appeals for the Seventh Circuit has stated that "a §106 or §107(a) action apparently must either be ongoing or already completed before §113(f)(1) is available." Rumpke of Ind., Inc. v. Cummins Engine Co., 107 F.3d 1235, 1241, 27 ELR 20596 (7th Cir. 1997). The U.S. Court of Appeals for the Ninth Circuit has recently expressed agreement with the en banc decision in *Aviall*. Western Properties Serv. Corp. v. Shell Oil Co., 358 F.3d 678, 684 (9th Cir. 2004).

43. The following decisions expressly rejected the panel decision in *Aviall*: Niagara Mohawk Power Corp. v. Consolidated Rail Corp., 291 F. Supp. 2d 105 (N.D.N.Y. 2003); American Special Risk Ins. Co. v. City of Centerline, 2002 WL 1480821 (E.D. Mich. 2002); Aero-Motive Co. v. Becker, 2001 WL 1699194 (W.D. Mich 2001).

44. *See supra* note 3.

45. This paragraph focuses upon the "Reasons for Granting the Writ" set forth at pages 4-5 of the Petition for a Writ of Certiorari. The petition also contains various arguments in support of the general proposition that the en banc decision was incorrect. The arguments set forth in Cooper's brief on the merits are summarized *infra*.

46. Petition for Certiorari at 4, *Aviall* (No. 02-1192).

47. *Id*. The petition also stated that "[d]isagreement over the scope of [§]113(f)(1) pervades the federal district courts as well." *Id.* at 5.

48. *Id*.

49. Brief for the United States as Amicus Curiae Supporting Petitioner at 9, *Aviall* (No. 02-1192).

50. *Id*.

> which typically involve multiple parties, are inherently complex. They usually involve difficult questions of allocating necessary response costs based on expert testimony, including scientific inquiry about conditions at the site. And, as this case illustrates, they may import, through the federal court's supplemental jurisdiction, state[-]law issues that would normally be resolved in state court.[51]

Cooper's assertion, in its petition, that there were "divergent and conflicting views" in the lower courts is somewhat misleading—Cooper and the Solicitor General had to acknowledge that there was no conflict in the circuits with respect to the precise issue set forth in Cooper's petition. Nevertheless, four members of the Court may have been persuaded that there was a degree of confusion in the lower courts with respect to the more general question of the relationship between §107 and §113(f)(1) and that some of that confusion might be attributable to the Court's statements in *Key Tronic*.[52]

The Court may also have accepted the views of the Solicitor General as representing the disinterested, objective judgment of the executive branch to whom Congress has delegated responsibility for administering and enforcing CERCLA.[53] In the brief of the United States in support of Cooper's petition for certiorari, the Solicitor General did not mention that the United States has a direct financial interest in the Court's resolution of the question presented in *Aviall*.[54] The United States has been named as a defendant in a number of actions in which private plaintiffs have sought to recover response costs by way of contribution claims under §113(f)(1).[55] In most, if not all, of these actions, the plaintiff PRPs have not been named as defendants in a government-initiated §106 or §107 action.[56] Thus, if the Court were to reverse the Fifth Circuit and hold that such claims could not be asserted under CERCLA, it is likely that the United States would escape liability altogether for any response costs incurred by a private party because, in most instances, the United States could assert sovereign immunity in response to any state-law-based contribution claims.[57]

It is, of course, impossible to know with certainty why the Court grants a petition for certiorari. But it is likely that the Court was influenced by the importance of the question presented, Cooper's assertion (exaggerated though it may have been) that there were conflicting decisions in the lower courts, and the Solicitor General's seemingly disinterested support for the petition.

The Arguments in Support of Reversal[58]

Cooper's brief on the merits asserts that "CERCLA's Plain Language, Its Essential Purpose, and Its Overall Structure Support Petitioner's Reading of Section 113(f)(1)."[59]

Plain Language

Generally stated, Cooper's primary argument is that Aviall's action is not a "contribution" action that may be asserted under §113(f)(1). In support of this general argument, Cooper points first to the "plain language" of §113(f)(1). Cooper's plain language argument is set forth succinctly in the following excerpt from the "Summary of Argument" in its brief:

51. *Id*.

52. The question of the relationship between §107 and §113 can arise in a number of different contexts besides the context presented in *Aviall*. For a discussion of the question of the relationship between these two provisions in various contexts, see JOHN M. HYSON, PRIVATE COST RECOVERY ACTIONS UNDER CERCLA ch. II (Envtl. L. Inst. 2003) [hereinafter PRIVATE COST RECOVERY ACTIONS].

53. CERCLA confers various types of authority and responsibility upon "the [p]resident" who, in turn, is authorized to subdelegate such authority and responsibility. CERCLA §115; 42 U.S.C. §9615. The president has subdelegated most of his CERCLA authority and responsibility to the Administrator of EPA. Aviall points out in its brief that the interpretation of §113(f) that is argued by the Solicitor General is at odds with the position taken by EPA in the provisions of the national contingency plan (NCP). Brief of Respondent at 34-35, *Aviall* (No. 02-1192).

54. This interest was acknowledged, after the Court had granted Cooper's petition for certiorari, in the U.S. brief on the merits, in which it was stated that "EPA and other federal agencies . . . are subject to CERCLA requirements and are [PRPs] at a number of sites." Brief for the United States as Amicus Curiae Supporting Petitioner at 1, *Aviall* (No. 02-1192), *available at* http://www.usdoj.gov/osg/briefs/2003/3mer/1ami/2002-1192.mer.ami.pdf (last visited July 30, 2004).

55. *See, e.g.*, East Bay Mun. Util. Dist. v. Department of Commerce, 142 F.3d 479, 28 ELR 21293 (D.C. Cir. 1998); FMC Corp. v. Department of Commerce, 29 F.3d 833, 24 ELR 20207 (3d Cir. 1994). In these §113(f)(1) contribution actions, the courts have held that Congress effectively waived federal sovereign immunity in §120(a)(1).

56. A recent example is E.I. DuPont de Nemours & Co. v. United States, 297 F. Supp. 2d 740 (D.N.J. 2003), in which a PRP brought a §113(f)(1) contribution action against the United States. The court granted summary judgment to the United States because the plaintiff PRP had not been named as a defendant in a government-initiated civil action under §106 or §107. The court believed that the U.S. Court of Appeals for the Third Circuit had held, in In re Reading Co., 115 F.3d 1111, 27 ELR 21075 (3d Cir. 1997), that the first sentence of §113(f)(1) limited the availability of contribution claims to those PRPs that had been named as defendants in a government-initiated action under §106 or §107. The court thus declined to follow the en banc decision of the Fifth Circuit in *Aviall*.

57. This point is emphasized in the amicus briefs. For example, one brief points out that there are a number of privately owned sites with contamination resulting in whole or in part from the activities of the federal government. The brief goes on to state:

> EPA and state regulatory agencies seek to expedite the cleanups at these sites, but they are often unable to sue the federal department or agency that helped to create the problem. Instead, they frequently approach private companies that also share the liability at these sites, hoping the companies will agree to undertake the cleanups themselves. . . .
>
> Some companies sign on to perform these massive cleanups, with the expectation that they can swiftly obtain equitable contribution from the United States. But if the right to contribution were now restricted to parties that have been sued under [§§]106 or 107 of CERCLA, then companies voluntarily cleaning up sites polluted by the United States would typically have no right of contribution. As a result, companies would be far less willing in the future to agree to perform such cleanups voluntarily.

Brief of Amici Curiae Superfund Settlements Project et al. at 18, *Aviall* (No. 02-1192). Although private parties who incurred cleanup costs voluntarily would, in theory, be able to assert state-law contribution claims against the Unites States in state courts, the United States would undoubtedly assert a sovereign immunity defense. Section 120(a)(4) waives federal sovereign immunity with respect to state law claims but only with respect to facilities that are owned or operated by an agency of the United States.

58. The following description of the arguments for reversal focuses upon the principal arguments in Cooper's brief. The arguments in the brief for the United States are similar. Where the brief for the United States contains a distinct and significant argument, such argument will be described.

59. Brief for the Petitioner, Argument Heading (B) at 13, *Aviall* (No. 02-1192). Cooper's brief also addresses the question as to whether its interpretation of §113(f)(1) is consistent with CERCLA's policies. *Id*. at 36-40.

> The plain language of the provision in question [i.e., the first sentence of §113(f)(1),] enables covered persons to sue "any other person who is liable or potentially liable" for contribution "during or following any civil action" under [§§]106 or 107 of CERCLA. . . . [Section 113(f)(1)'s] final sentence, using standard "savings clause" language, ensures that the right of contribution created in the provision's enabling clause [i.e., the first sentence,] will not "diminish the right of any person" to pursue whatever other rights of contribution might be available. When read together, both the text and context of [§]113(f)(1)'s four sentences compel the conclusion that CERCLA provides only a limited right of contribution which is available exclusively to litigants who have been subject to a [§]106 or [§]107(a) civil action.[60]

According to Cooper, the first sentence of §113(f)(1) codified the federal common-law right of contribution that had been developed by the federal courts after the enactment of CERCLA in 1980 and prior to the enactment of SARA in 1986. In other words, the contribution right created in the first sentence was, according to Cooper, consistent with the common-law contribution right that the federal courts had created prior to SARA. The first sentence enabled, or authorized, a federal right of contribution but only in the circumstances described in the first sentence—that is, "during or following any civil action under" §106 or §107. The fourth sentence saved "[a]ll other *such rights of contribution*, whether state or federal."[61] Such rights include contribution rights under state law and the right to contribution established in §113(f)(3)(B).[62]

What then of the pre-SARA "federal decisions [that] allowed CERCLA actions for recovery *in the nature of contribution* to proceed even though the plaintiff had not been sued under §106 or §107?"[63] According to the Fifth Circuit, pre-SARA case law had established that a right to assert such claims was implied under §107(a)(4)(B). Were not such claims "saved"—as the Fifth Circuit concluded—by the last sentence of §113(f)(1)?

Cooper's answer is quite simple: such claims, implied under §107(a)(4)(B), are not "contribution" claims; rather they are "cost recovery" claims.[64] As "cost recovery" claims, they are not saved by the fourth sentence of §113(f)(1), which saves only "contribution" claims. And the question whether Aviall could assert a cost recovery claim under §107(a)(4)(B) is not relevant because Aviall elected to drop its §107 claim and rely entirely upon a claim under §113(f)(1).[65] Having asserted only a §113(f)(1) claim, Aviall can not prevail because its claim does not come within the "enabling" language in the first sentence; nor is the claim a "contribution" claim saved by the fourth sentence.

The Solicitor General's view is somewhat different. The Solicitor General first states that "the courts of appeals have uniformly concluded that [§]107(a)(1)-(4)(B) allows a liable party, such as Aviall, to obtain a recovery from another jointly liable party only through a contribution action under 113(f)."[66] The Solicitor General then explains how such a claim by a liable party under §107 is affected by the provisions of §113(f)(1):

> The courts of appeals have correctly recognized that, while [§]107(a)(1)-(4)(B)'s reference to "any person" is broad enough to allow one jointly liable party to sue another for the former's response costs, that [s]ection does not prescribe what form that liability should take. When read in combination, the clear implication of [§]107(a)(1)-(4)(B) and [§]113 is that the jointly liable party is limited to seeking contribution *in the manner authorized by [§]113(f)*.[67]

The Solicitor General's argument seems to acknowledge that a claim for private response costs by one PRP against another PRP should be viewed as a claim for contribution, at least for some purposes,[68] but that such a claim for contribu-

60. Brief for the Petitioner at 5, *Aviall* (No. 02-1192).

61. *Id*. at 18 (emphasis added).

62. The en banc dissent emphasized that the fourth sentence saved contribution rights under state law. Section 113(f)(3)(B) establishes a right of contribution that is distinct from the right established in the first sentence of §113(f)(1) and that is saved (or not diminished) under the last sentence of §113(f)(1). Section 113(f)(3)(B) provides:

> A person who has resolved its liability to the United States or a [s]tate for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

42 U.S.C. §9613(f)(3)(B).

63. Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 682, 33 ELR 20101 (5th Cir. 2002) (emphasis added).

64. This assertion is stated most clearly in the following excerpt from Cooper's brief:

> [T]he cases cited by the Fifth Circuit for the proposition that other early federal court decisions allowed actions for recovery "in the nature of contribution" to proceed, even though the plaintiff had not been sued under [§]106 or [§]107(a), do not even address "contribution." *See*, *e.g.*, Bulk Distribution Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1442-44 (S.D. Fla. 1984); Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1140 (E.D. Pa. 1982). They involve, instead, persons who sued for direct cost recovery—not contribution. While the Fifth Circuit claims that "[w]hether the cases actually used the word 'contribution' is irrelevant" [quoting 312 F.3d at 683], Congress' concern was not with these direct cost recovery decisions, which were nowhere referenced in the legislative history, but rather was with the separate line of cases [that involved claims brought by PRPs that had been subject to joint and several liability in actions brought by a government identity under §106 or §107] . . . .

Brief for the Petitioner at 24 n.18, *Aviall* (No. 02-1192) (partial emphasis omitted).

65. In its brief, Aviall disputes that its claim is not grounded upon §107, as well as §113(f)(1). Brief of Respondent at 36-39, *Aviall* (No. 02-1192). The question of whether a PRP may recover voluntarily incurred response costs in a cost recovery action under §107 is discussed *infra*.

66. Brief for the United States as Amicus Curiae Supporting Petitioner at 20, *Aviall* (No. 02-1192).

67. *Id*. at 20-21 (emphasis added).

68. The Solicitor General asserts that his interpretation of the relationship between PRP claims under §107 and the provisions of §113(f)(1)

> ensures that parties who have settled with the government and received protection from "claims for contribution regarding matters addressed in the settlement," CERCLA §113(f)(2), 42 U.S.C. 9613(f)(2), are not subject to double liability through a [§]107(a) suit on the theory that such a suit imposes an independent basis of liability apart from contribution.

Id. at 21. In short, it appears that the Solicitor General's conclusion that a claim for private response costs by one PRP against another PRP should be viewed as a claim for "contribution" is driven, at least in part, by the Solicitor General's concern about ensuring that PRPs who settle with the government enjoy protection against claims by other PRPs for privately incurred response costs. Section 113(f)(2) extends such protection only with respect to "contribution" claims; it provides no protection against "cost recovery" actions that are grounded solely upon §107(a)(4)(B).

69. Brief for the Petitioner at 22, *Aviall* (No. 02-1192). This statement,

tion can be asserted under §113(f)(1) only in the circumstances described in the first sentence—during or following a government-initiated action under §106 or §107—or in the circumstances described in §113(f)(3)(B)—after the PRP has entered into an administrative or judicially approved settlement.

Purpose

Cooper's brief asserts that the "essential purpose" of §113(f)(1) supports a "limited right of action" under that section. More specifically, the brief states:

> Congress passed [§]113(f)(1) to make explicit a previously implied right of contribution, as found in federal common law, by enabling those parties which were or had been the subject of cost recovery actions under [§§]106 or 107(a) of CERCLA to implead or bring separate actions against third parties responsible or potentially responsible for the contamination.[69]

The brief goes on to state that the pre-SARA case law was developed in order to provide some relief to PRPs from the consequences of joint and several liability when PRPs were named as defendants in government cost recovery actions under §107(a). The brief refers to legislative history in support of the assertion that §113(f)(1) was enacted in order to deal with the same concern.[70] Thus, according to the brief, the purpose of §113(f)(1) was to codify a right to contribution that would provide relief to a PRP that had been named as a defendant in a government action under §106 or §107—a purpose that is reflected in the "enabling" language in the first sentence of §113(f)(1). The purpose of §113(f)(1) was not to provide a right-of-action for a person who had incurred response costs in the absence of being named as a defendant in such a government action.[71]

Structure

Cooper's brief asserts that §113(f)(1)'s "limited right of action"—that is, the right of contribution accorded to PRPs that have been named as defendants in a government cost recovery action under §106 or §107—is "supported by CERCLA's overall structure and scheme."[72] Specifically, a limited right-of-action under §113(f)(1) is consistent with the statute-of-limitations provisions for "contribution" actions in §113(g)(3); and is consistent with the "settlement scheme" established by the Act.[73]

The Probable Analysis of the Court

The question before the Court in *Aviall* is whether the Fifth Circuit erred in holding that Aviall, a PRP who had not been of an underlying civil action pursuant to §106 or §107, had the right to bring an action seeking contribution pursuant to §113(f)(1) to recover response costs that it had voluntarily incurred. To answer this question, the Court must address Cooper's primary argument: that Aviall's action is not a "contribution" action as that term is used in §113(f)(1). Aviall's action can be maintained under §113(f)(1) only if the Court agrees with the Fifth Circuit's conclusion that Aviall's action is a "contribution" action that is saved under the last sentence of §113(f)(1).[74]

In addressing this question, the Court will be under no obligation to discuss, much less explain and harmonize, the various lower court decisions that discuss the relationship between §§107(a)(4)(B) and 113(f)(1).[75] The Court will instead do what it usually does when faced with a difficult question of statutory interpretation: it will look to the language of the statute, perhaps to the legislative history, and it will consider its prior decisions that address (even indirectly) the issues presented in *Aviall*. The one prior decision that the Court will certainly discuss is *Key Tronic*.[76]

The Key Tronic *Decision*

The *Key Tronic* decision receives little consideration in the briefs submitted to the Court in *Aviall*.[77] This is somewhat

like the Fifth Circuit's en banc majority opinion (*see supra* note 23) blends together two distinct bases for two distinct lines of pre-SARA decisions. The line of cases to which the Solicitor General refers held, as a matter of federal common law, that PRPs were jointly and severally liable for response costs incurred by a government entity and that such PRPs had a right to seek contribution from other PRPs. Properly understood, the right of contribution articulated in these decisions was not implied under §107(a)(4)(B) since that provision imposes liability for directly incurred *private* response costs and thus has nothing to do with the right of a PRP to obtain contribution as a result of its liability for *government* response costs.

70. *Id*. at 22-25. The brief refers, among other things, to the following excerpt from a U.S. House of Representatives Report:

> It has been held that, when joint and several liability is imposed under [§]106 or [§]107(a) of the Act, a concomitant right of contribution exists under CERCLA, United States v. Ward, 8 Chem. & Rad. Waste Litig. Rep. 484, 487-88 (D.N.C. May 14, 1984). Other courts have recognized that a right to contribution exists without squarely addressing the issue. *See*, *e.g.*, United States v. South Carolina Recycling and Disposal, Inc., 7 Chem. & Rad. Waste Litig. Rep. 674, 677 (D.S.C. Feb[.] 23, 1984). This section [i.e., §113(f)(1),] clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or costs that may be greater than its equitable share under the circumstances.

Id. at 23-24 (emphasis omitted) (quoting H.R. Rep. No. 99-253(I), at 79 (1985)).

71. The brief goes on to assert that the "savings clause"—in the fourth sentence of §113(f)(1)—cannot, as a savings clause, "establish liability on its own." *Id*. at 27. Moreover, a construction of the savings clause that created a "contribution" claim for Aviall—a PRP that had not been named as a defendant in a government action under §106 or §107—could not "be squared with the federal common law" because "[a]t federal common law, one could not seek contribution unless and until that person had first discharged, pursuant to judgment or settlement, the liability of other wrongdoers against whom contribution was being sought." *Id*. Simply put, even if the fourth sentence of §113(f)(1) could be interpreted as establishing a free-standing right to contribution, it would not benefit Aviall because Aviall's action is not an action for contribution.

72. *Id*. at 31.

73. These structural arguments are explained and discussed *infra*. Cooper's brief and the briefs of Aviall and the Solicitor General also consider, toward the end of their analyses, whether their suggested interpretations of §113(f)(1) are consistent with the purpose or policies underlying CERCLA. Since the Court is unlikely to give much (if any) weight to policy considerations in interpreting §113(f)(1), the policy discussion in the briefs is not considered in this Article.

74. Aviall's action is clearly not a contribution action that is authorized under the first sentence of §113(f)(1) and thus can be brought under that section only if it is a "contribution" claim that is preserved under the last sentence.

75. For a discussion of these decisions, see Private Cost Recovery Actions, *supra* note 52.

76. 511 U.S. at 809.

77. The extent to which the briefs consider *Key Tronic* is discussed *infra*.

surprising since the Court in *Key Tronic*, admittedly in dicta, discussed the relationship between claims under §107(a) and claims under §113(f)(1).[78] Unless the Court abandons or qualifies its statements in *Key Tronic*, these statements suggest how the Court will analyze the question presented in *Aviall*.

The *Key Tronic* case involved a site at which Key Tronic Corporation and other parties had disposed of liquid chemicals. Key Tronic had entered into a settlement under which it agreed to contribute $4.2 million to an EPA cleanup fund. In addition, prior to entering into the settlement, Key Tronic itself had incurred $1.2 million in costs. Key Tronic brought an action in which it sought to recover these costs from other PRPs.[79] The Court described the action brought by Key Tronic as follows:

> Key Tronic thereafter brought this action . . . to recover part of its $4.2 million commitment to [ ] EPA in a contribution claim under CERCLA §113(f) . . . and seeking an additional $1.2 million for response costs that it incurred before the settlements in a cost recovery claim under CERCLA §107(a)(4)(B) . . . .[80]

Key Tronic's "contribution claim" under §113(f)(1) against the United States was dismissed by the district court because the United States had entered into an administrative settlement and thus was protected under §122(g)(5) against "contribution claims" regarding matters addressed in the settlement.[81] With respect to Key Tronic's "cost recovery claim" under §107(a)(4)(B), the question was whether certain costs for legal expenses were "costs of response." The district court held that they were, the court of appeals reversed, and the Court granted review.

Before addressing the specific issue before it, the Court spoke more generally about the relationship between §107 and §113(f)(1):

> [W]e begin . . . by considering the statutory basis for the claim [i.e., Key Tronic's "cost recovery" claim under §107(a)(4)(B),] in the original CERCLA enactment and the SARA [A]mendments' effect on it. In its original form, CERCLA contained no express provision authorizing a private party . . . to seek contribution from other [PRPs]. In numerous cases, however, [d]istrict [c]ourts interpreted the statute—particularly the §[107] provisions outlining the liabilities and defenses of persons against whom the [g]overnment may assert claims—to impliedly authorize such a cause of action.
>
> The 1986 [A]mendments included a provision—CERCLA §113(f)—that expressly created a cause of action for contribution. . . . Other SARA provisions, moreover, appeared to endorse the judicial decisions recognizing a cause of action under §107 by presupposing that such an action existed. . . . Thus, the statute now expressly authorizes a cause of action for contribution in §113 and impliedly authorizes a similar and somewhat overlapping remedy in §107.[82]

In a separate opinion (dissenting in part from the majority opinion), Justice Antonin Scalia expressed disagreement with the majority's assertion that the "right of recovery" under §107 was only "implied." In his view, §107(a)(4)(B) created an "express" cause of action for the recovery of private response costs.[83]

Application of the Key Tronic *Dicta*

The *Key Tronic* dicta suggest an answer to the question that is central to the *Aviall* case: Is Aviall's action, in which it seeks to recover directly incurred private response costs against another PRP, a "contribution" action that may be asserted under §113(f)(1)? Or is Aviall's action a "cost recovery" claim that may not be brought under §113(f)(1)?[84]

The *Key Tronic* dicta send somewhat conflicting signals. On the one hand, the Court initially characterized Key Tronic's claim for privately incurred response costs as "a cost recovery claim under CERCLA §107(a)(4)(B)." But then the Court stated that §107 "impliedly authorizes" a "remedy" that is "similar and somewhat overlapping" to the remedy that is authorized in §113(f)(1)—the allocation of response costs. Does this latter language suggest that the Court considered a PRP's action to recover response costs against another PRP as, at least for some purposes, a "contribution claim" since the remedy available in such an action is a contribution remedy?

The Court's treatment of the pre-SARA case law provides some support for the second conclusion. The Court stated first that "[i]n its original form CERCLA contained no express provision authorizing a private party that had incurred cleanup costs *to seek contribution* from other PRPs."[85] And, in the next sentence, the Court stated that "[i]n numerous cases, . . . [d]istrict [c]ourts interpreted the statute—particularly the §[107] provisions outlining the liability and defenses of persons against whom the [g]overnment may assert claims—to impliedly authorize *such a cause of action*."[86] Together, these two statements support the conclusion that the Court in *Key Tronic* believed that

78. The Fifth Circuit referred to, and relied upon, this dicta in reaching its decision.

79. One of the defendant PRPs was the United States because the U.S. Air Force had disposed of liquid chemicals at the site.

80. 511 U.S. at 812.

81. *Id*. Section 122(g)(5) is one of three contribution protection provisions in CERCLA. (The others are §113(f)(2) and §122(h)(4).) All provide that a settling party "shall not be liable for claims for contribution regarding matters addressed in the settlement." For a discussion of the effect of the contribution protection provisions, see Private Cost Recovery Actions, *supra* note 52, at 125-44.

82. 511 U.S. at 816. In connection with its reference to "numerous cases" in which courts had held that §107 impliedly authorized a right-of-action under which a private party could recover its response costs against those who are liable under §107(a), the Court inserted a footnote (footnote 7) in which the Court cited a number of pre-SARA decisions in which courts had allowed PRPs to assert claims for private response costs against other PRPs.

83. In his separate opinion (joined by Justices Harry Blackmun and Clarence Thomas), Justice Scalia stated:

> The Court seeks to characterize the right of recovery created by §107 as an "implied" right of action. . . . That characterization is mistaken. Section 107(a)(4)(B) states, as clearly as can be, that "[c]overed persons . . . shall be liable for . . . necessary costs of response incurred by any other person." Surely to say that A shall be liable to B is the *express* creation of a right of action.

511 U.S. at 822 (emphasis in original).

84. If the Court concludes that Aviall's action is a cost recovery action that may not be asserted under §113(f)(1)—but rather must be asserted under §107(a)(4)(B)—the Court may then have to address Aviall's contention that its claim is a "joint claim" that is grounded upon both §113(f)(1) and §107(a)(4)(B).

85. 511 U.S. at 816 (emphasis added).

86. *Id*. (emphasis added).

"numerous" pre-SARA decisions interpreted §107 as impliedly authorizing a cause of action under which a PRP who had incurred cleanup costs could "seek contribution" from other PRPs. And, as the Court stated quite clearly, "the statute now [post-SARA] expressly authorizes a cause of action for contribution in §113(f)(1) [i.e., the cause of action expressly authorized in the first sentence of §113(f)(1),] and impliedly authorizes a similar and somewhat overlapping remedy in §107." The latter statement, together with the Court's discussion of the pre-SARA decisions, supports the conclusion that the Court in *Key Tronic* was of the view that, after SARA, CERCLA authorized two distinct types of "contribution" claims—one expressly authorized under the first sentence of §113(f)(1) and the second impliedly authorized under §107.[87]

The preceding analysis is based upon a close reading of the *Key Tronic* dicta. It assumes that the statements in *Key Tronic*, though clearly dicta, will be given serious consideration as the Court resolves the question presented in *Aviall*. Neither Cooper nor the Solicitor General has presented a persuasive argument for abandoning or qualifying the dicta.

Treatment of Key Tronic *in Briefs*

As previously stated, the briefs give little attention to the *Key Tronic* dicta. Aviall quotes the dicta but does not develop an argument grounded upon the dicta.[88] The Solicitor General and Cooper acknowledge the dicta and deal with it in different ways.

The Solicitor General, by way of footnote, makes the following argument:

> [T]he federal government endorses the uniform conclusion of the courts of appeals that [§]107(a)(1)-(4)(B) does not provide an independent basis for a liable person to recover response costs from another liable person. *See* Amicus Brief for the United States at 10, Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (No. 97-795). As the government noted in *Pinal Creek*, that understanding of the relationship between [§§]107 and 113 is consistent with this Court's observations in *Key Tronic* that [§§]107 and 113 provide related remedies. *See* 511 U.S. at 816 & n.7. To the extent that the Court's observations suggest that [§]107 alone could give rise to an independent right of contribution, that "passing dictum" (SEC v. Edwards, 124 S. Ct. 892, 898 (2004) is inconsistent with the Court's analysis in Lamie [v. United States Trustee, 124 S. Ct. 1023 (2004)], which recognized that statutes should be interpreted on the basis of the "existing statutory test." 124 S. Ct. at 1030. Here, the "existing statutory text" provides an express and specific contribution remedy, see CERCLA 113(f), 42 U.S.C. 9613(f), so there is no basis for inferring another.[89]

Cooper notes that the Court "observed," in *Key Tronic*, that "the two sections [i.e., §§107 and 113,] work together to enable a party held liable under CERCLA, or involved in a CERCLA action, to seek contribution from other [PRPs]."[90] Cooper then goes on to describe how, in its view, the two sections work together:

> Where, for example, a person responsible for contaminating his property is subjected to CERCLA liability claims, he may not bring a separate direct cost recovery action against another responsible party under [§]107(a) seeking to impose joint and several liability, see Bedford Affiliates v. Sills, 156 F.3d 416, 423-24 (2d Cir. 1998) (citing cases from other circuits); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672-73 (5th Cir. 1989) . . . but is limited to pursuing contribution in the underlying CERCLA suit under [§]113(f)(1). This is to be distinguished from the person bearing no responsibility for the contaminated condition of its property, who, if not subject to CERCLA liability claims, can bring only a direct cost recovery action under [§]107(a), but cannot pursue contribution under [§]113(f)(1). . . .
>
> Aviall, of course, fits neither category. Having contributed to the contamination of its property . . . , it cannot pursue a direct cost recovery action under [§]107(a). . . . Moreover, since Aviall has never been the subject of a [§]106 or [§]107(a) civil action, it can assert no right of contribution under [§]113(f)(1). Yet, true to [§]113(f)(1)'s savings clause, whether other avenues to contribution might be available to Aviall remain "[un]diminish[ed]." It continues to assert state claims for contribution under Texas law. . . . In addition, Aviall could have pursued contribution under [§]113(f)(3)(B) if it had entered into an approved settlement for contribution with a state or federal authority. . . . To our knowledge, this exhausts all rights of contribution Aviall could possibly assert . . . .[91]

Both the Solicitor General and Cooper refer to a number of decisions in which courts of appeals have held that a PRP may not bring a §107 direct cost recovery action against other PRPs in which the plaintiff seeks to impose joint and several liability upon each defendant PRP.[92] In these decisions, the courts of appeals have held that, though §107(a)(4)(B) imposes liability upon a PRP for costs incurred by another PRP, a PRP seeking to recover such costs is limited to a contribution action under §113(f)(1). Representative of these decisions is *Pinal*

87. This is the conclusion reached by the en banc majority in *Aviall*:

> As the [Court] explained it [in *Key Tronic*], CERCLA, as amended by SARA, authorizes *two kinds of contribution actions among PRPs*, one that is explicit under §113(f) and another that is an "implied," "similar and somewhat overlapping" action pursuant to §107.

312 F.3d at 683 (emphasis added).

To be sure, the Court in *Key Tronic* did not address the specific issue presented in *Aviall*—the impact of the enactment of §113(f)(1) upon the continued viability of implied §107 claims. But the Court did state clearly that "now"—that is, post-SARA—§107 still impliedly authorized claims. Either of two rationales would support this conclusion: (1) such implied claims are "cost recovery" claims that are grounded solely upon §107 and thus are in no way affected by the provisions of §113(f)(1); or (2) such claims are "contribution" claims that, though not authorized by the first sentence of §113(f)(1), are saved under the last sentence. The latter view, adopted in the Fifth Circuit's en banc decision in *Aviall*—is consistent with the Court's characterization of the pre-SARA decisions involving PRP actions for private costs as actions in which the plaintiff PRP "seek[s] contribution" from other PRPs.

88. Brief of Respondent at 2-3, *Aviall* (No. 02-1192).

89. Brief for the United States as Amicus Curiae Supporting Petitioner at 20 n.9, *Aviall* (No. 02-1192) (emphasis added).

90. Brief for the Petitioner at 25, *Aviall* (No. 02-1192).

91. *Id.* at 25-26 (emphasis omitted).

92. *See, e.g.*, Bedford Affiliates v. Sills, 156 F.3d 416, 29 ELR 20229 (2d Cir. 1998); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 29 ELR 20065 (6th Cir. 1998); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 27 ELR 21211 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). For a discussion of these decisions, see PRIVATE COST RECOVERY ACTIONS, *supra* note 52.

Creek Group v. Newmont Mining Corp.,[93] in which the U.S. Court of Appeals for the Ninth Circuit set forth the following explanation of the relationship between §107(a)(4)(B) and §113(f)(1):

> Together, §§107 and 113 provide and regulate a PRP's right to claim contribution from other PRPs. *Key Tronic*, 511 U.S. at 814-18, 114 S. Ct. at 1965-66 (remedies in §§107 and 113 described as "similar and somewhat overlapping"). The contours and mechanics of this right are now governed by §113. Put another way, while §107 created the right of contribution, the "machinery" of §113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of §107.[94]

Both the Solicitor General and Cooper subscribe to these decisions to the extent that they hold that a PRP does not have a right to bring an action against another PRP in an independent direct cost recovery action under §107.[95] But both reject these decisions to the extent that they hold that a PRP may obtain contribution against another PRP for its directly incurred response costs in an action under §113(f)(1). Their reasons for rejecting the second component of the holdings in these decisions—the right of a PRP to bring a contribution action against another PRP in an action under §113(f)(1)—seem to differ.

The Solicitor General acknowledges that the *Key Tronic* dicta "suggest" that the language of §107(a)(4)(B) gives rise to an independent right of contribution. However, according to the Solicitor General, this is only "passing dictum" that should be disregarded as inconsistent with the principle stated in *Lamie v. U.S. Trustee*[96] that "statutes should be interpreted on the basis of the 'existing statutory text.'"

The *Key Tronic* dicta *are* grounded on the existing statutory text. Section 107(a)(4)(B) states that everyone who is a PRP (that is, within one of the four categories of liability set forth in §107(a)) is liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan [(NCP)]." Numerous pre-SARA decisions concluded that this language impliedly provided a PRP with a right to recover its response costs against another PRP.[97] In *Key Tronic*, the Court: (1) acknowledged these decisions[98]; (2) agreed that §107(a)(4)(B) impliedly authorized an action under which a PRP could seek contribution against other PRPs for its directly incurred response costs; and (3) said that this §107(a)(4)(B)-based cause of action survived the SARA Amendments.[99] To be sure, the first sentence of §113(f)(1) authorizes a distinct action for contribution—one that can be asserted only during or following a government-initiated civil action under §106 or §107. However, as the last sentence of §113(f)(1) makes clear, the creation of that right of contribution did not "diminish" other contribution rights under other provisions of the statutory text of CERCLA—whether it is a right of contribution under §113(f)(3)(B) or a right of contribution under §107(a)(4)(B).

The Solicitor General argues that the only contribution rights that have support in the statutory text of CERCLA are the contribution rights set forth in the first sentence of §113(f)(1) and in §113(f)(3)(B). The Solicitor General's argument is, in effect, an argument that, in enacting the amendments contained in SARA, Congress intended to establish these two rights of contribution and, at the same time, to override the statutory right of contribution that courts had (prior to SARA) grounded upon §107(a)(4)(B).[100] The briefs of both Cooper and the Solicitor General make a persuasive case that the legislative history shows that Congress, in enacting §113(f)(1), was primarily concerned about providing statutory support for a right of contribution that had been developed, by way of federal common law, in pre-SARA decisions—that is, the right of a PRP to seek contribution from other PRPs when a PRP has been named as a defendant in a government-initiated civil action under §106 or §107. There was no need for Congress to provide statutory support for a different type of contribution right, also recognized in pre-SARA decisions—the right of a PRP to seek contribution from other PRPs for directly incurred response costs. This right of contribution already had statutory support: §107(a)(4)(B). There is nothing in the legislative history of SARA to support the contention that, in creating statutory support for one type of contribution claim, Congress intended to limit, or implicitly repeal, a right of contribution grounded upon §107(a)(4)(B). And, as the Solicitor General acknowledges, the *Key Tronic* dicta are inconsistent with this contention.

Cooper's treatment of the *Key Tronic* dicta is different. Cooper does not suggest that the dicta should be disregarded. Rather, Cooper argues that, although the *Key Tronic* dicta state that §107(a)(4)(B) provides a right-of-action that is independent and distinct from the contribution right set forth in the first sentence of §113(f)(1), this §107-based right-of-action is not an action for "contribution" that can be asserted by one PRP against another PRP. Rather, Cooper states that a §107-based right-of-action is a "direct cost recovery action" that can be asserted only by persons who are not themselves liable under §107(a)—that is, non-PRPs.

Cooper's argument cannot be squared with the language or facts of *Key Tronic*. The Court in *Key Tronic* said that, in the original CERCLA enactment, there was no "express provision authorizing a private party that had incurred cleanup costs to seek *contribution* from *other PRPs*" but that numerous pre-SARA cases interpreted §107 "to impliedly authorize *such a cause of action*."[101] It is this case law that led the Court to conclude that "the statute now [post-SARA] authorizes a cause of action *for contribution* in §113 and a impliedly authorizes a *similar* and somewhat overlapping remedy in §107."[102] This language states, at

93. 118 F.3d 1298, 27 ELR 21211 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

94. *Id*. at 1301-02 (emphasis added).

95. For discussion of whether Aviall's claim might be asserted as a cost recovery action under §107(a)(4)(B), see *infra*.

96. 124 S. Ct. 1023 (2004).

97. It should be recalled that Justice Scalia (joined by Justices Blackmun and Thomas) asserted in *Key Tronic*, by way of a separate opinion, that §107(a)(4)(B) provided an *express* right-of-action under which a PRP could recover its response costs against other PRPs.

98. 511 U.S. at 816 n.7.

99. *See* the discussion of *Key Tronic supra*.

100. As previously described, the Solicitor General, unlike Cooper, acknowledges that the pre-SARA decisions in which the courts held that a PRP had an implied right under §107(a)(4)(B) to recover directly incurred response costs were decisions in which the courts held that the implied right was one of "contribution." Cooper argues that these decisions were "cost recovery," not "contribution," actions.

101. 511 U.S. at 816 (emphases added). The Court cited a number of these decisions. *Id*. at 816 n.7.

102. *Id*. (emphases added).

least implicitly, that §107 authorizes a "contribution" action in which a PRP can seek to recover a portion of its response costs from other PRPs. Indeed, the facts in *Key Tronic* itself involved a §107-based action by a PRP, i.e., a liable party, against other PRPs in which a PRP sought to recover response costs against other PRPs.[103]

In sum, neither the Solicitor General's brief nor Cooper's brief deals persuasively with the *Key Tronic* dicta.

Structural Arguments Advanced Against Affirmance of the Fifth Circuit's Decision

The preceding analysis focuses upon the primary, textual arguments advanced by Cooper and the Solicitor General—arguments that advocate a restrictive interpretation of the types of actions that may be asserted under §113(f)(1)—and seeks to demonstrate that these arguments are inconsistent with the dicta in *Key Tronic*. In their briefs, Cooper and the Solicitor General also argue that the Fifth Circuit's interpretation of §113(f)(1) is inconsistent with CERCLA's overall structure and scheme.

Cooper and the Solicitor General focus first upon the statute-of-limitations provisions in §113(g)(3) and argue that these provisions support their restrictive interpretation of the nature of the "contribution" claims that are established and saved in the first and fourth sentences of §113(f)(1).[104] Specifically, they point to the fact that §113(g)(3) provides a three-year limitations period for "action[s] for contribution" that runs from: (1) the date of judgment in any CERCLA action for recovery of response costs; or (2) the date of any administrative or judicially approved settlement.[105] These provisions lead Cooper to argue:

> Section 113(g)(3) identifies the applicable limitations period for pursuing a right of contribution. This provision allows a contribution action to be brought within three years from the date of judgment or settlement of a [§]106 or [§]107(a) action. . . . Notably, [§]113(g)(3) identifies no limitations period for contribution suits brought in the absence of either an underlying [§]106 or [§]107(a) civil action or a governmental settlement. This omission further suggests that Congress intended to create only the conditioned right of contribution set forth in [§]113(f)(1)'s enabling clause [i.e., the first sentence,] and the contribution right included in [§]113(f)(3)(B) for persons entering into approved settlements with government authorities.[106]

Aviall's brief provides a more than adequate response:

> If §113(g) is problematic, it is a problem that has been solved. The courts of appeals that have addressed the issue have concluded that an action by a PRP [seeking recovery of response costs from another PRP] brought in the absence of a prior judgment or settlement is for limitations purposes an "initial action for recovery" subject to §113(g)(2)'s statute of limitations.[107]

As the U.S. Court of Appeals for the Tenth Circuit stated in *Sun Co. v. Browning-Ferris, Inc.*[108]:

> By its own terms, §113(g)(2) covers the "initial action" for the recovery of "costs referred to" in §107. There is no question that this language covers a traditional §107 cost recovery action brought by the government or any other person who is not a waste-contributing PRP. *Nothing in this language, however, excludes a contribution action which also seeks to recover an equitable portion of "costs referred to" in §107, provided that particular contribution action is the "initial action" to recover such costs*.[109]

The Tenth Circuit expressly rejected the argument that Cooper makes in its brief—that all claims for contribution are governed by the three-year statute of limitations set forth in §113(g)(3). Rather, the court stated that "[i]n effect, there are two different types of contribution actions under CERCLA, each governed by the same equitable rules of §113(f) and each seeking to equitably apportion cost referred to in §107, but governed by different statutes of limitations."[110] Contribution actions under the first sentence of §113(f)(1) are governed by the statute-of-limitations periods set forth in §113(g)(3); contribution actions based on §107(a)(4)(B)—"saved" by the last sentence of §113(f)(1)—are governed by the statute-of-limitations periods set forth in §113(g)(2). The reasoning of the Tenth Circuit in *Sun Co.* has been expressly adopted by the Fifth Circuit[111] and the U.S. Court of Appeals for the Sixth Circuit and the Ninth Circuit have suggested, in dicta, that they would adopt the same reasoning.[112] In short, the statute-

103. The facts in *Key Tronic* are described *supra*. The only claim before the Court was Key Tronic's §107-based claim for directly incurred response costs. Although the Court held that some of the costs that Key Tronic sought to recover were not "costs of response," the Court's dicta acknowledged the right of Key Tronic, a PRP, to bring an action to recover its direct response costs in a contribution action grounded upon §107(a)(4)(B).

104. Brief for the Petitioner at 31-33, *Aviall* (No. 02-1192); Brief for the United States as Amicus Curiae Supporting Petitioner at 21-22, *Aviall* (No. 02-1192).

105. Section 113(g)(3) provides as follows:

> (3) Contribution
> No action for contribution for any response costs or damages may be commenced more than [three] years after—
> (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or
> (B) the date of an administrative order under [§]9622(g) of this title (relating to de minimis settlements) or [§]9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.
>
> 42 U.S.C. §9613(g).

106. Brief for the Petitioner at 31-32, *Aviall* (No. 02-1192).

107. Brief of Respondent at 24, *Aviall* (No. 02-1192).

108. 124 F.3d 1187, 27 ELR 21465 (10th Cir. 1997).

109. *Id*. at 1192 (emphasis added). Section 113(g)(2) provides, in relevant part, as follows:

> (2) Actions for recovery of costs
> An initial action for recovery of the costs referred to in [§]9607 of this title must be commenced—
> (A) for a removal action, within [three] years after completion of the removal action . . .
> (B) for a remedial action, within [six] years after initiation of physical on-site construction of the remedial action . . . .
>
> 42 U.S.C. §9613(g)(2).

110. *Id*. at 1193.

111. Geraghty & Miller, Inc. v. Conoco, Inc., 234 F.3d 917, 31 ELR 20369 (5th Cir. 2000).

112. Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 29 ELR 20065 (6th Cir. 1998): Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 27 ELR 21211 (9th Cir. 1997). *But see* United Technologies Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 24 ELR 21356 (1st Cir. 1994) (an action by a PRP against other PRPs for directly incurred private response costs is a "contribution" action that is subject to the limitations periods set forth in §113(g)(3)). For a discussion of the decisions that consider the appli-

of-limitations periods set forth in §113(g)(3) do not support the restrictive interpretations of §113(f)(1) that are advanced by Cooper and the Solicitor General.

Cooper advances a second "structural" argument which, stated generally, is that if the last sentence of §113(f)(1) is interpreted as saving a §107-based contribution claim for directly incurred response costs, the result would be that PRPs would be subject to the risk of multiple liability.[113] More specifically, Cooper makes two somewhat related arguments: (1) If a PRP settles a §107-based contribution claim for private response costs brought by another PRP, the settlement will not protect the settling defendant PRP from a subsequent §107-based claim brought by a government entity or by another PRP; and (2) if a PRP settles a §107 or §106 action brought by a government entity, the settling defendant will not be protected under §113(f)(2) against a §107-based claim by another PRP because §113(f)(2) affords settling parties protection only against "contribution" claims.[114] Both arguments are unpersuasive.

As to the first specific argument, it is correct that a defendant PRP who settles an action brought by another PRP for private response costs is not entitled to protection against subsequent cost recovery actions by a government entity or by other PRPs. CERCLA's contribution protection provisions can be invoked only by a PRP who has entered into an administrative or judicially approved settlement of a *government* claim[115]—and thus, a PRP who settles a claim brought by another PRP is not protected against a later government claim or a contribution claim brought by yet another PRP.[116] However, as Aviall argues in its brief, a PRP seeking contribution for its response costs in a §107-based contribution claim must establish that its costs were incurred consistent with the NCP. If a cleanup is consistent with the NCP, it is unlikely that there will be a future government or private action with respect to that cleanup. Any future government or private claims might involve contamination problems that were not the subject of the earlier cleanup; but such claims, based upon distinct contamination problems, could hardly be said to impose multiple liability. Rather such claims would impose separate liability for separate instances of contamination.[117]

Cooper's second specific argument simply misunderstands the nature of a §107-based contribution claim for private response costs. The argument presupposes that an administrative or judicially approved settlement of a government claim would not confer contribution protection upon a settling PRP because CERCLA's contribution protection provisions provide protection only against "claims for contribution" and thus would not provide protection against a "cost recovery" claim that is grounded upon §107. However, as numerous court of appeals' decisions have explained,[118] though *liability* for private response costs is grounded upon §107(a)(4)(B), a PRP's claim for such response costs is governed by the "mechanics" of §113(f)(1) and thus, insofar as relief is concerned, is a "claim for contribution." Thus, CERCLA's contribution protection provisions apply to §107-based contribution claims for directly incurred response costs to the same extent as they apply to contribution claims under the first sentence of §113(f)(1).

The Core Question: Is Aviall's Claim a "Contribution" Claim?

The core question that the Court must decide is whether Aviall's claim—a claim in which a PRP seeks to recover a portion of its response costs from another PRP—is a "contribution" claim as that term is used in §113(f)(1). The Fifth Circuit concluded that pre-SARA case law had recognized the implied right of a PRP, under §107(a)(4)(B), to bring an action "in the nature of contribution" and that, under the last sentence of §113(f)(1), such a right of contribution was not diminished by the establishment of a distinct right of contribution in the first sentence.

The Solicitor General does not dispute that Aviall's claim is a "contribution" claim.[119] But the Solicitor General argues that a PRP may assert a contribution claim grounded upon §107(a)(4)(B) "only in the manner authorized by [§]113(f)." According to the Solicitor General, §113(f) provides only "two avenues" by which a PRP may seek contribution from another PRP under CERCLA—under the first sentence of §113(f)(1) (during or following a government-initiated action under §106 or §107) or under §113(f)(3)(B) (after a PRP has entered into an administrative or judicially

cable statute of limitations in a PRP action for private response costs, see PRIVATE COST RECOVERY ACTIONS, *supra* note 52, at 144-55.

113. Brief for the Petitioner at 33-35, *Aviall* (No. 02-1192).

114. Cooper's "structure" argument based upon CERCLA's "settlement scheme" is stated as follows:

> By allowing [§]113(f)(1) contribution claims in the absence of an underlying [§]106 or [§]107(a) civil action, the Fifth Circuit majority exposes all defendants named in such "savings clause claims" to the very real prospect of multiple, inconsistent liability should the government (or a private party) thereafter pursue any or all of them under [§]106 or [§]107(a). . . . This follows, necessarily, because neither an ordered contribution payment in the private suit first brought, nor a settlement with said private plaintiff who claimed to have engaged in a voluntary cleanup, provides [§]113(f)(2) contribution protection. Thus, the Fifth Circuit's overly expansive reading of [§]113(f)(1)'s "savings clause" not only seriously undercuts CERCLA's objective to have cleanup costs appropriately allocated among joint tortfeasors, . . . but also takes out of play the "contribution protection" that [§]113(f)(2) affords liable parties upon settlement of a government suit under the enabling clause.

Brief for the Petitioner at 33-34, *Aviall* (No. 02-1192) (footnotes omitted). Similar arguments are made in the Solicitor General's brief. Brief for the United States as Amicus Curiae Supporting Petitioner at 28, *Aviall* (No. 02-1192).

115. CERCLA contains three contribution protection provisions: §113(f)(2), §122(g)(5), and §122(h)(4). The operative language of these provisions is almost identical. Each protects a private party that has entered into a settlement of a claim by a government entity from "claims for contribution regarding matters addressed in the settlement." For a discussion of the origins and effect of these provisions, see John M. Hyson, *CERCLA Settlements, Contribution Protection, and Fairness to Non-Settling Responsible Parties*, 10 VILL. ENVTL. L.J. 277 (1999).

116. The contribution protection provisions do not provide any protection against a *government* claim brought against a settling party.

117. This is one of Aviall's responses to Cooper's "multiple liability" contention. Brief of Respondent at 30-31, *Aviall* (No. 02-1192).

118. *See, e.g.*, Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 27 ELR 21211 (9th Cir. 1997).

119. As previously explained, the Solicitor General's acknowledgment that a claim by one PRP against another PRP for directly incurred response costs is a "contribution" claim appears to be driven by a concern about the extent to which PRPs who settle with a government entity are protected against claims by non-settling PRPs. If a claim by a PRP against another PRP for directly incurred response costs is *not* a contribution claim—but rather is a claim that is grounded independently upon §107(a)(4)(B)—such claim would not be barred under CERCLA's contribution protection provisions.

approved settlement of a government claim). The Solicitor General's argument does not explain why a PRP's right to bring a contribution claim under §107(a)(4)(B)—a right that was recognized in pre-SARA case law—is not diminished, as provided in the last sentence of §113(f)(1).[120] And, as the Solicitor General acknowledges, his argument is inconsistent with the dicta in *Key Tronic*.[121]

Cooper argues that Aviall's claim is not a "contribution" claim and thus may not be brought under §113(f)(1). If Aviall's claim is not a "contribution" claim, it is not saved under the last sentence of §113(f)(1). As Cooper acknowledges, the question is one of determining Congress' intent when it stated, in the last sentence of §113(f)(1), that "[n]othing in this subsection shall diminish the right of any person to bring *an action for contribution*" in the absence of the circumstances described in the first sentence of §113(f)(1). Cooper asserts that Congress, in using the term "contribution," intended to use the term in a way that was consistent with a "federal common law" of contribution that had been expressed by federal courts in a number of different substantive contexts. According to Cooper, this federal common-law right of "contribution" is limited to actions by a jointly liable entity against another jointly liable entity after the plaintiff had been named as a defendant (or was subject to a judgment) in an action brought by the entity to whom both parties are jointly liable.[122] Aviall, in its brief, disagrees with Cooper's view of the federal common law of contribution and asserts that its claim is consistent with the common law.[123]

The dispute as to the meaning of "contribution" under the common law is relevant but not dispositive. The question before the Court is how Congress intended to use the term "contribution" in §113(f)(1). Dictionary definitions and general statements contained in federal common-law decisions are relevant in determining that intent. But the Court should also consider the backdrop against which Congress enacted §113(f)(1).

Judicial decisions prior to SARA recognized two distinct types of actions by PRPs against other PRPs under CERCLA. One type of action was the product of a government cost recovery action against a PRP in which the government entity asserted that the defendant PRP was subject to joint and several liability. That PRP then sought to assert a "contribution" claim against one or more other PRPs. In these cases, the courts concluded that, as a matter of federal common law, such a claim could be asserted.[124] The parties in *Aviall* agree that the first sentence of §113(f)(1)—added in SARA—codifies this first line of decisions; that is, the parties agree that the first sentence of SARA expressly authorizes a claim for contribution by a defendant PRP before or during a government claim under §106 or §107 in which the government asserts the defendant's joint and several liability.

The second type of pre-SARA decision was one in which a PRP had incurred private response costs and sought to recover such costs in an action against one or more other PRPs under CERCLA. These cases held that §107(a)(4)(B) impliedly, or expressly, authorized such an action; and the decisions held that such an action was authorized irrespective of whether the PRP bringing such an action had been subject to a government action under §106 or §107. As we have seen, several of these decisions were cited by the Court in *Key Tronic* as representative of decisions that "impliedly authorize such a cause of action [i.e., a cause of action for contribution]."[125]

Against this backdrop, Congress (in SARA) established in the first sentence of §113(f)(1) a statutory right of contribution where there had previously been only a federal common-law right. In the last sentence of §113(f)(1), Congress stated that the establishment of the contribution right in the

120. In effect, the Solicitor General is arguing that the express establishment of two rights of contribution—in the first sentence of §113(f)(1) and in §113(f)(3)(B)—indicates that Congress intended that these two rights of contribution were to be the exclusive avenues for seeking contribution under CERCLA. This argument, a form of *inclusio unius est exclusio alterius*, is inconsistent with the "saving" function of the last sentence of §113(f)(1).

121. As previously described, the Solicitor General argues that the Court's statements to the contrary in *Key Tronic* should be disregarded as "passing dictum."

122. Cooper states its argument as follows:

> Congress undeniably understood the right of contribution to be based on the common law concept of shared liability among joint tortfeasors, and it intended [§]113(f)(1) to codify that common law. [Citations omitted.] At federal common law, one could not seek contribution unless and until that person had first discharged, pursuant to judgment or settlement, the liability of other wrongdoers against whom contribution was sought. *See* Musick, Peeler & Garrett v. Employers Ins., 508 U.S. 286, 298 (1993) (only those "charged with liability" in a common law suit for contribution under securities laws had a right to contribution); Texas Indus. [v. Radcliff Materials, Inc., 451 U.S. 630, 634 (1981)] (characterizing contribution as helping "one tortfeasor compel others to share in the sanctions imposed by way of damages intended to compensate the victim"); Northwest Airlines [v. Transport Workers Union of America, 451 U.S. 77, 87-88 (1981)] (right to contribution "is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability").

Brief for the Petitioner at 27, *Aviall* (No. 02-1192) (emphasis omitted) (footnote omitted). Cooper also argues that this understanding of contribution "was carried forward in the Restatements." *Id*. at 28.

123. Aviall states its general argument as follows:

> Contrary to petitioner's argument, a formal court adjudication of liability is not a prerequisite to an action for contribution at common law. Rather, a claim for contribution by a PRP in the absence of a judgment or settlement is consistent with general tort principles.

Brief of Respondent at 12, *Aviall* (No. 02-1192). Aviall supports its argument with citations to case law and the *Restatement (Second) of Torts*. In addition, Aviall notes that "[t]he federal courts of appeals have universally held that an action by one PRP against another to recover cleanup costs under CERCLA is a 'quintessential' claim for contribution." *Id*. at 14.

124. These cases are cited in Cooper's brief. Brief for the Petitioner at 10 n.5, *Aviall* (No. 02-1192). These decisions were not grounded upon §107(a)(4)(B) because that provision authorizes a right to recover private response costs, not a right of contribution grounded upon the joint liability of the litigants to a third party. These decisions were pure federal common-law decisions, an outgrowth of the federal common-law decisions that held that PRPs are jointly and severally liable for response costs incurred by a government entity. *See, e.g.*, United States v. Ward, 14 ELR 20804 (E.D.N.C. 1984).

125. The Court cited the following decisions: Walls v. Waste Resource Corp., 761 F.2d 311, 15 ELR 20438 (6th Cir. 1985); Bulk Distribution Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 15 ELR 20151 (S.D. Fla. 1984); Jones v. Inmont Corp., 584 F. Supp. 1425, 14 ELR 20485 (S.D. Ohio 1984); Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 12 ELR 20915 (E.D. Pa. 1982); and Pinole Point Properties v. Bethlehem Steel Corp., 596 F. Supp. 283, 15 ELR 20173 (N.D. Cal. 1984). *Key Tronic*, 511 U.S. at 816 n.7.

first sentence did not diminish other rights to bring an action for contribution. At the time Congress enacted this language, there was a judicially recognized implied right-of-action under §107(a)(4)(B) in which a PRP could recover its privately incurred response costs from other PRPs. The Fifth Circuit concluded that this latter type of action was "in the nature of contribution" and was saved—not "diminished"—under the fourth sentence of §113(f)(1).

Cooper's response to the Fifth Circuit's reasoning merits repetition:

> [T]he cases cited by the Fifth Circuit for the proposition that other early federal court decisions allowed actions for recovery "in the nature of contribution" to proceed, even though the plaintiff had not been sued under [§]106 or [§]107(a), do not even address "contribution." *See, e.g.*, Bulk Distribution Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1442-44 (S.D. Fla. 1984); Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1140 (E.D. Pa. 1982). They involve, instead, persons who sued for direct cost recovery—not contribution. While the Fifth Circuit claims that "[w]hether the cases actually used the word 'contribution' is irrelevant" [quoting 312 F.3d at 683], Congress' concern was not with these direct cost recovery decisions, which were nowhere referenced in the legislative history, but rather was with the separate line of cases [that involved claims brought by PRPs that had been subject to joint and several liability in actions brought by a government identity under §106 or §107] . . . .[126]

So, it comes to this: did the Fifth Circuit err when it concluded that, in the last sentence of §113(f)(1), Congress intended to save—as an "action for contribution"—the pre-SARA right-of-action, grounded upon §107(a)(4)(B), in which a PRP could recover its directly incurred private response costs against other PRPs irrespective of whether the plaintiff PRP had been named as a defendant in a government-initiated action under §106 or §107? The Fifth Circuit acknowledged that the pre-SARA decisions in this second type of action did not use the term "contribution" but said that the failure to use the term was "irrelevant" because such actions were "in the nature of contribution."

The Court will have to decide whether an action under §107(a)(4)(B) by a PRP against other PRPs to recover private response costs is an "action for contribution" that is saved—not "diminished"—under the last sentence of §113(f)(1). The dicta in *Key Tronic* characterize such an action as a "contribution" action apparently because of the Court's conclusion that the "remedy" available in such an action is "similar" to the remedy available in an action for contribution under the first sentence of §113(f)(1).

If the Court goes beyond simple reliance upon the *Key Tronic* dicta (as it undoubtedly will), the Court will have to determine how to go about interpreting the term "contribution." If the Court assumes that Congress intended to use the term "action for contribution" in accordance with the common-law usage of the term, it will have to decide whether Aviall or Cooper is more persuasive in describing the scope of contribution actions under the common law.

But the Court, in interpreting the term "action for contribution" in the last sentence of §113(f)(1), should not lightly assume that Congress intended to save (not diminish) only those claims that fit within a restrictive view of the common-law definition of contribution claims. Such an approach would ignore the reality of the pre-SARA case law, presumed to be known by Congress. That pre-SARA case law included decisions in which courts had held that a PRP had an implied right under §107(a)(4)(B) to recover its response costs against other PRPs. Even if such actions do not fit within some common-law definitions of "contribution" actions, they were (at the least) contribution-like in that the "remedy" available in such actions was, as the Court recognized in *Key Tronic*, "similar" to the remedy available in the type of action that was expressly codified in the first sentence of §113(f)(1)—that is, an allocation of financial responsibility for cleanup costs. Given this backdrop, the primary arguments by Cooper and the Solicitor General can be outlined as follows:

> (1) Congress, in the first sentence of §113(f)(1), established a right of contribution that was intended to codify a particular line of pre-SARA decisions that was grounded entirely upon federal common law. (That is, there was no statutory support for this line of decisions.)
>
> (2) Congress, in the last sentence of §113(f)(1), intended to save actions for "contribution" that did not fit within the circumstances described in the first sentence.
>
> (3) Congress, in the third sentence of §113(f)(1), established a remedy—allocation according to "equitable factors"—for all "contribution" claims.
>
> (4) Congress, in the last sentence of §113(f)(1), did not intend to save—indeed, Congress intended to override—a distinct line of pre-SARA decisions (grounded upon the language of §107(a)(4)(B) and therefore not requiring any additional statutory support) that was similar to the line of decisions that Congress intended to expressly protect in the first sentence. Such intent, though not expressed in the legislative history of SARA, can be seen in the "plain language" of the first and fourth sentences of §113(f)(1).

Given the pre-SARA case law—involving two distinct lines of decisions—it seems far more reasonable to conclude that the first sentence of §113(f)(1) was intended to codify one line (for which there was no statutory support) and that the last sentence was intended to save (not diminish) a distinct but similar line for which there was already statutory support.

If, contrary to the preceding analysis, the Court concludes that Congress intended to use the term "contribution" in the restrictive sense urged by Cooper—referring only to claims brought by a jointly liable person against another jointly liable person after the first person has been named as a defendant in an action asserting that person's joint and several liability—the Court must necessarily conclude that Aviall's action to recover its private response costs cannot be brought under §113(f)(1). For the Court to reach this conclusion, it would have to abandon, or at least qualify, its dicta in *Key Tronic* which states (or, at the very least, suggests) that an action under §107 is an action for "contribution."[127]

126. Brief for the Petitioner at 24 n.18, *Aviall* (No. 02-1192) (partial emphasis omitted). It should be noted that the cases cited by Cooper and characterized as "direct cost recovery" actions are two of the cases that were cited by the Court in *Key Tronic* (*see supra* note 125) and that were characterized by the Court as "contribution" actions.

127. For the precise language of the Court, see *supra*.

If the Court were to hold that Aviall's action is not an action for contribution under §113(f)(1), it will probably not address the question whether Aviall's action could be brought under §107(a)(4)(B)—since that question goes beyond the question that the Court accepted for review. In *Key Tronic*, the Court stated that §107(a)(4)(B) implicitly authorizes a cause of action in which a private entity can recover its directly incurred response costs against any entity that is within one of the four categories of liable persons described in §107(a).[128] So, if the Court were to conclude that Aviall could not bring its action as a contribution claim under §113(f)(1), it would seem to follow that Aviall would have a strong argument that it could bring its action directly under §107(a)(4)(B).[129]

If the Court were to conclude that Aviall's action is not a claim for contribution that may be asserted under §113(f)(1) and suggest that its action might be asserted under §107(a)(4)(B) (or simply not address this question), the Court would destabilize the carefully constructed scheme of liability for private response costs that has been constructed in numerous decisions by the courts of appeals. In these decisions, the courts of appeals have unanimously concluded that a PRP seeking to recover its direct response costs against another PRP in an action under CERCLA is limited to asserting a contribution claim governed by §113(f)(1) and may not assert a claim directly under §107.[130] If, however, the Court suggests that a PRP must look to §107—rather than §113(f)(1)—as a basis for bringing an action to recover private response costs, the lower courts would have to address a number of questions.

First, the lower courts would have to reconsider the numerous decisions in which the courts have held a PRP seeking to recover private response costs against other PRPs may not bring an action under §107. These holdings were all grounded upon the conclusion that a PRP seeking to recover its response costs against other PRPs was asserting a "quintessential claim for contribution" and thus had to seek recovery in a contribution claim under §113(f)(1). If the Court holds that such a claim is not a "contribution" claim and thus may not be asserted under §113(f)(1), the lower courts are likely to overrule their earlier decisions and hold that a PRP may bring an action under §107(a)(4)(B) to recover its response costs from other PRPs.[131]

Second, if a PRP seeking to recover private response costs is limited to asserting a claim under §107(a)(4)(B), the lower courts will have to consider the nature of the relief that is available in such an action. There are a number of lower court decisions that have dismissed actions by PRPs under §107(a)(4)(B) in which the plaintiff has asserted that defendant PRPs are jointly and severally liable for the response costs incurred by the plaintiff. But these decisions were also grounded upon a determination that a PRP seeking to recover its response costs from other PRPs was limited to a contribution claim under §113(f)(1) in which the liability is several, not joint and several. If the Court were to hold that PRPs seeking to recover private response costs cannot assert a contribution claim under §113(f)(1), these lower court decisions would have to be reconsidered.[132]

Third, if a claim for private response costs by a PRP against another PRP is not a contribution claim, it would

128. For a description of the *Key Tronic* dicta, see *supra*. It should be recalled that Justice Scalia (joined by Justices Blackmun and Thomas) went further, saying that §107(a)(4)(B) provided an *express* right-of-action under which a PRP could recover its response costs against other PRPs.

129. Aviall addresses this point at the end of its brief. It argues that "[i]f . . . respondent's action is not governed by §113, then this Court should remand for consideration of Aviall's remaining claim under §107(a)(4)(B)." Brief of Respondent at 36, *Aviall* (No. 02-1192).

130. *See, e.g.*, Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 29 ELR 20065 (6th Cir. 1998); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 27 ELR 21211 (9th Cir. 1997).

131. In theory, there is a question whether a PRP, i.e., a liable party, may bring an action under §107(a)(4)(B). That section provides that those who fall within one of the categories of liability in §107(a) are liable for "any other necessary costs of response incurred by *any other person* consistent with the [NCP]." 42 U.S.C. §9607(a)(4)(B) (emphasis added).

In City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 12 ELR 20915 (E.D. Pa. 1982) the seminal decision discussing the extent to which there is a private right-of-action under §107(a)(4)(B), the court acknowledged that there were two possible ways to interpret "any other person." The phrase could be interpreted as referring to the "persons" who are liable under §107(a). Under this interpretation, §107(a)(4)(B) would impose liability only for response costs incurred by persons who are not PRPs; or, to put it another way, only non-PRPs would have a right to recover response costs under §107(a)(4)(B). But the court recognized that there is another possible interpretation:

> The provision [§107(a)(4)(B)] merely sets forth, in general terms, three categories of "persons" entitled to recover response costs from those parties designated as liable for such costs. The first category [described in §107(a)(4)(A)] consists of the federal and state governments which are entitled to recoup "all costs of removal or remedial action . . . not inconsistent with the [NCP]." The provision in question, which follows immediately thereafter, permits recovery of "any other necessary costs of response incurred by any other person consistent with the [NCP]." Under 42 U.S.C. §9601(21) [CERCLA §101(21)] both federal and state governments are subsumed under the definition of person. In the context in which it appears, then, the term "any other person" is quite conceivably designed to refer to *persons other than federal or state governments* and not . . . to persons other than those responsible under the act.

544 F. Supp. at 1142 (emphasis added). This second interpretation is not only consistent with the text of §107(a)(4)(B), it is demanded by the overall structure of CERCLA. The settlement provisions of CERCLA encourage settlements in which PRPs agree to undertake remedial action that has been selected by EPA. And §106(a) authorizes EPA to order PRPs to undertake selected remedial action. In both of these situations, PRPs will incur response costs. If §107(a)(4)(B) were interpreted to limit liability to response costs incurred by non-PRPs, then recalcitrant PRPs (that is, PRPs who refused to participate in settlements) would not be liable for response costs incurred by cooperative PRPs. This is hardly consistent with the congressional desire to encourage private cleanups, either by way of settlement or compliance with §106(a) orders.

Although there are numerous decisions holding that PRPs may not recover their response costs in actions under §107(a)(4)(B), these decisions are, as previously explained, grounded upon the conclusion that PRPs must seek response costs by way of contribution claims under §113(f)(1). They are not grounded upon holdings that a PRP is not an "other person" as that term is used in §107(a)(4)(B). Indeed, the Solicitor General acknowledged in his brief that "[t]he courts of appeals have correctly recognized that . . . [§]107(a)(1)-(4)(B)'s reference to 'any person' is broad enough to allow one jointly liable party to sue another for the former's response costs." Brief for the United States as Amicus Curiae Supporting Petitioner at 20-21, *Aviall* (No. 02-1192).

132. If PRP actions to recover private response costs are not "contribution" claims, they are not subject to the allocation remedy set forth in the third sentence of §113(f)(1). And, although the courts have held that a PRP's liability in a *government* cost recovery action under §107(a)(4)(A) is joint and several, *see, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 19 ELR 20085 (4th Cir. 1988), there is no holding that a PRP's liability in a private cost recovery action under §107(a)(4)(B) is joint and several.

seem to follow that a PRP that has entered into a settlement with a government entity would not be able to avail itself of the contribution protection provisions if the settling PRP was named as a defendant in a §107 action for private response costs. Since such an action would not be a claim for "contribution," it would not be barred under CERCLA's contribution protection provisions.[133]

One way or another, a PRP has a right-of-action under §107(a)(4)(B) to recover its private response costs against other PRPs. Such an action is either a "contribution" claim under §113(f)(1)—governed by the mechanics of that section and subject to CERCLA's contribution protection provisions—or a "cost recovery" action grounded exclusively upon §107(a)(4)(B)[134]—not subject to the mechanics of §113(f)(1) and not subject to CERCLA's contribution protection provisions. The most reasonable interpretation of §113(f)(1) is that suggested by the dicta in *Key Tronic* and adopted by the Fifth Circuit in *Aviall*. An action by a PRP to recover its private response costs from other PRPs is a claim for "contribution" in which the right to recovery is grounded upon §107(a)(4)(B). Such a claim for contribution is distinct from the claim for contribution established in the first sentence of §113(f)(1) but such a claim, like other claims for contribution, is expressly saved by the last sentence of §113(f)(1). As a claim for contribution, such a claim is governed by the mechanics of §113(f)(1) and is subject to CERCLA's contribution protection provisions.

133. Concern about ensuring the effectiveness of CERCLA's contribution protection provisions has been a factor that has led lower courts to conclude that an action by a PRP to recover its response costs is a contribution claim under §113(f)(1) and thus is subject to the contribution protection provisions. *See, e.g.*, *Pinal Creek Group*, 118 F.3d at 1298; Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 24 ELR 21254 (7th Cir. 1994). This concern also appears to lie behind the Solicitor General's acknowledgment that Aviall's action is a contribution claim.

134. Justice Scalia's views are clear on this point. In his separate opinion in *Key Tronic*, he stated unequivocally (in an opinion joined by Justices Blackmun and Thomas) that §107(a)(4)(B) provides an express cause of action under which a private party can recover its response costs.