Supreme Court of the United States

October Term, 1968

In the Matter of:

NACIREMA OPERATING CO., INC., and LIBERTY MUTUAL INSURANCE COMPANY, et al.	Docket No. 528,663
Petitioners;	
vs.	
WILLIAM H. JOHNSON, JULIA T. KLOSEK AND ALBERT AVERY, et al.	
Respondents.	

Place Washington, D. C.

Date March 25, 1969

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

NACIREMA OPERATING CO., INC. and LIBERTY MUTUAL INSURANCE COMPANY, Petitioners;	:	
vs.	:	No. 528
WILLIAM H. JOHNSON, JULIA T. KLOSEK AND ALBERT AVERY, Respondents.	:	
JOHN P. TRAYNOR AND JERRY C. OOSTING, DEPUTY COMMISSIONERS, Petitioners;	:	
vs.	:	No. 663
WILLIAM H. JOHNSON, JULIA T. KLOSEK AND ALBERT AVERY, Respondents.	:	

Washington, D. C.
March 25, 1969

The above-entitled matter came on for argument at 11:12 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 528, Nacirema Operating Company, Inc., petitioners; versus William H. Johnson, Julia T. Klosek and Albert Avery, Respondents; and No. 663, John P. Traynor and Jerry C. Oosting, Deputy Commissioners, petitioners; versus William H. Johnson, Julian T. Klosek and Albert Avery, Respondents.

Mr. Coleman?

ARGUMENT OF RANDALL C. COLEMAN, ESQ.
ON BEHALF OF
NACIREMA OPERATING COMPANY, INC.

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

The issues before the Court today are whether pier injuries to longshoremen are injuries which occurred on navigable waters of the United States and are, thus, within the coverage of the Longshoremen's Act.

The question was answered in the affirmative by the Court of Appeals for the Fourth Circuit and, therefore, as one of the reasons that the Fourth Circuit decided the case affirmatively was that the Admiralty Extension Act broadened and expanded the coverage of the Longshoremen's Act, the Court will also have before it the Admiralty Extension Act and whether or not it did, in fact, extend the coverage of the Longshoremen's Act.

The facts in the case are undisputed and I will give

them, Your Honors, together with the history of the case.

These consolidated cases arose from pier injuries to three longshoremen. One of the injuries resulted in the death of the longshoreman.

The cases arose, two of them, William Johnson and Joseph Klosek, in Maryland; and one, Albert Avery, arose in Virginia. They were pier injuries under virtually identical circumstances because all three of the longshoremen involved were what is known as "slingers". They worked, and were working at the time of the injuries, in gondola cars on piers. They were slinging on cargo which was attached to ships falls, or cables, which then loaded the cargo which was being slung on, to the vessel.

The pier in the Maryland case was on the Patapsco River. It extended out into that river approximately 600 feet, I believe, and there is no question that the Patapsco River is navigable waters of the United States.

The pier in the Virginia case, city piers of Norfolk, Virginia, extended, I think, about 1,000 feet into the Elizabeth River. There is also no dispute that the Elizabeth River is on navigable waters of the United States.

It was found as a fact, and not disputed, that these longshoremen, in both cases, might have been working on the pier at one time; they might also have gone aboard the vessel. They sometimes switched positions.

It is also found as a fact, and undisputed, that these

particular piers were piers which were erected on pilings and certain small craft could get under them, and I think canoes and rowboats were named. Large vessels could not, because the piers obstructed them.

The Deputy Commissioner, Deputy Commissioner Oosting in Virginia, and Deputy Commissioner Traynor in Maryland, both found that the injuries to these men, which resulted when cargo swung against the men, in the case of Joseph Klosek he was knocked out of the gondola car to the dock and sustained fatal injuries; the other two men, Johnson and Avery, were pinned against the side of the railroad car.

The Deputy Commissioner found that those injuries, both Deputy Commissioners, found that those injuries were injuries which did not occur upon navigable waters. The opinions of both the Deputy Commissioners were then appealed to the District Courts, first to the Eastern District of Virginia, and to the District Court for the District of Maryland, and the District Judges, Judge Hoffman from the Eastern District of Virginia, and Judge Watkins of the District of Maryland, affirmed the findings of the Deputy Commissioner.

The cases were then appealed to the Court of Appeals for the Fourth Circuit. They were -- first the Avery case and the Johnson and Klosek cases, were first argued in separate panels, and after that they were consolidated and the Court of Appeals for the Fourth Circuit, en banc, heard all three cases. They

reversed the two District Judges. Certiorari was applied for by Nacirema Operating Company in the Maryland case, by Liberty Mutual Insurance Company in the Virginia case, and by the Solicitor General on behalf of the two Deputy Commissioners and are thus before the Court.

The principle point upon which I rely is that for some years the piers have been considered extensions of the land. I believe that was the law some time ago and is presently the law. The point was never mentioned by the Court of Appeals below, and I think the Court of Appeals might have had a somewhat difficult time answering the question.

A number of cases from this Court were cited. They are on page 10 of our briefs. The most recent that I can think of, of this Court, is the opinion announced by Mr. Justice Black in Swanson against Marra Brothers, which I think is still the law. It is certainly the most well known case. I will only quote that portion of the opinion which relates to this point.

Swanson was a longshoreman who was injured on the pier when a liferaft fell from the ship and injured him. This Court said, without dissent:

> "But since the Act" -- that's the Longshoremen's Act -- "is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms, and from the Jones Act, any remedies against the employer for injuries inflicted on shore. The Act leaves the injured employees

in such cases to pursue the remedies afforded by local law."

The Court then, and prior to that, had always considered pier injuries to be shore injuries, and I submit, Your Honors, that that is still the law.

The Court, this Court, has always followed, I believe, the line of demarcation which was set out in the Jensen case years ago, and that line is the line between State and Federal coverage, and specifically, it is the line between navigable waters and land, or extensions of the land. I think that has always been the law.

So far as I know, there has never been a decision except that of the Fourth Circuit which disputes that pier injuries are considered as land injuries. The injuries in this instance, all having occurred on the pier, don't fall within the stated exception of the Act, which is any drydock. Drydocks were explained and detailed as to what they were by Mr. Justice Douglas in Avondale Marine Ways against Henderson, I think, and it was clearly pointed out that the types of drydock referred to are not wharves or piers, as they are in this instance.

The injuries do not fall within the Court's exception, which was in Mr. Justice Black's decision in Davis against the Department of Labor, in the twilight zone. The twilight zone, as I understand it, is that sort of hazy area between the ship and the pier where it is difficult to determine which coverage does apply, and the Court, in the twilight zone cases, has held that

there may be both State and Federal coverage, and the injured longshoremen may elect.

The case most heavily relied on by the Court below was Calbeck against Travelers Insurance Company. I hope, since it was discussed at some length, that this Court won't consider it presumptuous of me, and particularly Mr. Justice Brennan, to try to state what I think that case held.

I do not think the case held, as the Court of Appeals below said it held, that pier injuries could be covered by the Longshoremen's Act. That was a case, Your Honors will recall, which involved two or more shipyard workers who were injured aboard ships which were on navigable waters under new construction. They were ships under construction.

Now, the Court had before it its prior holding in 1922 of Grant Smith-Porter Ship Company against Rohde, and that case, long ago, had established that there was a local concern in ships that were under construction in navigable waters, and where there was such local concern that the State Compensation Acts could apply, that there, and in that instance, the State Acts may apply and Federal coverage did not come into effect.

Now, I gathered from Mr. Justice Brennan's opinion, that this Court was very much concerned with whether or not, in all cases where there was local concern, and particularly in the very case that was before it, there would definitely be coverage for longshoremen who were injured. There was a fear, I got from

the opinion, that there might not be State or Federal coverage somewhere for those men who were working in areas that the pre-1927 decisions had set aside as local-concern areas.

So the Court in reversing the Fifth Circuit -- I believe it was the Fifth Circuit -- held that what this Act meant was precisely what it said. It wanted to cover injuries which occurred to longshoremen on navigable waters. It didn't mean all injuries; it meant injuries on navigable waters.

There was no dispute, there is no dispute, there can be no dispute, that ships under construction, just as much as ships that have been built, are on navigable waters if they are afloat, or in a drydock, or in a marine railway.

Q One of these men was knocked off the pier into the water, wasn't he?

A No, sir. That was a case that was not brought up on certiorari. There were two men in Norfolk. I cannot recall the other man's name. But you are quite right. One was knocked off.

Q I see. Would that make any difference?

A Your Honor, to me that makes a difference in that I felt, too, that that man was injured on navigable waters. I think this is totally situs oriented and that a man who sustains his injury in the ocean or in the river, in the water, is clearly on navigable waters.

Q That gets it down to a point that has the greatest appeal to legal technicians, doesn't it?

A I suppose whenever you draw a line, it is a difficult line to draw; yes, sir.

Q Here is a man working on a pier, two men working on a pier. This is a crane, isn't it, or a line that is attached to the ship?

A Well, in each instance -- well, I know in the Maryland case there was a derrick or crane on the ship, and from that derrick or crane a line descended to the gondola car and hoisted the steel beams out.

Q There is a ship here and there is a crane on it and a line coming from the crane, two men working on the pier in my hypothetical situation.

A Yes, sir.

Q They are both hit. One of them is just knocked to the floor of the pier and he sustained injuries. He is not covered. His fellow worker is knocked off the pier and into the water and, that being navigable water, he is covered. Is that about it?

A That is exactly it, Your Honor. I know, I recognize, I can't dispute that incongruities are going to develop wherever a line is drawn.

Q Didn't the Deputy Commissioner make an award in that case?

A Oh, yes.

Q That is what I thought. He made that precise distinction.

A Yes, sir.

Q Mr. Coleman, suppose the man --

A I am not sure the Deputy Commissioner did, Your Honor. I know the Court of Appeals held --

Q Well, I thought I read in the briefs that the Deputy Commissioner had, unlike these other cases.

A That is right. It did uphold the award in that case. I haven't borne that one particularly in mind --

Q No, because that is not before us, but I thought I read in the briefs, in a footnote someplace, that the Deputy Commissioner had made that precise distinction, for the man knocked in the water and drowned.

Q What happens if the longshoreman is on deck and he is knocked onto the pier?

A The injury occurred on the ship, Your Honor. That case was covered by this Court, the Admiral Peoples. It is the same idea. It happened to be the gangway in that case --

Q That is why I can't see the difference when he is on the pier and gets knocked into the water.

A Your Honor, again, you are hitting me right where that line is drawn and it is tough.

Q And you can't give the line up, obviously.

A No, sir; I can't give the line up. All that the Court of Appeals has done below us, they have just redrawn the line. It is just a question of where you are going to draw it.

Wherever you draw it, somebody on the other side of it who is aggrieved is going to be nudging and say, "I ought to be on that side of it."

I think this is a clearly established line. I honestly think it is a logical line to draw; that is, navigable waters, it was drawn by this Court for constitutional reasons, navigable waters and the land. Now, there are a number of examples which show what might happen if it were extended further shoreward. They might sound far fetched, but they are not far fetched if the Court adopts the status approach that was adopted by the Fourth Circuit.

Any time the status approach is adopted, it is going to be extremely difficult to tell what to do about that line. But if a clear situs approach is adopted, you know if it happened on navigable waters it was covered by this Act, if it happened on land or extensions of land it is covered by the State Act.

The Court, in Calbeck, went on to point out that the pre-1927 decisions, which has been referred to in the respondents' brief as static decisions where we should not freeze the line, were those very decisions of local concern and it was brought out in the Calbeck case, just as it was brought out in the Parker against Motor Boat Sales before it, that the local-concern doctrine was said to have been read out of the Act and that it simply means that where there are navigable waters, and the Court used the term "navigable waters" frequently, that is where the Federal

Act applies.

The Court also recognized in the Calbeck case the Jensen line of demarcation. It had recognized it in previous cases. The Court cited in the Calbeck case the Fifth Circuit case of Debardeleben which quoted that Congress intended to exercise to the fullest extent its power to act in this area. The fullest extent was determined by the Court some time ago to be where there are navigable waters, and apart from land or extensions of land which were within the State compensation acts.

Judge Sobeloff, in the majority decision below, stated that it would have been interesting if the three courts, or at least if the Fifth Circuit which decided the case contrariwise from the Fourth Circuit, if the Fifth Circuit had considered the impact of the Calbeck decision in reaching the result which was opposite this one.

The Fifth Circuit did not, in precise terms, refer to the Calbeck decision. It did, however, refer "to the extensive scholarly opinion of Judge Watkins who had at length discussed the Calbeck case because the Calbeck case had been argued to him."

In the Ninth Circuit case, which also held, that is, Houser against O'Leary, that piers are extensions of the land and that pier injuries are covered by the State Act rather than the Federal Act, there the Calbeck case was discussed at some length.

Q Do you suggest that the admiralty jurisdiction at its maximum extension would not reach an injury on a pier?

A Now wait a minute. The Admiralty Extension Act, Your Honor --

Q I understand that, but a while ago you said that it has been determined that the maximum extension of the admiralty jurisdiction still didn't reach an injury on a pier?

A No, Your Honor. You misunderstood me. What I said was that the Longshoremen's Act does not, that no extension of the Longshoremen's Act will reach a pier injury because that is not on navigable waters.

Perhaps what you are asking me, Mr. Justice White, is do I contend that Congress hasn't the right in the exercise of its maritime jurisdiction, to move all the way into the pier and, thus, let the Longshoremen's Act cover that?

I think, sir, that was the very point that was in Jensen, and Knickerbocker, and Dawson, where they held no. It is the same constitution.

Q So you do say, then, that admiralty jurisdiction ends with the pier.

A Not admiralty jurisdiction. Admiralty jurisdiction goes on land, Your Honor's decision in Guitierrez, by virtue of the Admiralty Extension Act, but jurisdiction under this statute is strictly limited to navigable waters by its terms.

Q But what about the Congress saying that it isn't limited. I suppose it could. Is that it?

A That is where it should be decided. I think maybe

Congress could, but it would be faced with this Court saying it couldn't, back in Jensen, and Knickerbocker, and Dawson.

Q Do you think Jensen is still the law?

A Yes, sir. It hasn't been overruled. I remember Your Honor's decision in Davis against the Department of Labor when no one there suggested that it would be appropriate to try to overrule Jensen because of the confusion it would create.

Now, I am mindful of the fact that the Solicitor General suggested in an appropriate case it might be a good idea, but he also points out that this wouldn't be that case because this calls for strictly an application of the Longshoremen's Act.

Q How much power do you think Congress was exercising in passing the Longshoremen's Act?

A It was exercising the power granted it under Article III, I think it is, the maritime power, in the area where the States may not act, and that Act, and where the maritime jurisdiction extends under the very length discussion in those three cases -- Jensen, Knickerbocker, and Dawson -- was again navigable waters, because the lands were within the exclusive jurisdiction of the State.

Now, I am not at all sure that that would be followed now. All I know is, that is what it has been for some time. The Court wrote fairly convincing opinions.

Q What was the power of Congress, I suppose, in passing the Admiralty Extension Act, was the maritime jurisdiction,

wasn't it?

A Well, they merely expanded the admiralty tort jurisdiction, and I am not sure whether that was commerce or whether it might have been maritime. I don't know. I think it might have been commerce, but I am not sure.

But I know that the approach given by the Court below, which is a status approach, certainly contradicts any idea that the Admiralty Extension Act extends the coverage of the Longshoremen's Act.

I finally point out that the Court, in the Calbeck case, also quoted extensively Senate Report 973, which was the crux of the legislative history, in a footnote, and in part it said "Injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship."

That is what Congress intended, and as I understand this Court's decision in Calbeck and many others, it felt the same way, and certainly did as recently as Calbeck.

Now, to the Admiralty Extension Act, I believe the reading of the Act itself makes it fairly clear that the Court below, in finding that the Admiralty Extension Act did extend the coverage of the Longshoremen's Act, was mistaken. The second part of the Admiralty Extension Act, to which very little attention seems to have been paid, and which was not commented upon, is that in any such case suit may be brought in rem or in personam

according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water.

One thing that is definite about the Longshoremen's Act, suit is not brought. The Longshoremen's Act involves an administrative proceeding wherein a claim is filed with an administrative agency. It can't be done in rem. It can't be done for damages, for a damage; it is done for injuries. It is strictly and purely an administrative proceeding.

To argue, as is argued below, and by respondents, that the Admiralty Extension Act expands, is completely contradictory to the same argument that the Longshoremen's Act is status oriented because if there is one thing the Admiralty Extension Act is, it is clearly situs oriented.

Q Is the review in the District Court on the civil side of the Court? It is not an admiralty matter at all, is it?

A The review of the Deputy Commissioners? It was in admiralty.

Q It is, now?

A Right now it is civil, but it was in admiralty.

Q It was considered an admiralty matter.

A The appeal was taken up in admiralty; yes, sir. I don't think it proves anything, sir.

Q Well, it doesn't help prove your point, either.

A No, sir.

What the Admiralty Extension Act has done, and did for these longshoremen, is give them the right to do what they have done. When there is a pier injury caused -- that is, the Maryland longshoremen -- caused by a vessel and there is some fault, they had the right to sue the third party, and they have exercised that right.

So I think that the Admiralty Extension Act applies only to a right which they have exercised, and does not expand the rights they have, which are considerable under the Longshoremen's Act.

Unless there are some further questions, that is all I have. Thank you, sir.

MR. CHIEF JUSTICE WARREN: Mr. Solicitor General.

ARGUMENT OF HON. ERWIN N. GRISWOLD
THE SOLICITOR GENERAL
ON BEHALF OF DEPUTY COMMISSIONERS TRAYNOR AND OOSTING

THE SOLICITOR GENERAL: Mr. Chief Justice, and may it please the Court:

The question in this case is solely one of statutory construction, although there is, of course, a constitutional background. In some ways, as Mr. Justice Fortas has indicated, it is in a sort of never-never land, but I think it helps if we focus on the fact that we are dealing with the construction and application of a statute which was passed by Congress in 1927, more than 40 years ago, and has never been amended.

It is appealing to think that the time has come when

the statute here involved should be given a broader sweep, as the Court below has done, but it is an appeal, I submit, that should be resisted in the interest of the proper allocation of governmental powers.

We have become accustomed to growing and expanding constructions of the Constitution, and there is reason for this, since constitutions are often written in general terms and they are hard to change.

In the area of statutory construction, though, Congress always has the power to amend the statute if it thinks that is desirable, and in the allocation of powers between the great branches of the government, it is the function of Congress to amend statutes, and not of the Court, as this Court itself pointed out in the Pillsbury case, involving the Longshoremen's Act, some years ago.

We don't contend that the proper construction of the statutory provision is a matter of black and white, as legal questions rarely are, but there are elements which we believe point clearly enough to a decision. The relevant language is in section 903 of Title 33, and is set out just above the middle of page 3 of the Government's brief. Beginning with the fourth line of that provision, I would call attention to three elements in the statutory language.

There is first "occurring upon the navigable waters of the United States." Now, "upon" is a common word and common

words often have many shades of meaning. This word in this place must take its content in part, at least, from its background, the most important element of which was the Jensen case.

The dictionary definition of "upon" is short and sweet. I looked it up this morning in the Second Edition of Webster's International: "Upward so as to be on." That makes us turn to "on" and "on" is defined as "The position of contact with or against a supporting surface."

I don't think the dictionary definition helps a great deal, but it does make it apparent that here the men were upon the pier, and not upon the water.

But in addition to the Jensen case, there was also the Nordenholt case, not to mention the Cleveland Terminal and Valley Railroad case, both of which were well known when the statute was written. In both of those cases, pier injuries were held to be outside the admiralty jurisdiction. It said that these piers were above the water and that, indeed, small boats and canoes can travel beneath the piers on the water, but that is not where the injury occurred; it occurred on a pier, which is a structure fixed in land.

When these workmen were on the pier, they were above the water, surely; but they were not upon the water. They were upon the pier. Suppose they had been on a bridge over the water, but resting on the two banks of a navigable stream. They would then have been above the water and, thus, upon the water in the

same sense that they were here, but no one would say that a person on a bridge was upon the water, even though ships could pass underneath.

Next we come to the phrase, immediately following, in parentheses "(including any dry dock)". Note that this is including any dry dock, not any dock or any dock or pier. The fact that Congress expressly included any "dry dock" is some indication that it did not include other docks or piers. I don't suggest that the other construction is impossible. I do submit that it is unlikely and that the construction which would make the Act applicable to injuries occurring on any dock or pier is not only unnatural in the light of the situation which Congress understood when it wrote the statute, but also makes this phrase of little use in the statute. Such a construction should, I think, be avoided.

Finally, in this same few lines of the statute, we come to the last clause, "and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

Now, it is said that this last clause was written out of the statute by this Court's decision in the Calbeck case. I am planning to devote the final portion of my available time to a discussion of the Calbeck case, but I will say now that I do not think the statement I have just recounted is true. Writing provisions of the statute is not the function of the Court, and

I don't interpret the Calbeck decision as attempting to do so.

On the contrary, the present case is, I submit, an excellent example of a situation where this final clause is applicable and is dispositive of the question of construction and of the litigation.

Turning specifically to the question of construction, I have already referred to the language of the statute, but the argument is confirmed by the legislative history. The statute, including this jurisdictional language, was of course passed following the Jensen decision, and the two cases where the Court struck down the first two attempts of Congress to deal with the problem.

Not only was the Jensen case there with clear territorial implications, but this Court had already decided the Nordenholt case in 259 U.S. in an opinion by Mr. Justice McReynolds, who was the author of the Jensen opinion, and the Court held that an injury to a longshoreman on a pier was covered by the State workmen's compensation law.

Now, this was no mere straining to find some way to provide compensation. The Court, in its opinion, referred to the doctrine that "locality" is the exclusive test of admiralty jurisdiction." It said "Isands, who was the injured workman, was injured upon the dock, an extension of the land. See Cleveland Terminal and Valley Rail Road Company against Cleveland Steamship Company."

Now, this was the setting in which Congress legislated. Its understanding was made explicit in the report of the Senate committee, which is set forth on page 13 of the Government's brief. The Senate report said that "* * *injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States."

In the process of enacting the statute, we have further evidence, for there was at one time in the bills, as they went through Congress, a general provision that it should apply to any employment performed on a place within the admiralty jurisdiction of the United States, except employment of local concern and of no direct relation to navigation or commerce, all of which would have been very uncertain in scope and would have yielded, would have lent itself, to a construction in this case in accordance with that of the Court below.

But Congress took that out, and substituted in its place, the language which has persisted unchanged for more than 40 years, "upon the navigable waters of the United States, including any dry dock." This showed a clearly territorial approach which is surely understandable in the light of the decisions as they stood at that time.

Next I would point out that this was the immediate and long continued, consistent, administrative construction of the statute, which should be given great weight at this late date.

Almost at once, and in a long series of rulings, the administrative agency charged with the application of the statute construed it not to apply to pierside injuries, as it has done in this case.

Finally, since the statute was enacted, this Court's decisions lead to the same conclusion. As long ago as 1941, this Court said, in Parker against Motor Boat Sales, "The field in which a State may not validly provide compensation must be taken for the purposes of the Act, as the same field which the Jensen line of decision excluded from State compensation laws. Without affirming or rejecting the constitutional implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence."

Shortly thereafter, in Davis against the Department of Labor, the Court said, "Congress has, by the Longshoremen's Act, accepted the Jensen line of demarcation between State and Federal jurisdiction."

More specifically, in Swanson against Marra Brothers Company, to which Mr. Coleman has referred, the Court held almost directly that a pierside injury was covered by the Longshoremen's Act, citing and relying on the Nordenholt case.

I turn now to the Calbeck case, which is, of course, an important authority in the construction of the Longshoremen's Act. My submission is that it supports our construction of the statute. Some language in it is taken out of context to sustain

the contrary argument, but that argument will not survive, I submit, when the language is placed in the context of the decision as a whole.

In the first place, we must give consideration to the actual facts of the Calbeck case. The language of an opinion, of course, takes significance as applied to the facts which were before the Court, and in the Calbeck case the Court was dealing with an injury to an employee who was working on a ship which was afloat on navigable waters.

This is the clearest possible situation within the admiralty jurisdiction, and within the Jensen case. The workmen there were on the water side of the Jensen line of demarcation. What the Court said there has great relevance to injuries which are so clearly maritime. That this was the area on which the Court focused is clearly shown by the repeated references in the opinion to "injuries incurred on navigable waters." This phrase occurs at least nine times in the opinion, with slight variations.

As to such injuries, the Court did use some rather broad language, but it was only such injuries that were actually before the Court. That the Court did not intend to go further is shown by its reference to the Act's adoption of, and here again I quote, "the Jensen line between admiralty and State jurisdiction as the limit of Federal coverage," and its reference to the fact that in Davis against the Department of Labor, the Court had pointed out that, and again I quote, "The Act

adopts the Jensen line of demarcation."

It should be observed, too, that in the Calbeck case the Court, at page 129, cited the Nordenholt case with approval, where it had been held just before the enactment of the statute that injuries on piers were on the State authority side of the Jensen line of demarcation.

Thus, Calbeck, when closely examined, deals only with the water side of the Jensen line of demarcation.

Q Suppose, Mr. Solicitor General, this were a floating pier on pontoons. There are some. Does that make any difference?

A Yes, I think a floating dock might be the equivalent of a vessel. I do not know. Then it would be upon navigable waters. I can only say that we do not have that case here.

Q I understand we do not have that case here, but it is just the fact that it is above the water, and not on it, that makes a distinction.

A Certainly a barge floating beside a ship, which is being used in unloading a ship, would be within the admiralty jurisdiction, and I do not recall a case which has involved a floating pier, but I think it is very likely that would be held to be within the admiralty jurisdiction.

Certainly it was not the situation which was involved in the Nordenholt case, which was a fixed structure built on land.

Calbeck, as I have said, does accept the Nordenholt case and makes it plain that a pierside injury, such as that involved here, is and always has been understood to be covered by the State Acts, and is, thus, outside the scope of the Longshoremen's Act, not only because the injury is on the State side of the Jensen line of demarcation, but also because coverage of the Longshoremen's Act is expressly excluded by the final clause of section 3(a), since a remedy under the State Act is clearly available, and this is the case, it seems to me, where that final clause can properly be applied.

In the Calbeck case, the Court did quote some rather expansive language from Judge Hutchison in the Debardeleben Coal case, but nevertheless, the case itself involves injuries which were clearly on the water side of the Jensen line of demarcation.

Congress did undertake to use its authority to the full as it then understood its authority to be under this Court's decisions. In undertaking to meet its responsibilities, it drew the line which it understood to be the Jensen line of demarcation, to which this Court has frequently since made reference, although it may be that it could draw the line someplace else if it were enacting the statute now, and I think it could, this is the place where it did draw the line when it enacted this statute in 1927. Nothing that has happened since is an appropriate reason for a court to draw the line someplace else. That

is the responsibility and the prerogative of Congress.

(Whereupon, at 12 Noon the argument in the above-entitled matter was recessed, to reconvene at 12:30 p.m. the same day.)

(The argument in the above-entitled matter resumed at 12:30 p.m.)

MR. CHIEF JUSTICE WARREN: Mr. O'Connor?

ARGUMENT OF JOHN J. O'CONNOR, JR., ESQ.

ON BEHALF OF RESPONDENTS WILLIAM H. JOHNSON AND JULIA T. KLOSEK

MR. O'CONNOR: Mr. Chief Justice, and Your Honors:

Before launching into my argument, I should like to define the issues involved in these cases. At the conclusion of my introductory portion, I will be very happy to proceed in whichever direction you suggest: (1) discuss the points set forth in my brief, but in a different sequence; (2) limit my discussion basically to the philosophy of five cases of this Court commencing with O'Donnell versus Great Lakes and terminating with the Reed decision; or (3) devoting the time I have allotted to responding to any questions you may care to direct to me.

First of all, these cases involve longshoremen who are members of a "gang", a work unit actively engaged in discharging cargo from a vessel alongside of a pier. Their duties, their rest periods, their lunch periods, require them to go back and forth between the vessel and the pier. They are doing the same work. They are receiving the same pay. They are exposed to the same risks.

We are not dealing in this case with anyone running to an office downtown, anyone working in a machine shop, anyone

driving a laundry truck.

My second point is, the issue in these cases is not of constitutional magnitude. Jensen, Stewart, and Dawson, these cases held that admiralty was exclusively Federal, and that States could not be permitted to invade that domain, with or without attempted Congressional sanction.

The crucial question in these questions is this: May the Federal Government legislate in a field where the States may have also exercised some dominion. These other cases were looking in the opposite direction. The issue there was one of permissiveness by this Court, and not a limitation on the power or the authority of the Federal Government.

The third point: There are two basic sources of jurisdiction for Congress: One, the admiralty article; two, the commerce article.

I am afraid I must differ with the distinguished Solicitor General when he appeared before you a few moments ago. He indicated that the exclusive source of admiralty jurisdiction was locality. Locality determines jurisdiction with reference to torts, but admiralty also has the contract aspect, and there it is the nature of the contract and not the locality.

In addition to this, we have the commerce power. These two powers are totally separate, distinct, and independent. They may be exercised jointly or independently. In the Longshoremen's Act, Congress was aware of, and actually did exercise, both of

these powers.

On the next point I find myself in agreement with the Solicitor General. We feel that these cases revolve about the correct, liberal interpretation of the simple term "upon the navigable waters of the United States."

The Court of Appeals held that this term applied equally to all structures on navigable waters, whether the structure happened to be a pier or a ship, and also to all injuries, whether the longshoreman happened to be aboard the ship, on the deck, or on the deck of a pier.

The final comment in this introductory portion that I should like to make is this, Your Honors: Under the Maryland law, the widow and the boy would receive a maximum of $15,000. Under the Federal statute, the benefits will be in the neighborhood of $63,000.

We submit that a hidden issue in this case is the cost to the insurance company, and ultimately to the stevedoring contractor. As this Court has repeatedly held, that is not a valid issue. The human cost of doing business should be borne by the industry, and not by the victim of the industry.

Before I leave that, I think Mr. Justice Fortas directed a question to the Solicitor General and inquired, "Suppose we have a floating pier? What would be the ruling in such a situation?" Well, it so happens that there has been such a case, and this is illustrative of the conflict and the confusion

which is existing throughout the country today.

A recovery for the longshoreman was awarded by the Compensation Commissioner. As I recall it, this recovery was affirmed by the District Court. It then went up to the appellate level, in the Fifth Circuit, the same circuit that has provided several of the authorities relied upon by the petitioners in this case.

The Court of Appeals for the Fifth Circuit, in a decision in 1967 -- I am not sure whether it is Travelers versus Shea in 382 F. 2d, or Nicholson versus Calbeck in 385 F. 2d -- but the Court of Appeals reversed and held that the injury was not compensable under the Act.

Now, my first point, if you wish me to follow the brief basically --

MR. CHIEF JUSTICE WARREN: Follow your own course.

MR. O'CONNOR: Suppose I take the first point and then I may deviate to another system, Mr. Chief Justice.

My first point is, in addition to being actually upon navigable waters, piers are their indispensable adjuncts. The facts of these cases are conceded. We might say there is a veritable tidal wave of navigable waters in these cases. First we have the Solicitor General's brief. He says the relevant facts are not in dispute. Then we have the admissions on the pleadings in the Klosek and Johnson cases. I am on page 29 of my brief at this point.

And, of course, in these undisputed verities is the fact that the piers involved in our controversy are "upon navigable waters." Going back to Johnson and Klosek, in our complaint for review which was filed on the admiralty side in the District of Maryland, we asserted:

"The complainant was working as a longshoreman on the 600-foot Bethlehem high pier, located upon navigable waters."

That is our allegation.

Paragraph 2 of the answer of the petitioner, Nacirema in this case, reads as follows:

"This respondent admits the matters and facts alleged in the second article of the complaint."

Turning our attention briefly to the Avery case, there is an expressed stipulation to that effect. That appears at page 9 of the appendix; that the pier is upon navigable waters.

Over and above that, in the finding of fact by Deputy Commissioner Traynor, he held as a fact, "The surface of the pier is situated over the navigable waters."

Then, of course, we have the admissions made by Mr. Coleman when he first appeared before you. He stated there is no question that the Patapsco River is navigable waters of the United States. Point 3 of his concession was that the pier was located on pilings and that small boats could navigate under them.

It is our position that this, of and by itself, is

dispositive of the issue involved in this case.

Now, suppose I pass on to an analysis of the principle and philosophy in what I consider the five leading cases. My brief, I believe, contains references to 60-some odd cases. I think these are the most important.

The first one is O'Donnell versus Great Lakes Dredge and Dock Company. This particular decision involved a suit by a seaman. Incidentally, we are back in 1943. This case involved a suit by a seaman who was working on a type of vessel that transported sand. This sand was taken ashore by some sort of a pipeline system.

He was ashore repairing a gasket on this discharging device. He filed a suit under the Jones Act and his claim was denied by the lower court. This Court entertained certiorari, issued the writ, and the case came up for disposition.

We feel it is extremely interesting to note that O'Donnell, in 1943, interpreted the scope of the Jones Act in fundamentally the same words this Court did some 20 years later when it delineated the borders of the Longshoremen's Act in Calbeck.

In O'Donnell, Mr. Chief Justice Stone, in resisting an attempt to restrict the coverage of this beneficial seamen's act, stated, and this is on page 39 of the opinion: "Congress, in the absence of any indication of a different purpose, must be taken to have intended to make them" -- "them" being the words

of the Jones Act -- "so far as the words and the Constitution permit and to have given to them the full support of all the constitutional power it possesses. Hence, the Act allows the recovery sought, unless the Constitution forbids it."

The Jones Act, as you may recall, was passed in 1920. It took that Act 23 years to come before this Court for the final interpretation. The Longshoremen's Act has taken a bit longer.

The second case I should like to discuss briefly with you is Avondale Marine Ways versus Henderson. This is a 1953 decision of this Court, in which the Court issued a pro curiam decision representing the views of eight Members of the Court. There was no dissent. One Judge did not participate.

O'Donnell also, I believe, was a unanimous decision.

In Avondale, the Court was dealing with a drydock case. The Longshoremen's Act covers two categories of workers. It covers your longshoreman who is working on the pier and the ship, and it also covers your drydock employees.

In Avondale, the situation is set forth in a footnote in the lower court's opinion. The factual backdrop was this: This is Footnote 2: By stipulation, or by the uncontroverted testimony, it was established that at the time of the explosion on the barge, the barge had been hauled out of the Mississippi River on the cradle of a marine railway. We are dealing with a marine railway, not, technically, a drydock.

Both cradle and barge at the time of the explosion, and for some time previously thereto, had been at rest ashore at a point 400 feet from the water.

To the predecessor Court, it was so obvious that the Longshoremen's Act should be liberally construed and applied, it did not even bother with writing an opinion. It had a one-sentence pro curia affirming an award in favor of the man who was injured on this barge 400 feet inland of navigable waters, not on a drydock, but on a marine railway.

Our analogy there is that if the drydock portion of coverage is to be applied with sufficient liberality as to embrace someone 400 feet inland, certainly a man injured on a pier just a few feet from the edge of the ship, and still at that time physically upon navigable waters, should also be held to be encompassed within the protection intended by Congress when this Act was passed back in 1927.

The third case, of course, is our incomparable Calbeck. That has been pretty well commented upon already. I don't know whether any further elaboration is required at this time. I don't want to belabor it.

The courts have not concurred in the views expressed by Mr. Coleman when he tries to place a very limited application on this case.

Now, as we all know, a case has basically two components. First it has the precise determination of the issue

based on the particular facts. Secondly, from that precise determination, it transcends into establishing or following a principle.

Now, the principle of law -- we all know the facts of Calbeck -- is simply that although in the past State comp was held applicable to a launched but incompleted ship, the lower court, I think, said it is about 57 percent complete, although the past law stated that the State could avoid compensation, Calbeck held that, nevertheless, the compensation, the Longshoremen's Compensation Act, also applied to that situation, and the mere fact that there may have been recognized or permitted State jurisdiction, did not oust the Federal Government, either Congress or the courts, of its or their control and jurisdiction over admiralty matters and navigable water.

We feel we have the same, precise situation here. In Calbeck there is no question that the statutes of Louisiana could apply to and be availed of by the workman. Similarly, here there is no question that the statutes, the Workmen's Compensation of Maryland, could apply to Mr. Johnson and also to the widow of Mr. Klosek.

But we submit that is totally insignificant. This case is not one of constitutional scope. We are not determining how far can the States go. We are merely deciding if the State was permitted in the past to exercise some jurisdiction in this field, does that mean that we have been ousted of our traditional

authority which, of course, goes all the way back to 1789?

Q What about the last part of 903(a)?

A What is that, Mr. Justice?

Q That says that compensation shall be payable in respect of disability or death if the injury occurred on navigable waters, and it says "and if recovery for the disability or death * * * may not validly be provided by State law."

A Well, Calbeck very effectively disposed of that, sir. Let me see if I can get the precise quotation from that decision.

Yes, sir. On page 117, of 378 U.S. this Court asserted, that was a 6-to-2 decision, "Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters, whether or not a particular injury might also have been within the constitutional reach of a State workmen's compensation law."

Q You say that that is the answer to my question?

A Yes, sir. That was one of the main points that was emphasized and stressed in the Calbeck case in the briefs, and also in the opinion of -- I have forgotten who offered the opinion in the Fifth Circuit.

Is there any further elaboration you would like, sir?

Q Well, I suppose that calls for study, and not elaboration. Thank you.

A Thank you, Mr. Justice Fortas.

The next case I should like to discuss briefly with Your Honors is Gutirrez versus Waterman Steam Ship Corporation, decided in 1963. That was a decision by this Court that divided 8-to-1. This has frequently been referred to as the "beans on the dock" case in Puerto Rico.

A longshoreman filed a suit and recovered in his action. This was appealed to the First Circuit and the lower court's decision was reversed, the recovery was taken away from him, and then it came up before this Court on writ.

I would like to read these excerpts from the opinion. This is 209 of 373 U.S.

> "Respondent contends that it is not liable, at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act swept it away when it made vessels on navigable water liable for damages or injury 'notwithstanding that such damage or injury may be done or consummated on land.'"

On page 210 we find this excerpt, and I read it principally because of the situations conjured up in the brief submitted by an amicus on behalf of petitioners.

> "Various farfetched hypotheticals are raised, such as a suit in admiralty for an automobile accident involving

a ship's officer on ship's business in port, or for someone slipping on beans that continued to leak from these bags in a warehouse in Denver. We think it sufficient for the needs of this occasion to hold that the case is within the maritime jurisdiction under 46 U.S.C., Section 740 when, as here, it is alleged that the shipowner commits a tort while or before the ship is being unloaded, and the impact of which is felt ashore at a time and place not remote from the wrongful act."

Q What is that from?

A This quotation, Your Honor? From Gutirrez, the Gutirrez decision.

The final excerpt is this brief paragraph on page 215 of the same decision.

"We agree with this reading of the case law and hold that the duty to provide a seaworthy ship and gear, including cargo containers, applies to longshoremen unloading the ship, whether they are standing aboard ship or on the pier."

We think we have a very analogous situation here. We feel that the Longshoremen's Act applies whether the man is on the deck of the ship or on the deck of the pier, and the basis of that is that the foundation of the Longshoremen's Act is the admiralty power of the United States. It is the same power which gave rise to the enactment of the Jones Act, which again was an employer-employee relationship.

The admiralty article of the Constitution also confers admiralty jurisdiction on this Court. This Court, in exercise of that jurisdiction, and in recognition of its humanitarian objective to protect maritime workers, has been constantly extending the seaworthiness or unseaworthiness doctrine.

We feel that it is almost incomprehensible to hold that this open end unseaworthiness protection is available to a longshoreman if he is injured on the pier, and yet the protection expressly designed for him by the Longshoremen's Act is denied him when he is injured on that same pier.

The final case is Reed versus S.S. Yoka. That was decided in the same term of the Court, 1963. This particular opinion was authored by Mr. Justice Black. It represented the views of seven Members of the Court.

In that case we were dealing with a situation where the injured person filed suit against the bareboat charter, who was also his employer. There was a provision in the Act which exonerated the employer from a damage suit. The Court of Appeals held that since a suit could not be instituted in personam, therefore, a suit could not be instituted in rem. This, of course, was an in rem proceeding.

So the lower court held that he had no cause of action. This Court took the case and, of course, held otherwise.

I am reading now from page 415 of the 373 U.S.

"We have previously said that the Longshoremen's Act

'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results. We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances, because some draw their pay directly from a shipowner and others from a stevedoring company during the ship's service.'"

The analogy here, I think, was sort of anticipated by Mr. Justice Fortas when he said, "Suppose this sling of cargo struck two men working on the pier, just knocking one down, or over to the edge of the pier, and flushing the other one off into the water?" The one who went into the water would be covered; the one who had the misfortune to just be knocked sideways a little distance would not be covered under the theory that is argued for by the petitioners in this particular case.

We say this would be a harsh and incongruous result because they are doing the same, precise type of work.

Q Was it reasonably clear before the Admiralty Extension Act that injuries on a pier to a longshoreman were not actionable in admiralty?

A I really can't directly answer that, sir. I tried to find out, Mr. Justice White, just at what point a pier, being an extension of land, came into the law books. I

could not locate it.

Q What gave rise to the Admiralty Extension Act?

A I wish I could answer that, sir, but I cannot. Perhaps the Solicitor General, when he comes back before you, may be able to fill that void.

Q But you are using the Admiralty Extension Act in your argument, aren't you? You don't know what gave rise to it?

A Well, possibly back in 1865 or thereabouts. That was a situation where some sparks from the funnel set fire --

Q Well, what was the so-called Jensen line?

A The Jensen line, Your Honor, as I understand it, is solely a decision that the States cannot legislate in the admiralty field, for the simple reason that it must be uniform.

Q Did the Jensen case define what that line was between -- did it have anything to do with docks, and gangplanks and ships?

A Jensen itself, Your Honor, Jensen was a longshoreman who operated an electric truck, who went back and forth from the pier to the ship. He was killed when he was taking cargo out of the ship's hold onto the gangway; it somehow became fouled up; he went back and he hit his head on the ship and sustained a broken neck. So Jensen sustained his injury as a result of striking the ship.

It was held that his injury was within the Federal

domain and that the New York State Compensation Act could not be applied. That is the factual backdrop of the Jensen decision. Following that, Congress tried to pass two different laws, but neither one passed judicial scrutiny by this Court, because both laws tried to confer on the State authority to act in this field and this Court stated that that would interfere with, disrupt, and perhaps destroy the uniformity that we must have in the admiralty field.

Q What do some of the cases mean when they say that the Longshoremen's Act adopted the Jensen line?

A This Court has never held that Congress did not have the authority to legislate in this particular field. I think one of your questions directed to Mr. Coleman --

Q I know, but the Court has indicated that the Longshoremen's Act adopted the Jensen line. Now, whatever that line is. Hasn't the Court so indicated, that the Longshoremen's Act adopted the Jensen line?

A There are dicta, yes, sir. There are dictas in the various decisions which expressly refer to the Jensen line of demarcation. That is absolutely correct.

Q Between what? Demarcation between what?

A I don't know. Jensen actually was injured as a result of, you might say, a ship borne injury, because he struck the side of the ship. Also, it has been universally held that a -- except that I shouldn't say "held" because I don't think

it has been expressly before this Court, and dicta has appeared in different cases.

It has been sort of universally accepted that on board ship, or on board the gangway, Federal; on the pier, State. I believe at one time, with reference to pier injuries, they even held it depends on what direction you are going in. If you are going from the pier to the ship it is land; if you are coming from the ship to the pier, you are still on the ship until you reach the pier. But I think these hair-splitting decisions have all been done away with.

Again, Your Honor, I think we are dealing in this particular case, or these cases, with a liberal interpretation of a liberal statute, workmen's compensation law, so these distinctions which might have to be measured by maybe Johansen blocks or real delicate calipers should not take up the time of the Court. I think we should be dealing with what is fair and equitable, and what the Congress intended by passing this act to aid and assist these men that were exposed to these numerous damages and injuries because of the hazards of their occupation.

The final excerpt from Reed versus Yoka is the following:

> "As we said in a slightly different factual context, 'All were subjected to the same danger, all were entitled to like treatment under law.'"

In the conclusion portion of my brief, commencing on

page 34, I set forth various anomalies and bizarre situations which the petitioners are requesting this Court to ratify and support. If I may touch briefly on the legislative history of the Act, if one thing stands out preeminently, it is the Congressional resolve to avoid the constitutional pitfalls of lack of uniformity which caused Congress to stumble in its two earlier attempts to help longshoremen, the preoccupation of the chairman with uniformity, and his apprehensiveness over its possible vitiating absence.

Seamen were left out of the Act. The only omission is seamen. Everything else there is to extend and enlarge it, and that is why they put in "including any dry dock", because in a normal, factual, common-sense appraisal, a drydock is not upon navigable waters. So that was a term of inclusion.

The chairman was concerned because seamen were omitted. This preoccupation is apparent throughout all the proceedings, the Senate hearings, and also the hearings before the House of Representatives.

Now, with reference to the uniformity of full coverage, there was just about unanimous accord. The committees in both Houses wanted to avoid the constitutional flaw in the law. Labor, both the ILA and the shipyard unions, wanted full coverage. Management supported it. In fact, Mr. Keating was very critical -- who represented the shipowners, and a very noted admiralty proctor at the time. He was critical of the Act

because he was afraid it wasn't embracive enough; it didn't include everyone. That was one of the reasons why they changed the terminology from a place in admiralty jurisdiction, provided it is not a place of local concern, and whatnot.

The Government agency entrusted with the administration of the Act wanted all facets of the job covered. To argue that the Congress of the United States deliberately excluded 25 percent of the longshoremen work force -- statistically 25 percent on the pier and 75 percent aboard ship -- that they are not protected by the Act, is striving to defeat the very uniformity that Congress not only strove for, but actually achieved.

My final comment will be this, Your Honors: It may come as a shock to petitioners, who are so patently enamored of some pre-1927 views, but one cannot thrust the mighty 42-year oak of the Act back into its embryonic acorn. Both the seaworthiness doctrine, and the Act -- and we may also interpolate here the Jones Act as well -- are traceable to a common origin: solicitude for maritime workers who spend their lives in such a hazardous occupation.

As the seaworthiness doctrine has grown, as the application of the Jones Act has been extended, these have expanded, these have developed, down through the years. So, too, it is respectfully submitted, must the Longshoremen's Act.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Rabinowitz?

ARGUMENT OF RALPH RABINOWITZ, ESQ.

ON BEHALF OF RESPONDENT AVERY

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

I am Ralph Rabinowitz, from Norfolk, Virginia, and I represent longshoreman Albert Avery, who has been attempting to get compensation under this Act since 1961.

I take it the question before the Court is, did not Congress, whose dominant purpose was to help longshoremen, intend the Longshoremen's Compensation Act to cover injuries caused by ships' gear to longshoremen in the ship's gang working the ship from a pier built upon freely flowing navigable waters.

Going right to Calbeck, the Solicitor General would have us disregard what he calls broad language. The Court was construing the very coverage language that we are involved here today with, 903 of the Act, and the Court said in Calbeck:

> "Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters, whether or not a particular injury might also have been within the constitutional reach of a State workmen's compensation law."

This injury was upon the navigable waters. The injury was upon the navigable waters both factually and legally.

Going right to the question that was asked about Jensen, which I think the Court has asked, Jensen was a case that

says to State Compensation Commissions, "You can't touch these people because this is an admiralty matter." After that, the States over-reacted to Jensen.

For example, the best illustration of that is a case called Anderson against Johnson Lighterage Company, 120 New York 55. That is a case where a longshoreman on the dock is on the dock and he slipped down on the dock. It was in 1918, which is right after Jensen in 1917.

Now, the New York people wanted to give this fellow compensation. It went up through the courts, through the Court of Appeals of New York, which included Cardoza, and, reading Jensen, they said, "We can't give this fellow compensation. Why? Because in Jensen the Court had said the work of a stevedore is maritime in nature and his employment was a maritime contract." Injuries which he received were, likewise, maritime, and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction, and so even if they were on the dock, they couldn't get compensation.

Then the Nordenholt case came along, and this is history, which Mr. Justice Brennan went through in the Calbeck case to come out with the holding in Calbeck, which is very important in this Court. Now you come up with Nordenholt.

In Nordenholt, the Court said, "Well, this fellow fell down from a bag, a stack or pile on the dock and there is no pertinent Federal statute," and they started the local concern

doctrine. They said, "It is a bad result. Let's start a local concern doctrine. Let's say that fellow who fell on the dock, and his mother won't be able to get compensation, he was killed, because of Jensen, if we say that, he won't get compensation. Let's start the local concern doctrine."

They said, "There is no pertinent Federal statute, and that result will not do material prejudice, or will not affect materially the maritime jurisdiction of the United States." So they started the local concern doctrine.

Now, let's go back to poor Johnson. Poor Johnson, the fellow in New York, after the Nordenholt case came out, he said, "I fell on the dock, too." He went back and asked for a re-hearing, and the New York courts said, "No, no, no. We don't care about Nordenholt. We still think Jensen doesn't let you get compensation because you are fulfilling a maritime contract. You are a stevedore," citing Invovek -- which I never can pronounce; I don't know whether that is quite correct -- but the Court, in Jensen, citing Invovek, said that "This is a maritime matter. This is exclusively within the cognizance of maritime matters. The Constitution, Article III, Section 2, gives these powers to admiralty, which is a Federal domain, of Federal competence."

Now, this is what the Court meant, I believe, in Calbeck, when Mr. Justice Brennan said, at 371-20, "There emerges from a complete legislative history a Congressional desire for

a statute which would provide compensation for all injuries to employees on navigable waters; in every case, that is, where Jensen might have seemed to preclude State compensation."

I think that is important. Remember poor Johnson here on the dock, the New York court saying, "You cannot get compensation," because Johnson said "It appears to us that you cannot get compensation because of Jensen."

So I think that is what the courts were talking about and that is what Mr. Justice Brennan so precisely set out in Calbeck, and that is why he said, "We cannot allow this area of Federal domain to depend on whether or not a State Act applies or not. We cannot let that happen. This is a Longshoremen's Act." That is precisely what he said.

That is why it is important to remember that Calbeck said it is sufficient to say that Congress intended the compensation to have a coverage coextensive with the limits of its authority.

Q You said "within the limits" of what?

A Within the limits of its authority, and its authority is the admiralty and maritime jurisdiction of the United States, if Your Honor please.

Then the Extension Act, to go to that question, the Extension Act only cleared up a fuzzy area. It has been applied retroactively. Mr. Justice Hand, in the Second Circuit, had held in the Striker case that dockside injuries were within

maritime competence without benefit, without benefit of the Admiralty Extension Act. I believe it just cleared up an area that was fuzzy.

Q Were there some cases in this Court that said injuries on a dock or pier were not within the admiralty jurisdiction?

A Admiralty tort jurisdiction. There were old cases that said that; yes, Your Honor. There were old cases, pre-1927 cases, that said they were not within the admiralty tort jurisdiction.

Q And a seaman who was injured on a dock couldn't sue the vessel?

A There were cases, pre-1927 cases, that said that.

Q Were they ever changed or overruled that you know of?

A Well, the Strika case did, and that was before the Extension Act. Strika was a longshoreman who was injured on the dock.

Q Was there a citation of that case?

A Yes, sir. He was hurt by something falling from a vessel.HeHe was swinging a load, or something like that.

Q Whose case was that?

A Justice Learned Hand. Strika against Netherlands Ministry, 185 F. 2d 555, Second Circuit.

Q And the other cases were cases in this Court?

A There were cases in this Court, pre-1927 cases, that did not --

Q Well, Strika couldn't very well overrule them, could it?

A Strika got around them. I don't remember how, Judge, but to be precise and correct to tell Your Honor, to direct myself to this Court, it would not. If he expressly --

Q Have you looked at the legislative history of the Admiralty Extension Act?

A Not recently.

Q Would you know why it was passed?

A I think it was passed -- and this is just a surmise; it is not based on a study of the history --

Q Well, never mind, then.

A Yes, sir.

Going on to the argument, it is clear that Calbeck expressly repudiated a determination on the basis of the line of demarcation, and this is quoting from Calbeck again, a line of demarcation as a static one fixed at pre-1927 constitutional decisions.

The Court, in Calbeck, holds that there are areas where the States may act or may not act, but this has no effect on whether Federal compensation applies. There is nothing in the history -- I have read the legislative history of the Longshoremen's Act, and it is one time when the employer's and

employee's representatives were together. They all wanted a broad Act, and there is nothing in that Act, or the legislative history, which shows anything but a Congressional interest in covering workers in maritime employment, injured as these fellows were, right beside the ship, working the ship. They could have been aboard the ship. If their employers had said, "Go aboard the ship" that morning, they would have been aboard the ship.

If one of their fellows had said, "I want to switch places with you today," they would have been aboard the ship. There is no difference in the hazards or the work they do.

Going now to, and in closing, as I see my time is close to ending --

MR. CHIEF JUSTICE WARREN: It is ended.

MR. RABINOWITZ: May I say one last thing, Judge, and I will close with that?

MR. CHIEF JUSTICE WARREN: Yes.

MR. RABINOWITZ: Mr. Chief Justice, I say to this Court in conclusion that this case could be affirmed and should be affirmed. It could be affirmed on a very narrow ground, and that is that all these fellows, all these longshoremen -- remember, this is an Act called the Longshoremen's Act, passed for the benefit of longshoremen -- were injured by ship's gear while serving the ship, and they were on areas that were constructed over the navigable waters of the United States. It is as simple as that.

I respectfully suggest to the Court that that is the proper result, and I respectfully pray that the Court affirm the judgment of the en banc court of the Fourth Circuit.

MR. CHIEF JUSTICE WARREN: Mr. Coleman?

REBUTTAL ARGUMENT OF RANDALL C. COLEMAN, ESQ.

ON BEHALF OF PETITIONERS

MR. COLEMAN: Mr. Chief Justice, and may it please the Court: I have about a minute left. I would like to call Mr. Justice White's attention, and I will not attempt to read it, but at page 25, Your Honor, of the appendix, Judge Watkins, the District Judge who decided these cases, did go into the legislative history of the Extension Act.

The last thing I would say, Your Honors, is that I think it becomes abundantly clear why the argument made by the respondent should be made to the legislature, when one considers that there are States in which the benefits afforded by the State Acts exceed those afforded by the Federal Act, and in those States I would suggest that perhaps this action would not have been brought.

This is not a case of no compensation. These men have gotten State compensation. It is just a question that they are trying here to get compensation under an Act which we submit, Your Honors, does not apply to them.

Thank you, sir.

(Whereupon, at 1:30 p.m. the argument in the above-entitled matter was concluded.