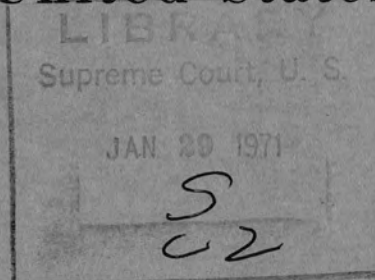


Supreme Court of the United States

OCTOBER TERM 1970



In the Matter of:

STATE OF OHIO,

Plaintiff,

vs.

WYANDOTTE CHEMICALS
CORPORATION, ET AL.,

Defendants.

Docket No. 41 original

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

STATE OF OHIO,

Plaintiff

vs

WYANDOTTE CHEMICALS
CORPORATION, ET AL.,

Defendants

No. 41 Orig.

The above-entitled matter came on for argument at
10:56 o'clock a.m., on Monday, January 18, 1971.

BEFORE:

WARREN E. BURGER, 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
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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Columbus, Ohio 43215

PETER L. STRAUSS, ESQ.
Office of the Solicitor General
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(for the United States, as
amicus curiae)

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15 On behalf of Dow Chemical Company
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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in Number 41; original jurisdiction, the State of Ohio against Wyandotte Chemicals.

Mr. Brown, you may proceed whenever you are ready.

ORAL ARGUMENT BY PAUL W. BROWN, ESQ.

ON BEHALF OF PLAINTIFFS

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

We have here a case which involves mercury pollution in the Great Lakes, an immense problem which has become more immendse as we have factually realized that the mercury pollution is extremely damaging to health and life of our citizens.

Now, we address this action to the original jurisdiction of this Court under Article 3, Section 2, Clause 2 of the Constitution and we think that the Court has, in an exceedingly clear way, outlined the cases in which such an action is proper.

We think that Georgia versus the Tennessee Copper Company is extremely in point and that New Jersey versus New York is extremely in point, in that each of these cases provide in a single factual situation that this Court will hear a complaint so addressed by a state against the citizens of another state and against the residents of a foreign country.

1 Now, in each instance the facts are identical in
2 that: acts were committed the status of which was outside of the
3 complaining state, but which created a nuisance within the
4 state and this Court here being for the purpose of enjoinder.

5 Q What law do you think the Court applied in
6 the Tennessee case?

7 A In the Tennessee case I think it applied the
8 common law of the --

9 Q Common Federal Law --

10 A No; the common law of the State of Georgia.

11 Q But there was some discussion of that matter;
12 wasn't there, about what --

13 A It seems to me that here --

14 Q -- about what would be the actual law or --

15 A It seems to me here -- it hasn't occurred to
16 me that we could apply in this case anything except the common
17 law of the State of Ohio where the nuisance occurred.

18 Q But you are claiming under a Federal statute
19 you say --

20 A No; we are not claiming under a Federal statute
21 statute; we are claiming under the Federal Constitution the
22 right to file. The ultimate Federal question here.

23 Q Well, you aren't stating a Federal cause of
24 action?

25 A We are not stating a Federal cause of action.

1 We are filing this under the common law of the State of Ohio
2 and addressing our complaint as was done in these other two
3 cases --

4 Q Well, didn't your complaint say that the
5 defendants had violated Federal statutes?

6 A No, sir; it does not. If it does, it wasn't
7 intended that it should.

8 Q So you are strictly seeking --

9 A A common --

10 Q A Federal forum to have adjudicated a cause
11 of action under Ohio law?

12 A Right. And our right to do so arises from
13 the Constitution and from these two cases and only from that.

14 Q You think we are obligated to apply Ohio
15 law?

16 A I think you are obligated to apply Ohio
17 common law with regard to whether or not this constitutes a
18 nuisance and I think you are obligated to apply Ohio common law
19 to questions of damages which may arise in the case.

20 Q May I ask you a question, Mr. Brown?

21 A Yes.

22 Q At the time this suit was brought, it was
23 brought by you, as Attorney General of the State --

24 A Yes.

25 Q -- so, of course you had the power to bring

1 it. You are no longer Attorney General and did the state so
2 wish this suit maintained?

3 A It does. I have been appointed as special
4 counsel by my successor to come here and argue the case at this
5 time. We desperately want it to be maintained. We think this
6 is our own forum. We think that if we go to a lower Federal
7 court we are confronted by the fact that we do not have a
8 Federal question nor do we have diversity of citizenship.

9 Q I know, but doesn't the statute say that where
10 a state is a party the -- our jurisdiction is not exclusive?

11 A We do not fall within the exclusive jurisdic-
12 tion but there is no other except our state court and the pur-
13 pose of including in the constitution the requirement that a
14 state might come here for original jurisdiction, was so that we
15 might not have to do exactly that. We might not have to con-
16 front our adversaries in their state court with this question
17 which is so important.

18 Q Your state court.

19 A In their state court. In our state court
20 also we --

21 Q In your state court you could have sued two
22 of these defendants in your own state courts.

23 A We could.

24 Q Who might be more familiar with Ohio law than
25 we are.

1 A We felt that the purpose for including in the
2 Federal Constitution the requirement, the right, this form of
3 original jurisdiction was that so that this would not be
4 necessary between the states and the citizens of another state.

5 Q But, Congress, in its first judiciary act,
6 said that the -- the jurisdiction of this Court in a suit
7 between a state and the citizens of another state was not
8 exclusive.

9 A It is not exclusive.

10 Q So, are you suggesting that that provision is
11 not --

12 A No; we could sue in our home state, and we
13 could, of course, sue in the foreign forum. We take the
14 posture that we do not need to, as Georgia did not need to, or
15 as New Jersey did not need to.

16 Q Well, you think the choice is yours; not this
17 Court's?

18 A I think it's ours and I think this Court has
19 already defined the cases in which it would hear such cases.
20 In Massachusetts versus Mellon case, outlines the factual
21 situation, which is again, identical to ours. And that is one
22 where we are filing suit in our proprietary capacity and we
23 are protecting our citizens in their rights to air, water, land
24 and, of course, anyone who argues, as do our opponents in their
25 briefs, that we do not hold title, we are not proprietors of

1 land and water for this purpose, are entering into a legal
2 quibble.

3 We feel that we are properly here. We feel that
4 this Court has carefully defined in the two cases cited:
5 Georgia versus Tennessee and also in New Jersey versus New
6 York, that this is a proper Court. We think that except for
7 our own court, it is the only -- we have no Federal Court
8 available to us except this Court and we think that the concern
9 of the people of Ohio and the people of the Great Lakes Dis-
10 trict, with the ecology of the Great Lakes is so real that
11 this Court ought to grant our motion.

12 Q What is the specific relief that you're
13 asking for in this lawsuit?

14 A Indeed, our prayer is quite general, as you
15 have undoubtedly observed. I think we ought to go into --
16 we've asked for an injunction. We have asked for damages in
17 lieu of that and we have asked for compensatory damages. We
18 feel that under the cases that we have read we are entitled to
19 all of these things, or some of them, at least.

20 If for some reason we can't enjoin further dumping
21 of mercury, metallic mercury into the Detroit and St. Clair
22 Rivers, then -- and if that metallic mercury which has been
23 placed in the river by the defendants, polluters here with no
24 other status than polluters who have, within three or four days
25 after discovering that they should not pollute, found ways of

1 substantially reducing the pollution. If we cannot get in-
2 junction a removal then we think we have very properly asked
3 this Court for damages and we think that we asked for damages
4 for two purposes: one, to give Ohio in money those things that
5 it has lost which are its natural resources and belong to all
6 of its people, and two:

7 And I think this is most important, to say to
8 polluters generally, who are not fearful of injunctions because
9 they continue to produce and continue to pollute until they are
10 enjoined from so doing. But, to say to them in the future:
11 damage will be award for the state for its natural resources in
12 those instances where you have placed into the public water and
13 air commodities which can be removed, if at all, only with
14 great difficulty.

15 We rather enjoy being confronted by the defendant
16 saying it's impractical for us to remove this mercury from the
17 River St. Clair and the Detroit River. We don't believe it is,
18 because metallic mercury there in the river is at the point
19 where it was discharged into the River by Dow Chem, has been
20 tested and checked and it comes to 1400 to 1800 parts per
21 million of metallic mercury still embedded into the slime and
22 industrial debris at the bottom of that river. It's there.

23 The things we have learned in the last few years
24 is that this metallic mercury, by the action of the small
25 living animals at the bottom of that sludge, in the absence of

1 oxygen, are able to convert metallic mercury into mercury which
2 can be assumed and which enters the food chain. And this, of
3 course, is what was discovered in 1969 which brought about the
4 order from both Ohio and from Ontario that fishing be stopped
5 in the lakes because it was discovered more than 50 percent
6 of the fish tested exceeded the mercury content of .5 parts
7 per million in their edible portions.

8 Now, some of them exceeded this by so much that it
9 was startling, fierce and dangerous, because some of them were
10 8 parts per million of mercury, methyl mercury in the flesh of
11 these fish. And some of them in Lake St. Clair weigh as much
12 as 10 parts per million.

13 Now, in Japan where they had 116 deaths or severe
14 neurological damage from -- which arose from the fact that
15 people in the Minnebata(ph) were consuming fish, arose in
16 instances where the fish had only double that amount. And the
17 deaths that occurred and the neurological damage that occurred,
18 was so severe that there were included in those number, 16
19 cases of children who were born with birth defects because of
20 the inclusion of this methyl mercury in their food.

21 Q Do you think that Congress has power to pass
22 a law allowing, creating a cause of action on the part of the
23 state for damages for this --

24 A I think that the right already exists for,
25 if I understand your question, for Ohio to ask for damages

1 against those who prove --

2 Q Under a Federal law or state law?

3 A This is under the state common law, sir. We
4 don't have a Federal law. There is no Federal law on this --
5 there is no Federal bar to this action. This is argued in the
6 briefs in Dow and not in the brief of Wyandotte. Wyandotte
7 admits that there is no Federal bar that either the treaty or
8 the international commission bars our action. The Solicitor
9 General agrees with us that there is no Federal bar. The
10 Solicitor General, I think, will argue this in detail and I
11 leave part of this to him for that purpose.

12 But there is no bar. We are properly within the
13 jurisdiction of this Court and that the only question in that we
14 are here as a proprietor and we are seeking damages for all the
15 people and that these cases --

16 Q Can you do that?

17 A Any case here reflects our --

18 Q Can you seek damages for all the people?

19 A Sir?

20 Q Can you seek damages for all the people?

21 A We seek damages; yes, sir, for the State's
22 right as a proprietor of its natural resources for all of its
23 people and you do have, and you have decided cases which are
24 cited in the defendant's brief in which this Court did not take
25 original jurisdiction in cases in which the damages were sought

1 for a particular group of people and those cases do not apply
2 here because our --

3 Q If a state didn't have an action under its
4 common law, why couldn't its legislature create one?

5 A We do have one already, sir. The action is
6 there was damages.

7 Q Couldn't the legislature create one and sit
8 on its boundaries and so forth for the damages --

9 A There is one way, sir and we could use it,
10 except under the constitution we are entitled to bring an
11 action in this Court.

12 Q What statute? Have you cited that statute?

13 A It's Article 3 of the Constitution, Section
14 2, Clause 2 of the Federal Constitution and there is a 28
15 United States Code annotated that is also -- this right is
16 formalized in the Federal Statutes.

17 Q Could I ask you this question: assuming,
18 assuming, as you all seem to agree on both sides, that there is
19 technical jurisdiction in this Court to entertain this case, I
20 assume you would also agree that the Court has discretion as
21 to whether or not it should exercise jurisdiction which is
22 technically conferred upon it.

23 A I don't agree.

24 Q You do not agree?

25 A I do not agree. The word "discretion" appears

1 only in a footnote in the Solicitor General's brief and the
2 real way this Court should determine whether or not it accepts
3 is either -- is to follow the guidelines which have all been
4 set out by this Court in Massachusetts versus Mellon, in which
5 this Court said that the state, really being a party did not
6 give it the right to come in here; it must also have a justifi-
7 ciable lawsuit. And we have such.

8 We have a lawsuit. It doesn't fall within any
9 of the cases in which a state has been precluded from action
10 and it does fall within those on the right side of the juris-
11 dictional guidelines drawn by this Court and very clearly
12 stated in Massachusetts versus Mellon.

13 There are some other cases which the Defendant
14 argues, which do not apply. The defendants in this case have
15 set up a number of straw men. They, as polluters, have tried
16 desperately to use every measure to continue to pollute.

17 Q What would you -- what is your reaction --
18 it may not go to jurisdiction, but in terms of the injunction
19 phase of the case, what's the significance to the fact, if it
20 is a fact, that Wyandotte has ceased to pollute and that Dow
21 Chemical of Canada is under an Ontario order to hold its pollu-
22 tion down to a certain level?

23 A These are factual questions which we will get
24 to on the merits. We do not think they have ceased to pollute.
25 In fact, we have indications that Canada does not think that

1 they have ceased to pollute and that Canada is about to file
2 further judicial action there.

3 Q Well, let us assume it were true that they
4 had stopped polluting completely. Let's just assume it were
5 true --

6 A I think this is a ploy that polluters
7 generally would -- in other words, "when you catch me" --

8 Q You say that --

9 A They are still introducing mercury into the
10 water. They admit it at least to the point of half a ton a
11 day.

12 Q You say this shouldn't go to jurisdiction;
13 it should be a matter for the special master --

14 A Indeed it should be a matter for the special
15 master.

16 Q On a motion to dismiss or something like
17 that, for failure to state a claim or something else.

18 A If we fail to prove our case, then of course
19 we will lose, but we have to prove that they not only have
20 polluted, but that pollution continues.

21 In addition to this, metallic mercury, concen-
22 trated at the point at which the effluent is dumped into the
23 river by Dow and by Wyandotte, is still there on the bottom
24 of the river and is still being released by the passage of
25 water over it and it is still being acted upon by bacteria

1 throughout the lakes so that we continue to get pollution,
2 which was caused and brought about by their original action.

3 In addition to that this proceeding is going to
4 have to be constantly monitored because the amount of sewage
5 and other industrial waste that is in the lake made by other
6 changes, began to react upon this metallic mercury, and in the
7 ever-increasing rate so that we may get a higher rate of
8 mercury pollution in the fish themselves without the addition
9 of any additional mercury.

10 Q Well, I suppose there are sources of mercury
11 besides these particular defendants?

12 A We believe we can show that the chlor-alkali
13 process of making caustic soda and chlorine is the process
14 which provides by far the greatest percentage and amount of
15 this particular --

16 Q But there are other contributors to --
17 of Lake Erie.

18 A There are. We believe the evidence will
19 clearly show there are no other substantial polluters; that
20 these people are the only substantial polluters in this par-
21 ticular area and we believe that if there are other substan-
22 tial polluter we would be delighted to have the defendants
23 make them parties after we are in here on the merits.

24 Q But, of course that's not all -- I appreciate
25 your answering my Brother White's question, but that all does

1 go to the merits?

2 A It does go to the merits --

3 Q Which would become, if as or when this motion
4 of filed complaint is granted, but only then.

5 A And I am afraid that the judgment with regard
6 to my motion may turn upon your anticipation of what the merits
7 area. And hence, I must strongly state that the facts are with
8 us and against our opponents.

9 Q Well, I would assume that under ordinary
10 concepts of pleading, we had a motion to file a complaint and
11 that we could assume the allegations in the complaint are
12 true for the purposes of that motion.

13 A That's right; that's right.

14 Q But the real problem here, our initial
15 problem and what the argument on this motion was directed to,
16 I should suppose, would be the jurisdiction of this Court.
17 There is no jurisdiction. As you say, there seems to be no
18 doubt about jurisdiction under Article 3, Section 2 and action
19 by the state against citizens of different states. And then
20 in answer to my Brother Harlan I understood you to say that
21 it is your position that the Court had absolutely no jurisdic-
22 tion in this area. What I think you meant to say was "no
23 discretion in this area," that since the constitution conferred
24 jurisdiction; that was it.

25 But, I think perhaps you meant, and perhaps what

1 you did say was that in light of the decided cases --

2 A Right.

3 Q -- the Court should allow the complaint to
4 be filed. And in light of its decided cases the Court's
5 discretion was limited by those precedents and would require
6 filing of the complaint.

7 A You will have to write some new law if you
8 want to exercise the discretion of --

9 Q If we want to deny the motion.

10 A Right.

11 Q Right.

12 A Now, I -- in Ohio we have the same complaints
13 in -- we were final, and hence we had a certain discretion.

14 Q Right.

15 A But, under the cases which have been written
16 under the constitutional laws on the books we are entitled to
17 be here and the only question that I would have any difficulty
18 with answering is the question of the exact shape and form of
19 the final decree in this Court, which is also something we must
20 reach when we develop all the factual background.

21 Q Just to get back to what I had thought and
22 is really the only thing before us, and that is the motion to
23 file the bill of complaint.

24 A That's all there is before you.

25 Q Not a matter of any of the facts of the case,

1 whether your allegations are correct or incorrect, certainly
2 are not a matter of relief yet, but a motion to file a com-
3 plaint.

4 Now, I understand your position that under the
5 decided cases, under those precedents this motion ought to be
6 granted, but I -- you do concede, do you not, that Article 3
7 Section 2 does not confer compulsory jurisdiction in and of its
8 own terms on a case of this nature? Does it?

9 A It seems to me --

10 Q I mean, Massachusetts against Mellon said if
11 you --

12 A It said we had to be a party and in addition,
13 we had to have a lawsuit.

14 Q Right.

15 A That's exactly what it said. And I have a
16 lawsuit here.

17 Q You had to have rights beyond the rights of
18 every other citizen, which is my question. Am I correct that
19 this alleged pollution affects others than the State of Ohio
20 people in the State of Ohio?

21 A It affects individuals and groups differently
22 than it affects the public generally, but this has never been a
23 test under --

24 Q I said, as it might affect people in other
25 states other than Ohio.

1 A It does.

2 Q So, Ohio doesn't have any unique position
3 on --

4 A It has a unique position factually with
5 regard to injury in that 80 percent of the fish --

6 Q Well, Mr. Brown, if you say --

7 A 80 percent of the fish are in Ohio waters.

8 Q If you are so certain that this Court must
9 take jurisdiction why did you file a motion?

10 A We filed a motion --

11 Q Why didn't you just file the complaint if
12 there is nothing else we could do but take it?

13 A Well, there is something else you could do,
14 sir, and I beg your pardon if you gathered that I say nothing,
15 that you have no discretion. Of course you have an existing
16 discretion to deny any case, and there would be nothing I, as an
17 applicant to the Court, could do about it, because of the
18 finality of your judgment.

19 But, Mr. Justice Stewart has said exactly what I
20 think my position is, and that is: the constitution is clear;
21 the Federal statute is clear and the cases that this Court has
22 heretofore decided are clear; and those which we have cited
23 say we have the right in these particular facts to address our-
24 selves to the Court in this way and those which have denied this
25 Court to others for reasons which have been stated, those

1 reasons do not apply to us or to our action.

2 Q And it's your submission -- I guess it's
3 agreed that you could not bring this -- you could not file this
4 complaint in a Federal District Court --

5 A We could not and --

6 Q --because there is no diversity -- this
7 company asked a question, sir.

8 A Sir, I'm sorry.

9 Q -- because there is no diversity and because
10 there is no Federal question; is that correct?

11 A Right. And this was raised also by Kelley
12 from Michigan, the Attorney General, who joined with us as
13 amicus and this Court --

14 Q And why couldn't you file it in a Common
15 Pleas Court in the State of Ohio?

16 A We could file it in the Common Pleas Court in
17 the State of Ohio, but because we have the right of review under
18 the constitution to say this is our Court; the Supreme Court
19 was conceived by those who drafted the constitution to be de-
20 clared a state under these circumstances, hence we come here.

21 Again, the urgency of the matter, the urgency of
22 thematter which rests upon the facts that this polluter: Dow
23 Chemical, principally Dow Chemical of Canada, has introduced
24 into the Sarnia River, beginning in 1939 and proceeding up to
25 and including the present, amounts of mercury known to be a

1 poison and they have done this at a rate which they admit to
2 have been as much as 200 pounds in one day and at an average
3 rate of 30 pounds a day.

4 Q Well, why couldn't the Common Pleas Court in
5 the appropriate county in Ohio handle that situation just as
6 well, if not a little better than we can. For one thing, they
7 are far more conversant with the Ohio common law than would
8 this Court be, and secondly, I don't see why matters would not
9 move just as expeditiously in that court.

10 A Well, the problem is immense and people are
11 concerned --

12 Q Well, the Common Pleas Courts of Ohio are
13 used to immense problems; aren't they?

14 A True. I believe there is another problem:
15 the connection between Dow in U. S. may be easily proved. The
16 connection between Dow and Ohio may not be so easily proved.

17 In other words, we can get a connection between
18 Dow of Canada which would justify a court saying that we have
19 proper service, also a question which we will have to arrive at
20 at a later date.

21 Q It's a problem of personal service.

22 A The problem of personal service is here,
23 better handled than there.

24 Q Haven't you brought an action under the
25 Common Pleas Court of Ohio, not including the Canadian

1 corporations?

2 A We have brought an action in the Common
3 Pleas Court of Ohio against one who is charged with being a
4 polluter in Ohio. The Detrex Company, who is also a producer
5 of chlorine and caustic soda, using the mercury -- method.

6 Q Well, how is that case different from the
7 basic case here, laying aside the jurisdiction of the Canadian
8 Corporation?

9 A Their case is different, vastly different,
10 in that we have found that they are not a substantial polluter
11 and there is no factual background --

12 Q But you could have sought that action here
13 against the Detrex Company; could you not?

14 A We could not have because then we would not
15 have the jurisdiction here. We can address ourselves here only
16 to residents of other states or to foreign residents.

17 Q Is Detrex an Ohio Corporation?

18 A Detrex is an Ohio corporation.

19 Q Oh, I see.

20 A And some of our opponents may see fit to make
21 them parties to this case, but we could not.

22 Q Very well, Mr. Brown.

23 Mr. Strauss.

24 ORAL ARGUMENT BY PETER L. STRAUSS, ESQ.

25 ON BEHALF OF THE UNITED STATES AS

1 AMICUS CURIAE

2 MR. STRAUSS: Mr. Chief Justice and may it please
3 the Court:

4 The United States has filed its brief amicus
5 curiae and it appears here today on the invitation of this
6 Court, and as the Court knows, from our brief we express no
7 view as to whether in this particular case the Court should, as
8 a matter of discretion, grant leave to Ohio to file its com-
9 plaint and I may suggest that perhaps I will have very little
10 to talk about since the parties do --

11 Q Do you have any doubt about our discretion,
12 apart from being a Court of Last Resort? We can do anything,
13 even though it's arbitrary, of course; but --

14 A No; I find none --

15 Q You what?

16 A I find no --

17 Q No doubt about it.

18 A And one thing which might have been mentioned:
19 while there are these prior cases which point in very much the
20 same direction as -- of Ohio's complaint, but New Jersey versus
21 New York City, particularly has a remarkable factual -- with the
22 asserted facts of the complaint here. Those cases were all
23 decided before the Federal statutes and before the prominence,
24 at least, of perhaps certain matters under the Boundary Waters
25 Treaty, were bound to that in any event, and this Court in its

1 opinion in those cases, albeit after the matters had been
2 decided, was quite emphatic about how they would rather have
3 Federal statutes or some kind of conference procedures or some-
4 thing of the sort and it seems incumbent upon us to address
5 ourselves as we have in our brief, to the question: whether
6 indeed, those statutes foreclosed a remedy in this Court and
7 to give the Court the types of information that it might wish
8 to use in exercising its discretion.

9 Q Mr. Strauss, for a moment: where do we get
10 our discretion to refuse to hear a case that is within our
11 jurisdiction? What is the theoretical basis for that?

12 A I suppose what we are speaking of here is a
13 case which is not only within this Court's original jurisdic-
14 tion, but also within the original jurisdiction of another
15 court.

16 Q Yes.

17 A That when the Court's jurisdiction is ex-
18 clusive and original the Court quite properly could be said not
19 to have jurisdiction, but when it believes that there may be a
20 remedy in another court something on the order of doctrine of
21 foreign non convenience, which I think quite appropriately
22 takes into account the other responsibilities that this Court
23 has and that --

24 Q The -- sort of an abstention doctrine?

25 A That's right; its capacity to sit as a finder

1 of fact which it is called on to be, and on the other side you
2 do have the aspect that Mr. Brown was speaking of: its
3 appointment, really, as a court for the states and you do have
4 one of the states --

5 Q Sort of like an adversity action when it
6 proper to abstain, even though there is jurisdiction?

7 A Somewhat similar to that. I think the con-
8 siderations are different.

9 Q Would it not be a more, perhaps like the
10 abstention doctrine applied where state courts have jurisdic-
11 tion and precisely the same range of remedies?

12 A I'm not sure I follow the question.

13 Q Well, in the three-judge court cases that
14 come here frequently. We sometimes abstain, as we did last
15 year in Reis against Kosanich when there was a challenge to
16 the Alaska statute.

17 A Well, I think --

18 Q We had jurisdiction, as Justice White
19 suggested and we remanded to the state courts because there was
20 a possible remedy there.

21 A I think there one has certain considerations
22 of Federalism which are quite important. There has been some
23 discussion this morning about the capacity of this Court as
24 distinct from an Ohio court to determine Ohio law, and that
25 certainly is a relevant factor.

1 Now, I may say that I think that there may turn
2 out to be somewhat more dispute about the actual jurisdiction
3 of this Court than does appear from the papers in their present
4 state. And in particular, with respect to the jurisdiction
5 over Dow Chemical of Canada, and that's the principle matter I
6 intend to talk about this morning. It is agreed that the
7 questions of personal jurisdiction and service of process not
8 yet raised. Similarly, any questions about indispensable
9 parties, issues of that sort, would have to await decision for
10 a later time.

11 And there does seem to be general agreement that
12 injunctive relief, at least would be within the Court's power
13 to order, although there is some dispute again with regard to
14 the Canadian defendant.

15 So, I don't feel I have to spend much time on the
16 Wyandotte Corporation's plaint. They address themselves only
17 to the Federal Water Quality statutes and in this respect I
18 simply want to restate it's set out in much greater detail in
19 our brief what are, certainly Ohio's point of view, and I think
20 in terms of the relief that's asked in this Court, realistically
21 deficiencies in those remedies which the Court ought very much
22 to bear in mind.

23 In particular, the remedy is prospective only; it
24 operates only as a means of stopping future pollution and is
25 heavily laden with administrative delay besides, except

1 for oil, which is dealt with in a separate provision: 33 USC
2 Sec. 1161. The act imposes no obligation on someone who has
3 polluted in the past to remove the polluting substances which
4 he has introduced into the water or to bear responsibility for
5 the damages which those substances have caused, but leave those
6 matters to the courts or other agencies, to a suit, such as this
7 one.

8 An injunctive remedy for nuisance is common in
9 this Court's original jurisdiction as has already been pointed
10 out and it is also clear that this Court could order removal
11 of a nuisance which did not abate of its own force, as this
12 mercury is alleged to be. The Court did such a thing in
13 Pennsylvania versus the Wheeling Bridge Company in 13 Howard,
14 of it reports, we think it easily follows also from the
15 Wyandotte Transportation Company decision of a few terms ago.
16 that removal might be accomplished by the provisions of a fund
17 such as Ohio seeks to which the defendant could pay monies to
18 be used for that purpose.

19 I may say we do have some difficulty with the
20 claim of Ohio for compensatory damages, but it doesn't seem to
21 us that that claim is necessarily excluded from this Court's
22 jurisdiction. In the past the Court has rejected such claims,
23 as Mr. Brown points out, because it was clear that they were
24 intended for the benefit of particular individuals.

25 In North Dakota versus Minnesota, in particular,

1 the state segregated its claim: it was \$5,000 for us and a
2 million dollars for the farmers who were paying the expenses
3 of the litigation. Now, there is no such differentiation here;
4 we really don't know how Ohio intends to use the money, which
5 is the key.

6 It may be remarked in the first place that Ohio
7 has an undoubted proprietary interest here and we can't say,
8 as could be said in North Dakota. The North Dakota case
9 proportioned that proprietary interest as to the damages that
10 might be assessed. Nor, is it excluded, I think, that an
11 assessment of damages could be used in a way that bears very
12 strongly on the nuisance remedy.

13 The defendants make a very great deal in their
14 brief of the difficulty of calculating the sums that would be
15 required to remove the mercury from the lake bed and of the
16 enormity of that financial burden. I would suggest, and it has
17 been suggested by commentators that an appropriate way of
18 calculating monetary relief in such circumstances, and perhaps
19 the simpler one, is to assess the damages which have been done
20 and then to use those funds for that removal purpose and it
21 certainly doesn't seem to me excluded on the complaint that
22 that's what Ohio would do.

23 Certainly it ought not to be the case that because
24 the one of the funds is so hard to compute and so immense in
25 amount that the polluter should simply go away scot-free.

1 And finally, I would point out in this regard that
2 if Ohio were using the funds in this particular way, as a means
3 of remedying the nuisance it couldn't be claimed, as the
4 defendants do, that there was some risk of double recovery,
5 because although the measure might be the same as could be
6 obtained in a suit brought by an individual, the use and the
7 remedy would be entirely different.

8 I come now to the principal area of controversy
9 of importance to the United States and that is the possible
10 liability of Dow Chemical of Canada or of its parent, Dow
11 Chemical Company, for acts done at the company's Canadian
12 factory whose effects are felt in the United States.

13 These two companies appear quite strongly to
14 insist that any assertion of jurisdiction by this Court might
15 provoke an international incident or undercut an international
16 treaty. And we want to make it plain that it is the view of
17 the United States that no such consequences would occur.

18 The power of American Courts to the _____
19 courts whose effects are felt on American soil is, we believe,
20 undisputable. The companies also raised certain doubts re-
21 garding whether the Court would provide an effective remedy.
22 These go, essentially to matters of discretion, but we do point
23 out certain respects in which more facts are needed before
24 final conclusion can be reached.

25 Let me begin with the issue of liability. I

1 think all of us would agree on a simple case in which issues
2 of causation are not obscured, the case of the individual who
3 is standing on one side of the Niagara River, fires a rifle
4 across it and kills a person on the other side. If the state
5 in which the individual was murdered is able to secure juris-
6 diction over the person of the sniper, and that of course is
7 not a question that's here today. But there could be no dis-
8 pute of its power to try him for murder. International law
9 recognizes that right and I don't think the parties seriously
10 contest it.

11 The situation is the same if, instead of sending
12 a rifle bullet he sends sludge which causes a public nuisance
13 on the other side of the river. Again, to the extent a public
14 nuisance may be prosecuted as a crime, there could be no dis-
15 pute, that the recipient state may prosecute the individual if
16 it may obtain service on him for that crime.

17 A Canadian court would feel as competent as an
18 American court in those circumstances and the only way an inter-
19 national incident could arise would be if some improper means
20 had been used to secure jurisdiction over the defendant or due
21 process was somehow denied and of course, both of which we are
22 quite certain will not happen in these proceedings.

23 There might be some question whether a judicial
24 decree obtained in a civil proceedings would be enforceable in
25 the courts of the other jurisdiction. That is, we don't -- we

1 think it should be clear to this Court that if it ultimately
2 does grant relief, a judgment to Ohio, that judgment will then
3 be Ohio's to enforce, as part of the same situation. And
4 Ohio may, indeed, have such a difficulty in enforcing that
5 judgement in Canadian courts.

6 Q When you say, Mr. Strauss, it's up to Ohio
7 to -- I'm not quite sure I follow you. Are you suggesting that
8 courts have no responsibility for enforcement of their own
9 judgments?

10 A In Canada. Excuse me.

11 Q You mean the judgments of territorial juris-
12 diction.

13 A Right. The suggestion is made that the fact
14 that this is a public nuisance suit here makes the difference.
15 I think the argument is essentially that only the United States
16 could bring an action for public nuisance against a person who
17 is resident in a foreign country and producing a nuisance from
18 that point as if only the United States could prosecute the
19 sniper on the banks of the Niagara River for a murder which he
20 causes in New York State.

21 I think, to state the proposition in that way is
22 the answer. Under the Constitution the states are forbidden
23 from engaging in diplomacy, but Ohio doesn't seek to involve
24 the Canadian Government in any respect in this case. The
25 charge is an offense to its domestic laws felt on its own soil,

1 against a particular individual who may or may not be within
2 its power to bring to justice. And if the individual is within
3 its power it is only because it is available to domestic
4 service of process.

5 Canada need never be consulted and its territory
6 is never entered upon. If Ohio obtains a judgment and seeks to
7 have it enforced, as I said before, if it must take it to
8 Canada, Canadian courts will then decide what recognition to
9 give the judgment. And that will be a Canadian domestic matter.

10 There are, of course, alternative ways of dealing
11 with the situation. Ohio might have come to the United States
12 and requested the United States to take this matter up with the
13 Canadian Government as a diplomatic matter. That was done in
14 the case prominently mentioned in the briefs: the Trail
15 Smelters case in British Columbia.

16 But, this is merely an alternative on a required
17 mode of proceeding and as we set out at length in our brief,
18 the Boundary Waters Treaty of 1909 provides no mechanism for
19 the mandatory resolution of pollution disputes concerning
20 boundary waters.

21 In this connection I think I ought to correct a
22 misapprehension which Dow Chemical of the United States at
23 least has with regard to the Boundary Waters Treaty. They
24 twice mention Article II of the treaty as if it had some bearing
25 on this case. It may be found at page 3-A and 4-A of the brief

1 of Dow Chemical of Canada.

2 That article applies -- well, I think perhaps the
3 quickest way to do this is to suggest that three different
4 situations that one might have across the Canadian-American
5 boundary. We have a river that runs across the boundary that
6 may be interfered with upstream or downstream. And then one
7 may have waters like Lake Erie which sit on the boundary. Only
8 waters on the boundary are designated boundary waters under the
9 treaty.

10 Article II provides as to a river which runs
11 across the boundary that if someone on the upstream end of it
12 interfered with its use and that might conceivably include
13 pollution although it has never been so adjudicated, then and
14 in that circumstance only, a downstream individual may come
15 into the courts of the upstream nation and litigate in that
16 forum the issue of the damage which is done to him and is en-
17 titled to have that litigation resolved in his favor under the
18 laws of that nation and if he were a citizen thereof.

19 Now, that is a specific remedy and if that were
20 applicable in this case Ohio would be able to go into the
21 courts of Canada and get relief against Dow Chemical. It is
22 not applicable here because we are dealing with boundary waters
23 not a river which crosses the boundary. And the result is that
24 Ohio has a much less certain remedy I would say, than it would
25 have if Article II applied.

1 Nonetheless, the failure of the treaty to deal
2 with that situation, in the view of the United States, does
3 not at all exclude the possibility of the remedy which Ohio is
4 seeking today. The remedy which Ohio is seeking is recognized
5 in international law and there is nothing in the treaty which
6 excludes, it seems to us, the principles stated by this Court
7 in New Jersey versus New York City is equally applicable here.

8 "If the defendant is before the Court," and I am
9 reading from page 482 of Volume 283 of the Court's opinion.

10 "If a defendant is before the court and the property of plain-
11 tiff and its citizens that is alleged to have been injured by
12 such dumping is within the Court's territorial jurisdiction,
13 the situs of the acts creating a nuisance, whether within or
14 without the United States, is of no importance."

15 I will turn very briefly to the problems of en-
16 forcement which chiefly, as I think this Court has already
17 recognized, should await later resolution.

18 The first observation is that to the extent that
19 money damages are possible there is really no issue about en-
20 forcement; nor is there any possible disability regarding this
21 Court's power to get injunctive relief so far as that injunc-
22 tive relief applies on this side of the boundary. If the Court
23 has jurisdiction over Dow Canada's person it may enjoin Dow
24 Chemical, requiring it to remove the mercury from the American
25 half of the St. Clair River and the Detroit River and Lake Erie.

1 And there should be no question of this Court's power to do
2 that.

3 There are, I think, some problems involved with
4 granting injunctive relief which would necessarily take effect
5 in Canada or excuse me, to put it another way which would re-
6 quire the aid of a Canadian court. If the Court were ever to
7 conclude that that were necessary it could fairly apprehend
8 that the aid of the Canadian court might not be forthcoming.

9 But, as we understand its complaint, Ohio asks
10 only that Dow be enjoined from producing the objected to effects
11 on the American side of the boundary. And the cases are legion
12 which state that such an injunction is proper for an American
13 court to enter.

14 The Salt and Sea cases; excuse me -- Steel versus
15 Bulova Watch Company, Vanity Fair Mills versus Eaton; all of
16 these cases quite clearly comprehend that where, in effect, is
17 felt within the United States the United States court having
18 jurisdiction of the parties, has the authority to enter an
19 injunction requiring that that effect be ceased and as we
20 understand, that is all that Ohio seeks in this case.

21 The point is that it begs the question to state,
22 as Dow does, that Dow Chemical of Canada's conduct has been
23 wholly foreign and that therefore this Court lacks jurisdiction
24 to correct it and the allegations of the complaint it must be
25 assumed that the tortuous conduct has extended to this country

1 and if that's the case there is no principle of international
2 law that bars this Court from entertaining Ohio's suit.

3 Thank you.

4 MR. CHIEF JUSTICE BURGER: Thank you, Mr.
5 Strauss.

6 Mr. Moelmann.

7 ORAL ARGUMENT BY JOHN M. MOELMANN, ESQ
8 ON BEHALF OF DEFENDANT WYANDOTTE
9 CHEMICALS CORPORATION

10 MR. MOELMANN. Mr. Chief Justice and may it
11 please the Court:

12 On behalf of the Defendant Wyandotte Chemicals
13 Corporation we have raised no question of jurisdiction in this
14 Court. It is our position that it is a discretionary matter
15 within the Court's sound discretion and therefore we have
16 urged certain prudential considerations to suggest to the
17 Court how its discretion should be exercised.

18 There are not only considerable legal precedents,
19 but there are practical precedents. The questions have indi-
20 cated the legal precedents are not as well-established as Mr.
21 Brown would have the Court believe. The cases of which he
22 speaks, I believe, were cases that either fell within the
23 realm of cases of exclusive jurisdiction or there were cases
24 where there were no mechanics set up by the statute for ad-
25 ministrative agencies to afford relief and therefore the Court

1 exercised its discretion because the applicant had no other
2 place to go for relief.

3 For the Court to accept this motion, it is our
4 belief that it would not only contravene national and state
5 policy which relates to these complex problems of pollution,
6 but also has an international aspect to it under the treaty.
7 I will confine my remarks solely to the national and state
8 problems because my colleagues representing Dow have very ably
9 handled the international problem and I am sure they will dis-
10 cuss it with you.

11 The complexities of ecology are involved here, as
12 well as the complexity of remedy. The statutes of this United
13 States as well as the various states, has set up a very com-
14 plex organization for handling the matters of pollution to
15 administrative agencies and this is so important because the
16 matter of pollution as being a problem within this country, is
17 relatively new.

18 For instance, nobody knew that mercury and water
19 created any problems before last March, 1970, less than a year
20 ago. These companies that were emptying water into the streams
21 and the lakes felt that they were doing something that was not
22 injurious to anybody. Wyandotte had continued the same opera-
23 tion for over 32 years and under the inspections of the State
24 of Michigan through their Water Resources Commission, which
25 inspected them periodically, never raised any question about

1 mercury.

2 There was no known problem and still science is
3 not aware that there is even a problem now insofar as the
4 metallic mercury, which is inorganic, being put into water,
5 creating the methylmercury which is organic, and which is in-
6 gested by fish. Nobody has been able to prove that that comes
7 from the inorganic mercury.

8 As you all know, mercury is very heavy. It goes
9 into water and it sinks right to the bottom. Dow has this
10 plant up at Sarnia. The Wyandotte plant is at Wyandotte on
11 the Detroit River. Neither of them are on Lake Erie. Lake
12 Erie is receiving mercury from multiple sources. Mr. Brown
13 has tended to minimize it, but it is coming not only from
14 these sources, if it can be proven that they are coming from
15 there and nobody's quite sure of that; but there are other
16 companies that are on those waters or on the streams that
17 empty into Lake Erie.

18 There is much mercury in the air coming from
19 furnaces burning coal and being a heavy substance, it
20 immediately settles on the earth or on the top of the water
21 and the surface waters carry it into Lake Erie and other bodies
22 of water.

23 There is mercury coming from sewage disposal
24 plants of all the metropolitan areas around that area. There
25 is mercury coming from less serious things; for instance, even

1 dentist dumps some of it down his sink when he's working on
2 your teeth.

3 Q Is your client's plant located at Wyandotte,
4 Michigan?

5 A Yes, Your Honor.

6 Q On --

7 A On the Detroit River.

8 Q On the Detroit River, which -- is there in any
9 of these briefs or documents a map that would be helpful, or
10 any map at all?

11 A I believe there is one in one of the briefs;
12 is there not, counsel? Yes.

13 Q Is it in this that was filed very recently?

14 A Yes; it's in that.

15 Q Where did you say it is?

16 A It's in the document that Mr. Justice
17 Stewart has in his hand there. Page 131.

18 The problem of mercury has come to the attention
19 of the public -- and by the way, it was accidentally dis-
20 covered by a Swedish student who had known that the problem
21 was studied in Sweden insofar as it had to do with wildlife
22 that consumed seeds treated by fungicides and in the fungicide
23 mercury is used. And so he knew that that problem existed and
24 when he found by accident, some methylmercury, which is the
25 organic type within fish up in Lake St. Clair, and referred it

1 to the Canadian Government, they immediately reacted and
2 before they could determine whether or not there was any
3 serious problem they put a prohibition on fishing.

4 This set up all the publicity that has been given
5 the problem. But the manner in which methylmercury is developed
6 is unknown to science.

7 Now, counsel spoke of the Japanese incident.
8 Before commenting on that I would like to say that no one in
9 North America or Europe has been known to have been injured by
10 ingesting mercury, eating fish. The only incident that is
11 known is an incident that occurred in Japan. And there the
12 situation was much different because it wasn't metallic mercury
13 put in the water; it was organic mercury in the form of
14 methylmercury which, of course, is very toxic. It was induced
15 directly into the water at a place where this village got all
16 of its shellfish. And as you know, the Japanese eat fish
17 about three times a day.

18 And therefore, they had a serious problem. But
19 that problem doesn't exist in this country. This leads me to
20 the conclusion and a point which I would like to strongly urge
21 to this Court in deciding whether or not it should exercise
22 its discretion, and that is that there is no emergency whatso-
23 ever in this problem.

24 I attended the science conference at the Univer-
25 sity of Michigan, held this fall. Science is working on this

1 problem every day. The conclusions I have learned from that
2 meeting are few because science hasn't advanced very far on the
3 subject. But I did learn this: that there is no imminent
4 danger to the American people or the people of Canada in any
5 location. And I also learned that there are many bodies of
6 water on this continent where fish are found to contain as
7 much mercury as the ones in Lake Erie and there is no commer-
8 cial dumping of mercury at all into those bodies of water.

9 Q Are there many fish left in Lake Erie?

10 A This, by the way, Your Honor, does not
11 kill the fish.

12 Q Well, I -- what's --

13 A There are a lot of fish there. Mr. Justice
14 Douglas wrote on the subject; maybe he can tell you. I don't
15 know. I --

16 Q -- I haven't been invited in recent years
17 and I understood there is not much to catch any more.

18 A I understand there are a lot of fish, but I
19 think the varieties are not as desirable as they used to be.

20 Q Trash fish is about all that is left there;
21 isn't there?

22 A That's right. But there are a lot of
23 problems, and this is the subject on which Mr. Justice Douglas
24 wrote, that is creating this problem, one of which is the
25 phosphates that are continuously dumped into Lake Erie. These

1 phosphates have caused an excessive amount of algae to grow in
2 that lake and have removed the oxygen from the water and have
3 caused the type of fish to which you refer to greatly develop.

4 Mercury, you wouldn't even be aware that was in
5 the water when you look at it.

6 Q -- has Ohio been -- they closed it for a
7 while to fishing; didn't they?

8 A They closed it for a short while and they
9 reopened it; yes, Your Honor. I think they still prohibit the
10 fishing of walleyes.

11 Q Why?

12 A Well, apparently they seem to develop a
13 greater amount of methylmercury in their tissue than the other
14 fish.

15 Q So it is the mercury problem that prohibits
16 the fishing of walleye?

17 A Now, Wyandotte ceased putting any mercury
18 into the Detroit River on March 24, 1970, as soon as this
19 problem become apparent. The Michigan court took up the
20 problem and a consent decree was entered into by Wyandotte,
21 whereby Wyandotte agreed to immediately set up the temporary
22 means for keeping any mercury to go back into the water and to
23 create a permanent recycling facility on May 1, 1971.

24 And I must regretfully advise this Court that when
25 they went into the problem of revising the whole plant to do

1 this, they found it was uneconomical to do so and the plant
2 will be permanently closed on May 1st -- pardon me, April 1st
3 of this year.

4 There is, of course, the alternate remedies which
5 have been mentioned. We have this network of public statutes
6 which have recently been developed to which the State of
7 Ohio can turn for its relief. I don't have time to go into
8 them, but the briefs cover them very thoroughly and Ohio has
9 these alternate methods which are much more able to deal with
10 the continuing problem and to work out solutions than the
11 facilities of this Court.

12 If this Court were to take this case, I venture
13 to say it will be inundated with pollution litigation. The
14 facilities of this Court are not set up for that purpose. It
15 would need a special master; it's kind of a form nonconvenience
16 as far as the litigants are concerned; it would be a very
17 expensive type of litigation and we don't know where we're
18 going because science hasn't progressed that far.

19 One of the questions had to do with the prayer
20 of the complaint. I'd like to just conclude by calling your
21 specific attention to the prayers of this complaint. First, it
22 asks the Court to declare that this is a public nuisance and
23 that it be abated. It has already been abated.

24 Secondly, it asks for an injunction of something
25 which has already ceased, be entered. Third: it asks that a

1 mandatory injunction to remove all mercury compounds from Lake
2 Erie, be entered, whereas science knows of no way this can be
3 done. In fact, a lot of the scientists are saying if it be
4 attempted it will stir up the mercury so as to cause a greater
5 problem.

6 And this decree could only be concerned with that
7 proportionate share of the mercury in the water that the
8 respective litigants have put in there, and proportionate to
9 what everybody has contributed to the situation. And that has
10 become a fundamental precedent of pollution law.

11 How will that be determined? You know they can't
12 measure the mercury in the lake because it is so infinitesimal
13 in proportion to the size of the lake.

14 And lastly, they ask that damages be assessed to
15 compensate for existing and future damages to Lake Erie: the
16 fish and other wildlife, the vegetation and the citizens and
17 inhabitants of Ohio which would be impossible to measure.

18 It seems to me that prayer indulges in asking
19 this Court to do that which would be futile. To take the top
20 tribunal of this country into something where we don't know
21 where we're going.

22 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Moelmann.
23 We will recess for lunch.

24 (Whereupon, at 12:00 o'clock p.m. the argument in
25 the above-entitled matter was recessed to resume at 1:00 o'clock
p.m. this day.)

1 1:00 o'clock p.m.

2 MR. CHIEF JUSTICE BURGER: Mr. Outerbridge, you
3 may proceed whenever you are ready.

4 ORAL ARGUMENT BY IAN W. OUTERBRIDGE, Q. C.,

5 ON BEHALF OF DEFENDANT

6 DOW CHEMICAL OF CANADA, LTD.

7 MR. OUTERBRIDGE: Mr. Chief Justice and may it
8 please the Court:

9 Since March of 1970 our horizons of knowledge
10 with respect to the problems of mercury pollution have expanded
11 like the universe.

12 In the appendix to our brief of reply the Court
13 will find an article from the Washington Post dated December
14 28, 1970 and the Court may know that the International Joint
15 Commission came down with their report of 9 December 1970 and
16 that report was filed both in Washington and Ottawa on the
17 14th of January 1971.

18 I would like to review with the Court some of the
19 facts which appear from these two most recent documents. The
20 first of these is that mercury is omnipresent, it's present
21 everywhere. It occurs naturally and the conclusion would
22 appear to be that only 50 percent of its occurrence is as a
23 consequence of the effluent of manufacturing processes.

24 The second one is that up to 1.5 parts per million
25 methylmercury, which is the above the limits of .5 set by the

1 department of health, has been found in fish caught as much as
2 42 years ago in the United States and that presence of mercury
3 in those fish is unlikely to be attributable to pollution.

4 Q Just as a matter of curiosity, Mr.
5 Outerbridge, how did they --

6 A There were biological specimens, Mr. Justice
7 White, preserved in alcohol.

8 Q And they now tested them?

9 A They tested them and found mercury present
10 in the flesh of those fish in the quantities that I gave the
11 Court.

12 Q But those are recent tests, obviously.

13 A Recent tests. It was reported in the
14 Washington Post article of December 28.

15 Further, the IJC reports that the major source of
16 pollution generally of Lake Erie is the Detroit River, and the
17 second largest source of pollution of Lake Erie as reported by
18 the International Joint Commission as being the State of Ohio
19 itself.

20 Thirdly, the International Joint Commission's
21 official report discusses mercury pollution, but in particular
22 it attaches a first priority to phosphorus pollution and
23 estimates the cost of something in the order of \$2 billion and
24 urges that the -- both the Governments of Canada and the United
25 States commence immediately to clean up Lake Erie and remove

1 phosphorus.

2 This report has been universally well-received.
3 In Canada, our Acting Prime Minister, Mr. Sharp, has committed
4 his government to implementing the report.

5 Mr. William P. Rogers of your Government, has
6 indicated, and is quoted as saying that he is initiating
7 follow-up action in a most urgent way.

8 There are technological limitations to the
9 cessation of mercury pollution, short of shutting down the
10 plants completely and abandoning them as was the alternative
11 selected by Wyandotte, and the fact that these are set out
12 in the appendices to the brief in reply.

13 But, there in comparison the Court should examine
14 the record filed with respect to Detrex Chemical Industries,
15 Incorporated, of Ashtabula, Ohio. Now, this is a company
16 engaged in the same business as my client under the cease and
17 desist order of April 13, 1970 by the Government of the State
18 of Ohio. And the material before the Court indicates that on
19 May 11, 1970, that's the last report we have, after the
20 operational changes in that plant had been completed, short of
21 shutting that plant down, their escape is 1.2 pounds per day,
22 which escape, I tell the Court, is greater than the escape
23 continuing from my client's plant in Sarnia, which is less than
24 a pound a day.

25 And, if the Court would look at the draft

1 regulations of the Department of Fisheries and Forestry of the
2 Government of Canada, proposed to be introduced when the
3 Government resumes, you will observe that the Government of
4 Canada recognizes a technological limitation to the ability of
5 mankind to shut off the flow of mercury from this type of an
6 operation, short of shutting down the plants.

7 In an appropriate filed with the brief in
8 reply, was a list of eight companies provided by your govern-
9 ment at our request as being those known to have discharged
10 mercury in Lake Erie. There are eight of them listed and I
11 would point out to the Court that Dow, my clients, are not one
12 of them, or is not.

13 Two of these companies are situated in the State
14 of Pennsylvania; one of them is a company situated in the State
15 of New York; one of them is a company situated in Michigan and
16 four of them are companies resident within the State of Ohio.

17 One cannot refrain from reference to the dictum
18 of Mr. Justice Holmes in Missouri and Illinois, 1905, at page
19 542: "Whereas here the plaintiff has sovereign powers and
20 deliberately permits discharges similar to those of which he
21 complained, it not only offers the standard to which the
22 defendant has the right to appeal, but it warrants the defen-
23 dant, in demanding the strictest proof that the plaintiff's
24 own combat does not produce the result."

25 Q May I ask you how that applies?

1 A How that applies?

2 Q Yes.

3 A It is my submission to the Court that the
4 State of Ohio can legislatively and can administratively and
5 can judicially, take action against the polluters within its
6 own jurisdiction and if they do then the standard that they
7 adopt with respect to their own polluters becomes the standard
8 that we can comply with. And I would say to the Court that we
9 comply with a standard which is much higher than the standard
10 which the State of Ohio expects of its own residents and
11 citizens.

12 I would like to make one comment with respect to
13 the brief of the Solicitor General where reliance is placed by
14 the Solicitor General on the case of U. S. versus Aluminum
15 Company of America and he also clearly mentions two cases to
16 the Court: Vanity Fair Mills and the T. Eaton Company and
17 Steel and Bulova Watch.

18 It is my respectful submission that when those
19 cases are examined carefully the only two cases which are
20 governing in the problem we're confronted with is the Steel
21 and Bulova Watch case as amplified and explained in Vanity
22 Fair v. T. Eaton Company.

23 Because, in the Vanity Fair case you are dealing
24 with precisely the situation we have here of a nonresident
25 citizen of a foreign country, carrying on combat in that

1 foreign country subject to and regulated by the Governments of
2 that foreign country and the conduct which is approved of by
3 that foreign country.

4 Now, by that I'm not suggesting to the Court that
5 my government approves pollution. I am saying to the Court,
6 however, that my government, the government which regulates the
7 company which I represent, has enacted regulations and has
8 an effective organization called the Clear Water Resources
9 Commission, which regulates -- test samples and has approved of
10 the quality of the effluent escaping from the plant in Sarnia.

11 And in those cases the principle would appear to
12 be that if the order of the Court is one which would infringe
13 upon the sovereignty of the foreign of a foreign sovereign,
14 the injunctive relief would have to be granted and the Court
15 has no jurisdiction to entertain injunctive relief.

16 Now, I do not quarrel with the proposition that
17 the law of Ohio may apply with respect to an action for damages.
18 That remark is directed solely to the action that is sought to
19 be maintained for an injunction and for a mandatory injunction.

20 There is a second principle --

21 Q May I ask you: do you mean that if what was
22 being done in Canada undoubtedly polluted the waters and made
23 life dangerous for people in the United States, that they --
24 that this country would have no power to enjoin them?

25 A I would say, Mr. Justice Black, that the

1 action would be one which should take place between two
2 sovereigns, and short of making war, there is no way in which
3 the Courts can enforce the injunction.

4 Q You are talking now about the enforcement of
5 it.

6 A I am simply stating it as a matter of
7 principle that if the resident, if the man is a national of a
8 foreign sovereign and a resident of another country and if the
9 order of the Court would infringe upon, but would not be, I
10 submit, in conflict with; for example: if the courts of
11 Ontario were to say that as a matter of necessity it was
12 important to them that the industrial complex in Sarnia be
13 maintained because of the labor forces that would be employed
14 there, and they said that it could go on and must go on, then
15 there would be a clear conflict, and that is something which
16 should be resolved diplomatically and not by judicial action.

17 Q And nothing can be done even though people
18 were being killed by it?

19 A Well, "nothing" is a rather exclusive word.

20 Q I'm just assuming, now.

21 A I would respectfully submit that the proper
22 course would be to resort to diplomatic action between the
23 two countries long before anybody became killed.

24 Q That would be the only way, the only jurisdic-
25 tion that you think would exist?

1 A I believe that is the state of the
2 authorities.

3 Q I suppose that's another way of saying that
4 a court that has no jurisdiction can't enter an injunction.
5 Is that your point?

6 A Yes, and I would like to come to that
7 further, Mr. Chief Justice. There are a lot of cases that say
8 that this Court ought not to assume original jurisdiction in
9 cases where indefensible parties cannot be brought before this
10 Court. And to adjudicate on the issues presented, it is my
11 respectful submission that there are a number of indefensible
12 parties who cannot be brought before the Court and my respect-
13 ful submission that the residents of the State of Ohio cannot
14 be brought before this Court, constitutionally. That was
15 before -- it is my respectful submission the Province of
16 Ontario and the Government of Canada are also indispensable
17 parties, because anyone who is going to tamper with the ecology
18 of Lake Erie must have authority or jurisdiction to bind all of
19 the people who are going to be concerned.

20 And because these people are indispensable parties,
21 only authority of the Minnesota and Northern Securities case
22 and Arizona and California cases, this Court to decline juris-
23 diction because people who are indispensable to the orders
24 which this Court must make cannot be brought before the Court.

25 Q Would the International Court of Justice

1 have jurisdiction in a dispute between the United States and
2 Canada on this matter?

3 A I'm sorry; I cannot answer Your Honor's
4 question. I would say this to you, Mr. Justice Douglas: the
5 matter is, in my respectful submission, governed by the
6 International Joint Commission and the proper source and proper
7 course should be to resort to the International Joint Commis-
8 sion.

9 It is my respectful submission that basic to this
10 case there is only one real issue and that is whether or not
11 the legislative jurisdictions of your government and my govern-
12 ment, the governments of the countries, the governments of the
13 states, the provinces, whether they can avoid coming to grips
14 with their real responsibility, which is to adjudicate and
15 legislate and make decisions with respect to pollution.

16 Now, they have responsibility and they have got
17 ample powers. Their powers are as great or greater than this
18 Court in terms of executive power; they have administrative
19 capacities way beyond the administrative capacities of this
20 Court and they are the ones who should be doing the job.

21 But, as to this action, we are in a situation
22 where the State of Ohio and the State of Michigan are, if I
23 may respectfully submit, really shirking their responsibilities
24 and seeking to place that responsibility onto the Court. If
25 the Court accepts responsibility, this Court assumes

1 jurisdiction, the effect, to my respectful submission, is to
2 consign the whole problem of pollution in Lake Erie, which is
3 a very urgent problem, which the International Joint Commis-
4 sion urges be undertaken immediately, is to consign that whole
5 problem to the judicial process.

6 Q Well, Mr. Outerbridge, I think that under
7 your submission, if Ohio proceeded against one of its own com-
8 panies to keep it from polluting Lake Erie, that there would
9 be some indispensable parties in that action; mainly: the
10 Government of Canada, of Ontario; wouldn't you have the same
11 problem there? Anyone who tampers with Lake Erie is immediately
12 concerning a foreign government --

13 A Mr. Justice White, I think you are right
14 with this submission I make to you --

15 Q I know but it's a question of whether you're
16 right.

17 A Beg pardon?

18 Q The question is whether you are right.

19 (Laughter)

20 A The process, it's impossible to enjoin one
21 polluter if you don't enjoin them all, so --

22 Q In Ohio --

23 A They must all be before the Court.

24 Q So, that Ohio would be completely without
25 power to move against one of the companies in Ohio which is

1 polluting Lake Erie?

2 A No. With respect, you can move for a simple
3 injunction with respect to any one of these companies in any
4 jurisdiction. You could come in --

5 Q Including your company.

6 A Yes. In Ontario we could enjoin Ontario --
7 in Ontario you could enjoin any company in Ohio in Ohio; you
8 could enjoin any company in Michigan in Michigan. The problem
9 is with respect to the remedial situation: who's going to dig
10 it up and how's it going to be done?

11 Q So the injunction side of your argument does
12 not go to the injunction side of the case? In terms of in-
13 dispensable parties.

14 A Indispensable parties, they are indispensable
15 to the remedial --

16 Q But not to the injunction.

17 A Not to the prohibiting --

18 Q Well, that's rather significant --

19 A -- except if I may say this: that there is
20 no point in making a mandatory order --

21 Q I understand.

22 A Thank you, gentlemen.

23 MR. CHIEF JUSTICE BURGER: Mr. Outerbridge, thank
24 you.

25 Mr. McNeal.

1 ORAL ARGUMENT BY HARLEY J. MC NEAL, ESQ.

2 ON BEHALF OF DEFENDANT DOW CHEMICAL

3 COMPANY IN REPLY TO BRIEF OF THE

4 UNITED STATES AS AMICUS CURIAE

5 MR. MC NEAL: Mr. Chief Justice and Members of the
6 Court:

7 In our view, in light of the present knowledge
8 and expertise concerning mercury pollution in Lake Erie, it
9 is respectfully suggested that Ohio's proposed litigation is
10 premature and it may very well be ill-advised because of the
11 posture in which the complaint comes to this Court.

12 We have but three defendants, when, as my brothers
13 have stated, there are many known polluters of Lake Erie:
14 mercury polluters, municipal government polluters, sewage,
15 phosphates; almost an innumerable number, including other
16 chemicals which are -- of expertise being found to be also
17 polluters.

18 So, in the Court's discretion, which I believe
19 this Court has in this case, to consider the issues raised by
20 the complaint, I believe, with but three defendants, one being
21 a foreigner, this Court would be proper and right and just in
22 refusing to entertain Ohio's complaint on the basis that the
23 complaint involves not only the judiciary, but it also involves
24 the political side of our government; namely: the executive
25 and the legislative branches.

1 So that in the exercise of this Court's jurisdic-
2 tion it is believed that this Court should examine carefully
3 whether the complaint of Ohio on its face demonstrates whether
4 there is or is not a lack of satisfactory criteria which would
5 enable this Court, in the posture in which the complaint comes,
6 to make a binding judicial determination which would be deter-
7 minative of the problem of mercury pollution in the Great
8 Lakes, particularly Lake Erie, when we know New York and
9 Pennsylvania, Michigan and Ontario also are interested in Lake
10 Erie and its pollution.

11 It seems very difficult for me to understand how
12 this Court with the power that it has, would be able to legis-
13 late or make a judicial finding which would satisfy Ohio inso-
14 far as Ohio's common law is concerned, leaving open a judicial
15 determination of the rights and interests of the other states
16 and that of Ontario.

17 Further, I believe this Court, in the exercising
18 of its jurisdiction and discretion, should ascertain whether
19 there are alternative forums available which could, by reason
20 of their structure, reach a better determination in the long
21 run and over a long period of time than the narrow confines of
22 a judicial decree in the posture that pollution now is, that
23 the state of expertise and the present knowledge that we have
24 concerning and the number of pollutants and the people involved.

25 I say this because, to me it is most important

1 that this Court consider the provisions of the Boundary Waters
2 Treaty of 1909, which is proclaimed by the two governments,
3 wherein it was stated generally that insofar as Canada and the
4 United States would be concerned, pollution of the boundary
5 waters which occurred on one side of the boundary or the other,
6 which resulted in harm to the inhabitants of the other side,
7 would be determined by means of an international joint commis-
8 sion.

9 And the history of what the International Joint
10 Commission has done concerning investigation of pollution, I
11 believe, is most important.

12 Beginning in 1918 the International Joint Commis-
13 sion handed down a report wherein in that report the Inter-
14 national Joint Commission was required to investigate the extent,
15 causes and where the boundary waters were polluted so as to be
16 injurious to public health and unfit for domestic and other
17 uses.

18 In the 1918 report the International Joint Commis-
19 sion concluded at that time that pollution was very intense
20 along the shores of the Detroit and Niagara Rivers and that a
21 condition existed which would impair the health and excellence
22 and welfare of the citizens.

23 Now, what have the two governments done since 1918?
24 By two joint references, the executive branches of the two
25 governments have referred the problem of pollution to the

1 International Joint Commission under the Boundary Waters
2 Treaty. In 1946 both governments requested the International
3 Joint Commission to investigate pollution problems in the St.
4 Marys, St. Clair, Detroit and Niagara Rivers. And in 1950 the
5 International Joint Commission reported certain water quality
6 objectives to restore and maintain the waters which they were
7 requested to investigate.

8 Q Mr. McNeal, with what result?

9 A The two governments approved the recommenda-
10 tions and this resulted in pollution abatement programs being
11 set up by various enforcement agencies in Canada and in the
12 United States.

13 Now, as late as October 1964 by another joint
14 to the International Joint Commission, the executive branches
15 of the two governments referred an investigation of the waters
16 of Lake Erie insofar as pollution is concerned and by my
17 brother Mr. Outerbridge, you have heard him state that the
18 report concerning investigation of pollution of the waters of
19 Lake Erie was filed by the State Department wherein the Inter-
20 national Joint Commission reported, and I think it is helpful
21 to summarize what the International Joint Commission found and
22 reported, through the State Department of the United States,
23 which filed the report.

24 The International Joint Commission found that
25 until 1968 mercury was thought to be very stable; that it could

1 not be established with certainty that the concentration of a
2 particular pollutant on one side of the boundary is due to any
3 specific force on the other side.

4 Contaminants from both sides of the boundary are
5 affecting and degrading the water quality of Lake Erie. In
6 order to achieve effective pollution control the laws of the
7 governments interested in Lake Erie's pollution problems must
8 be coordinated to a varied inaction and inconsistency.

9 The economic cost and social consequences of the
10 pollution problem will be a most difficult one to assess. The
11 International Joint Commission also said: "Studies are necessary
12 to find solutions to the legislative, legal and enforcement
13 problems related to curtailing and eliminating the sources of
14 pollution.

15 "The solution of such social problems may well
16 prove as difficult and time-consuming as the solution of all
17 of the scientific and technical problems involved."

18 This brings me to my point: this Court exercising
19 its discretion inasmuch as there has been no emergency, inso-
20 far as Ohio is concerned, because Ohio within ten days after it
21 declared a fishing ban, lifted that fishing ban.

22 The only species of fish which may not be commer-
23 cially fished today is the walleyed pike. The ban went into
24 effect April 10th in 1970 and I believe as to most other fish,
25 was lifted on April 22nd, or thereabouts, 1970.

1 So that the commercial fishermen who were unable
2 to commercial fish and sell fish, were held up for a matter of
3 ten days.

4 The inhabitants of Ohio are not advised not to buy
5 fish; the commercial fishermen may sell fish and things are
6 going on insofar as the taking of fish from Lake Erie as they
7 did before. Now, why is this? Because, at least in the news-
8 paper reports it has found that 87 of the -- 87 percent of the
9 fish that were banned, indicating that they were commercially
10 unfit, within ten days after Ohio had put a ban on commercial
11 fishing, were found to be well below the dangerous level of
12 methylmercury, which is said to be toxic insofar as humans are
13 concerned.

14 So that my point is that if there is no emergency
15 insofar as Ohio's position is concerned, this Court, exercising
16 its discretion may well refuse to entertain Ohio's complaint
17 because Ohio has a basis whereby it may bring its action in
18 the Court of Common Pleas in Ohio; it may resort to the Inter-
19 national Joint Commission and contrary to what my brother, Mr.
20 Strauss, has said, I believe under Article II of the Boundary
21 Waters Treaty which reads: "The exclusive jurisdiction and
22 control of the use and diversion, whether temporary or permanent
23 of all waters on this side of the line which in their natural
24 channels would flow across the boundaries or into the boundary
25 waters are reserved to that nation." And that if there is some

1 damage resulting in any injury on the other side of the
2 boundary that nation that causes the condition shall give rise
3 to the same rights and entitled the injured parties to the
4 same legal remedies as if the injury took place in the country,
5 in Canada.

6 So that I say: my interpretation of Article II
7 that Ohio has the right to use the good offices of the Ontario
8 courts to prevent this problem if they want to get at Dow
9 Canada. They have a right to sue in their own jurisdiction in
10 the Court of Common Pleas in Ohio and under the treaty, Ohio has
11 the perfect vehicle to have an adjudication. And my brother,
12 Mr. Strauss, also said that under the treaty there are no
13 powers of arbitration, yet in the Trail Smelter(?) case, which
14 is a landmark case, involving pollution where a company in
15 Canada was polluting the air in the State of Washington. The
16 two nations, Canada and the United States, referred the problem
17 to the International Joint Commission and the International
18 Joint Commission took testimony, learned about the issues and
19 reported back to the two governments with recommendations.

20 As a result of that investigation, at the hearings
21 that were had, it was decided that a commission would be chosen
22 and a tribunal appointed and that tribunal proceeded to find
23 liability and to assess damages. This was all done under this
24 Boundary Waters Treaty.

25 And under Article X of the Boundary Waters Treaty

1 it is provided that where there is a dispute between the
2 United States and Canada, the high contracting parties may
3 refer the matter to an umpire chosen in accordance with the
4 proceedings prescribed in the 4th, 5th and 6th paragraphs of
5 the Hague Convention, for the specific settlement of inter-
6 national disputes. Such umpire shall have the power to render
7 a final decision with respect to those matters and questions
8 so referred on which the Commission shall fail to agree.

9 So that there is built into the Boundary Waters
10 Treaty a provision whereby if the International Joint Commis-
11 sion so recommends to the two nations that there be a finding
12 of fault and a determination of liability, this can be accom-
13 plished under the terms and provisions of the Boundary Waters
14 Treaty.

15 Q How does Ohio trigger action by the Commis-
16 sion?

17 A By consulting the State Department; requesting
18 of the State Department that there is a problem involving
19 pollution of Lake Erie. If the relief comes within the terms
20 and provisions of the Boundary Waters Treaty which will then
21 enable the State Department and the Executive Department of
22 Canada to consult on the matter and if they come to an agreement
23 refer to the International Joint Commission, which in turn,
24 will handle the matter to a conclusion.

25 And this has been done and the landmark case is

1 the Trail Smelter case. To burden this Court with this kind
2 litigation which would be interminable by reason of the
3 information that one has to acquire; the scientific knowledge
4 that has to be presented; the witnesses who would have to be
5 subpoenaed, who would have to appear, would seem to me to be
6 an improper forum.

7 There are other matters which entitle this
8 Court to give time to decide them.

9 Q Mr. McNeal.

10 A Yes, Mr. Justice Brennan.

11 Q I understood Mr. Strauss to say that the
12 Government's position is that the treaty does not cover this
13 problem. And don't you suppose that's a representation to us
14 on behalf of the State Department?

15 A I am only saying, Mr. Justice Brennan, that
16 I believe that the Boundary Waters Treaty is the whole vehicle
17 by --

18 Q Well, I know you do, but aren't we in the
19 position of having, in effect, the State Department tell us
20 that no, they don't agree?

21 A Well, I think there is an opinion in Brady
22 versus Hart(?) which I believe Your Honor wrote that opinion.
23 I believe it is proper for this Court, where there is no
24 government action taken, for this Court to examine whether or
25 not the Boundary Waters Treaty provides the answer to this

1 problem.

2 And I believe that was the effect and the weight
3 of what the opinion stated in Brady versus Carr(?).

4 Q But you are suggesting that Ohio should
5 go to the State Department and the State Department's ready
6 answer will be: there really is no effective remedy under the
7 treaty and we couldn't get you one. That's our reading of the
8 treaty. So, isn't that a rather discouraging prospect for the
9 State of Ohio?

10 A Well, Mr. Justice White, I am somewhat at a
11 loss to answer that because the State Department was the
12 vehicle which filed this very report which was filed on
13 January 14th. So that I cannot conceive of the State Depart-
14 ment, becoming interested in the International Joint Commis-
15 sion's report and yet saying that the International Joint
16 Commission isn't a proper vehicle to determine problems of
17 pollution in Lake Erie.

18 And it just doesn't seem to fit under the circum-
19 stances.

20 Q May I ask you one question?

21 A Yes, Mr. Justice.

22 Q Does the record show any identity of owner-
23 ship or interest between the Dow Chemical Company of Canada and
24 the Dow Chemical Company of the United States?

25 A Mr. Justice Black, the claim is made in the

1 brief filed by Ohio that inasmuch as Dow, Canada is a wholly
2 owned subsidiary, that that one --

3 Q Which one is a wholly owned subsidiary?

4 A Dow Chemical.

5 Q Of Canada?

6 A Yes. Dow rests on its --

7 Q Wholly owned subsidiary of the Dow Chemical
8 Company of America?

9 A Yes. But we don't think that the mere owner-
10 ship of stock in a subsidiary --

11 Q They own it; don't they?

12 A They own their own stock, but that is --

13 Q But isn't that the only ownership there is to
14 have?

15 A No; I don't believe so, because Dow, Canada
16 is a separate entity; it has its own contracts --

17 Q Fictionally, but it's actually owned by the
18 Dow Chemical Company of the United States?

19 A Well, they own the stock, sir.

20 Q Well, that's the only way you can own it;
21 isn't it?

22 A But I don't concede that it becomes an agent
23 of Dow, U. S. because it is conducting its own business within
24 the territory of Canada and has its own contracts; has its own
25 board of directors and has its own finances and furnishes its

1 balance sheet.

2 Thank you very much.

3 Q Well, at this stage we have no record who
4 showing what the exact relationship is between -- we've simply
5 got the bare allegations of the complaint.

6 A That is correct, Mr. Justice.

7 Q May I ask you: what does the record show?

8 A There is no record, Mr. Justice Black.

9 Q Well, isn't there a complaint?

10 A There is a complaint --

11 Q What did that show about that?

12 A The allegation is that Dow, Canada is a
13 wholly owned subsidiary of Dow, U. S.

14 Q Then we do have it in the record.

15 A It appears in the bill of complaint; yes,
16 sir.

17 Q And it's not denied for this purpose?

18 A It can't be denied for this purpose.

19 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Mc Neal.

20 Mr. Brown, you have about four minutes left.

21 REBUTTAL ARGUMENT BY PAUL W. BROWN, ESQ.

22 ON BEHALF OF PLAINTIFFS

23 MR. BROWN: All of the directors of Dow Canada, or
24 substantially all of the directors of Dow Canada live in
25 Michigan. So this is another tie.

1 The Trail Smelter case took eleven years. It was
2 not under the Commission, but -- to which reference was made
3 it was under a special commission and during that eleven years
4 Trail Smelter continued to pour sulphur by the tons into the
5 atmosphere of the complaining state for the entire 11 years.

6 Now, my friends have suggested that Ontario,
7 Canada is satisfied with the progress that's being made to
8 date by the Dow Chemical Company of Canada.

9 And I say to you that I have a letter dated
10 January 2nd, here with whom I -- the general counsel of the --

11 MR. CHIEF JUSTICE BURGER: Is this in the record,
12 Counsel?

13 A Sir?

14 MR. CHIEF JUSTICE BURGER: Is this in the record?

15 A Well, we have the new record, the records to
16 the report of the Commission, indicating that Dow of Canada
17 was satisfied with the progress and I am reading in response
18 to that --

19 MR. CHIEF JUSTICE BURGER: Well, I take it that
20 that's a report which we can judicially notice, but if you have
21 a letter from someone that is not within the scope of judicial
22 notice, I would question its appropriateness here.

23 A I'm sorry, Your Honor.

24 I will say here that much of what has been said is
25 factual. And if we get to the factual part of this case we

1 will prevail. The fish to which reference was made which
2 contained mercury can be explained factually. The entire
3 factual background: the location of fish, the contents of
4 mercury, its poisonous quality and characteristics; whether or
5 not they were known, or should have been known, all can be
6 thoroughly covered and I have and I am ready to present, cases
7 in full well-prepared. Ohio wants the opportunity, factually
8 to give this case to this Court. It is a big case; it deserves
9 a big Court.

10 These men desperately want to avoid, as polluters,
11 being brought before this Court. I say to you that for all
12 of the resources of the State of Ohio that can be brought to
13 bear upon the preparation of this case factually, are already
14 meshed and proceeding and it will be presented. A master can
15 do a fine job.

16 If all we got from this Court ultimately in the
17 decree, were a final order barring any further pollution of
18 mercury it would be a fine thing; and if you added to that,
19 any damages to punish these polluters for putting into the
20 Great Lakes waters this deadly poison which is not an ordinary
21 pollutant, we would have accomplished something which would be
22 a deterrant for all polluters.

23 I say to you they are still polluting. I say to
24 you the mercury they put into the lake is still being acted
25 upon by biological process, which is making it more and more

1 deadly and I say there is an emergency that will not occasion
2 too much difficulty and a master could well handle this matter.

3 Thank you.

4 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Brown.

5 Thank you gentlemen; the case is submitted.

6 (Whereupon, at 1:42 o'clock p.m. the argument in
7 the above-entitled matter was concluded)