In the

Supreme Court of the United States

TIDEWATER OIL COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA
and
PHILLIPS PETROLEUM COMPANY,

Respondents.

No. 71-366

Washington, D. C.
October 11, 1972

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Washington, D. C.,

Wednesday, October 11, 1972.

The above-entitled matter came on for argument at 2:03 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MOSES LASKY, ESQ., Brobeck, Phleger & Harrison; Hecht, Hadfield, Hays, Landsman & Head, 111 Sutter Street, San Francisco, California 94104; for the Petitioner.

A. RAYMOND RANDOLPH, ESQ., Assistant to the Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 71-366, Tidewater Oil against United States and Phillips Petroleum.

Mr. Lasky, you may proceed.

ORAL ARGUMENT OF MOSES LASKY, ESQ.,

ON BEHALF OF THE PETITIONER

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

The issue in this case can be stated quite quickly and quite succinctly. It's a question of statutory construction. It can be stated this way: Does a court of appeals have jurisdiction, under the Interlocutory Appeals Act of 1958, to entertain an interlocutory appeal in a government civil antitrust cast, or has that appeal been precluded by the much earlier expediting Act of 1903?

Now, the Act of 1958 was, of course, a revolutionary act, because it was the customary and traditional animosity of the law to interlocutory appeals that had existed from time immemorial, first broken through in the Evarts Act of 1891, to permit interlocutory appeals on injunctive orders; in 1958, as a result of the experience of the judges, the Administrative Office of the Courts, the interlocutory appeals Act was enacted, because it was believed that there were situations where interlocutory appeal could be very helpful

in speeding along the law, in a situation where both the district judge certified the case as an appropriate one, and the court of appeals felt the same.

QUESTION: Well, perhaps you put your finger on the essence of the case. It works if they both feel the same way about it.

MR. LASKY: Oh, yes. And our Court of Appeals here did not pass upon that. It simply said it had no jurisdiction even to consider the matter.

QUESTION: Then just probably they didn't feel the same way about it. For different reasons.

MR. LASKY: They didn't -- they didn't consider the matter on its merits.

QUESTION: All right.

MR. LASKY: Now, in this case, the present case would, if the Court of Appeals had jurisdiction, have been the perfect textbook example of an appropriate case for an interlocutory appeal.

Now, the question on which the interlocutory appeal was certified by the District Court was a sharp, simple, and controlling question of law. This suit had been filed in 1966, to enjoin acquisition by Phillips Petroleum Company of certain of the assets in the western Tidewater Oil Company, charging that it would violate the Clayton Act, Section 7.

After extensive hearings, taking of evidence, the

District Court had denied a restraining order, denied a preliminary injunction, and that parties, although the closing date had come, did not consummate the case but deferred doing anything at all until the District Court had denied the restraint and the injunction, and then the transaction was consummated. The sale was made.

Petitioner proceeded through the next five years then as one for a divestiture against Phillips Petroleum, and the seller, my client, Tidewater, remained in the case passively, except to respond to all discovery; then when discovery was completed and the government announced it was ready to go to trial, Tidewater moved to dismiss the action as against it, on the simple legal proposition that Section 7 was not aimed at the seller but is directed solely at the buyer.

That was a cleancut proposition. If we were correct, that would negate the case as to Tidewater, and, as the trial judge said, the case would be a different case.

The District Judge, this time a different District Judge, denied the motion, our motion to dismiss. But being doubtful of the correctness of his decision, he volunteered -- volunteered -- to certify for interlocutory appeal or, in the alternative, suggested that we mandamus them. That mandamus, of course, is not an open remedy, because the court had jurisdiction to decide what the law meant, it had jurisdiction

to misconstrue the law; so mandamus was not open.

Now, we did therefore petition the Ninth Circuit, within the time allowed by the Act, for an interlocutory appeal. That Court held that it lacked jurisdiction. And it held that the Expediting Act of 1903 precluded it from having jurisdiction. It did so, however, solely upon the basis of authorities having to do with the jurisdiction of a court of appeals to entertain an appeal from orders granting or denying interlocutory injunctions. And that has a wholly different history. And I'll suggest and indicate.

Now, the case is here before this Court because of a conflict. The Ninth and the District of Columbia Circuits both in the same quick decision have held the court of appeals lacks jurisdiction under the interlocutory appeals Act; the Seventh Circuit, in a very careful opinion, has held that courts of appeals do possess jurisdiction. And thereupon, this Court having denied my petition for certiorari granted it upon a petition for rehearing.

Now, the place to start analysis, I would assume, must be in the text of the two statutes. If it isn't the place to end analysis, it certainly is the place to start analysis.

The Interlocutory Appeals Act of 1958 states, in the plainest possible language, that in a civil action an interlocutory appeal to a court of appeals may be taken if

the District Court makes a certain certification and the court of appeals, in its discretion, permits.

Now, the words "in a civil action" are all-comprehensive. They're unlimited as to type of suit; they're unlimited as to litigants.

On the other hand, the Expediting Act, which was enacted, of course, 55 years earlier, says nothing at all about interlocutory appeals. There's not a word in it about the subject. It simply says, quote, "that an appeal from the final judgment", end quote, in a government civil antitrust suit will lie only to this Court.

Now, as the Seventh Circuit very cogently observed, if these two Acts had been enacted by Congress simultaneously, the language of each could have been given effect without limiting the scope of the other; and it is, of course, the fundamental principle of statutory construction that where there are two Acts, effect should be given to each, if possible.

Now, as the Seventh Circuit commented, there is entirely different language with respect to interlocutory appeals from injunctive orders. That goes back to the Evarts Act of 1891. And what the Evarts Act said was that an interlocutory appeal on injunctive orders can be taken to a court of appeals if that court has the jurisdiction to hear an appeal from the final judgment. That was in that.

So that, when in 1903 the Expediting Act was passed, which said that appeals from final judgments -- and that's its language -- in government civil antitrust cases lie to this Court alone, that class of cases ceased to be the class of cases that the Evarts Act had to do with, by its express language.

Now, over the years, there have been revisions in the language of the Evarts Act, revisions, amendments, codifications, finally getting into the Judicial Code in 1948; and, as a result, there has been debate whether the court of appeals can entertain an appeal from an interlocutory injunctive order as of right. And again this conflict, the Ninth Circuit and one of the other circuits holds "no", and the First Circuit held "yes". And that question has never reached this Court because it was never to anybody's interest to bring it here.

Now, I'm not debating that line of decisions here, it's not the problem we're dealing with. We're dealing here with a right to an interlocutory appeal, not as a right but discretionary under the Act of 1958.

Now, --

QUESTION: You're speaking of discretionary to the Ninth Circuit Court of Appeals in this?

MR. LASKY: Oh, yes. And that, if the Court please, is why I do not ask this Court to determine whether

our appeal should be allowed, I merely ask this Court to tell the Ninth Circuit that it has jurisdiction to consider that question, and to remand this case to the Ninth Circuit to exercise its discretion and to determine whether we should have an appeal. It's well-established, I think, that if a lower court denies that it has jurisdiction and therefore refuses to exercise it, this Court can tell it: You do have jurisdiction; now exercise it.

What the Ninth Circuit might do to my petition for leave to appeal when we get back is an open question; but it's not a question I can present to this Court.

Now, the government's argument here has been that the Expediting Act is a special Act, and that the 1958 Interlocutory Appeals Act is a general Act, and that a later general Act does not repeal an earlier special Act unless it's very specific.

But the error in that argument is that both Acts are special Acts, and that the Act of 1958 repeals nothing. I say that they are both special Acts in this sense: the Expediting Act of 1903 is a special Act dealing with the problem of appeal from a final judgment in a specific kind of case, government civil antitrust.

The Interlocutory Appeals Act of 1958 is a special Act dealing with the right to take interlocutory appeals in all kinds of legislation. No repeal of the Expediting Act is

involved here, because, as I have already suggested to the Court, the Expediting Act says nothing about interlocutory appeals.

Now, the reason -- the reason why, before 1958, there was no right to an interlocutory appeal in a government antitrust case was not that the Expediting Act prohibited it but because there was no Act of Congress which authorized it.

Prior to 1891 there was no Act which authorized any interlocutory appeal. Then we had an Act that authorized interlocutory appeals in injunctive orders to a court that had jurisdiction over the final appeal.

But not until 1958 did any kind of law or statute authorize an interlocutory appeal of a different character. So the Act of 1958 repealed nothing, it added something brand new to the law, something which the courts had felt would be useful.

And I've cited in my brief a statement from the Harvard Jounral on Legislation, that the judgment of Congress that the interlocutory appeals Act would expedite litigation had proved to be sound from experience.

Now, we come then to this question: The government has relied primarily on dictum, language of Justice Brandeis in United States vs. California Canneries, the famous language -- and I will read those two sentences, because this is what the case has been made to turn on by the court below.

Said the Court, referring to the provisions concerning appeal prior to the Expediting Act:

"These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act 'in which the United States is complainant', the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters; and it precluded the possibility of an appeal to either court from an interlocutory decree."

That's the language my adversary seeks to fasten upon us as somehow disposing of this case.

I have two observations I wish to make about that language, and I believe both of them are very trenchant.

First, the Court was not then laying down any rule of constitutional law. It says there cannot be interlocutory appeals and that everything must be decided on a final appeal. It was laying down no law of nature, some -- to use an expression of Mr. Justice Holmes -- some brooding omnipresence in the sky. It was saying nothing about some immutable perpetual restriction. It was speaking about a clear legislative policy on the state of the statutes in 1925. And it was entirely correct in what it said, because since Congress had made no provision for an interlocutory appeal, and it provided that only a final appeal went to this Court,

it was correct; there was no way to get an interlocutory appeal.

Now, the interlocutoary appeals Act was enacted 55 years after the Expediting Act, about 40 years after the California Canneries case, it was a sharp break with former attitutes about desirability of interlocutory appeals. As I have already suggested, it was a new departure, manifesting a radically different attitude toward interlocutory appeals from a former antipathy, and in the Canneries case this Court was, at most, expressing a judgment on what Congress had done, not on what Congress could do or what it might be doing thirty years later.

QUESTION: The difficulty, of course, is that this language was later quoted in Brown Shoe, --

MR. LASKY: Yes, it was.

QUESTION: -- after the enactment of the new law in 1958.

MR. LASKY: Now, the point about Brown Shoe was that it was purely dictum. The question was not -- that was not the question in Brown Shoe, the question in Brown Shoe was whether a decision by the trial court that an acquisition had violated the law before it created a remedy was sufficiently final to permit appeal at all.

And the court held that it was.

Then in a footnote it had this statement: Now, as

to that, of course, it's well settled that not only the dictum is not binding, but statements made in a context in which the matter is not even before the Court should not be given broad and exaggerated value.

Just the other day, I said the other day, in May of this year, in Pastergard vs. United STates, which is reported in 406 United States, this Court observed that broad language was particularly in dictum; and in the context of ancillary points, no essential to the decision of the Court, has no weight.

Now, not only was Brown Shoe dictum, but the Court wasn't dealing with the question, wasn't presented to it for its consideration; but what was said in the Canneries case on the subject was also dictum.

Also dictum, for this reason: There, what was being appealed from was an order denying a motion for leave to intervene after a final decree in United States vs. Swift & Company, and it's settled law, that a post-judgment order, on appeal from a post-judgment order is not an interlocutory appeal, in itself is an appeal from a final order, which this Court has held, in the El Paso case, one of the El Paso Natural Gas cases, well-settled at the time. And most of Justice Brandeis's opinion was pointing that out, that that was a final order; therefore an appeal lay only to that Court.

QUESTION: Mr. Lasky, let me get back to --

MR. LASKY: Yes, sir.

QUESTION: -- with you, if you will. If the District Judge was correct that there was an issue of law which might dispose of the whole indication, and your position is that the court of appeals then should have resolved that issue, that -- would that be open to a petition for certiorari?

MR. LASKY: Oh, definitly.

QUESTION: Now, then, suppose it was decided and accepted, that would be final disposition of the case --

MR. LASKY: Yes, Your Honor.

QUESTION: -- there would be no petition for certiorari.

Isn't that somewhat incompatible, at least, with the concept of this statute that appeals were to be directly to this Court?

MR. LASKY: Well, I can answer that --

QUESTION: The final disposition of a case was to be here as a matter of right.

MR. LASKY: The Expediting Act was enacted under certain suppositions, that this was a way to expedite litigation, and experience has shown that it was not. Secondly, that it was better to get the case into the hands of this Court and bypass the courts of appeals; and, as the Seventh Circuit remarked, much more has been read into the

Expediting Act than it actually contained.

Now, we're coming now to questions of policy, and as to this I think my adversaries, when I present these questions of policy, are holding the sword by its blade.

This Court has frequently observed that it appreciates and can make good use of the screening function of the courts of appeals. It's useful. This Court, or Justices of this Court have more than once, in the last few years, observed that the Expediting Act is not as desirable, to put it mildly, as it once was.

Now we have an Act here, and my adversaries say they can conceive of legislation to handle the problem much better than this, and I don't dispute that Congress might think of legislation better than this, but I say here is an Act that exists and what aid the Congress has given to this Court should not be spurned, even if better may be found.

Now, let me address myself to the question of whether -- two things: whether this is an anomalous procedure, and whether it would impose a burden on this Court instead of alleviating a burden, which, I submit, is the case.

It is not anomalous. Congress has a right to experiment on appellate procedure. It could well have determined that interlocutory appeals are helpful. It did so determine. Experience has shown it was right.

At the same time it could very well say that: Let's

not burden the Supreme Court with interlocutory appeals, let's carry it through the Court of Appeals, then this Court, through certiorari jurisdiction, having the benefit of that screening, the benefit of that judgment, can look at it upon a petition for certiorari and determine whether it deserves further review.

QUESTION: Mr. Lasky, supposing that the Ninth Circuit had held otherwise as to its jurisdiction, or entertained your appeal and moved with you, would the result have been then that the case goes back to the District Court for a dismissal, and then doesn't the government have a right to appeal under the Expediting Act to this Court?

MR. LASKY: It would have a right to appeal under the Expediting Act to this Court at the end of the whole case, or immediately if the Court made a proper order -- I think it's under Rule 54; I don't have the exact rule number -- but it could have specified no reason for delay on that appeal. That is true.

QUESTION: It could -- at any rate, the propriety of the decision of the court of appeals could have been reviewed under the Expediting Act by this Court at some future stage of litigation?

MR. LASKY: Oh, yes. In other words, this Court remains the final word in government antitrust cases, but it also remains the final word in every other case. And in

every other case it determines that question, whether it should intervene, after it has had the benefit of the views of the court of appeals.

The procedure that I say -- submit that the interlocutory appeals Act offers is that it can do the same here. And I would submit that it would be extraordinarily useful if the courts below made greater use of this kind of procedure.

Now, there are other arguments that have been presented by my adversaries, and I approach the matter from a standpoint of responding to adversaries' argument, because it seems to me, and as it seemed to the Seventh Circuit, if you take the language of the statute on its face, it is plainly in favor of the interlocutory appeal. The only way adversaries read the language to eliminate that is to bring to bear upon it an erroneous history, which is the history of interlocutory appeals from injunctive orders.

Now, one other argument has been presented by the Solicitor General's office, which is that interlocutory appeals from injunctive orders deserve, or are meritorious, should be allowed more than interlocutory appeals of a discretionary type that the 1958 Act deals with; of course that's a value judgment. They start with that premise. And they say that no interlocutory appeal lies from an injunctive order in a government antitrust suit, and it would

be very anomalous, then, to permit it to lie from another type of order.

This is one of the major arguments made in the Solicitor General's brief, and it has several flaws about it.

In the first place, it is by no means clear that injunction -- an appeal does not lie from an interlocutory injunctive order in a government antitrust suit under 28 U.S. Code 1292(a).

Now, 1292(a) is the Evarts Act brought up to date. 1292(b) is the Interlocutory Appeals Act of 1958. There is a difference.

Where you have an appeal under 1292(a), it is as of right, an injuctive order, receiverships. To have an appeal under 1292(b), it is a matter of joint discretion of the two lower courts.

Now, it is not at all settled that there is no appeal as of right from an injunctive order, because, as I said, there is a conflict between the circuits on that, and this Court has never resolved it.

But, assuming that you cannot have an appeal from an injunctive order as of right under 1292(a), then you do have that right under 1292(b), because 1292(b) says, and here's its language:

"When a district judge, in making in a civil action an order not otherwise appealable under this section" -- that's

1292 -- then the 1958 procedure applies.

So that the argument doesn't bear it up.

I submit the matter in this way: The Interlocutory Appeals Act of 1958 was the culmination of a going feeling over the years that the old, hard rule against interlocutory appeals was injurious to the administration of justice. And it opened it up. The Interlocutory Appeals Act repealed nothing, it added something to the law. On the face of the statute, legally it allows an interlocutory appeal in any kind of civil case to a court of appeals if the two lower courts believe it is an appropriate case.

QUESTION: Mr. Lasky, if you're right in your last contention, that 1292(b) did repeal something, didn't it repeal 1292(a)'s limition on right to appeal injunctive decrees to the court that had jurisdiction?

MR. LASKY: In this, it not really repealed, add to, because 1292(a) is a right to appeal as a right.

QUESTION: Right.

MR. LASKY: It doesn't call for any certification by the district court, it calls for a permission by the court of appeals. And in order to come in under 1292(b), one would have to show that there is involved a controlling question of law upon which there is good grounds for dispute. I think that's -- and that the decision would expedite the litigation. Those were the tests that have to be made under

1292(b) that do not have to be made under 1292(a).

Now, in how many injunctions, preliminary injunction cases -- matters that you could meet those tests, I don't know. I think you might often be able to do so, because an interlocutory injunction, as was observed, I think, by Mr. Justice Fortas in one of the cases in this Court, granted in a Section 7 case often has the effect of terminating the transaction, and terminating the litigation.

So that, I submit that the statute on its face allows interlocutory appeal; I submit that the statute so interpreted, so applied, would go a long way to alleviate the burden of this Court, would give the Court the benefit of the screening action of the courts of appeals, and I do not dispute that Congress might well look at it again and determine what other relief would be in order; but that is no reason to spurn the relief which Congress has presently given.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lasky.

Mr. Randolph.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, ESQ.,

ON BEHALF OF RESPONDENT, UNITED STATES

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

Mr. Lasky is quite right in characterizing the issue here as one of statutory interpretation. It's somewhat

complicated because here we have two statutes to interpret, the Expediting Act of 1903 and the Interlocutory Appeals Act, amendment of 1958, which is Section 1292(b).

Since we believe that the Expediting Act controls the decision in this case, and that the decision below should therefore be affirmed, I'll begin with that statute.

Section 2 of the Expediting Act provides, and I quote, "that in a government civil antitrust cases an appeal from the final judgment of the District Court will lie only to the Supreme Court."

This Act, passed in 1903, had two basic purposes:

One, to eliminate the delays of intermediate appeals; and, two, to insure that this Court and only this Court would decide that the questions in the cases presented are in these cases because of their importance, and in order to insure nationwide uniformity in their interpretation of the antitrust laws.

Now, Congress accomplished both of these objectives in the Act. As is obvious from its terms, it included a direct path from the district court to this Court in the final judgments,for review of final judgments.

But it also precluded interlocutory appeals to the courts of appeals. And it did this because at the time it was passed, the Evarts Act, as Mr. Lasky pointed out, said that the courts of appeals had jurisdiction to review inter-

locutory appeals only in cases where they had jurisdiction to review the final judgment.

QUESTION: Well, then, it was the Evarts Act and not the Expiting Act that precluded interlocutory appeals, wasn't it?

MR. RANDOLPH: Well, I think that question can be cleared up when I discuss the cases that have interpreted the Expediting Act.

If Congress wanted to do -- if Congress had the purpose of precluding intermediate appeals in the Expediting Act -- and we think it did -- it would have been just simply superfluous for it to say: And also we do not want any interlocutory appeals to take place.

It didn't have to say that because, under the provisions of the Evarts Act, there would be no interlocutory appeals once the Expediting Act was passed.

That is why Congress, when it gave this Court jurisdiction over final judgments, precluded interlocutory appeals.

Now, over the years, there's been a consistent interpretation of the Expediting Act, to mean exactly what Congress intended it to mean.

In 1929, Mr. Justice Brandeis stated for the Court that the Expediting Act had amended the provisions of the Evarts Act, and he said: In the Expediting Act -- and Mr.

Lasky quoted this also -- Congress, quote, "limited the right of review to an appeal fromthe decree which disposed of all matters and precluded the possibility of an appeal either to this Court or to the Court of Appeals from an interlocutory decree."

And Mr. Lasky tells us that was dictum. Mr. Justice Brandeis, who was noted for his sensitivity to jurisdiction, in pronouncing that statement, was not the holding of the Court.

And he tells us this because he says that in that case what we really had was a final judgment.

Well, if this Court examines the opinion in California Canneries, they'll notice that Mr. Justice Brandeis never did resolve whether the order being appealed from in that case was a final judgment or a final decree or an interlocutory decree. What he said was: it doesn't matter which it is, because the courts of appeals have jurisdiction over neighter.

Fifteen years later, after the opinion in the California Canneries case, the Court decided a case entitled Allen Calculators, which we've cited, I believe on page 23 of our brief.

In that case the Court also relying on California Canneries, again stated, quote, "jurisdiction to review District Court decrees was not vested in the Circuit Courts of Appeals

but solely in this Court, and the Expediting Act -- the Expediting Act limited the right of appeal to final decrees." Not the Evarts Act, the Expediting Act.

Then, shortly thereafter, in two other cases, in Alkali Exporters, and in the DeBeers case, both of which involved review of interlocutory orders in government civil antitrust cases by the common law writ of certiorari under the all writs Act, the Court said that sole appellate jurisdiction in these kinds of cases lies in this Court.

It said the Expediting Act, quote, "permits appellate review of interlocutory orders only on appeal from final judgment." And it pointed out that the Act, quote, "manifests a plain indication of the legislative purpose to avoid piecemeal reviews."

This brings us to Brown Shoe, decided in 1962, four years after the amendment to the Interlocutory Appeals Act, that Tidewater relies upon. Mr. Chief Justice Warren, for the majority, cited Canneries and said that in the Expediting Act Congress precluded appeals to this Court and to the courts of appeals from interlocutory decrees.

Mr. Lasky points out that 1292(b) was not involved in Brown Shoe. That's true. But what was involved in Brown Shoe was the question whether the decree in that case was a final judgment, and one of the factors that motivated the Court to hold that it was a final judgment was simply that if

it was not, it was not appealable at all.

QUESTION: Mr. Randolph, I read the footnote in Brown Shoe, and I don't get any impression from the footnote that the Court was even aware that 1292(b) had been passed several years earlier. Do you think I'm wrong?

MR. RANDOLPH: Well, I don't know whether the Court was aware of it or not, but I think --

QUESTION: There's certainly no indication in the footnote there, is there?

MR. RANDOLPH: Well, I think it's significant that the Court, in making that statement, as the Court has said since 1929 in all of the cases I've just discussed, this said that the statute that governs appeals in government civil antitrust cases, since 1903, is the Expediting Act.

QUESTION: But if they weren't aware of the statute passed in 1958, certainly that footnote isn't addressed to be taken to construe a statutory --

MR. RANDOLPH: Oh, I'm not arguing that that should be considered holding. Not at all.

But I think it's also significant that in his concurring opinion Mr. Justice Clark, who, incidentally, was no friend of the Expediting Act, stated, and I quote again, that the Act declares that appeals in civil antitrust cases, in which the United States is complainant, lie only to this Court. It thus deprives the parties of an intermediate appeal.

And Mr. Justice Harlan, in his separate opinion, said, and I quote again, the Congress has seen fit to make this Court the sole appellate tribunal for civil antitrust cases instituted by the United STates; in doing so it has chosen to limit this Court's reviewing power to final judgments. Mr. Justice --

QUESTION: Did any of those separate opinions mention 1292(b).

MR. RANDOLPH: Not (b), but Mr. Justice Harlan said -- did mention the Interlocutory Appeals Act, and he said that if this were other than a government civil antitrust case, the decree could have been appealed to the courts of appeals under 1292(a). That's on page 365; 370 U.S. 365.

QUESTION: Well, all of that is generally just a true statement of the general rule and the general facts of the matter. There was none of those opinions that addressed themselves to the problem that we have here today, really, at all.

MR. RANDOLPH: Well, I think they did, in the sense that I'm now about to propose to the Court.

QUESTION: I was here then, and I read the opinions before they were published, and --

MR. RANDOLPH: 1292(b) certainly was not involved in any of these cases. I agree with that.

But the important point is that we find, from every

Justice that has ever spoken about the matter, saying that the purpose of Congress in passing the Expediting Act was to preclude interlocutory appeals to the courts of appeals. And that Congress did just that.

QUESTION: But Congress changes purposes in new Acts.

MR. RANDOLPH: And I think that's one of the questions that I'm going to discuss.

Since that's what we have, a consistent interpretation of the Expediting Act for -- since 1929, from 1929 to 1962 at least; then I might add that in opinions we cited in our brief by Mr. Justice Goldberg in chambers, he repeated the same thing.

And it's against this background, this is the background against which Tidewater argues that it may appeal from an interlocutory decree in this case, and it relies upon 1292(b), which says that when a district judge in making in a civil action an order not otherwise appealable under this section certifies that it involves a controlling question of law about which there is substantial difference of opinion that, and it may as resolution on appeal may advance termination of the litigation, then the court of appeals has discretion whether to hear the appeal.

Tidewater's position amounts to this: that although the courts of appeals have no jurisdiction to review final

judgment in this case, they may, nevertheless, cite controlling questions of law in government civil antitrust cases by reviewing interlocutory orders.

In other words, they may speak about and decide controlling questions of law in cases where they have no authority to speak with finality.

QUESTION: Except for injunctions.

MR. RANDOLPH: I'm sorry, I don't under the question, sir.

QUESTION: Well, is it their position they can review injunctive orders, too? Interlocutory injunctive orders.

MR. RANDOLPH: Is it Tidewater's position?

In their reply brief they come very close to taking that position. They say that --

QUESTION: Then you think 1292(a) is clear, that courts of appeals may not review interlocutory injunctive orders?

MR. RANDOLPH: That's right. The Justice Department, I might add, had argued otherwise, for a number of years; had attempted to argue otherwise. And --

QUESTION: You say this approach that Mr. Lasky fancies would defeat the objective of having this Court and only this Court be the final arbiter?

MR. RANDOLPH: Yes. I think so.

But I think, as far as the question of statutory

interpretation involved in here, what it means is that given the consistent interpretation of the Expediting Act of 1903, and I've said what it stands for and what this Court has said it stands for, the question if whether anything changed in 1958 by the passage of this general provision that applies to appeals in general.

And if Congress were about to change the Expediting Act, and it's been trying to do that now, I might add, with bills before it since 1963, at least, one would expect at least a reference to the Expediting Act in the provision that supposedly repeals part of it.

QUESTION: But the Expediting Act doesn't, by its terms, deal with interlocutory appeals, does it?

MR. RANDOLPH: This Court has said --

QUESTION: Does the Expediting Act, by its terms, deal with interlocutory appeal?

MR. RANDOLPH: Not on its face, but I think you have to forget about fifty years of history and the legislative history behind it, to say that the Expediting Act, as its purpose, did not preclude interlocutory appeals. That was one of the reasons --

QUESTION: Well, doesn't it say final judgment?

MR. RANDOLPH: It says only final judgment on the face, right.

QUESTION: Well then, it does deal with interlocutory

appeals in a sense that interlocutory appeals may not be brought here?

MR. RANDOLPH: Well, this -- that's right. The -- what it does not say is --

QUESTION: And, arguably, it means that no interlocutory appeals should be taken anywhere.

MR. RANDOLPH: That's what this Court has said for -- since 1929.

QUESTION: So it does deal with interlocutory appeals, doesn't it?

MR. RANDOLPH: Mr. Justice Rehnquist asked me whether one can see that on its face; it doesn't say interlocutory appeal, and that was what I was trying to show.

QUESTION: It deals with it by explicit exclusion.

MR. RANDOLPH: That's right. And that was not inadvertence, that was one of the very reasons it was passed, to prevent it.

QUESTION: Does the legislative history give us any aid there?

MR. RANDOLPH: Of the interlocutory appeals Act? It would be the Expediting Act, Mr. Justice --

QUESTION: Well, either.

MR. RANDOLPH: Well, I think so, and I'm about to discuss that question.

It would seem reasonable to expect, that since what

we're talking about is revision of the policy, the procedural policy that's been followed for fifty years, that if Congress is about to revise that they would at least mention the Expediting Act or discuss it thoroughly, or say, this is the way the Expediting Act should be revised.

But one will search in vain in the three years of committee reports, this bill for 1292(b), passed in 1958, came about as a result of a draft by the Judicial Conference of the United States. In three years of reports, which we cite in our brief, there's not one word of the Expediting Act -- about the Expediting Act or any indication they intended to revise that. There's not one word about government civil antitrust cases.

One can look through the congressional hearings on this bill, the House Report, the Senate Report, remarks on the Floor in Congress, again not one word about the Expediting Act.

Not one word about government civil antitrust cases, and yet Tidewater tells us that the very purpose of this bill was to repeal the Expediting Act insofar as it precluded interlocutory appeals.

Now, there is some mention of antitrust cases. We have to remember that all the Expediting Act deals with is government civil antitrust cases. And we think it's perfectly clear that when Congress was talking about antitrust

cases in the legislative history of 1292(b), they were referring only to private treble-damage actions.

Thus, on page 11 of our brief -- that's wrong. I apologize, it's page 29 of our brief. On page 11 in Tidewater's brief this is quoted.

But the Senate Report says: "Disposition of antitrust cases may take considerable time, yet upon appeal following final disposition of such cases, the court of appeals may well determine that the statute of limitations had run" and so on and so forth.

Well, it's obvious that what they're talking about there is a private treble-damage action, because the final disposition of that kind of antitrust case would go to the court of appeals, whereas in a government case it will come to this Court, and no one has disputed that.

There's another reason why that -- which is not mentioned in our brief; which occurred to me -- why that quotation cannot apply to government civil antitrust cases. It's simply this, that when the United States brings an action for an injunction under the Sherman Act or the Clayton Act there's no statute of limitations.

I think that the examples in the Senate Report and in the House Report that deal with antitrust cases were taken from Chief Judge Parker's testimony in the hearings on 1292(b). As the Court refers to that, they'll notice that

Chief Judge Parker, in testifying about it, did say that he was only talking about private treble-damage actions. He said: Take, for example, an action of private treble-damage action.

QUESTION: Mr. Randolph, is there no statute of limitations at all in a government civil antitrust action?

MR. RANDOLPH: For injunctive relief; that's right.

QUESTION: For injunctive relief.

MR. RANDOLPH: There is one in the private treble-damage action. It's four years after the cause of action accrued.

QUESTION: But none when the government is in it?

MR. RANDOLPH: That's right.

QUESTION: What was that -- what would you suggest was the reason for 1292(b)?

MR. RANDOLPH: I think the reason is the same as the reason for allowing any interlocutory appeals, which is simply that it saves the litigants and the trial courts a great deal of effort.

QUESTION: I suppose the reasons -- the reasons for 1292(b) would apply equally to the kind of suit we have in this case?

MR. RANDOLPH: Yes.

QUESTION: And there would be no reason that you could think of to exclude this kind of a case from 1292(b),

if you were approaching it rationally, I don't suppose.

MR. RANDOLPH: Well, let me --

QUESTION: You'd either have interlocutory appeal --

MR. RANDOLPH: Well, yes, I can think of a reason for this.

QUESTION: You'd either have an interlocutory appeal somewhere, anyway.

MR. RANDOLPH: Yes. Let me just say this. Now, since 1963, Congress has been considering bills to revise the Expediting Act. And as we pointed out in our brief, they came very close in the last Congress to giving a thorough revision to the Expediting Act. And what they were about to do there was make it the basic rule that all these appeals will go to the courts of appeals. The Justice Department supported this legislation.

But then there would be an exception, that after the final judgment of the District Court, if the attorney general of the District Court certified that the case was of general public importance, then there would be a direct appeal to this Court, but this Court would have discretion to refuse the appeal and remand the case to the court of appeals.

The one provision that's been contained in every bill before Congress since 1963, and these are cited in our brief, is dealing with interlocutory appeals. And it says this: that appeals shall be allowed under 1292(a) but not

otherwise. And that's the bill that passed both Houses of Congress last year. And the reason for it is that in the Committee Reports -- I haven't cited this in our brief, but in the Committee Reports on the bill that was in the last House of Congress, that Congress thought it would be anomalous to have the courts of appeals deciding controlling questions of law in a case where the direct appeal might go to the Supreme Court of the United States.

QUESTION: Is that -- are those reasons expressed in the --

MR. RANDOLPH: In the Committee Report?

QUESTION: Yes.

MR. RANDOLPH: Yes, they are.

Well, I can read directly from it, if I can find it. But I can assure you that is the reason that's expressed there. I can give you the citation, it's --

QUESTION: So you think there is some reason -- some sensible reason for saying that the policy of 1292 shouldn't reach cases like this?

MR. RANDOLPH: Yes. I think also -- the question that remains in this case, that constantly remains in this case, is why would -- if Congress wanted to revise the Expediting Act, why would they have done it this way? And we're given an explanation -- well, first of all, they didn't even mention the Expediting Act in any of the history,

and what we have is a clear policy that the Expediting Act includes interlocutory appeals, and unless Congress even deals with that question, that a general statute can't repeal that Expediting Act provision. But the rationalization that Tidewater gives is: Well, what Congress wanted to do is save this Court a lot of time, wanted to reduce this Court's workload, because of the direct appeals under the Expediting Act.

Well, the strange thing is that that's not mentioned at all in any of the committee reports, the hearings or anything else. But the interesting thing about it is I fail to see how appeals under the interlocutory appeals provision is going to reduce this Court's workload one iota.

Because the point is that no matter what the court of appeals decides on the interlocutory appeal, the number of cases where direct appeal would lie remains the same.

In fact, --

QUESTION: Do you agree that if the court of appeals had allowed this interlocutory appeal and had decided for Tidewater that that would have -- that the matter would have gone back to the District Court and that issue would have been appealable here?

MR. RANDOLPH: It would depend, first of all, there could be a petition for certiorari from the court of appeals' judgment. That would be one avenue. The court

would get the case, have to consider --

QUESTION: Well, but that means that --

MR. RANDOLPH: If it goes back --

QUESTION: That means that you don't have an appeal as it's raised.

MR. RANDOLPH: Well, if it goes back, this is a question that's never been decided by the Court. But it's possible, when you have multiple parties in a case, under Rule 54(b) of the Rules of Civil Procedure, a district judge may enter an order as to one party.

QUESTION: This is a final judgment.

MR. RANDOLPH: A final judgment order. And then we may appeal just simply that part of the case, under the Expediting Act.

QUESTION: Under the final judgment.

MR. RANDOLPH: The judge that has the final judgment, yes.

But, anyway, take, for example, a case that arises under Section 7 of the Clayton Act, and the question in the case is that there's a motion to dismiss by the defendant, he claims Section 7 doesn't cover conglowerate mergers. And the district court denies the motion to dismiss.

Now, suppose you can have an interlocutory appeal. Well, the defendant then takes his -- certainly a controlling question of law, certainly important, there may be a

substantial difference of opinion about it. The defendant takes his appeal to the courts of appeals. The court of appeals affirms, let us suppose, and says that Section 7 may in fact cover conglomerate mergers. Then what happens?

Well, of course, since it's such an important question he petitions for -- the defendant petitions for certiorari. And then what does this Court do?

Well, it looks at it, it's certainly kmportant. I mean, if that's the test for granting certiorari, it's certainly significant.

Suppose the Court grants certiorari, and then decides that issue -- somewhat in the abstract, I might add. And then what happens?

Well, then the case goes back to the district court, and suppose the Court says Section 7 does cover conglomerate mergers, the case goes back, you have a full trial, after which there could be another direct appeal, because the claim would be then that the evidence doesn't support the judgment of the District Court.

The court will look at the case twice. Suppose --

QUESTION: Well, that wouldn't be the only basis on which the appeal could be taken. It might be on the basis that the district court was wrong as a matter of law, would it not?

MR. RANDOLPH: Yes. It could be on any number of

things.

QUESTION: For following the court of appeals?

MR. RANDOLPH: Right.

But suppose that the -- suppose there were no interlocutory appeals allowed. How many times would the court have to look at the case? Once. One time.

Of course, the litigants, you know, if the Court finally decides that Section 7 does not cover conglomerate mergers, it puts the litigants to a great deal of effort, it put the trial court to a great deal of effort that might otherwise have been avoided.

But the point is that Congress made that judgment with respect to government civil antitrust cases. It decided that we have a choice: one is to allow interlocutory appeals and save the litigants some time in district courts; the other is to get expeditious review on appeal. Congress made the choice in 1903, it hasn't changed it yet, it very well may in the future. It's been considering that.

But that judgment as to government civil antitrust cases has already been made, and we don't think it's been revised.

QUESTION: Mr. Randolph, supposing that 1292(b) did apply to this sort of a situation, don't you think that since the certification by the district judge is discretionary, and the entertainment of the appeal by the court of appeals

is also discretionary, that both the lower federal courts could be trusted to be pretty sparing with this type of -- allowing this type of appeal?

MR. RANDOLPH: Well, I just have no basis on which to make that judgment.

I might say this, though, that in these government civil antitrust cases, I would -- if I were a district judge, perhaps my inclination would be that if there were any way to get it off my back, I'd do that. And one of the ways may very well be to keep certifying interlocutory appeals.

QUESTION: Well, district judges don't traditionally act that way very often, Mr. Randolph.

MR. RANDOLPH: Thankfully not. I made the hypothetical myself.

But anway, the possibility is real. I think that's something that Congress has to consider, the possibility of too many certifications, and therefore slowing down the disposition of these cases.

Well, time is important. The cases do drag out over a number of years. But I think time is important in these cases. Particularly when you have injunctions in effect. Or an injunction to deny, which is the usual type situation.

And so I think, in summary, what it comes down to is this: that the system of appellate review of Expediting Act cases, that Tidewater envisages, with circuit courts of

appeals that have no jurisdiction to review final judgments, passing on controlling questions of law, is an anomaly in the federal appellate system. There's no other area of federal appeallate law where that exists.

Now, maybe Congress experimented, but it seems strange that Congress did not even mention this, mention the possibility of this kind of system arising, if it was attempting to experiment, it didn't know what ingredients it was pouring into the brew.

I think that in itself casts substantial doubt on the correctness of Tidewater's position.

We add to this the fact that there's no indication whatsoever that Congress considered the Expediting Act, or even considered, in the revision of 1292(b), the burdens on this Court, and that it's doubtful, at best, that Tidewater's proposed scheme would even save this Court any trouble. And that in the long series of cases from the Canneries case to Brown Shoe, every Justice that's spoken on the matter said that the Expediting Act forbids interlocutory appeals.

When you put all this together, we believe that there's no doubt that the Court below correctly held that it didn't have jurisdiction over the Tidewater appeal, and we think, therefore, the decision should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Randolph.

Do you have anything further, Mr. Lasky?

MR. LASKY: No, if the Court please, I am prepared to submit the matter.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:57 o'clock, p.m., the case in the above-entitled matter was submitted.]