In the

Supreme Court of the United States

UNITED STATES OF AMERICA)
)
Petitioner,)
)
vs.) No. 72-624
)
PENNSYLVANIA INDUSTRIAL)
CHEMICAL CORPORATION,)
)
Respondent.)

Washington, D. C.
March 27, 1973

Pages 1 thru 50

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 72-624
PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION, Respondent.	:	

Washington, D. C.,

Tuesday, March 27, 1973.

The above-entitled matter came on for argument at 11:14 o'clock, a.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:

WILLIAM BRADFORD REYNOLDS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Petitioner.

HAROLD GONDELMAN, ESQ., Baskin, Boreman, Wilner, Sachs, Gondelman & Craig, 1018 Frick Building, Pittsburgh, Pennsylvania 15219; 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 will hear arguments next in No. 72-624, United States against Pennsylvania Industrial Chemical Corporation.

Mr. Reynolds, you may proceed.

ORAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on writ of certiorari to the United States Court of Appeals for the Third Circuit, to review that Court's judgment reversing the judgment of conviction by the District Court and remanding for further proceedings.

The action was commenced by criminal information in April 1971 against respondent, Pennsylvania Industrial Chemical Corporation, hereafter referred to as PICCO.

The company was charged in four counts with violating Section 13 of the Rivers and Harbors Act of 1899, the so-called Refuse Act, which, in relevant part, makes it unlawful without first obtaining permission from the Secretary of the Army to discharge into any navigable water of the United States, quote, "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state", close quote.

QUESTION: Mr. Reynolds, what was the date of the

alleged offense here charged?

MR. REYNOLDS: The date -- well, there were two dates, August 7 and August 19, 1970.

QUESTION: Do you know why the complaint -- I think it was by complaint here -- didn't zero-in on a post-December date?

MR. REYNOLDS: No, Your Honor, I don't know why they --

QUESTION: It would have simplified your case somewhat, wouldn't it?

MR. REYNOLDS: It certainly would have made a much different case --

QUESTION: Well, I suppose there weren't anybody canoeing on the Monongahela in December.

MR. REYNOLDS: Well, at least nobody, apparently, was sampling the discharges on the Monongahela after that date. But the date of the offenses were August 7th and August 19th, 1970.

Now, the discharges involved here flowed into the Monongahela River, admittedly in navigable water, from two pipes owned by PICCO and used by the company to carry off treated waste matter left from the manufacture of chemical compounds used in industry.

One of the pipes, an iron pipe, served only PICCO's plant; the other, a concrete pipe, served the plant primarily

but was also used by six private residences nearby, essentially to discard used laundry water.

On August 7 and again on August 19, 1970, the discharges from the two pipes were sampled by private citizens, and the samples were turned over to the Allegheny County Bureau of Tests for chemical analysis. This analysis revealed that the effluent flowing from PICCO's pipe contained a disproportionately high amount of aluminum, some iron, chloride, phosphate, and other chemicals, all in greater amounts than were found in the midstream waters of the river, and an unusually high quantity of suspended solids.

At trial, PICCO took the position that the industrial waste it was discharging into the Monongahela River did not constitute prohibited refuse matter under the Act.

First, it argued that the Refuse Act covers only river deposits that impede navigation, not non-impeding liquid solutions of the sort involved here.

In the alternative, it urged that the discharge from its plant was nothing more than sewage, and thus came within the explicit statutory exception.

Both of these contentions were rejected by the District Court. They were renewed in the Court of Appeals and also rejected. No cross-petition was filed by respondent in this Court seeking further review of those rulings, and thus the application of the Refuse Act to discharges of the type

involved in this case is not at issue here, because the judgment under review is based on the premise that the Act does apply to these discharges.

Rather, the issues before the Court relate essentially to the second proviso in the Act, which provides that the Secretary of the Army, quote, "may permit", close quote, the deposition of otherwise prohibited material in navigable waters if navigation will not be adversely affected thereby; provided that application is made to the Secretary prior to depositing such material.

QUESTION: You're suggesting that we don't know, or that it's irrelevant whether these discharges would be -- would pass muster under existing regulations under another Act, or under the State Act?

MR. REYNOLDS: I'm suggesting that that is irrelevant for purposes of this case. We don't know it, but whether they would or would not pass --

QUESTION: Are the State --

MR. REYNOLDS: -- muster under State Water Quality Standards, I say is not relevant.

QUESTION: Are the State Water Quality Standards approved by the Federal authorities?

MR. REYNOLDS: The 1967 State Quality Standards for the Commonwealth of Pennsylvania have been approved. The record --

QUESTION: Well, let's assume -- assume for the moment that under those regulations approved by the Federal authorities, these discharges could continue to be made. Just assume that, --

MR. REYNOLDS: To assume that, I still --

QUESTION: -- would that have some significance for whether or not a criminal prosecution under another Act should go forward, for making these very discharges?

MR. REYNOLDS: It would have significance, Your Honor, to the extent that the plant sought permission from the Federal Government also to discharge. The 1970 Water Pollution statutes require that in order to get permission from the Federal Government, a certification has to be presented that you do meet State Quality Standards.

QUESTION: So, then, this is a prosecution for not getting a permit; not whether or not you could get one if you applied?

MR. REYNOLDS: For discharging without getting a permit under -- without getting a Federal permit, or without getting permission from the Federal Government. It does not concern whether, if application had been made, this plant could have gotten a permit.

But we don't know on this record or on the basis of the offers of proof whether they even had a State permit, a State certification that they met the 1967 Standards.

QUESTION: But if that sort of thing were relevant, the government would lose its case here, since they did make an offer of proof, wouldn't they?

MR. REYNOLDS: Well, --

QUESTION: You've got to say it's irrelevant, and the trial judge properly excluded it.

MR. REYNOLDS: That's right. But its irrelevant because they never -- in any event, they never presented that certification, even if they did have it, to the Federal Government, and therefore never sought a Federal permit. It's irrelevant if they just hold it and keep it in their office, which would be all that the offer of proof in any event would have shown, had it incorporated such a permit.

QUESTION: Mr. Reynolds, what is the significance -- I gather there are pending other criminal prosecutions, but how about for the future?

MR. REYNOLDS: Well, Your Honor, I think it's relatively insignificant for the future. It does have significance with respect to the pending criminal and civil actions --

QUESTION: Well, how many of them are there?

MR. REYNOLDS: There are now 115, I believe 115, pending criminal actions and 70 pending civil injunctive suits under the Act. But the 1972 Water Pollution Control Act, which does require -- set up a statutory permit program,

and provides a moratorium, in essence, on Refuse Act prosecutions until after implementation of that permit plan, really makes this particular case insignificant with respect to the future.

QUESTION: In the future, once that program is implemented, people are still going to have to get a permit, aren't they?

MR. REYNOLDS: People will still have to get a permit, but --

QUESTION: It may be they could get one in these circumstances, but if they don't get one, they may be criminally prosecuted?

MR. REYNOLDS: That's correct, Your Honor; but I believe they would be criminally prosecuted under another statute.

QUESTION: Not under --

MR. REYNOLDS: I believe it would not be under this statute; it would rather be under the new 1972 Water Pollution Control Act amendment.

QUESTION: Because that Act modifies this one?

MR. REYNOLDS: Well, that Act has transferred the permit authority that was vested under this Act in the Secretary, has transferred it to the Environmental Protection Agency, and it requires now that you get your permit from that agency. And I think that --

QUESTION: But does that agency -- but you have to get a permit, one of the reasons you have to get a permit is to satisfy the Refuse Act?

MR. REYNOLDS: Well, I believe that the Refuse Act -- that the prosecution would proceed. There are criminal penalties now under the 1972 Act. I think that the Refuse Act could well still be viable for nonpoint source emissions, because the 1972 Act really pertains to point source. That is, emissions coming from pipes directly into the river.

Where your Refuse Act prosecutions in the future will lie is essentially with respect to matter that's placed on the bank, where --

QUESTION: Where it trucks it in and dumps it.

MR. REYNOLDS: Of course; or that type of situation.

QUESTION: Yes. Or an accident.

MR. REYNOLDS: Or an accident. That's correct.

QUESTION: Mr. Reynolds, I think you mentioned that there now are more than 100 prosecutions pending under the 1899 Act. How many prosecutions were there between 1899 and 1970, when this prosecution was brought?

MR. REYNOLDS: Well, --

QUESTION: There's a footnote in --

MR. REYNOLDS: -- I don't -- I think that before 1968, Your Honor, that there were relatively few prosecutions brought. That in 1968, I believe that there were something

like 30 or 40; and then in 1969, that is when the government really began to use this particular statute to reach the activity that we're talking about in this case. So that most of the prosecutions that are set forth in that footnote were prosecutions that were commenced in nineteen sixty- -- perhaps late '68, but generally 1969, '70, and '71.

QUESTION: The footnote on page 15(a) of the opinion below, which, as I read it, states that there was only one case in the '70 year-period, where the prosecuting authorities pressed criminal charges under comparable conditions, and that conviction was overturned. Page 15(a) of your petition for certiorari.

I don't want to interrupt your argument, I just wondered whether you challenged that statement in the opinion below. But if you -- if you don't recall it --

QUESTION: But that's a Texas case, and it says "Tax Criminal", but I think it means "Tex", it's a Texas case.

MR. REYNOLDS: Oh! Yes, I see.

QUESTION: And it involves the principle, that principle that the court is talking about.

MR. REYNOLDS: That's right, that is not a -- that's a case -- in fact, those two cases do not even involve the Refuse Act. They involve statutes requiring plumbers to get a license before they could operate in the State of Texas.

There were more than one criminal prosecutions --

there was more than one criminal prosecution under this Act before this particular action was brought. There was the La Merced case in 1936; there were a couple of cases prior to that. There was the Ballard Oil case. Of course, we have the two cases that were in this Court, Republic Steel and Standard Oil. There was --

QUESTION: Were those criminal?

MR. REYNOLDS: The Standard Oil case was a criminal case; the Republic Steel case was not.

There was a decision in the Third Circuit, and there were a number of others. So it was certainly more than one.

QUESTION: This -- these two cases cited in Footnote 8 of the court's opinion have to do with the principle of imposing criminal penalties for people who fail to comply with a nonexistent regulatory program, as I understand it.

MR. REYNOLDS: That's correct. That's correct. Yes, Your Honor.

Let me look just briefly to the language of the Refuse Act, and this second proviso. The Act itself speaks in broad terms. It bans all discharges of refuse matter into navigable rivers or into navigable waters, except sewage. But under the second proviso, the Secretary of the Army, quote, "may permit", close quote, certain forbidden discharges, quote, "provided application is made to him prior to depositing such material."

Now, this proviso does not speak in terms of a formal regulatory program. What Congress did in 1899 was to vest in the Secretary discretionary authority in those instances where a prior application is made, discretionary authority to immunize from criminal prosecution discharges that would otherwise be unlawful. How, when, and under what circumstances he might exercise that authority were left to him.

In this regard, the 1899 Refuse Act was no different from the predecessor statutes on which it was based. Neither the Act of 1890 nor the Act of 1894, both of which imposed a flat ban on the discharge of enumerated substances into navigable waters; neither of those statutes called for the establishment of a formal regulatory program, under which permission to discharge would be given.

Instead, the decision whether to permit a forbidden discharge was left, in those earlier statutes, to the discretion of the Secretary of War; he could act or not, as he saw fit, to except particular discharges from the general statutory prohibition.

And this we think is what Congress intended by the second proviso in the Refuse Act.

If the Secretary wished to establish a formal regulatory program, it certainly was within his authority to do so under this proviso. But for some seventy years he

chose not to operate on that basis. Rather, he chose to act informally, passing on applications only when and as submitted.

QUESTION: Would it really make much difference in your argument if Congress had contemplated the establishment of a formal regulatory program?

MR. REYNOLDS: I believe that if Congress had contemplated that, and had contemplated that the violations of the statute turned on compliance with that program, it would make a difference, Your Honor.

QUESTION: But if the language were still the same, that you're guilty of --

MR. REYNOLDS: Oh, I see --

QUESTION: -- doing this unless you get a permit.

MR. REYNOLDS: I'm sorry, I --

QUESTION: Does it make any difference how formalized the procedure for getting the permit is?

MR. REYNOLDS: I thought you meant if the language had required -- if the statute required it. No, I think it would not make any difference under this language, that whether there was a program set up, a formal program set up or not would make no difference.

I think the -- what the proviso does, it provides a limited defense to a Refuse Act prosecution, for discharges which the Secretary, in his discretion, may permit.

Now, under the Court of Appeals decision, that

limited defense, based on affirmative action taken by the Secretary, is converted to an absolute defense through a formal permit -- because the Secretary fails to exercise his discretion through a formal permit program.

What the Court of Appeals decision does is turn the statute on its head. That which Congress in 1899 declared to be generally prohibited, that is, the continuous discharge of industrial waste into our nation's waters, becomes generally permissible in the absence of a formal regulatory scheme which Congress did not prescribe.

Now, apparently the Court of Appeals reached this result not so much on the basis of the language or the history of the Refuse Act, but, rather, on the basis of its reading of later Congressional enactments in the water quality field, particularly the Water Pollution Control Act of 1948, as amended through 1970, but not the 1972 amendments, which I've alluded to and which were enacted after this decision.

But this water quality legislation, the Court of Appeals suggests, can't be reconciled with the 1899 prohibition, unless we read enforcement of that prohibition as turning on the existence of a formal regulatory program.

I might just interject that this problem of reconciliation, whatever it might be, has been, in large part, resolved by the 1972 amendments, where Congress itself

incorporated the two Acts, in essence, and certainly reconciled them in that legislation.

But before that, in the earlier water quality legislation, Congress provided explicitly that that water quality legislation was not to be construed as impairing or affecting the prohibition of the Refuse Act.

Moreover, the water quality legislation and the Refuse Act don't work at cross-purposes, as the Court of Appeals seemed to suggest; both are aimed at the same end, cleaning up the nation's waters. But they use different means to do it.

Now, we've spelled out in our brief the structure of the Water Pollution Control Act.

Essentially, that legislation contemplates a cooperative effort by the States and the Federal Government in establishing and enforcing Water Quality Standards.

But prior to 1972, that is the new amendment in 1972 to this water quality legislation, prior to that time the water quality legislation contained no penalty provisions. Discharges which reduced the quality of the receiving body of water below the said Standards was subject only to lengthy proceedings which could possibly end in an abatement order.

Thus, the Refuse Act, which was saved by Congress, the Refuse Act of 1899 essentially provided the teeth to the

Clean Water Program.

QUESTION: Would this discharge have violated the water quality legislation?

MR. REYNOLDS: We don't know -- it just can't be determined, Your Honor, on this record or on the base of the offers of proof. We have a permit that's in the appendix, I believe, to respondent's brief, a State permit issued in 1956, which permitted the construction of the plant and discharge at that time. The State of Pennsylvania's Water Quality Standards were approved in 1967 by the Federal Government, and there's no indication that they company has gotten a permit, a certification from the State that it was in line with the 1967 Water Quality Standards. But --

QUESTION: If it is your submission that the Refuse Act did no more than provide the teeth for enforcement of the Water Quality Standards Act, I should suppose the first inquiry in this case, if you're right, would be whether or not this discharge violated the Water Quality legislation, wouldn't it?

MR. REYNOLDS: Well, I think that would be the first inquiry to be made on submission of an application to the Federal Government for a permit. But the point that we're making in this case is that the Refuse Act precludes those discharges which fail to meet the Water Quality Standards, and also even those that arguably do meet them until you

first go to the Federal Government and get permission.

Now, the 1970 water quality legislation, that's the earlier amendments, required that the companies submit to the Federal Government certification that it met the Water Quality Standards, and its efforts to obtain a permit. And the Refuse Act would -- there would be no violation if they had gone to the Federal Government and they had submitted a certification that they did in fact comply, and then they had been permitted by the Federal Government to discharge.

But in this case we don't have any inquiry made by the company whatsoever to the Federal Government with respect to a permit for these particular discharges.

Now, the company's argument is that they were affirmatively misled by the Corps of Engineers into believing that a permit wasn't required in this situation, since its discharges did not impede navigation. And principal reliance for this argument is placed on the Corps of Engineers' early regulations, which, in 1968, or until 1968, indicated that the Corps viewed its responsibility under the Refuse Act as -- and I'm quoting from those 1968 regulations -- as, quote, "directed principally against the discharges of those materials that are obstructive or injurious to navigation", close quote.

In view of these earlier regulations, and the fact that there were many industrial plants up and down the river

that were discharging industrial waste in the same manner, PICCO argues that it could properly assume -- and I use that word advisedly -- it did not go to the Corps of Engineers and ask about these discharges, it didn't make any inquiry; it says that it could properly assume that it needed no Federal authorization for its nonimpeding discharges.

Well, I think this Court in 1966 made it clear in the Standard Oil case that the Refuse Act proscribes discharges of refuse matter having no adverse effect on navigation to the same extent as it proscribes those discharges that in fact impede navigation.

And the fact that the 1899 statute had not for many years been enforced as vigorously, with respect to the non-impeding discharges, cannot be held to diminish its force today.

We think the essential point here is that following the Standard Oil decision, the Corps of Engineers changed its view of its responsibilities under the Refuse Act with respect to administering activities in navigable waterways.

And as we spelled out in our brief, the regulations issued -- the regulations on which PICCO relied were withdrawn in 1968. New regulations were issued by the Corps. They were published in the Federal Register, and they served notice that the Corps would consider pollution and conservation factors in passing on applications for permission to use

navigable waters.

In addition -- and this, Mr. Justice Powell, goes to, I guess, your earlier question -- in addition, a number of actions, both criminal and civil, were commenced in 1969 and in 1970, a large number of actions, under the Refuse Act against companies that were discharging nonimpeding industrial waste into the rivers.

In fact, as early as 1967, the Third Circuit -- the same court that rendered the decision below -- the Third Circuit held that that activity, that's the nonimpeding discharges, that that was unlawful.

Interlake Steel, which is perhaps the case most often cited in this area -- lower Federal Court case most often cited in this area -- was to the same effect; it was decided in 1969, and, indeed, there's no court decision that we've been able to find prior to the offenses here that held that the Refuse Act was not -- was limited just to discharges that impede navigation.

In short, the scope of the criminal prohibition have been authoritatively settled well before PICCO made the present illegal discharges into the Monongahela River.

Moreover, the Corps announced in the summer of 1970 sweeping changes in its regulations pertaining to permits for work in navigable waters. We have set forth that announcement in our -- as an Appendix to our main brief; with specific

reference to the Refuse Act. It also announced in July 1970, and this announcement is in both our main brief and our reply brief; but there's a misprint in the main brief, and that's why we incorporated it in our reply brief.

In July 1970 it made the following -- issued the following announcement, and let me just read quickly the first paragraph of that. It says:

"The Corps of Engineers today announced new permit requirements under the Refuse Act concerning all discharges into navigable waters. Permits will be required for all industrial discharges into navigable waters and their tributaries. New permits will be required where existing permits were granted without adequate consideration of the quality of the effluent. Permits will also be required for current discharges into navigable waters where no permits have been granted." Close quote.

Now, we believe that it's clear that if PICCO had made even the most superficial inquiry after 1968, it would have known that it needed a permit to discharge this kind of industrial waste into the waterways. It made no such inquiry.

And we think that without such an inquiry, in the face of the change in the regulations, the clear pronouncements by this Court and other lower courts, and the clear pronouncements by the Corps of Engineers, that it cannot now be seen to

rely on the defense that it was affirmatively misled into believing that this conduct was lawful and was not prohibited by the Act.

For these reasons and the reasons stated in our main brief and reply brief, we submit that the judgment of the Court of Appeals should be reversed, and the judgment of the District Court should be reinstated.

Mr. Chief Justice, if I have any time remaining, I'd like to reserve it for rebuttal.

MR. CHIEF JUSTICE BURGER: All right.

Mr. Gondelman.

ORAL ARGUMENT OF HAROLD GONDELMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Listening to government's argument today reminds me very much of the lyrics of The Mikado, where Mr. Gilbert said, "The flowers that bloom in the spring, tra la have nothing to do with the case."

And the government's argument has nothing to do with this case. He did not tell you, Mr. Justice Powell, that the first attorney in the history of the United States, since March 3rd, 1899, who has fought a case under that Act through to a jury verdict is me. That's the first and only case that has come before this Court on a trial in a courtroom, and Your

Honors have specifically reserved that, and that is why I did not go through motions and have the case come up here in the vacuum that it did in Republic Steel and Standard Oil.

You have to have the facts of the case.

And, in fact, in the opinion of this Court in Standard Oil, the last paragraph says, We pass only on the quality of the pollutant, not on the quantity of proof necessary to support a conviction, nor on the question as to what scienter requirement the Act imposes, as those questions are not before the Court on that restricted appeal.

Interestingly enough, in the footnote, it says, Having dealt with the construction placed by the court below in the Sherman Act, our jurisdiction on this appeal is exhausted, we are not at liberty to consider other objections to the indictment, or objections which may arise upon the trial with respect to the merits of the charge.

I don't know whether they mean the criminal charge or the charge to the court. I did attack both of those before the court below.

Now, being trial counsel in the case perhaps gives me a little advantage. I'm a bit appalled when the government tells this Court that there was no offer in the court below to prove that the discharges of which we stand convicted comply with the Water Quality Standards of the Government of the United States. So you have this anomalous situation.

PICCO has been fined $10,000 for violating a criminal statute which the Government of the United States says is not a pollution discharge under its own water quality.

Now, I would refer you to page 158 of the Appendix that the government printed. Despite the efforts of the court below to keep me from making a record that this Court would have, I insisted that certain offers be made. One of them is: "I also want to be on record" -- "I want to be on the record the fact that in connection with Mr." --

QUESTION: What page?

MR. GONDELMAN: 158, sir; at the top.

Mr. Lisanti, incidentally, is a water quality control expert who, at one time, while the canoes were running up and down the Monongahela River, one of his employees filled the bottle and gave it to one of the bounty hunters in the canoe so that he would have it to take back.

-- "Mr. Lisanti's testimony, he would have testified, if permitted, that the discharges", August 7th, August 19th, that's the discharges -- "and the specific analysis on every matter which is related to this, and these informations, are absolutely within the prescribed limits of the Pennsylvania Water Quality standards."

This case was tried in June 1972, and I intended to prove as late as June 1972 that every item on the exhibits that the government had, the chemical analysis, and they are

attached to their brief, every item is below the standards that the Pennsylvania Sanitary Water Board in charge of it permits under our State permits, permits PICCO to discharge in the Monongahela River. And the Court said, "Yes, but I've overruled that."

And to make sure that the record was clear, I said: "But it is not on the record and I want it to be, that every matter discharged by this Defendant" -- PICCO -- "is within the prescribed regulations of the Commonwealth of Pennsylvania which have been adopted by the Government of the United States, and therefore insofar as this actually relates to our dumping, the cases refer to pollutants and refuse interchangeably. As to the Government's own regulations", what we were convicted of discharging as a pollutant, "is not a pollutant."

Now, we've said it in our brief, and I need not go into that, that the government has adopted specifically the Pennsylvania standards. Congress has specifica-ly said that the primacy of enforcing water pollution controls is in the States.

QUESTION: Mr. Gondelman, does this part of your argument go to the existence of the offense, so to speak, or to the existence of the defense, the permit?

MR. GONDELMAN: The existence of the offense. I tried very hard, believe me, to get the court to harmonize the Water Quality Acts which were passed in 1965-1970, and the

Refuse Act, they can be read harmoniously together without putting the Government of the United States into the box that it has painted itself by actually being the one who muddies the waters of this whole situation more than anyone else.

QUESTION: I understand the government's position to be that since you hadn't cross-petitioned for certiorari from the Third Circuit, that the existence of the offense wasn't properly here.

MR. GONDELMAN: Well, of course I find that argument very difficult to believe. Because the government has appealed from the Circuit's finding, No. 1, that Congress intended no crime under the facts of this case, and, two, if Congress did intend such a crime, such a crime would violate due process.

I don't know how this Court can consider the government's appeal without getting into the merits of the case, and whether or not a crime actually was committed. And on the issue of whether a crime has been committed, Mr. Justice Rehnquist, the issue seems to me to be: What is refuse? And in technology, in Mr. Lisanti's testimony, he was completely -- almost as frustrated as I, because he would not talk about pollutant and refuse or define those terms, because, he said, I must know what the receptacle is into which the effluent is being discharged.

You see, they go out to the middle of the Monongahela River and find a little bit of iron and a little bit of

sulphur and other solids, where if you came closer to the river, and the millions of gallons, and I think even their test -- expert testified billions of gallons of water, in water pollution science you must know what the effluent is going into, and the rate of water flow; not dissolve and evaporate the water to get the solids out and make these exhibits sound like these were actually solids. All of the discharges in PICCO's plant were in a liquid state, not solids.

And the fact is that what I tried to do is say to the court: The word "pollutant" has a scientific present technology definition.

How can you charge a jury that we have no permit to discharge refuse if in the science and technology today it is not refuse as that term is defined by the very science trying to work to clean up the streams?

Mr. Lisanti would have testified, and I've cited in the brief the fact that Pennsylvania and the Federal Government define pollutants as things above a certain standard, above a certain discharge rate. And Mr. Lisanti continuously said: I cannot tell you if this is refuse, since, Your Honor, you have told me I can't talk about what it goes into and the rate of the flow of the stream. In other words, you can't let me testify as an expert, which I am trying to do.

QUESTION: Well, your case doesn't hinge on this, does it?

MR. GONDELMAN: It doesn't hinge on that, but it hinges on this, Your Honor: The question asked was: If there was no permit program, is there a crime committed?

I must first say that such a finding would, I think, adopt the court's approach to this case. The lower court's understanding of this case in light of Republic Steel and Standard Oil was that it's like when he was in Bolivia, they told him that he couldn't carry a cigarette lighter without a permit; he went down to get the cigarette lighter and they say, "We don't have permits", they confiscated the cigarette lighter.

And this is the way this whole case was tried. The court continually said to me that whether we --

QUESTION: Well, I think it's one thing if you're just going to attempt to sustain the Court of Appeals judgment on the grounds it views, but something else if you think you have to reach some other ground to sustain it.

MR. GONDELMAN: I don't have to reach other grounds, Your Honor. What I'm saying is that under these circumstances the Court of Appeals has said that without a permit program, and that I should be entitled to prove whether or not there was a permit program in effect, because, after all, the regulations and the statute itself -- unfortunately the government doesn't quote these things completely to the Court.

If they read the complete "Provided further, however" quote of the Act of 1899 -- incidentally, it's interesting that up until 1969 this was the Rivers and Harbors Act of 1899. Congress has not amended that Act. The government has amended it by continually referring to it as the Refuse Act. It becomes the Refuse Act on December 23rd, 1970, in the Presidential Proclamation, when he referred to the Refuse Act of 1899.

But the Act itself, Section 13, says: "And provided further, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby," -- now the government hasn't read the next clause to you -- comma, "may permit the deposit of any material above mentioned in navigable waters," comma, "within limits to be defined and under conditions to be prescribed by him," comma, then it says "provided application is made to him prior to the deposit of such material".

Now, the courts have been, the lower courts especially have been very concerned about whether the phrase comes after the semicolon or before the semicolon; I don't know how anyone would diagram this sentence at all, it would be an impossibility. But it certainly seems to me that as the phrases flow, the Secretary may permit the deposit of materials "within limits to be defined and under conditions to be prescribed by him".

Now, what we find actually is that in 413 of the Act, that is 33 U.S.C. 413, the Department of Justice shall conduct the legal proceedings under Section 407, and it shall be the duty of the United States Attorneys to vigorously prosecute all offenders against the same.

This was passed on March 3rd, 1899, with the Act we're concerned about.

I happened to check, I find there are 28 Attorneys General of the United States, five of whom have graced this honorable Court, and yet we find that no vigorous prosecution, except for the Act of 1899 affecting navigation; next we find Section 419, this was a new statute passed in 1905, in which Congress said: The Secretary of the Army is authorized and empowered to prescribe regulations to govern the transportation and dumping into any navigable waters or waters adjacent thereto of dredings, earth, garbage, and other refuse materials of every kind and description. The exact language in the Act, Section 407.

The Secretary must prescribe regulations concerning the dumping of, among other things, "other refuse materials of every kind or description", whenever in his judgment navigation will not be affected thereby.

So I say that the Secretary of the Army , if this was a pollution statute, and if we required a permit, he had a duty to set forth in regulations what the permits would

be.

I offered these exhibits in evidence, and they are part of my brief; I think they are Exhibits 7, 8, and 9.

In 1939, and this comes to the Court of Appeals argument, Justice White, that the administrative rulings and interpretations caused PICCO not to apply for a permit any more than to ask if anything else were required. In 1939 the Information Circular says "Applications for authority to execute work or erect structures in the navigable waters of the United States." Nothing about pollution in this circular.

This was secured by subpoena to the Corps of Engineers to bring with them all of the regulations they had ever published under section 407. This they brought.

QUESTION: What was the date of that?

MR. GONDELMAN: This is 1939, Mr. Justice Stewart.

Now, they then brought to me, since we hear that the regulation was somehow changed in 1968, after some of the decisions in this Court which went beyond the factual situations in those cases, they then show how well they amended it in 1968, "Permits for work in navigable waters". This is the administrative ruling and publication which was given to everyone.

Then we find -- now we see the difference; this was after the Presidential Proclamation, which, incidentally, had a moratorium, and the date you asked about, Justice

Blackmun, was very important -- these informations are filed in April 1971. In December the President issued: An order to implement a permit program.

And you had until July 1st to apply for a permit. So that under the President's own proclamation of December 23rd, there was an attempted moratorium to get people to now understand what had never been the law in this country, that you needed a permit. Because in 1971, the same regulation now says: "Permits for work and structures in, and for discharges or deposits into navigable waters."

And now we get to the need for a permit, and it's not a letter, like Judge Teitelbaum kept telling me, but the permits are five, six, and seven pages, and require thousands and thousands of dollars to determine the quantity of the effluent, and there are vast technological data that is needed in order to apply for a permit.

QUESTION: Those regulations are in the record, I take it?

MR. GONDELMAN: They are only in the record in this way, Justice Powell, that I offered them, they were put in this envelope, and I have added them to my brief, and therefore you will find simply the cover as an appendix to my brief, I did not duplicate because I was afraid the brief would simply get out of hand. But you'll find that Exhibit 9 is the 1971 regulation; Exhibit 8 is the '68 regulation.

I have duplicated a few sections, which show that it -- actually, the regulation says, since Republic Steel, the Secretary of the Army must now, with the Corps of Engineers, find out how to get industry to pay for dredging the Calumet River, in effect, because the solids were building up.

QUESTION: Did you just say, Mr. Gondelman, that you offered these regulations in evidence at the trial?

MR. GONDELMAN: Yes, Your Honor.

QUESTION: Isn't that kind of an unusual thing to do? I can imagine the regulations might have a bearing on the judge's determination of a legal point, but ordinarily you wouldn't offer them for use of the jury.

MR. GONDELMAN: Only, Your Honor, if the theory, as I have it, is that the finder of fact -- now we're going to a jury -- under the court's theory of this case there was really no point in trying it, I think you plead guilty because you have no defense. You don't have a permit. He says this throughout: The only way you can avoid liability and criminal culpability is, show me if you have a permit; or that you didn't know that you were putting this stuff in the river.

Now, the fact is, we knew we were putting it in the river and we knew that we didn't have a permit; but I was offering in evidence at the trial a number of things. We're talking now about scienter. I thought I would get a charge on mens rea because it's reserved, this honorable Court hasn't

decided whether it's malum prohibitum. If it is, of course, then all industry should have been closed down for seventy years in this country. But if there is any scienter required, I felt that the actual publications of the Government of the United States, telling us whether we needed a permit, would be necessary to prove in the court.

Not only that --

MR. CHIEF JUSTICE BURGER: We'll resume at that point after lunch.

MR. GONDELMAN: Oh. Thank you.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Gondelman, you may proceed.

May I suggest to you that your time is running out, and the merits aren't really the important factor here. The only issue before the Court now is whether the case should go back to the District Court for a new trial, and that's a limited aspect of the merits.

ORAL ARGUMENT OF HAROLD GONDELMAN, ESQ.,

ON BEHALF OF THE RESPONDENT -- Resumed

MR. GONDELMAN: Or really whether the case has a criminal violation inherent in it at all, Mr. Chief Justice, and in connection with that --

QUESTION: Well, did you cross-petition?

MR. GONDELMAN: I did not cross-petition. However, the --

QUESTION: Then let's just stay with the -- let's concentrate; you've only got about 11 minutes left.

MR. GONDELMAN: All right. I'll cover it in less time than that.

We have to look at the opinion of the Court of Appeals to see what this Court granted certiorari from. And the Court of Appeals specifically held that the due process violations, in answer to Mr. Justice Rehnquist's question,

how did I offer this, the fact that I offered this in the trial is what the Court of Appeals -- and that is what is now before this Court, I might respectfully suggest, because the Court of Appeals held two things: One, Congress never intended a crime under the facts of this case. From that, the government has appealed, and that is what is before this Court.

So the Court must now decide whether a crime has been committed.

QUESTION: Well, why did the Court of Appeals send it back to the District Court if no crime -- if their holdings was definitively that no crime has been committed?

MR. GONDELMAN: Because they held that at least my offers of proof should have been affirmatively allowed.

QUESTION: If there was error in the rejection of evidence.

MR. GONDELMAN: That is correct. And if the evidence -- the effect of the opinion of the Court of Appeals is; If I can prove the exhibits which I have shown this Court, namely, that there was no permit program; that the Corps of Engineers did not believe thata permit program affecting pollution rather than navigation was necessary; that the -- that there was no crime committed under the facts of this case.

And I think that by reversing, they simply said:

Put that evidence before a court, and I'm entitled to a directed verdict.

QUESTION: But that's before the District Court, not this Court.

MR. GONDELMAN: That would be before the District Court, unless this Court were to find, as the Court of Appeals found, that if there was no permit program, which is throughout, everybody but the Department of Justice agrees that there was no permit program.

And it is definitely before this Court, because the second holding of the Court of Appeals is that the circumstances here demonstrate that no crime was committed. And in that connection they discussed the regulations of the Corps of Engineers, they discussed the lack of any affirmative permit program. They discussed the fact that we were affirmatively told that there was no permit program required until 1970, and then, in the third part of the opinion, he says "Even if the Act of 1899 were construed to make PICCO's activities criminal, due process considerations would require a reversal." And in that situation he says that PICCO claims it was misled by interpretation given to the statute by the Corps of Engineers.

And this is where we get to the offers of evidence, none of which was admitted in the court below; but which are attached to the brief for the consideration of this Court.

So I do believe that the government's petition for cert and this Court having granted cert directly places before this Court: Was a crime committed at all, if the offers in the court below had been allowed?

Now, I think we briefly ought to get to the effect of what the government is saying here. Since Kalur vs. Resor, the government has been enjoined from issuing permits, period.

Now, if we understand the government's argument today, then under the administrative absolutism that the Department of Justice says it has, every industry in this country, since the injunction has been issued, where no permits are now available by a court injunction, every industry that has been discharging without a permit is guilty of a crime, obviously. It has to be the logical conclusion of the government's argument before this Court today.

We know that you cannot get a permit today because of that decision. It's on appeal, but at least for a year, year and a half now, nobody could get a permit.

And yet a U. S. Attorney certainly could prosecute any industry discharging into a navigable stream matters which do not affect navigation, because they don't have a permit, because, after all, what difference does it make, they don't have a permit only because a court has enjoined the government from issuing them; and if they have not committed -- if industry has not committed a crime during the pendency of that

injunction, then why doesn't it logically follow that before the injunction, if there was no permit program, there also was no crime committed.

Mr. Ruckelshaus, the Director of the EPA, says that there's no question, that no one could get a permit under the Act of 1899. I have his citation in my brief.

So that without a permit program, because of court injunction, or prior to that, certainly there is no crime committed here, and that issue has been decided by the Court of Appeals.

The court below took the position completely that it does not make any difference whether we could get a permit. The only way that we could not violate the law is not to discharge effluent into a river.

I suggest that if that position had been taken by a United States Attorney in 1944 when industry was going full blast to supply the war materiel for the boys on Omaha Beach in World War II, and the effect of that type of criminal prosecution would have been to advise industry to close its doors, the U. S. Attorney would have been subject to, I'm certain, great criticism if not internment for having taken un-American activities approaches to the law.

The fact that they didn't in 1943-1944, in fact the fact that the Secretary of the Army awarded "E" awards to industry during those periods in our national crisis certainly

would indicate that there is no criminal violation.

And to compound it in this case, the court below charged the jury that if the Secretary of the Army, in his discretion, decided not to issue permits, despite the fact that my entire offer was to show that the Secretary of the Army had actually exercised his discretion, saying that no permits were required.

In fact, in the 1968 regulations, when they talk about the Republic Steel case, the only change the Corps of Engineers saw was that under Republic Steel they were now obligated to assess who should pay for dreding.

I think what has happened in this situation, and the metamorphises, so-called, the change from a Rivers and Harbors Act to a Refuse Act, unfortunately comes about in this way: Republic Steel came before this Court on a petition by the Government of the United States, and if you read their briefs you will find that they affirmatively told this Court that they are not in a pollution case they are in a navigation case; the entire brief on both sides talked about navigation.

The opinion of this Court says: We have a pollution statute, but that is obiter dictum as to the facts that were before this Court.

Then from there we are led to Standard Oil. An accidental discharge in which the Court defined good gasoline, aviation fuel, as a pollutant.

From those two cases we have now jumped the complete line, to say that we now have in the United States -- and, as I said, now they talk about a Refuse Act. But I think that when you see the Presidential Regulation, Proclamation of December 23rd, 1970, you must ask yourself: Why did the President of the United States take time from a busy schedule to issue a proclamation implementing a permit program and talking about all of the laws dealings with water control in the implementation of that program?

He did it because there was no such program. The Water Pollution Control Act of '65, '70, '72, can be harmoniously read with the ACt of 1899 if one defines pollution in terms of those Acts.

This case has no impact whatsoever on future cases because of the Act of 1972. The government admits that.

This case, and the thing that must be understood here is that this case is not a pollution case. It has -- it's being brought here with that attractiveness in the times of today, but the fact is that it is not a pollution case because if we are complying with State and Federal standards concerning what went into the river, we could put the same thing into the Monongahela River today, and I offered to prove that, that we did in 1970, because they are within the standards of the Government of the United States.

The reply brief of the government, again this

represents what I offered to prove. It says that I offered to prove that we would comply with the 1974 standards. That is not the offer of proof.

The Commonwealth of Pennsylvania passed Clean Streams Legislation before the Federal Government found out that there was a problem. Our Act was passed in 1937; the Federal Act in 1948.

I offered to prove that under the present Pennsylvania standards, which are among the highest in the country, they intelligently to deal with the economy and the ecology and the technology that is available said by December 31st, 1974, these will be the new standards that will be applicable to effluent discharges in streams of this Commonwealth.

I offered to prove that PICCO is already in the process, and was when the canoes floated up and down the river, ready, in the process of building a $300,000 additional water treatment plant to meet the new standards which were effected and will be effective December 31st, 1974. You do not have, as the government untruthfully tells this Court in its reply brief, the largest polluter of the Monongahela River. You have a company that has accepted its responsibilities, understands its responsibilities, and the only thing the government has done in this prosecution has attempted to turn off an industry that recognizes that it is

trying to be a good citizen of this country and comply with the Water Control Programs of the Federal and State governments.

QUESTION: Mr. Gondelman, the Court of Appeals relied heavily on its conclusion that even if an application for a permit had been made, no permit could have been obtained because the court's opinion says permits were unavailable.

In your view, is the record clear on that, or is that disputed in the record?

MR. GONDELMAN: It was disputed in the record. It was disputed, but I tried to prove it in two ways: First of all, Exhibit G, which I offered in evidence and attempted to argue to the jury, shows the schedule of permits, the dollar cost of all permits. There is nothing in Exhibit G that would indicate that this permit would have been required, or that there was a charge for it, or included in Exhibit G.

The other is the -- twofold: first, that Mr. Ruckelshaus, and I have that as part of my brief, actually in an interview had said -- I think it's on page 7a of my brief, Your Honor; and I'm prepared to prove this. Mr. Ruckelshaus, who theoretically should know something about the Act of 1899, since today he is the one in charge of the administration of the program, was asked if there was an overlapping of the statutes. In the second paragraph, he says:

"It really isn't entirely fair to say that the reason a person is being sued under the Refuse Act is because

they don't have a permit, they couldn't get one if they wanted to.

"Until the permit program of the Corps of Engineers was announced late last year, after the Presidential Proclamation, we didn't have any permit program for the discharge of waste into a stream." So that under his own admission, under the exhibits which I did offer, and I would be pleased to leave these -- these were maintained by me, I didn't realize the Court of Appeals had sent them up --

QUESTION: Mr. Gondelman, let's assume you were dumping solid metal of some kind, which unquestionably was a pollutant in the river. Let's just assume that you had been. Would you say that there was any doubt under the Refuse Act that you could be prosecuted?

MR. GONDELMAN: No, sir, because if I were dumping a solid into the river, then we are under the Republic Steel case, and the history of Republic Steel since 1904 --

QUESTION: It wouldn't make any difference whether you had a permit or not, or whether you applied for a permit or not, or whether there was a permit program or not, would it?

MR. GONDELMAN: Well, it would in this sense, Your Honor, --

QUESTION: Well, I'll just ask you again, you are dumping solids in a river, let's assume there was no permit program up until that -- at the time that you dumped the solids

in the river. Now, could you be prosecuted under this law or not?

MR. GONDELMAN: If there was no permit program whatsoever?

QUESTION: Yes.

MR. GONDELMAN: I don't think we could be prosecuted under this law.

QUESTION: So you're saying that we must then construe this law as meaning that unless there's a permit program, you may not be prosecuted even if you were dumping admittedly polluting material in the stream?

MR. GONDELMAN: Right. And then we would not have this case. That's why I said originally --

QUESTION: What do you mean you wouldn't have this case?

MR. GONDELMAN: Well, because this case and Your Honor's case are two different cases. And the facts of my case --

QUESTION: Well, they aren't two different cases if you think, for example, that the question of whether this was refuse is foreclosed.

MR. GONDELMAN: No, you don't have this case because, Your Honor, since 1899 everybody in this country knew that the Act of 1899 affected the discharge of solids into a stream. The Republic Steel case only made new law,

because it took a civil procedure and permitted an injunction.

QUESTION: But again, your argument turns on whether or not a permit program is essential to permit prosecution under the Refuse Act.

MR. GONDELMAN: Not completely. My argument --

QUESTION: But rather substantially, I would think.

MR. GONDELMAN: My argument is --

QUESTION: Well, let's assume for the moment, then, that you say a permit program is not essential to permit prosecution under the Act, and that you may be prosecuted even if there was no way of getting a permit.

MR. GONDELMAN: What I'm saying, Your Honor, and the reason I can't fit a factual situation into your hypothetical factual situation is simply this: It doesn't stop with the narrow factual situation you're presenting to me, I respectfully suggest. What I'm saying to you is this: change your factual situation just a little bit for me, and say that solids are being dumped into the river and for seventy years the Corps of Engineers says you don't need a permit to dump those solids in the river, and then have a criminal prosecution, and then I say of course, the government cannot lead an industry into an entrapment --

QUESTION: So you're really saying, then, that it's not just the existence of a permit program, --

MR. GONDELMAN: That's right.

QUESTION: -- it's an affirmative representation that you don't need a permit or anything else for this.

MR. GONDELMAN: That's right.

QUESTION: It's just as though you had a permit.

MR. GONDELMAN: It's an affirmative -- the Court of Appeals said we were misled, and that is a very basic finding.

QUESTION: Well, you're saying -- in effect you're saying you had a permit.

MR. GONDELMAN: And in effect I'm saying we had a permit because the State --

QUESTION: And to be prosecuted when you had a permit is a denial of due process; that's really your case.

MR. GONDELMAN: Basically that is the second part of my case, that is correct, Your Honor.

QUESTION: Well, is that any different from the first?

MR. GONDELMAN: It is in part because in the first situation we're saying that without any permit program whatsoever --

QUESTION: Yes, but that doesn't seem to hold water, does it, if you are dumping real solids in the river?

MR. GONDELMAN: Well, it would hold real solid, you see, but not real water. I mean, we have to talk about water in the --

QUESTION: Well, if you were dumping real solids in the river, it wouldn't make any difference whether there

was a permit program or not.

MR. GONDELMAN: Right. Unless the government affirmatively misled industry into believing they could do so.

QUESTION: Well, that's your second argument.

MR. GONDELMAN: Fine. I'd stand on that argument as well.

Thank you, Your Honor, I'm sorry I ran over.

MR. CHIEF JUSTICE BURGER: Mr. Reynolds, do you have anything further?

REBUTTAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS, ESQ.,
ON BEHALF OF THE PETITIONER

MR. REYNOLDS: Just one or two points, Mr. Chief Justice.

I think that with respect --

QUESTION: You don't refer in your brief to the old well-established federal law of public nuisance in polluting the stream. Was that considered below or argued below?

MR. REYNOLDS: No, Your Honor, that -- this case was exclusively under the statute, and the public nuisance federal law was not involved in this particular case.

QUESTION: Conceivably you might have been able to get an injunction under the law of nuisance that Mr. Justice Douglas was suggesting?

MR. REYNOLDS: Conceivably I think that's right.

QUESTION: But that couldn't be criminal prosecution.

MR. REYNOLDS: Illinois and the City of Milwaukee, I believe this Court indicated that under the -- there is a federal law of nuisance which conceivably would be available. But this was an action brought under the federal statute, and that was not involved.

I just want to make the point that the Corps of Engineers, after 1968, after this Court decided the Standard Oil case and made it clear that the Refuse Act applied to non-navigation impeding discharges, that at that time it changed its attitude with respect to its responsibilities; it's this 1968 regulation which Mr. Gondelman showed to the Court was withdrawn, it instituted new regulations which put -- whereby everyone was put on notice of the fact that the Corps was now considering pollution matters, conservation matters with respect to applications for permission to use the navigable waters. And this was made crystal clear with respect to the Refuse Act itself in the notice that we have appended to the reply brief, in July of 1970, where it made -- it was clear that there was a permit available at the time of these offenses, and even if the most superficial inquiry had been made by the company of the Corps, assuming that they had some doubt as to whether the law did in fact apply to this particular discharge, if they made the most superficial inquiry, they would have been notified at that time that there was in fact a permit available, and one that they should

have gotten before making these discharges.

I would point out, just in closing, that in fact in November of 1970, which is after the time of these offenses, Mr. Justice Blackmun, the dates you were talking about earlier, but in November of 1970 the Corps explicitly advised this company that their discharges from this plant into the Monongahela River was in violation of the Refuse Act without a permit, and they would need a permit.

So that the permit, the permits were available and had they made any kind of inquiry they could have gotten these permits. They didn't, and in the absence of doing so, we think that it was proper -- that the conviction was proper under the Refuse Act.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted. You may leave them if you wish with the Clerk.

MR. GONDELMAN: All right, sir.

[Whereupon, at 1:20 o'clock, p.m., the case was submitted.]