ORIGINAL

Atlas Roofing Company, Inc.,
Petitioner,

v.

Occupational Safety And Health Review Commission, Et Al.,
Respondent; and

Frank Irey, Jr., Inc.,
Petitioner,

v.

Occupational Safety And Health Review Commission, Et Al.,
Respondent

No. 75-746
and
No. 75-748

Washington, D. C.
November 29, 1976

Pages 1 thru 51

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IN THE SUPREME COURT OF THE UNITED STATES

ATLAS ROOFING COMPANY, INC., Petitioner,	:	
v.	:	No. 75-746
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.; Respondent; and	:	and No. 75-748
FRANK IREY, JR., INC., Petitioner,	:	
v.	:	
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL, Respondent.	:	

Washington, D. C.
Monday, November 29, 1976

The above-entitled matter came on for argument at 10:07 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

McNEILL STOKES, ESQ., Stokes & Shapiro,
3920 First National Bank Tower
Atlanta, Georgia 30303, for the Petitioners.

APPEARANCES (Cont'd):

ROBERT H. BORK, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C., for the Respondents.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 75-746, Atlas Roofing against the Occupational Safety and Health Commission and the related case, Irey against the Commission.

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

ORAL ARGUMENT OF McNEILL STOKES, ESQ.

ON BEHALF OF THE PETITIONER

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

The issue in these cases involves whether our Consitution allows the Federal Government to issue fines against its citizens without the right to jury trial of their peers.

We submit that the clear command of the Seventh Amendment of the United States Constitution expressly forbids it.

More fundamentally at issue is also the very bedrock of judicial power under Article III of the Constitution.

These cases take on particular importance because they are the first cases to come before this Court of the Occupational Safety and Health Act of 1970, and its enforcement structure which is unique.

The most obvious consequence of the Occupational Safety and Health Act's enforcement structure is the United States

Government seeks fines against its citizens administratively without the right to jury trial during any stage in the proceedings.

Under this most unusual enforcement structure of penalty, the inspector issues citations and fines, turns civil penalties.

A citizens recourse is to another administrative agency, the Occupational Safety and Health Review Commission, which is still part of the Executive Branch of Government.

Unlike other penalty statutes, there is only limited judicial review in the Court of Appeals and all facts which are determined administratively are conclusive if supported by substantial evidence.

We submit that this Executive agency, the delegation of power to this agency, violates the Constitution in its relationships, first, to its citizens, and that is providing a right to jury trial, and second, in its relationship to the Judicial Branch.

A ruling in the Petitioner's favor will do no more than uphold the Constitution, as we have traditionally and historically known it.

We submit that a ruling in the Government's favor will effect the most profound redistribution of power among the three branches of Government.

We are not asking the Court to expand on constitutional

rights. We are merely asking the Court to recognize the traditional and historical right recognized by our forefathers in the Seventh Amendment, that a citizen has a right to jury trial when the Federal Government seeks a fine against him in whatever manner and whatever form it takes.

We ask no more than that and we submit the Constitution will tolerate nothing less.

Now, under OSHA, the Executive Branch of Government has been vested with plenary powers to determine and assess fines administratively, without the right to jury trial and in violation of the Seventh Amendment, which provides that a citizen has a right to jury trial in suits at common law, where the amount at controversy exceeds $20.

This particular provision is extremely clear. And the history is extremely clear that a suit at common law, totally and unequivocably embraces a fine sought by the United States Government.

At the time of the passage of the Seventh Amendment, both in England and the United States, a citizen would have been afforded a right to jury trial when the Government sought a fine against him.

In England and, at the time of the passage of the Seventh Amendment and for years before, a suit, a fine would have been brought on the judicial side of the Court of Exchequer. And there, they would have gotten a right to jury

trial under the common law side.

As we have briefed in our brief, all the States, virtually all the States, would have granted jury trial for fines and forfeitures at the time of the enactment of the Seventh Amendment.

The history of this amendment, in England, was preserved in America under the Seventh Amendment in 1791. Only in America did England ever attempt to deny citizens jury trial, and that was under the Americas Trade Act in the Courts of Vice Admiralty which, historians tell us is one of the sparks that ignited the Revolution and directly led to that provision in the Declaration of Independence that said that King George has denied us jury trial in many cases.

Well, when Hancock's ship, the sloop Liberty, was seized in Boston Harbor in 1767, along with its cargo, England also brought a case against him for an in personam fine of triple the amount of the goods.

Well, he hired a young lawyer to defend him in those days, a Boston lawyer, John Adams. And Adams' argument is just as valid before this Court today as it was 200 years ago, when he said, "The legislative authority by which this act is passed is grievous enough, but the way it is enforced with these Executive tribunals, makes it more penal than any other statute in the realm."

He said, "My client is not" -- and I am paraphrasing

a little bit -- He said, "My client is not tried by the law of the land, by jury trial, but by single judge." And he says, "No matter how fair that judge is, it makes this act extremely penal and my client has lost a precious right, the right to jury trial."

Well, in 1791, this right was imbedded in the Constitution for all Americans to come, as it was passed and codified in the Seventh Amendment. In response to a call and one of the foremost cries against the Constitution as originally drafted was the want of preservation of the right to jury trial.

It is now in grave jeopardy because now, 200 years later, the Federal Government is seeking fines against its citizens in Executive tribunals with much similar procedures as those Courts of Vice Admiralty.

But more fundamentally at issue in this case is the very bedrock of judicial power. The Third Circuit opinion, in the case of Frank Irey, basically held that the United States Government can vest, Congress can vest an administrative tribunal with enforcement powers -- in this case penalties -- and thereby eliminate the Seventh Amendment right to jury trial.

Implicit in this holding is that Congress and not the Courts has the power to determine when and if a provision of the Constitution applies, merely by vesting it in an administrative agency.

Judge Gibbons and the other three dissenters in that

case, as they so astutely pointed out, that if Congress can determine by legislative fiat when and if a provision of the Constitution applies and thereby define the meaning of the words "suits at common law," what role do the Article III courts play?

He also pointed out that it would be an absurd spectacle if the only branch of Government bound by the Bill of Rights would be the Article III courts.

And in commenting on the majority's holding of their interpretation of Jones and Laughlin v. the National Labor Relations Board, he pointed out that if that case is interpreted for the breadth that the majority gave it, unbeknownst to the world of legal scholarship, that case effected the most profound and enormous redistribution of power of any case in the history of the United States.

QUESTION: What's your interpretation of the case?

MR. STOKES: Mr. Justice, our interpretation of Jones & Laughlin merely stands for this doctrine that Congress can vest an administrative agency with traditional equitable roles, that is the cease and desist power which is an equitable injunction remedy and an incidental back pay remedy which is the classic restitutionary remedy.

But beyond that, they cannot vest an administrative agency with powers that are judicial suits at common law.

QUESTION: What if the NLRB, in that case, had

ordered only back pay? Would you say that it would have had to go to court and be tried to a jury?

MR. STOKES: If the -- the back pay is a restitutionary type of remedy. I would say that would be permissible in that case.

It arose in a situation where the NLRB had a cease and desist power coupled with back pay.

But in OSHA you are dealing with a naked vengeance penalty, where the Government is putting a penalty on its citizens for past violation. It is the devoid of any equitable consideration, devoid of any restitutionary element and devoid of any compensatory element.

QUESTION: Do you limit your argument to cases where the sanction is a money sanction?

MR. STOKES: In this case, we are not trying to invalidate any abatement powers of the courts. We are merely saying, in the posture of these cases, they arise in a posture where, in these cases, they are monetary penalties, $5,000 sought against Irey and $600 sought against Atlas Roofing Company.

We submit it is that violation that offends the Constitution, the collection of monetary penalties, which are not at all incidental. Of course, they could not be equitable remedies under the classic doctrines that equity will not enforce a penalty and will not enforce criminal sanction,

particularly the criminal provisions.

We submit, as we have briefed, that they are in no sense ancillary and that in this case they are primary. As a matter of fact, that's all that is being sought in these cases.

QUESTION: You recognize that the administrative regulatory agencies can sometimes decide questions that involve not $5,000 but millions of dollars without the intervention of a jury trial?

MR. STOKES: Yes, sir, we do recognize that. And, as I cited Professor Davis in his treatise, he said they can involve regulatory orders involving millions of dollars, but they cannot assess $20 in a penalty. In Professor Davis' treatise that we have cited to --

There is a great distinction, because if these cases arise on $5,000, but the same principle applies, no matter how it is, if it is in excess of $20, we submit to the Court.

QUESTION: At what stage in this procedure do you think a jury trial attaches?

You haven't really told us about the procedure and, as you say, it is novel, and I wondered -- do you think the Constitution would be satisfied if it provided a jury trial at any stage?

MR. STOKES: Yes, sir.

QUESTION: Could you describe it a little bit?

MR. STOKES: At any stage, either under the normal regulatory penal powers, they either have to bring the penalties originally in court, or they have de novo review.

In this case, neither is provided; as a matter of fact, it is expressly stated that it will not be provided and it even has conclusions that the facts of the Commission are supported on substantial evidence.

In this case, it is not provided at any stage.

QUESTION: By your submission, the Seventh Amendment would be satisfied, would it, if a jury trial were provided either to try the original assessment of the penalty or by de novo review later, at the end of the proceeding.

MR. STOKES: Precisely, Mr. Justice Stewart, that is our position.

QUESTION: The Seventh Amendment, in your submission would be satisfied in either event, is that it?

MR. STOKES: Yes, sir.

QUESTION: Before whom, a court?

MR. STOKES: Before a court, an Article III court.

QUESTION: And a jury.

MR. STOKES: And a jury. It doesn't stipulate, of course, as to whether the locus of it would be in an Article III court. We would submit it --

QUESTION: Court of Appeals would not have a jury.

MR. STOKES: No. The Court of Appeals would not have a jury.

QUESTION: There is a Court of Appeals review now, isn't there?

MR. STOKES: There is a limited Court of Appeals review, where they have a substantial evidence test --

QUESTION: Universal Camera.

MR. STOKES: Universal Camera. But in Universal Camera, there was no fine being sought. No, of course, that was a National Labor Relations Board case.

In this case, there is a raw penalty, as arises in this particular case, $5,000, and another one, $600.

In support of its position --

QUESTION: Mr. Stokes, going to your broad position that you can't commit this power to the Executive, supposing there was a two-stage procedure where there was first a determination of a violation and an order to comply, and then a refusal to comply with that order? Could the Executive Branch then impose penalties for that by analogy to contempt for violation of an injunction?

MR. STOKES: Yes, sir. And that would be in a separate proceedings. There is a similar proceedings to that under this Act. It has a most unusual thing in which a decision to contest can, in fact, subject you to cumulative penalties on top of that; if the inspector comes back and says,

"I don't think you contested in good faith," or if he says, "You didn't abate," then it can attach up to $1,000.

QUESTION: I understand. That's not directly involved and I am wondering if your argument would cover that situation, as well.

MR. STOKES: That would be a separate proceedings. You see, that is backing up the equitable remedies.

QUESTION: Do you contend there would be a jury trial required in that procedure?

MR. STOKES: Yes, sir, Mr. Justice Stevens, that would be very similar to the Federal Trade Commission enforcement power, where they have to go to court for the failure to abate or the failure to comply with its orders.

QUESTION: Why wouldn't the answer to the jury trial requirement be that that's analogous to an equitable proceeding where there has never been a requirement of a jury trial and contempt for violation of an injunction?

MR. STOKES: Again, they are seeking a monetary penalty.

Now, you may say that you get a back pay award, which is an incidental restitutionary award and that the penalty is still money, but it is compensatory, restoring the status quo. It was never a suit at common law, but when you get to a penalty, it was always a suit at common law, a classic suit at common law which we have submitted in our briefs and we noted that the

Government did not contest --

QUESTION: A violation of an injunction -- a suit for money for violating an injunction would not be a classic suit at common law, would it?

MR. STOKES: That could very well -- Yes, sir, that could be that it is not in that. Depending on the penality, it would be in the nature of a contempt-type case.

QUESTION: Well then, your FTC enforcement proceedings, they go to the Court of Appeals and if you disobey an order of the Court of Appeals in force in the administrative order, you are subject to contempt and you don't have a jury trial in the Court of Appeals, do you?

MR. STOKES: On the contempt issue -- It is my understanding that procedure is correct, that you do not have a jury trial. But if you do not comply with the order of the Commission, you then face, I believe, it is up to $5,000 a day penalty which is brought in directly in court.

QUESTION: In the District Court?

MR. STOKES: In the District Court, in the FTC regulations. That is my understanding.

Now, the Government, in --

QUESTION: In your case, if the ruling is that you cease and desist what you are doing, put your place in safe order, stop killing people and, incidentally, pay $5,000 fine, you are not contesting the whole first part, you are only

contesting the last part.

MR. STOKES: It's the $5,000 which we --

QUESTION: The rest is okay without a jury.

MR. STOKES: In this case, there was no contention that there was not abatement when the ditch was closed up immediately and it was never an issue in this case, in the Frank Irey case.

QUESTION: And in the old, traditional case where you get an injunction and damages, you say in the second part you have to have a jury, in the first part, you don't.

MR. STOKES: That would be our interpretation, Mr. Justice Marshall.

In support of its position, the Government cites the tax and immigration cases with the doctrine that they can bypass the Seventh Amendment. But in these tax and immigration cases, they are unique areas where the plenary power of Congress has been recognized as complete and exclusive. This power has been traditionally limited, even in those cases, to only these unique areas.

Now, the Government urges that these cases be expanded.

QUESTION: Why is the power of the Government under the Commerce Clause so much less than its power under the tax laws or under the immigration laws? If there is an immigration --

MR. STOKES: Mr. Justice Rehnquist, under --

Traditionally, the Government has always had -- the Legislative part of the Government, the Executive part of the Government, albeit all governments, have had the power to control its borders, free from the interference of courts.

Also, in taxation cases, they have always had this power.

In England, at the time of the passage of the Seventh Amendment, a revenue case would have been brought on the revenue side of the Court of Exchequer, but a fine and penalty case would have been brought on the judicial side of the Exchequer.

In these cases, particularly, the courts, as they have stated in these particular unique areas, have been careful to say this is only confined to these unique areas.

Similarly with the Legislative line of court cases, where Congress has plenary powers to deal with the District of Columbia and other territories, in which that power has been upheld because the Congress is then acting as a State, with a concurrent jurisdiction of State and Federal.

QUESTION: Going back to my Brother Marshall's question: What kind of trial would you have in the District Court? What would be the issue?

MR. STOKES: It would be de novo review on the facts, very similar to the other statutes which we are familiar with. What comes to mind is de novo review --

QUESTION: No res judicata, at all?

MR. STOKES: Not on the penalty cases. It would be very similar to other de novo reviews, such as the Coal Mine Safety Act, as we interpret the Coal Mine Safety Act to be.

QUESTION: Even though the administrative finding has been sustained on appeal?

MR. STOKES: That would be opposition.

QUESTION: Well, let's suppose that it is then tried out before the administrative agency and it goes to the Court of Appeals on the record, is that right?

MR. STOKES: It goes on the record, sir.

QUESTION: And it is sustained?

MR. STOKES: It is sustained.

QUESTION: And then you would say that the Government wants to sue you for a fine. It's de novo in the District Court?

MR. STOKES: If you do not give de novo view on the facts in the District Court --

QUESTION: That's right, because you don't have a right to jury trial.

MR. STOKES: That's right, you have no right to jury trial, and there is nothing left.

QUESTION: Following up my Brother Brennan's question, the issues would be at least two, in your submission, whether or not there was a violation, and then assuming there

was a finding there was a violation, what the amount of the penalty should be, both?

MR. STOKES: That would be our position. Of course, fines could be determined judicially, since fines are traditionally determined judicially.

QUESTION: Normally, a jury assesses damages and normally a judge imposes -- it is in his discretion to impose punishment. Which would it be here?

MR. STOKES: It would be the fact of the violation.

QUESTION: Simply the fact of the violation, not whether or not the monetary award was -- not what the penalty should be?

MR. STOKES: Yes. And Mr. Justice Stewart, these are within the traditional realm of juries. The typical facts --

QUESTION: Usually, the jury determines the amount, too, except when it is criminal punishment, then with some exceptions, in some States -- in most of the States, I think, the judge determines what the sentence shall be.

Which would it be here, in your submission?

MR. STOKES: Well, in our original brief, in our original petition for certiorari which was not granted on this issue, we took the position that a civil penalty is nothing more than a penal fine. Certainly to a corporation, there is no difference in a $10,000 fine to a corporation, criminal fine,

than a $10,000 civil penalty. We are dealing with semantics, but the effect is the same.

QUESTION: The Court found against you on that and we did not grant certiorari on that question.

MR. STOKES: Yes, sir.

QUESTION: But, in any event, on this question, the Seventh Amendment question, would it be open to the jury to decide how much the penalty should be, in your view?

MR. STOKES: We would say that that would be up to Congress to determine. Congress, within its power, could say that would be up to the judge, but as to the facts, the Seventh Amendment, we say, is quite --

QUESTION: Whether or not there was a violation?

MR. STOKES: That's right.

QUESTION: At least that much, you think, is trial by jury under the Seventh Amendment.

MR. STOKES: That is our entire position. And if not, you are left with a device that circumvents the Seventh Amendment, in a nice, neat, little package that says, "Well, initially, we go to this administrative agency and then we go to the Court of Appeals," and somehow the right to jury trial just evanesces.

And, if it is going to be done in this statute, then I submit, and we have briefed in our papers, the Administrative Conference of the United States in its recommendations

to all other agencies, that all other agencies get this power.

QUESTION: Mr. Stokes, you keep saying be realistic.

If you go before a District Judge and the District Judge, without a jury, puts a $5,000 fine on your client, that would be bad, right?

Yet if you go before a jury and the jury says that you should be fined something and the same judge gives you $5,000 fine, you wouldn't complain. Something wrong.

MR. STOKES: That is precisely our point, Mr. Justice Marshall.

QUESTION: Well, there is something wrong. You would still get $5,000.

MR. STOKES: That presupposes that the jury finds us guilty. And we have a right to a jury of our peers and the interposing of a jury between the Judiciary, albeit in this case, it's not judges with life tenure. It's administrators, hearing officers.

QUESTION: I thought my Brother Stewart was trying to get you to say the jury ought to set the amount, too. You'd be better off if the jury -- I mean speaking realistically, as you like to say.

MR. STOKES: That would be our position, sir.

QUESTION: You wouldn't think you would have any right to enjoin the administrative proceeding pending some jury trial?

MR. STOKES: There is some -- In the Beacon Theatres, Dairy Queen trilogy, there is language that would indicate that there is a possibility that --

QUESTION: What's your position?

MR. STOKES: We would say that that would be in the discretion of the judge handling it, but in this case, we would say that the abatement would go on. There is some language that says that the equitable side is then stayed until the Judicial side, but we are saying if Congress did provide, which, of course, it is not provided in here, which is a fatal flaw -- We are saying that that would be, the whole realm would be deferred until after the administrative action is completed.

QUESTION: With the statute silent like this one you would think that the administrative proceeding should abate until the jury trial.

MR. STOKES: Correct. No, we would say the administrative proceedings would go on and you would have de novo review --

QUESTION: I am sorry. So, you wouldn't say in this case you would have any right to enjoin an administrative proceeding until there is a jury trial.

MR. STOKES: I would not think that that would be a right.

QUESTION: Is it your claim that because of the failure to provide a jury trial at some stage of the proceeding

here, this legislation is simply constitutionally invalid? Or, is it your position that judicial decisions can somehow patch it up? In other words --

MR. STOKES: Mr. Justice Stewart, there is no provision in here --

QUESTION: Under your submission, should the court hold this legislation to be invalid constitutionally and then leave it to Congress to enact some new law, providing at some stage of the game a jury trial?

MR. STOKES: The penalty provision should be held unconstitutional, unless and until a jury trial is provided at some stage in the proceedings --

QUESTION: By Congress.

MR. STOKES: By Congress.

QUESTION: That would leave the abatement and all the other kind of orders perfectly constitutional, I take it.

MR. STOKES: Just like the National Labor Relations Board type of proceedings, cease and desist type of proceedings, and many others.

Now, the Government has cited cases, such as Katchen v. Landry, which arises under the Bankruptcy Act, in which a preference can be determined without jury trial. But there, a litigant has to voluntarily submit himself to that jurisdiction.

Similar reasoning is on the sovereign immunity cases where you go before the Court of Claims. There, a litigant has

to voluntarily submit to that jurisdiction. We say that these have no force and effect. I'd like to --

QUESTION: Do you suggest there is a right to a jury trial in connection with an involuntary proceeding in bankruptcy?

MR. STOKES: Yes, sir, in a preference -- in a plenary action, where --

QUESTION: Yes, but how about just the matter of declaring a person bankrupt?

MR. STOKES: Well, there, you voluntarily submit, you are declaring bankruptcy. Oh, involuntary?

QUESTION: I said involuntary.

MR. STOKES: In involuntary preference, where you are seeking --

QUESTION: Just when all of a sudden you find that creditors have filed a petition to have you declared bankrupt, and you say, "I demand a jury trial because the net effect of this will be to transfer all my property to the trustee, so I demand a jury trial."

Do you think you could have a jury trial for that?

MR. STOKES: You don't have a jury trial for that. These have been upheld, as I understand it, because of the equitable nature of an accounting of the race in bankruptcy. It's an equitable type proceedings, sir.

QUESTION: It is a historic test, is it not?

MR. STOKES: It is, yes, sir.

QUESTION: Mr. Stokes, is it part of your position that this kind of proceeding must be committed to an Article III court?

MR. STOKES: Yes, sir.

We would like to reserve, Mr. Chief Justice, the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.

FOR THE RESPONDENTS

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

It is apparent that the acceptance of Petitioners' contention that a jury trial is required by the Seventh Amendment before any civil penalty may be imposed under the Act would go a long way towards collapsing this program.

It should be remembered that we are dealing with an act that covers over five million work places and sixty-five million employees. A jury trial requirement would make it effectively impossible to administer OSHA effectively and uniformly, as cases would back up, jury trial cases would back up before more than four hundred District Court judges.

I should correct one statement. This tribunal we are dealing with here, the Review Commission, is not an Executive

Branch tribunal. It is an independent agency.

Now, there is very good reason --

QUESTION: You are not suggesting that the abatement provisions are not valuable in the enforcement --

MR. BORK: They are valuable, but I think they are not as valuable as they, not nearly as valuable as they are with this penalty proceeding.

Now, with 1300 compliance inspectors and five million work places in the country, it is quite obvious that it would be -- the abatement procedures alone would not be terribly effective in achieving a national standard of health and safety in work places.

The employer has no incentive whatsoever to comply, no monetary incentive, no private incentive to comply with this statute and these regulations beforehand. He can wait.

QUESTION: In addition to the penalties that Mr. Stokes was talking about, that is, just the imposition of $2,000, $3,500, whatever -- and that's what he is talking about, that that requires a jury trial, as I understand it.

But then, in addition to that, aren't there sanctions for failure of the employer to obey an abatement order which would be much more in the nature of a contempt and, therefore, perhaps, not trial by jury?

MR. BORK: There are other sanctions. Once the order has been enforced by the Court of Appeals, it is then

enforced and there is a sanction in the nature of contempt, just as there is in a Federal Trade Commission order.

QUESTION: Yes. And they would be left untouched.

MR. BORK: They would be left untouched by this and, indeed, they might be much more severe than any penalty provided here.

QUESTION: Yes.

MR. BORK: My point, Mr. Justice Stewart, in response to Mr. Justice Brennan, simply is that the existence of a civil penalty gives employers an incentive to comply before an inspector comes around and finds a violation and issues an abatement order.

Absent the penalty, the Act would be much less effective because you only wait and nothing happens to you until you have an abatement order and the Court of Appeals enforces it and then you comply.

So the civil penalty feature is an integral part of this statute and that's why I say that acceptance of petitioner's argument would go a long way towards collapsing this program as an effective national program.

QUESTION: I suppose as a matter of practical operation and administration of this statute, nothing really happens until, in most cases at least, until an employee is injured or killed. That seems to be the case in these two cases.

MR. BORK: I think that probably is the case, although I cannot speak with authority to that.

QUESTION: I mean with that many shops, as you say --

MR. BORK: That would draw the attention of a program which has a relatively small number of inspectors.

QUESTION: Maybe it comes out of an -- from an informer, or something. Are there any just routine inspections?

MR. BORK: Yes, there are. There are some routine inspections, but obviously where there has been an injury, it is likely to draw the attention of --

QUESTION: Yes. And that's, I think, what happened in both of these cases.

MR. BORK: Both of these cases.

QUESTION: Mr. Solicitor, is there any history of unions in various plants acting the role of informer?

MR. BORK: I do not know, but I assume -- I am certain that there are. I do not have an example at my command, but I am certain that that takes place.

QUESTION: Mr. Solicitor General, my understanding is that routine inspections are routine. They are regularly conducted on a fairly extensive basis.

MR. BORK: Well, there are, Mr. Justice Powell. I was just suggesting that you would get to an employer faster if there has been a serious accident, and the --

QUESTION: Right.

May I ask this question: After there has been an evidentiary hearing before the law judge, and let's assume the employer wishes to appeal to the Commission, may it appeal as a matter of right?

MR. BORK: No, as I understand the scheme, the Commission may review or may not. But then if the Commission does not review, I understand the employer has an appeal to the Court of Appeals.

QUESTION: Yes, but he then appeals from the decision of the law judge.

MR. BORK: That's as I understand it, Mr. Justice Powell.

QUESTION: Mr. Solicitor General, in National Independent Coal Operators case last year against the Secretary of the Interior -- I don't recall if you argued that or not, but there was no question raised in that case here about the right to a jury trial where there was an administrative penalty, only the question of whether explicit findings were required.

I notice you cite that case, but your friend does not. How do you think that bears on this case?

MR. BORK: Well, I think -- there is another case like that, the Turner-Alcorn case where the same lack of a challenge to a scheme of this sort was present. I don't think that the Court addressed it directly and, therefore, I think we have been assuming that the Seventh Amendment poses no bar

in these cases. But those cases don't directly assess it, they just assume it.

I would like to say that there is in this case, it seems to me, both history -- I think there is a square conflict between the Petitioners and ourselves about what history shows.

And there is also a long line of decisions in this Court which we think squarely governs this case.

QUESTION: May I interrupt you once more, Mr. Solicitor General.

If your friend prevails here, then someone in the future could certainly raise this question of the jury trial with reference to the Coal Mining Safety Act.

MR. BORK: I think it's entirely true that a number of regulatory schemes will --

QUESTION: I was just scanning the opinion -- last year's opinion. It has no reference to it because obviously the parties didn't raise it.

MR. BORK: As we know, the Eastern District of Kentucky now is, I think, very backed up with penalty cases. Acceptance of this contention in a society which intends to regulate the environment and safety and health and other matters, would really, I think, pose an impossible problem for the courts in the future.

If all civil penalties had to move through jury trials, I don't think the Federal Judicial system could handle it.

QUESTION: Assume that your position is correct as applied to the limits of the penalty in this case, under this statute, do you think that would be true without reference to the amount of the penalty?

MR. BORK: Yes, Mr. Chief Justice. I don't think the amount of the penalty is the crucial factor. I think the crucial factors here are the -- this is a public right case, rather than a private right case. It is not litigation between two individuals -- which is somebody attempted to move into an administrative agency. You can do some of that, I think, under the Constitution, but there may be limits as to how far Congress can go there.

But this is a public right case.

Secondly, I think -- I will advance what I think is a solid, although perhaps somewhat novel proposition, but I think it is solid in history, that the Seventh Amendment was never intended to apply to a case in which the Government was a party.

And thirdly, I think it is also true that the penalties here are intertwined with equitable remedies, and in themselves there is great discretion over the size of the penalty. It is intertwined with the abatement action and supports the abatement action.

So, I think that under the Jones and Laughlin case or under the Katchen case, I think that line of cases, too,

support this.

Those are three reasons why I think -- I don't offer any of those propositions, that is, that it is a public right case, the Government is a party and that it is intertwined with an equitable remedy.

Perhaps those three propositions do not completely exhaust the field of the Seventh Amendment and explain all practices, but we offer them as analytical factors. And when you look at them, I think they are the major analytical factors that come out of the history and out of the cases, and I think when you look at them you discover that this case lies right at the core of the kind of case that may be moved by Congress into administrative adjudication.

QUESTION: Your public right analogy seems to me to create a rather strange hiatus because you have a -- when the Government proceeds against a person criminally, they clearly, the defendant clearly has a right to jury trial under the Sixth Amendment.

When a private individual pursues another private individual for damages in the Federal Courts, you concede that the Seventh Amendment guarantees the jury trial.

And yet, you are having this kind of intermediate classification, no jury trial.

MR. BORK: That's quite right, Mr. Justice Rehnquist.

I think if we look -- one reason for that is historical and the other reason is a policy reason.

We are flatly in conflict with Petitioners on the history and we would refer the Court to the history developed in the article by Frankfurter and Corcoran which is cited at page 81 of our brief, among other places, which shows that historically, in this country both civil and criminal penalties were administered by magistrates and by non-jury means before the Revolution and after the Revolution, often with fines up to 500 pounds which was quite a good deal of money in that time.

So, historically, I think, we have recognized a public policy area, a public right area, where no jury trial was required.

And the reason for that, historically, and today, I think, is quite plain. And that reason is that we want speed of administration, we want informality, we want expertise in the tribunal, which we have developed here in this Review Commission, and we want uniformity of decisions when we are administering a public right policy across the nation.

QUESTION: Mr. Solicitor General, if your argument is valid, I think it would follow, would it not, that the Federal Trade Commission could be given the power to impose penalties for price fixing?

MR. BORK: Penalties -- the Federal Trade Commission --

a civil penalty?

QUESTION: Yes. $10 million.

MR. BORK: I beg your pardon.

QUESTION: $10 million, because the amount is irrelevant.

MR. BORK: I think amount probably is irrelevant, Mr. Justice Stevens. At least, I've never seen a case in which amount was thought to be relevant. For example, Helvering v. Mitchell, a tax assessment, and then an additional assessment for fraud at 50%, which amounted to about $365,000, which this Court held was a civil penalty, and it was administratively imposed through a tribunal of the Board of Tax Appeals which has an adjudicative structure just like the OSHA structure.

QUESTION: So you do agree that your argument above would apply with equal force to the Federal Trade Commission imposing a penalty for price fixing?

MR. BORK: I think it would, Mr. Justice Stevens.

QUESTION: As far as you know, Mr. Solicitor General, has the Government ever before taken the position, even argumentatively, that the Seventh Amendment doesn't apply to any civil action in which the United States is one of the parties?

MR. BORK: No, as far as I know, that position, Mr. Justice Stewart was evolved in my office, primarily --

QUESTION: Somebody got a bright idea over in your

office and then you just pursued it.

MR. BORK: He got a very bright idea and then left for England with me to argue the case.

(laughter)

QUESTION: Because that's a very extreme position and a fascinating one, I must say, but it is contrary to at least a good deal of dicta in this Court -- and contrary to a good many assumptions that we've made, isn't it?

MR. BORK: I think it is, Mr. Justice Stewart, but I think that the demonstration -- our case does not rise or fall --

QUESTION: I know, but you spend about half your brief on that proposition and it is an extraordinary one.

MR. BORK: It is extraordinary, but I think, Mr. Justice Stewart, if one looks at the way the Seventh Amendment was framed, the preceding guarantees of jury trials, it obviously applied to private litigation in the States.

The proposals from the States for the Seventh Amendment only applied to private litigation.

Thomas Jefferson -- we rely heavily upon the Virginia Declaration of Rights which is confined to private litigation. Thomas Jefferson proposed, as we note in our brief, a jury trial for every tax, every immersement, every penalty that was rejected.

I think the history is fairly clear. In fact, I

think it is unambiguous.

QUESTION: We don't need to accept your broad, sweeping argument in order to sustain your position, do we?

MR. BORK: No, Mr. Chief Justice. That's why I pointed out that we have three propositions, all of which point in the direction of sustaining the judgments below.

QUESTION: Mr. Solicitor General, one other point.

If we have to have a jury trial, do you agree that it has to be an Article III judge?

MR. BORK: I don't think so, Mr. Justice Marshall, because I would hate to see the law develop in a way that is, that there must be a jury and it must be an Article III judge, because I think with the regulation that exists in this society, and the one we fairly predict will come to exist in this society, that would be a terrible blow to the Federal Judiciary.

It would make it impossible, for example, for alternative types of tribunals to be devised to deal with repetitive factual claims of a relatively simple nature. And I don't think the Federal Judiciary could handle the flow of litigation that regulation would then generate.

QUESTION: Mr. Solicitor General, it would only be impossible to the extent that penalties were imposed in the first instance. Isn't that true?

MR. BORK: But I think, Mr. Justice Stevens, that's

going to be a fairly useful feature.

Unless we multiply the number of enforcement personnel enormously, it is simply impossible to deal with these wide-ranging factual problems, as I say, in five million work places, unless there is some incentive to comply, other than the fact that an agent showed up and issued an abatement order.

QUESTION: You say you would hate to see the law develop in this way. But what we are talking about is a historical provision adopted in 1791, and it is not a broad general provision, at all. It is not like the Due Process Clause. It is really a question of is it or isn't it, isn't it? Rather than something we had a great deal of discretion in deciding whether it should or should not apply.

MR. BORK: Quite right, Mr. Justice Rehnquist.

I didn't mean to suggest that. I was replying to Mr. Justice Marshall's question of whether if a jury trial were provided, it would have to be provided in Article III form. I was simply saying that I hoped the law would not develop in that way because I don't think the Federal Judiciary can handle it. But I quite agree with you that the history in the case is controlled --

QUESTION: Are you suggesting in response to Mr. Justice Marshall's question that we could say a jury trial is required and you would nonetheless have the Administrative

Law Judge summa non venire?

MR. BORK: I would hope, Mr. Justice Rehnquist, that that position could be sustained in another case, because of the reason I gave to Mr. Justice Marshall, but that isn't a case we have before us today.

I think it is rather clear in terms of history and in terms of the prior cases that no jury is required in this case.

Now the Petitioners' contentions, I must say, are kind of like a loose cannon, because they don't really draw out the implications of their arguments. And the acceptance of their arguments, really, have extraordinary results.

For example, there is in their brief the contention that somehow the Commerce Clause is not a very plenary power. It is a plenary power, but it is not as plenary as other powers -- A metaphysical argument that I don't follow with great facility -- but that under other powers Congress may delegate to administrative adjudication factual determinations just like this. But they may not under the Commerce Clause because the Commerce Clause simply isn't strong enough to do it.

And then they argue that if it is something that could be an Article III case or controversy, and it is a commerce power, not only do you need a jury, but you need an Article III forum, which I think is quite wrong.

And I should point out that not only is it quite wrong, but everybody has been overlooking that argument for all these years because if it is true then all of the agencies based on the commerce power are unconstitutional and have been for years. That is, you couldn't have the ICC, the SEC, the FTC, the CAB, the FCC and so forth, all of the Commerce Clause agencies.

QUESTION: You couldn't have them impose civil penalty.

MR. BORK: No. Their argument, I believe, Mr. Justice Rehnquist is broader. They say if it is a case or controversy, then you can't take it out of an Article III tribunal unless you are using a power other than the Commerce Clause.

It is a complicated argument and one does not follow all of its steps, but nevertheless that's the way it comes out, which means jury or no, all of these factual determinations being made by all of these agencies under the Commerce Clause are being unconstitutionally made if they look like a case or controversy.

QUESTION: Why was it the agencies could do anything that an equity court could do, but couldn't do what a law court could do?

MR. BORK: Well, Mr. Justice Marshall, I -- that may be their point. Maybe they have two points, but it seems to me at one point in their reply brief, beginning about page 33, I

think, they are really arguing that factual determinations of a case and controversy nature must be made in Article III tribunals, and may not be removed under the Commerce Clause, although they could be removed for reasons which are not apparent under the revenue power or under the immigration power --

QUESTION: Well, if they say that, that closes up all the agencies.

MR. BORK: I think that's what they have loosed upon us in that argument.

QUESTION: Well, it didn't sound like the argument he -- your colleague was making this morning.

MR. BORK: That is quite true, Mr. Justice White, but I think it is in the brief and I thought I ought to mention the fact that the arguments are somewhat diffuse and I think they have implications that haven't been analyzed fully.

But, in any event, I -- on the history point, I must -- if there is no time to argue it orally, I must ask that the Court refer to the Frankfurter and Corcoran article which establishes, I think, beyond a doubt that civil penalties much larger than this in the real money of the time were regularly and routinely administered without juries in Colonial times and after the Revolution.

QUESTION: Did that article apply to in personam judgments as well as --

MR. BORK: Oh, yes. I understand, Mr. Justice Stevens, but the fines and penalties, and so forth, being administered were in personam and they were regulatory, regulating hunting and fishing, liquor and a variety of other fields of endeavor.

So I think the history is quite clear.

I think it is also quite clear that the case law is against the Petitioners. Jones and Laughlin, of course, is a case which I think is directly on point here because, as I've suggested, the money penalty here is as intertwined with the equitable remedies here as was the case in Jones and Laughlin. So that the rationale of Jones and Laughlin directly applies here.

In addition, Jones and Laughlin suggests, as was said in Southall Realty and in Curtis v. Loether that if it is a public right case, an administrative agency case, you simply don't need a jury.

And that is true here also and Jones and Laughlin, of course, is an administrative determination made by a tribunal or by an agency set up under the Commerce Clause.

So it is not at all one of these other powers which Petitioners find so much more powerful than they find the Commerce Clause.

Helvering v. Mitchell, I would suggest is directly in point also. It has an administrative structure and a procedure

for fact finding which is almost identical to that here, and for that reason, I think, the history and the policy and the case law all suggest affirmance of this case.

Petitioners have largely ignored that. Their reply to our argument about American legal history is to ignore the Goldschmidt Report and to ignore -- which was cited in our brief -- and to ignore Frankfurter and Corcoran -- and to discuss instead of American legal history the practice in the English Court of Exchequer.

Their reply to our policy arguments, I think, is essentially to declare that practical matters are unworthy of discussion in a constitutional context. I think they are not.

And their argument on the law, insofar as it proceeds from Article III, is unique and would have devastating results to administrative agencies insofar as it proceeds by distinguishing the cases. I suggest that the distinction has not been made, that this case is identical to any number of cases.

QUESTION: I can't think of its name and I don't see it cited in any of the briefs.

What's the case in which we held that a petty offense, subject to not more than six months in prison, may be tried without a jury?

MR. BORK: Well, that's a case, Mr. Justice Brennan, which escapes my memory, but that was a case that came up in argument in the Muniz v. Hoffman case, which was the question

of criminal contempt.

QUESTION: Can you help me out? Can you remember another --

MR. BORK: Well, I think I am about to be able to help you out, sir.

It says here that the last name is Hamlin, Mr. Justice Brennan.

QUESTION: Hamlin?

MR. BORK: Hamlin.

I remember we discussed that in the Muniz v. Hoffman case.

That raises an additional point I think that ought to be made. There really ought to be some congruence between the Sixth Amendment and the Seventh.

It is quite clear here that if Congress had decided to be really Draconian about these matters, it could have provided for six months imprisonment and no jury would have been required.

Muniz v. Hoffman suggests where a $10,000 contempt sanction, criminal contempt sanction against a union was upheld as not requiring a jury trial under the Constitution.

That case suggests that had these penalties, $600 and $5,000, against corporations been assessed criminally, there probably would not have been a need for a jury trial.

So it surely cannot be that we have the paradox that

a Congress decides to proceed with a civil action rather than a criminal action, thereby, finding itself hampered and the greater procedural protections are required because they decided to use a civil action instead of a criminal action.

QUESTION: Well, the law is full of paradoxes and the fact is that the Seventh Amendment guarantees a jury trial in civil actions and other provisions of the Constitution guarantee a jury trial in criminal cases and other provisions of the Constitution, at least implicitly, based upon historic reasons, do not provide for a jury trial in a contempt action.

Now, the Court has subsequently said that if the imprisonment is longer than six months, there is a jury trial in a contempt action; but generally speaking, historically, there never was a jury trial in an action for contempt of court. And this is just history. Not logic, maybe, and maybe paradoxical, but it is history. And also it involves the specific provisions of the Constitution of the United States, for better or for worse. Maybe they are paradoxical. Maybe they are inconsistent, but there they are.

MR. BORK: My point, Mr. Justice Stewart, was that it would be paradoxical and that the paradox need not be created. It need not be created not because of the Sixth Amendment, but it need not be created because of the history of the Seventh, which, aside from our argument that the amendment never applies when the Government is a party, clearly,

I think, the history shows that where public right is concerned these kinds of penalties have been imposed without a jury trial throughout our history. And my primary reliance is upon history and upon the decisions of this Court, Mr. Justice Stewart, rather than upon inference from the Sixth Amendment.

I don't believe in multiplying paradoxes needlessly and I was merely pointing out that I think this paradox need not be created.

QUESTION: Mr. Solicitor General, with your emphasis on history, I wonder if -- because it is really not discussed in the briefs and I am not sufficiently familiar to know, does the history of the Seventh Amendment indicate, perhaps, that one of the concerns of that Amendment was the relationship between the Federal Government and the States? And one thing the drafters of the Amendment were concerned with was the problem of excess of Federal power, and might that be relevant to our problem here?

MR. BORK: It might be. There is no discussion anywhere, so far as I am aware, Mr. Justice Stevens. There is no discussion in the drafting or the framing or the proposals that go into the Seventh Amendment, nor in the ratification debates of the Seventh Amendment. There is no discussion of anybody's fear of the Government as litigant and that this is in any way designed to cure or to safeguard that.

All of the discussion is about proposals which purport

to save the jury trial in suits between man and man, which we think is a phrase that only means private litigation, or in suits respecting property.

Now, of course, the suits respecting property dropped out. It was never proposed by Madison when he drafted the beginning of the Seventh Amendment. So that this idea that somehow the Seventh Amendment was to protect the citizen against the Federal Government, I think is quite wrong. There is no suggestion in the debates about that and, in fact, as Frankfurter and Corcoran point out -- I hate to keep coming back to that article, but it is the mine of information on this subject -- the colonists were entirely used to Government litigation in which fines and penalties were imposed for regulatory purposes without a jury, because they wanted speed, they wanted uniformity.

QUESTION: Were these matters of speed and convenience underlying the decision of Congress when they passed the Tucker Act and the Federal Tort Claims Act to have no juries in those cases which, of course, are strictly civil cases, aren't they?

MR. BORK: They are, indeed. The argument is made, Mr. Chief Justice, that those were not suits at common law because the Government had sovereign immunity. I am not entirely persuaded by that argument, but, for example, if you sue the Government in the Court of Claims and the Government

counterclaims for an amount much, much larger than your original claim, nevertheless, no jury is required. And that counterclaim has nothing to do with sovereign immunity.

QUESTION: But that, again, is justified on the quite independent grounds that frequently when you counterclaim in a suit you can be treated as if you had brought the suit in the first instance, that you may be subject to many rules that you wouldn't be subject to if the counterclaim were entirely independent of the original suit.

MR. BORK: I think, Mr. Justice Rehnquist, that that would probably not be the case, one suit in equity and somebody came back with a damage action. And the first party wanted a trial as to the damage action. But in any event, my real point can be illustrated another way, which is, for example, the renegotiation litigation comes from the Renegotiation Board into the Court of Claims. It is only a question of whether the Government, as a contractor, is paying too much, or not. No jury trial.

I don't know that that kind of thing can be explained. We've got lots of practices of that sort.

QUESTION: But that isn't a practical action for damages.

MR. BORK: Well, I don't know, Mr. Justice Rehnquist, in what sense that is not a classical action for damages -- Certainly, if that is not a classical action for damages and

therefore not a suit at common law, as the Seventh Amendment requires, Mr. Justice Rehnquist, then I think it is quite clear that these penalties here are also not actions for damages, and are not suits at common law.

QUESTION: It should be treated as an actual affirmation of the contract, the Renegotiation Board thing.

MR. BORK: Well, one can, I suppose, apply that term to it, but the fact is that the Government is going for money from a contractor and no jury is required. No jury is required in the Government's counterclaim. There are lots of these things which I think are best explained by the fact that the Government is a party.

But this Court need not accept that principle in its totality to decide this case because, I think, all of the three principles discussed here point to the fact that this case is at the core of Congress' power to move a dispute into administrative adjudication.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Stokes.

REBUTTAL ORAL ARGUMENT OF McNEILL STOKES, ESQ.

ON BEHALF OF THE PETITIONERS

MR. STOKES: We have, in our brief, cited the People v. One 1941 Chevrolet, I believe, where the Supreme Court of California went through this same exercise and went

through every State in which they determined that a suit for fine and forfeiture would have been an action at common law trial by jury. I believe they cite some eleven States and the actual cases in which that occurred.

As for the policy, I think the majority said it best in the Third Circuit opinion in Footnote 11, I believe, it was, when they said they couldn't understand why de novo review was not provided because it is the de novo review, far from using it, it is the availability of the remedy. And there, they analogize it to a local fire department, that a citizen would hope he would never have to use it but he takes comfort in knowing it's there.

Now, we have cited that there are only less than 50 cases a year hitting the Court of Appeals, under the limited review. It is mere speculation, but I question whether there would be a tidal wave as the Government would have us look at. In the de novo reviews, albeit, there is only 1.2%, as we also cited in our brief, of all the penalty and forfeiture cases with all the statutes that have de novo review now, including the liquor forfeiture cases under the 19 -- I believe -- '75 statistics.

QUESTION: Do I understand the Government's position to be that the possibility of a fine would be persuasive toward a man reading the Act and following it, and that wouldn't be true if the only penalty would be if he violated the Act, and

everything in the world went wrong. Then eventually the Court of Appeals got around to it. He would be put under an order, and the Government's position that the first tends to make the employer follow the Act.

MR. STOKES: Mr. Justice Marshall, so does --

QUESTION: You agree with that, don't you?

MR. STOKES: Yes, sir. So does every other criminal penalty for which jury trial is provided.

QUESTION: This isn't criminal, now, --

MR. STOKES: Well, any other penalty, sir.

QUESTION: What's your understanding of the law in a criminal case where the only authorized penalty is a fine?

MR. STOKES: $500, is that --

QUESTION: What's the constitutional rule? Suppose there is a statute that says that the only penalty for this crime is a fine, but you can be fined up to $1 million?

MR. STOKES: We would take the position that that is unconstitutional, that is certainly more than a petty fine, which is my understanding of the case as it has been defined at the $500 range. I could be wrong, Mr. Justice White, on that.

QUESTION: The test is whether or not it is a petty offense.

MR. STOKES: Yes, sir.

QUESTION: Mr. Stokes, you called our attention to a

case called People v. Chevrolet, or Plymouth, or something I don't find it --

MR. STOKES: It is in our reply brief, sir.

QUESTION: In your reply brief.

MR. STOKES: When the Government cites that this would collapse the penalty structure of the Occupational Safety and Health Act of 1970, but more fundamentally it may very well collapse a realistic Seventh Amendment right against -- when the Government seeks fines against its citizens.

You know, we are not dealing here with a balancing, as Mr. Justice Rehnquist pointed out. We are dealing with jury trials.

When all is said and done, it gets down to this. You either have a right to a jury trial when the Government seeks a fine against you or you don't have one.

I really believe that this case is going to stand as a high water mark beyond which the Executive police power of Government cannot go without providing jury trial. Or it will be the breach of the dike that creates a virtual tidal wave of similar legislation.

We submit that OSHA is the breach of the dike.

We would hope that dike would be plugged in this case.

Thank you very much.

It is at page 7 in our brief.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:08 o'clock, a.m., the case in the above-entitled matter was submitted.)