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In the

Supreme Court of the United States

ADAMO WRECKING CO.,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

No. 76-911

Washington, D. C.
October 11, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

ADAMO WRECKING CO.,

Petitioner,

v. No. 76-911

UNITED STATES OF AMERICA,

Respondent.

Washington, D. C.

Tuesday, October 11, 1977

The above-entitled matter came on for argument at 11:47 o'clock, a.m.

BEFORE:

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

APPEARANCES:

STANLEY M. LIPNICK, ESQ., 75th Floor, Sears Tower, Chicago, Illinois 60606; for the Petitioner.

FRANK H. EASTERBROOK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Respondent.

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 next in 76-911, Adamo Wrecking Company against United States.

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

ORAL ARGUMENT OF STANLEY M. LIPNICK, ESQ.

ON BEHALF OF THE PETITIONER

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

This is a criminal case arising under the Clean Air Act as it stood prior to the amendment this past summer. Section 112(b) of the Act, as it then stood, instructed the Administrator of the Environmental Protection Agency to promulgate an emission standard for controlling emissions of hazardous air pollutants, one of which is asbestos.

The Administrator issued a work practice regulation for demolition operations and gave it the title "emission standard." Section 112(c) of the Act prohibits a violation of an emission standard.

My client is accused by indictment of violating Section 112(c) of the Act for an alleged failure to follow the Environmental Protection Agency's work practice rule.

In the trial court, we challenged the indictment on the ground that a violation of an emission standard is an essential element of the crime and that a work practice rule is not the same thing as an emission standard, notwithstanding

its title.

The trial court agreed and dismissed the first count of a two-count indictment which is the only count now before this Court. The Government appealed and the Sixth Circuit reversed. The Sixth Circuit held that our position amounted to a challenge to the validity of the regulation itself.

QUESTION: What is left of your issue after the amendment this summer?

MR. LIPNICK: Well, one thing that is left is whether my client has to go to trial and possibly be convicted of a felony.

QUESTION: The issue is in the meaning of that statute, isn't it?

MR. LIPNICK: The issue -- The first issue, as I understand it, sir, is the meaning of Section 307(b)(2) of the Act which, by its language, says "there shall be no judicial review in a civil or criminal proceeding for enforcement of action which could have been reviewed under the statutory review procedure."

I think one issue which is still open for decision by this Court is whether that statute, that preclusion provision, is in fact an absolute preclusion of all judicial consideration of the propriety of actions by the Administrator, even actions which, on their face, are alleged to be in violation of his duties under the Act.

QUESTION: If it is an absolute preclusion, do you make any claim in this case, or have you, that that kind of a preclusion, purported conclusion, would be unconstitutional?

MR. LIPNICK: I think that's a question of fact which would have to be developed at trial, sir. I think it would depend on whether we were able to show at trial whether we --

QUESTION: But have you raised any constitutional issue about --

MR. LIPNICK: Not by our motion to dismiss, sir. I think --

QUESTION: And you haven't pressed any constitutional issue here?

MR. LIPNICK: No, sir, except for the fact that I do believe that there is a question of adequacy and effectiveness of the statutory remedy which could invoke the constitutional question and which would require development in litigation of an issue of fact in the trial court.

The preclusion section, as I indicated, says there is to be no judicial review at enforcement proceedings of regulations which could be reviewed under the statutory review procedure. The review procedure is not now available to my client, and could have been initiated only by filing a petition for review within 30 days of the date on which the regulation was issued.

The Court of Appeals, in our view, ignored the language of Section 112(c) itself, which prohibits violation of an emission standard and which does not prohibit a violation of any regulation which the Administrator might issue concerning asbestos. From that perspective, we are not prepared to concede that the trial court was even reviewing the regulation within the meaning of the preclusive provision, as opposed to simply looking at the face of the regulation to ascertain whether it was in fact the type of regulation specified in the criminal prohibition.

However, if that should be considered judicial review, we believe that it is review which is within the sphere of this Court's decisions which permit a limited type of review even in circumstances when review of Agency action is ordinarily unavailable. We traced that, starting with this Court's decision in Leedom v. Kyne, in which this Court indicated that statutory review provisions normally contemplate review of Agency action which is, at least on its face, within the scope of Agency authority, and therefore permitted an inquiry into the question of whether the Agency in that case had complied with specific statutory instruction.

Subsequently, in a case cited by the Government in its brief, Brotherhood of Railway Clerks v. Noncontract Employees, this Court again said that nonstatutory review is available to assure that Agency action does not exceed the

statutory authority and that action which is ordinarily non-reviewable is, in fact, reviewable to the extent of ascertaining that the Agency performed its statutory duty. And in the Brotherhood of Railway Clerks case, this Court, as I read the decision, entered holdings on the merits on those limited issues, of whether the Agency action was within the scope of its authority and whether it, at least on its face, purported to comply with the Agency's statutory duty. Those holdings were not jurisdictional, as I read them. They were holdings on the merits.

Last year, in the Thermtron Products case, concerning the removal procedures from state to federal courts and the remand procedures back, this Court held that the statutory preclusion of review of a remand order which, on its face, purported to be absolute, still permitted judicial review in the limited sense of ascertaining whether a trial court order of remand was at least based upon one of the grounds for remand specified in the statute.

This past June the two Voting Act cases which are cited in the Government's brief, I believe continue to recognize this principle of the availability of limited review. In Briscoe v. Bell, the Court avoided holding that coverage determinations by the Attorney General and by the Director of Census were not open to judicial inquiry at least to ascertain whether there was reliance by those officials

upon the criteria specified in the statute for making those determinations. And on the same day in Norris v. Gressette the majority opinion of this Court noted that Congress, like the Court, operates on the assumption that public officials will perform their duty, and indicates that line of inquiry harkens back to Leedom v. Kyne and to Railway Clerks, which indicates to me a line of authority of this Court which is very sound, in my view, and very persuasive, that legislation governing the scope of review of agency actions simply does not contemplate agency action which is lawless, that even where the review provisions say review is unavailable there can be at least an inquiry to ascertain whether an agency took action which, on its face, complied with what a statute told the agency to do.

QUESTION: Of course, this statute didn't say review was unavailable. It said it just had to be taken within a certain time, didn't it?

MR. LIPNICK: Well, in our position now it's unavailable.

QUESTION: Well, I suppose you could say that about the statute of limitations or laches, too; if you let the thing go long enough, it is unavailable. That doesn't mean that the statute of limitations is ignored.

MR. LIPNICK: No. I don't think there is really, from the context of this case -- Your Honor, I don't think

there is really a difference between saying you can't review it unless you seek review within 30 days of the time when it's issued or saying you can't review it at all. I think the question still is: If Congress passes a law which says you must seek review within 30 days or not at all, do they contemplate by the term "review," or by that provision, do they contemplate foreclosing the federal judiciary from any jurisdiction to inquire into the question of whether an administrative agency has committed an act which, on its face, is unlawful?

QUESTION: Even though the attack on the administrative action comes two or three years after the promulgation of the regulation?

MR. LIPNICK: Yes, sir. I think that limited inquiry is always open. I think it is always open for us to say that we are being prosecuted for conduct which Congress did not make a crime. Congress said you can't violate an emission standard, and if we can't raise the question of whether or not this regulation is an emission standard, I think we are in the position of having the Sixth Circuit decision stand, which holds that we can be brought to trial and convicted for conduct which Congress did not make a crime. I think we are in the position, if the Sixth Circuit's decision stands -- I think we are in the position of having a rule which says that even though this Agency was at the time in

violation of its own continuing mandatory duty to promulgate the kind of regulation Congress told them to promulgate, an emission standard, nonetheless the federal courts are going to enforce that violation of law by the Agency. And they are going to do it by convicting my client of conduct which was not made a crime by Congress. We think that's wrong. And I don't think it matters whether our attack upon the Agency's action as being lawless on its face comes two years or twenty years after the regulation is promulgated.

QUESTION: Did the Agency think this was an emission standard?

MR. LIPNICK: The Agency gave it the title of emission standard. I think the Agency's position has not been entirely consistent as to whether it is or is not an emission standard, and I am not certain that the Agency has ever really squarely addressed that particular question. I think the Agency has, as I understand them --

QUESTION: Well, you didn't give them too much of a chance. I mean you could have gone to the Agency.

MR. LIPNICK: We have gone to the Agency in other proceedings, sir.

QUESTION: But not this one.

MR. LIPNICK: Not this one. No, sir.

QUESTION: In other proceedings, has the Agency said it was an emission standard?

MR. LIPNICK: No, sir. The Agency has always taken the position that we are questioning the validity of the regulation, that we are questioning its authority to issue the regulation and that the regulation is authorized. I don't think they have ever, to my knowledge, focused on the question simply of whether or not it's an emission standard.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

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

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: You may proceed, Mr. Lipnick.

ORAL ARGUMENT OF STANLEY M. LIPNICK, ESQ.,

ON BEHALF OF THE PETITIONER (Resumed)

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

Before the luncheon break, if I recall, I was asked whether the Agency had ever itself considered the question of whether the work practice rule is an emission standard, and I think I would like to expand upon my answer, just briefly, if I may.

I think the Agency has always known the work practice rule is not an emission standard. On December 7, 1971, when it first published its proposed regulation in the Federal Register, the following statement appears in the preamble to the proposed regulation at Volume 36, page 23239 of the Federal Register, quote: "Because there is no suitable technique for sampling and analyzing asbestos in the ambient air or in emission gases, the standards are expressed as requirements for the operation of specific control equipment or other equipment of comparable effectiveness or in situations where no control system is available as prohibitions on the use of asbestos. When acceptable source sampling and

analytical methods are available and it is possible to delineate hazardous levels, these standards may be revised to require compliance with a measured allowable emission.

On April 6, 1973, when the work practice regulation was first promulgated in final form, in the preamble to that publication, at Volume 38, page 8820 of the Federal Register, the Agency stated, quote: "It is not practicable at this time to establish allowable numerical concentrations or mass emission limits for asbestos."

And then in the third column of the same page: "The means of control used are limitations on visible emissions with an option in some cases to use designated control equipment, requirements that certain procedures be followed and prohibition on the use of certain materials or of certain operations. These means of control are required because of the impossibility at this time of prescribing and enforcing allowable numerical concentrations or mass emission limitations known to provide an ample margin of safety."

QUESTION: Does that appear in anything you have filed here? What you have just read.

MR. LIPNICK: I am certain that the final publication is cited in the brief. I am also certain that the quotation is not, sir.

QUESTION: The quotation --

MR. LIPNICK: I am certain that the Federal Register

publication -- This is the final regulation as published.

I think the only other thing I need to say, if the Court please, is that the only inquiry which is necessary here to ascertain that the Administrator did not comply with Section 112(b) of the Act is whether or not the regulation, on its face, is an emission standard. And the result of that inquiry shows that my client is, indeed, being prosecuted for something Congress did not make criminal and we believe that that is simply wrong and that it should be reversed.

The portion of the Federal Register at which the final regulation is promulgated, Mr. Chief Justice, is cited at page 5 of our brief, and the regulation itself is quoted.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Easterbrook.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

FOR THE RESPONDENT

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

The central statutory provision at issue here is Section 307(b) of the Clean Air Act Amendment. That section provides that the District of Columbia Circuit has exclusive jurisdiction to any challenge of the action of the Administrator of the EPA in promulgating any emission standard, and that review may be had in that court on any petition filed

within 30 days of the promulgation or thereafter if new grounds arise after the 30th day.

Section 307(b)(2) provides, and I quote: "Action of the Administrator with respect to which review could have been obtained under the first paragraph shall not be subject to judicial review in civil or criminal proceedings for enforcement." That statute is abundantly clear.

The challenge Petitioner now raises to the validity of the emission standard promulgated by the Administrator --

QUESTION: Just so I've got it clear, is there any restriction on what issues could be raised in the Court of Appeals for the District of Columbia?

MR. EASTERBROOK: There is none, Your Honor. The District --

QUESTION: Whether you've gone to the Administrator with them or not?

MR. EASTERBROOK: Well, the District of Columbia Circuit requires that the claims have been raised. The statutory claim --

QUESTION: But if you haven't presented a particular claim to the Agency, the court won't hear it?

MR. EASTERBROOK: There are sometimes problems of exhaustion of administrative remedies, Your Honor, that would go with claims of this sort. If it were a claim being raised for the first time in the District of Columbia Circuit that

the Administrator had never had a chance to consider, it might be appropriate not to consider it, or it might be appropriate under District of Columbia Circuit practice.

QUESTION: What would you think about a coverage question?

MR. EASTERBROOK: A pure attack on the face --

QUESTION: Well, just say that the regulation just simply isn't authorized by the statute. That must have been presented to the Administrator before the court will hear it?

MR. EASTERBROOK: No, Your Honor, I think the true coverage case could be raised at any time in the D.C. -- not at any time, but it could be raised in the D.C. Circuit.

QUESTION: And without ever having been presented to the Administrator?

MR. EASTERBROOK: Yes, Your Honor.

QUESTION: What about a constitutional challenge to the underlying statute?

MR. EASTERBROOK: The result of that would be the same, since the Administrator lacks the authority to declare the underlying statute unconstitutional.

QUESTION: And what about the constitutionality of the regulation?

MR. EASTERBROOK: I think that would depend in part on the nature of the challenge to the regulation. If the nature

of the challenge were such that a regulation easily could have been drafted consistent with the Protestant's view of constitutionality, that that kind of claim should be presented first to the Administrator so that he would have a chance to draft a regulation that in the view of the challenger is constitutional.

If there were a constitutional claim in this case, that rationale would not apply because the Administrator has already considered whether it is practicable to promulgate a regulation in some other form. And we have the Administrator's judgment on that. There would be no point in asking for his judgment again.

QUESTION: How do you work all that into the 30-day time limit? The administrative exhaustion.

MR. EASTERBROOK: The 30-day time limit commences to run, Mr. Justice Rehnquist, only after the final promulgation of the regulation. These regulations are promulgated after notice and comment rule-making. In this case, the initial notice and publication came in 1971 and there was a process of more than a year before the final promulgation. The 30 days commence to run only after the final promulgation of the regulation.

QUESTION: Okay. Well, supposing a person gets a copy of the notice or advice of it, doesn't do anything then and the regulation becomes final. And then he seeks to

challenge it in the Court of Appeals of the District of Columbia Circuit within 30 days. Is he then barred because he didn't challenge it before the Agency?

MR. EASTERBROOK: If he not only did not challenge it before the Agency, but no one challenged it before the Agency, on those grounds, then consistent with the rationale that I gave in answer to Mr. Justice White's question, I think he would then be barred in the D.C. Circuit.

The statute itself, as I have said, is quite clear. And the contention that Petitioner now raises is one that he could have raised in the District of Columbia Circuit under the answer that I gave to Mr. Justice White. Indeed, Petitioner conceded in the District Court, a concession that appears at page 85 of the Court of Appeals Appendix, that he could have raised in the District of Columbia Circuit the contentions he now raises. Because the challenge could have been raised in that court --

QUESTION: Mr. Easterbrook, may I stop you there? Could he have raised this on the theory that it was an emission standard under Section 112, within the meaning of 307(b)(1)?

MR. EASTERBROOK: I am sorry, Your Honor, I don't understand your question.

QUESTION: Well, the plain language of the statute controlled. (b)(2) says that you are barred unless you file the petition for review as authorized by (b)(1). (b)(1)

authorized the petition for review of the action of the Administrator in promulgating any emission standard.

So for us to conclude that he should have followed that procedure, need we not decide that it was an emission standard?

MR. EASTERBROOK: I believe not, Your Honor.

And I can answer that in several respects. Section (b)(2) says that review is barred on any question that could have been reviewed under (b)(1).

QUESTION: Correct.

MR. EASTERBROOK: So, in order for Petitioner to prevail here, you would have to first conclude that his contentions are ones that the District of Columbia Circuit could not have considered on a petition being filed under (b)(1).

QUESTION: Correct.

MR. EASTERBROOK: The District of Columbia Circuit has held in the Oljato case, which is cited in the footnote at page 15 of our brief, that it may consider challenges similar to the challenge at issue here, that is, contention that the regulation was on its face not the kind of thing that the statute authorized. Under that rationale, this was a challenge, review of which could have been had in the D.C. Circuit, and of which review therefore may not be had now under (b)(2).

I can set out a couple of reasons for that. The argument that you can now review in a criminal proceeding, the contention that there is no emission standard would essentially make the question of jurisdiction turn on the merit. That is, under Petitioner's view, review would be precluded only after the District Court had already given the regulation full review.

QUESTION: Yes, but under your view, if the Administrator promulgates something called an emission standard and the text of it is that every wrecker shall pay $500 a month into a conservation fund, he is bound to go to the Court of Appeals, no matter how far away from the legislative intent that was.

MR. EASTERBROOK: Mr. Justice Rehnquist, I don't think that we need to make an argument that extreme in order to prevail here.

Let me suggest the two kinds of inquiry that I think the District Court should ask. The first kind of inquiry is whether the Administrator's regulation purports to rely on Section 112, that is whether he says that this is an emission standard.

The second kind of question the District Court might ask, and properly so, is whether the Administrator's regulation purports to control the emission of the hazardous substance, since Section 112 is a section dealing with release of

hazardous substances into the air.

The District Court, if it answers those questions affirmatively, that is, if it says the Administrator says he relied on Section 112 and this regulation, in fact, controls the emission of hazardous substances into the air, should conclude its inquiry at that point. There are, of course, a myriad of ways in which the Administrator might go about controlling those kinds of emissions. The question whether he has controlled emissions in the very way that the statute contemplates is, we think, exactly the kind of question Congress had in mind when it required review of that thing to come in the District of Columbia Circuit.

QUESTION: But even if the District Court asks those questions and answers them now, this isn't the kind of a -- he doesn't even purport to be acting under this section. That question still could have been raised in the Court of Appeals, under your argument.

MR. EASTERBROOK: When I answered Mr. Justice Rehnquist by saying that we did not have to go as far as his hypothetical, I did not mean to say that we think it would be inappropriate for the District of Columbia Circuit to review it. Ultimately --

QUESTION: So there are then some questions that can be raised later, despite Section (2)?

MR. EASTERBROOK: I think -- No. The suggestion

that I made to Mr. Justice Rehnquist was, I think, the same kind of question that the District of Columbia Circuit would ask itself when someone filed a petition for review in the District of Columbia Circuit, that is to say before that court could exercise its statutory review authority it would have to decide whether the claim that was being made before it was a challenge --

QUESTION: If it is wrong enough, we won't review it.

MR. EASTERBROOK: Not if it's wrong enough, but if it is not --

QUESTION: If it's --

MR. EASTERBROOK: -- not even purported to be promulgated under this section.

QUESTION: So, we will just let it stand, the District of Columbia Circuit would say?

MR. EASTERBROOK: The District of Columbia Circuit's answer, I think, would be that this would be something for an original action in the District Court.

Similar problems were before this Court last year in the three Dupont cases, involving the question whether the Court of Appeals or the District Court would have review of certain regulations promulgated by the Administrator. Before you could decide that question, you had to decide what kind of regulations they were.

I think the District of Columbia Circuit must ask the same kind of question when someone files a petition for review with it. It says this is a regulation promulgated by the Administrator. Is it the kind of thing described in Section 307(b)(1)? If so, it will review it there. If not, it must dismiss the petition for review.

And the two criteria that I gave in answer to Mr. Justice Rehnquist are, I believe, the criteria that that court should ask. I think, if you ask those questions here, the regulation satisfies those criteria and, therefore, was one that could have been reviewed in the District of Columbia Circuit.

Let me go back if I can, briefly, to discuss the legislative history of Section 307(b), because I believe it sheds considerable light on the kinds of things that must be reviewed in the District of Columbia Circuit. Section 307(b) originated in the Senate which adopted the limitation on judicial review as an alternative, according to the Senate report at page 41, to an absolute preclusion. The reason why it was considering something as extreme as an absolute preclusion of judicial review was that it wanted, and I quote: "to maintain the integrity of the time sequences provided throughout the Act."

Each of the steps in promulgation of regulations

and review of regulations is a precondition to something else, in this case, a precondition to compliance. But one of the necessities of compliance is to have a valid regulation. And so Congress centralized review in a single forum, the District of Columbia Circuit, with a very short time limitation for review in order to achieve two important objectives. The first of those objectives was to make sure that any review would produce uniform results across the nation. All competitors in the industry would be subjected to the same standards, rather than different standards that might be imposed by different judges.

And second, it wanted to be sure that if, in fact, the regulation was invalid, the invalidity would be detected quickly so that the Administrator could then promulgate a new and valid regulation. That required a time limitation on judicial review.

Congress set out to give the regulations, after the period for review had expired, the same unquestioned authority as the statute itself. Section 307 accomplished that end, and the position of Petitioner which amounts to saying that the regulations are always open to challenge, would frustrate that end.

We understand Petitioner to make three kinds of arguments. First, Petitioner argues that any regulation may be attacked on its face at any time. Second -- and this is a

variation of the first argument that I have already discussed in part -- Petitioner contends that Section 307(b) applies only to regulations that are in fact and in law emission standards.

The third contention, which Petitioner makes only implicitly but which the District Court made more clearly, is that Section 307 applies only to attack on the procedure by which the regulation was promulgated and not the contentions that the substance of the regulation is unauthorized by statute.

None of these arguments is correct, and I will take them up in turn. The first argument that regulations may be attacked on their face at any time is inconsistent with the progeny of the Yakus case. In the wake of Yakus, which upheld against constitutional attack, a statute very similar to Section 307(b), this Court applied that rule of preclusion in a number of cases, attacking regulations as inconsistent on their face with the statute authorizing the promulgation of price regulations. These cases are collected at page 24 of our brief.

If there were any reason to distinguish between attacks on the face of the regulation and attacks on the regulation as applied -- and Section 307 makes no such distinction -- it would be more appropriate to bar facial attacks. After all, facial defects are known the instant a

regulation is promulgated, whereas attacks on the regulation as applied in particular cases may not come to rise until later. And, therefore, it may be difficult to protest within 30 days things that are unknown at the time of the promulgation.

Petitioner contends, however, that Leedom v. Kyne supports the position that a person always may challenge a regulation as facially inconsistent with the authorizing statute. But this Court has pointed out in later cases, most recently last June in Briscoe V. Bell, Footnote 13, that Leedom did not establish that principle. Leedom was a case in which judicial review was conditioned on a final order by the National Labor Relations Board. It was necessary to construe that ambiguous term in order to determine when review was appropriate. If in Leedom, that term had not been construed to make review available, it might never have been available.

But those problems don't arise here.

QUESTION: Didn't Leedom involve a certification of a bargaining unit?

MR. EASTERBROOK: Of a bargaining unit.

QUESTION: And isn't review always available on an a(5) violation for refusal to bargain?

MR. EASTERBROOK: It would be available only if the employer then refused to bargain.

QUESTION: Right. And that's the normal way in

which it is reviewable. It is reviewable thousands of times a year by the Board, isn't it?

MR. EASTERBROOK: Yes, it is. But in Leedom the question was inclusion of particular employees in the bargaining unit.

QUESTION: Right.

MR. EASTERBROOK: And the employer and the employee, the employer and the union were then going to bargain. There never would have been any 8(a)(5) violation in Leedom. The 8(a)(5) violation can come about only if the employer refuses to bargain.

QUESTION: Refuses to bargain and he can refuse to bargain because he says this is not the appropriate bargaining unit.

MR. EASTERBROOK: That's right, but that wasn't going to happen in Leedom. The people --

QUESTION: It couldn't happen because Leedom said that an appeal was allowable before it happened.

MR. EASTERBROOK: But, my point, Mr. Justice Stewart, was that there was going to be no review in Leedom because the employer had already said that he was willing to bargain. So it was a case in which there could be no effective review at all. That was the need to resolve the ambiguity.

Later cases, such as Brotherhood of Railway Trainmen, have construed Leedom rather narrowly. And, in any event,

Leedom did not involve a review preclusion statute, like Section 307, nor did it involve what 307 involves. It is not a complete preclusion of review. It is a statute requiring contentions to be made in a particular court at a particular time. It does not bar Adamo from challenging the regulation. It simply --

QUESTION: If there is any practical -- You mentioned the word "practical" a couple of sentences ago -- If you take a wrecker out 2,000 miles away from Washington who doesn't read the Federal Register, and so forth, and has a very small business, this kind of a statute really practically bars him from challenge, doesn't it?

MR. EASTERBROOK: I don't think that is so, Your Honor. There are a number of means that small contractors have to address these kinds of problems. One is to form a trade association, which the National Association of Demolition Contractors is, which acts effectively as the agent of all of the small demolition contractors for reading the Federal Register and advising them of their interests, and in some cases including a subsequent challenge to the regulations at issue here, the National Association of Demolition Contractors has filed a petition for judicial review, acting to protect the interests of its members. That kind of collective action is always available to small contractors.

But the second answer is that I think that it is

appropriate for Congress to require small contractors to read the Federal Register. When contractors are dealing, as they are here, with a material like asbestos which is one of the most potent cancer-causing agents known, it is not unreasonable for Congress to pass a statute which tells those who may cause the deaths of innocent people to read the Federal Register to protect their interests.

QUESTION: I may agree with that, and perhaps all the Court may agree with that, but I think you should delete the word "practical" then from your argument, because as a practical matter many, many small businessmen would be precluded from reviewing this sort of thing.

MR. EASTERBROOK: I didn't want to imply that all of them would read the Federal Register, and I retract that kind of suggestion.

The second argument, which we have discussed briefly already, is that Section 307 applies only to emission standards and that therefore you have to decide first whether something is an emission standard in order to know whether review is precluded in the District Court.

I think the answer to that, as I said to you earlier, Mr. Justice Stevens, is that that makes jurisdiction turn on the merits, and it makes it turn on the merits in a way that would make Section 307(b) completely ineffective.

One of the things that can be done to challenge

regulations of this sort is to contend that they are not only not emission standards, but they are not emission standards because they are arbitrary, capricious, an abuse of discretion and the like.

It is clear that Congress did not authorize the Administrator of the EPA to be arbitrary or to be capricious or to abuse his discretion, or to do something that on its face is unreasonable.

All of those things are reasons why the Administrator has acted unlawfully, and therefore has not promulgated the kind of emission standard that the statute contemplated. But if those kinds of contentions are open, then Section 307 (b) means nothing, because those are surely at the core of what Congress intended to preclude, as I think are contentions that rather than regulating emissions of asbestos in one way, by requiring it to be wetted, it should have regulated emissions of asbestos in some other way, that is by setting numerical standards.

All of those attacks on how the Administrator ought to go about the business of regulating asbestos emission are the kinds of things that Congress intended to be reviewed in the District of Columbia Circuit, and that therefore cannot be reviewed now.

QUESTION: Mr. Easterbrook, there is a rather clear difference between what the statute says, in the category you

describe "arbitrary and capricious and the like," it is quite clear that the statute purports to preclude review because you are dealing with an emission standard, albeit one that is arbitrary and erroneous. But if your question is whether or not it is an emission standard -- It is true you have to decide the merit to decide the jurisdictional issue, but I am not sure that's an answer.

MR. EASTERBROOK: In part, I think, we may have become engaged in a semantic exercise. My point, and perhaps an excessively semantic one, was that it is always possible to say that because the regulation was arbitrary and capricious it was not the kind of emission standard that Congress contemplated at all.

Ultimately, what Petitioner is arguing is that what the Administrator did is not the kind of emission standard Congress contemplated. Petitioner agrees, I believe, that Congress intended the Administrator to regulate asbestos and to control the amount of asbestos that could come off into the air. What this dispute is about is how best the Administrator should do that, and whether Congress authorized him to do it in a particular way.

And, although you can, it is true, always phrase that question as to whether there is any emission standard at all, it is equally reasonable to phrase it as the question whether the emission standard that the Administrator promulgated

was the kind of thing that Congress had in mind.

QUESTION: Would any of your arguments be any different, Mr. Easterbrook, if the time period was 10 days?

MR. EASTERBROOK: Those kinds of arguments would go, Mr. Chief Justice, to whether the procedures for review established an adequate forum in which it could be reviewed.

We understand Petitioner's answer to Mr. Justice White. He is not contending that the opportunity for review was, in fact, inadequate. Petitioner said that he is going to reserve these for disposition at the trial. We believe that they cannot be so reserved under Rule 12(b) of the Rules of Criminal Procedure. But in any event, Petitioner is not making any argument that the opportunity for review in the District of Columbia Circuit was inadequate. And I think the 10-day review would pose more difficult questions.

I think I ought to point out that Congress has been sensitive to these kinds of concerns. The most recent legislation, which the President signed in August and which we refer to in the first footnote of our Supplemental Brief, extends from 30 to 60 days the time within which to challenge the provision of the District of Columbia Circuit. So that Congress has been very careful not to cut off necessary opportunities to receive and study the regulation before deciding whether to object.

QUESTION: Do you know of any other federal statute

that has a 30-day limitation?

MR. EASTERBROOK: Your Honor, there are a number of such statutes which are collected in one of the footnotes to our brief. The Federal Trade Commission and the Securities and Exchange Commission statutes contain 30-day limitations. And in both of those cases violation of the rules can be criminal, can lead to criminal prosecution.

QUESTION: Is there still a 10-day limit on criminal appeals?

MR. EASTERBROOK: Yes, there is, I believe, Your Honor.

QUESTION: Of course, everyone in a criminal case is quite aware of all of the conditions at the time the 10 days begins to run.

MR. EASTERBROOK: Ten days would sometimes get exceedingly close, in light of the possibility of mail delays or perhaps negligence in delivering the mail, the subject of an earlier case.

QUESTION: Mr. Easterbrook, assume for the moment, that the statute, in addition to authorizing the Administrator to promulgate emission standards, contains an exception, the substance of which read quite explicitly that the Administrator would have no authority to promulgate work rules. And let's assume further that the Administrator went ahead and promulgated what fairly could be characterized as a work rule.

Assume further there would be no appeal within the 30-day period. Would that present a different case?

MR. EASTERBROOK: No, Your Honor, it would not. It would be the position of the United States that that complaint should be raised within 30 days in the District of Columbia Circuit.

The question, one again of national applicability and one that ought to be resolved very quickly, is whether this is or is not the kind of thing that Congress forbade.

QUESTION: Even though it is perfectly clear that the Administrator had violated the Act of Congress?

MR. EASTERBROOK: I believe so, Your Honor. It should be resolved in the D.C. Circuit.

The final ground for challenging, for arguing that there is jurisdiction in the District Court, was one raised by the District Court itself, which is that Section 307(b)(1) refers only to the action of the Administrator "in promulgating" an emission standard. The District Court thought that this meant that it referred only to procedural flaws and not to substantive flaws.

The answer to that, of course, is that if 307(b)(1) is interpreted in that way the evident desire of Congress is again defeated, because it is impossible to have unified and prompt review of the substantive rules.

Indeed, if the District Court were correct, the

District of Columbia Circuit would have absolutely no authority to review the substantive portions of the objection. But the District of Columbia Circuit has held that it does have such authority, and we think rightly so.

Petitioner's ultimate argument is simply that it is unfair to foreclose its attack on the regulation. We do not see the unfairness which Petitioner protests. Public regulatory offenses, of which this is one, are often strict liability offenses, that is, criminal sanctions can be imposed without any form of mens rea. The statute at issue here does not make violation of the regulations a strict liability offense. Emission in violation of a regulation is criminal only if done knowingly. But what it does require is that persons read the Federal Register at their peril or obtain someone else to do that for them. It is a standard --

QUESTION: You mean fail to read it, fail to have it available?

MR. EASTERBROOK: Find out what is going on in Washington that might effect their interests and take care of them.

QUESTION: That's a large undertaking, don't you agree?

MR. EASTERBROOK: It's a large undertaking and that, I think, is one of the reasons for the formation of the National Association of Demolition Contractors. But my point

is that it is not unfair for Congress to require members of the industry to undertake that kind of project to understand and protect their own interests within a period of time.

Petitioner, or someone acting in his behalf, had 30 days within which to file a petition for review, and the statute does provide that if any reasons arise later that would be good grounds for review they may be raised later. The statute is simply a plan that allocates judicial review to a particular court at a particular time. And we believe that it should be respected.

I would like to make one final point in answer to Mr. Justice Brennan's first question of Mr. Lipnick. The case is still a live one, Mr. Justice Brennan, even though the statute has been amended, because the acts at issue here took place before the Amendment. This is a criminal enforcement proceeding and the ex post facto clause would prohibit the application of the 1977 Amendments to this case, assuming that the 1977 Amendments changed the law. It is our position that they did not change the law, and the legislative history of those Amendments indicate that Congress was simply clarifying authority that the Administrator already possessed. But if, in fact, Petitioner is right that the 1977 statute did not authorize this regulation, this criminal prosecution would not be assisted by the 1977 Amendments.

QUESTION: You said it didn't change the law but it

says that -- words of the statute now, not the legislative history. The August 1977 statute talks about when it not being feasible to prescribe an emission standard the Administrator may instead promulgate work practice standards.

That sounds like they are two different animals, doesn't it?

MR. EASTERBROOK: It does, Mr. Justice Stewart. We have addressed that problem in Footnote 2, two pages over --

QUESTION: I know, by referring to the legislative history.

MR. EASTERBROOK: By referring to the legislative history. We think it clear from the legislative history that the reason Congress addressed them as two different animals in the statute was to restrict the Administrator's authority to use work practices instead of numerical limitations.

QUESTION: Well, it says -- I left some language out, as you know -- design, equipment, work practice or operational standards. What we are involved with here is a work practice standard.

MR. EASTERBROOK: Yes, Your Honor.

QUESTION: It is not very explicit.

MR. EASTERBROOK: It is not, but I think that what Congress had in mind by giving them different names was --

QUESTION: It certainly indicates they were different things, if you have to call them by different names, doesn't it?

MR. EASTERBROOK: If you want to achieve, if you want to say that the Administrator must prefer numerical units to work practice limitations, then I think you have to call them by different names. But the requirement that the Administrator prefer one to the other is a new requirement that we think was not present in the 1970 statute.

Thank you, very much.

QUESTION: May I ask just one question about the new statute that I don't -- It may be clear from the text, but I am not sure. Did Congress also amend 307(b) at the same time to make it clear that review of the work practice rule would be in the Court of Appeals?

MR. EASTERBROOK: It did not amend that in 307(b). 307(b)(1) still refers to emission standards promulgated under Section 112.

QUESTION: Thank you.

QUESTION: Where do you now review work practice standards?

MR. EASTERBROOK: They are treated as emission standards, promulgated under Section 112 and reviewed in the District of Columbia Circuit.

QUESTION: By what authority?

MR. EASTERBROOK: Under Section 307(b)(1).

QUESTION: Well, that's the most circular thing I ever heard of.

MR. EASTERBROOK: The statute is not a model of legislative draftsmanship, Mr. Justice Rehnquist.

MR. CHIEF JUSTICE BURGER: Mr. Lipnick.

REBUTTAL ORAL ARGUMENT OF STANLEY M. LIPNICK, ESQ.,

ON BEHALF OF THE PETITIONER

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

I have only a few brief observations.

First, the National Association of Demolition Contractors which suddenly seems to have backed in as a party to this case, was in fact first organized within a very few months previous to the promulgation of the work practice regulation. It is true that the National Association of Demolition Contractors now undertakes certain legal activities which might be described as done jointly for its members. It is also true that that legal work was undertaken in response to the very problem which underlies this very case which is that small businessmen do not read ten and twenty thousand pages of fine print of the Federal Register every year, and they particularly don't do it in 30 days. And I am not aware of any Act of Congress which says that they have to do so.

I think a reference was made to the notice of proceeding of the Administrator from the standpoint of publishing a proposed regulation for comment. I am not sure that my client, Adamo Wrecking Company, knew about the proposed regulation, either. I am not sure that any wrecking company knew about it. I am sure that anybody picking it up to read it would find on the very first page, 23239 of Volume 36 of the Federal Register, quote: "The sources covered in the asbestos standard are: mining, milling, spraying and manufacturing." Period, close quote. I think --

QUESTION: May I ask you: In the criminal enforcement proceeding, what is the state of knowledge by the defendant supposed to be for liability?

MR. LIPNICK: As a matter of law?

I believe under the Boyce Motor Lines case we have to be shown to have knowledge of the facts which would constitute a violation of the law. I take that to mean we have to know that the material we are dealing with is, in fact, friable asbestos, as defined in the regulation, and that we must also know that whatever it is we are proved to have done would in fact cause an emission of that material.

QUESTION: But it isn't required that you know anything about the law.

MR. LIPNICK: I believe that this Court's decisions in Boyce Motor Lines and its progeny make it very clear that

our knowledge of the law is absolutely irrelevant.

QUESTION: I just wondered if, under this statute, it imposes any different standard?

MR. LIPNICK: Not that I am aware of. I think the word is just knowingly, and I think that's -- the meaning of that term is well settled.

I think that it is obvious on the face of the statute that Congress did not tell the Administrator of the Environmental Protection Agency, "Just go out and do whatever you think is best to control emissions of asbestos." Congress, for whatever reason, and as the 1977 Amendments teach us, Congress changed its mind and was persuaded that it should have done something differently in the first place. Congress originally told the Administrator to go out and promulgate an emission standard.

I think even before the 1977 Amendments, there is no way that this Act can be read as a whole, and particularly the references in other sections of the Act to emission standards. There is just no way that one can conclude that it's reasonable to think that an emission standard is now or ever could have been the same thing as a work practice rule. They must be different things.

QUESTION: What if Congress had passed a law that simply said anything labeled an emission standard by the Administrator and not challenged within 30 days of its

promulgation, shall be deemed written into the statute itself? Would you have any case?

MR. LIPNICK: I think -- Well, the closest case I would have would be Thermtron from last year, which, if I recall correctly, the statute said a decision remanding to a state court was absolutely unreviewable. And this Court said that it was at least reviewable to ascertain that the trial judge had remanded on a ground specified as a basis for remand in the statute.

I think if we can have that much inquiry here we can look to see whether this regulation is, in fact, an emission standard. That's what we are charged with violating, an emission standard. There is no section of this Act which says, or at least we are not -- There is a section of this Act, 113, if I recall correctly, which says that it's a crime to knowingly violate any regulation issued as part of a state implementation plan, under Section 110. It is a crime to violate any regulation issued under Section 110 as part of a state implementation plan.

The section we are charged with violating does not say it's a crime to violate any regulation the Administrator might issue. It only says it's a crime to violate an emission standard. And if we can have the same scope of review as was accorded in the Hermensdorfer case last year, I think that is enough to allow us to show that this regulation is not an

emission standard, if indeed, we are asking for review of the regulation.

In our view, we still think that there is a substantial question whether we are asking for a ruling by the trial court on whether this indictment alleges an essential element of the crime.

QUESTION: Mr. Lipnick, if we should be persuaded that the jurisdictional issue depends on whether or not it's an emission standard -- In other words, you have to decide the merits to decide whether 307(b)(2) applies. In your view, should the District Court decide that question or should we send it back to the Court of Appeals? Because the Court of Appeals did not decide that question, if I remember.

MR. LIPNICK: In our view, sir, I think the record is perfectly adequate to enable this Court to decide it, particularly with the 1977 Amendments which I think make abundantly clear that a work practice rule just is not the same thing as an emission standard.

And the Government, just today, said in the Government's view, the 1977 Amendments don't change the law. I think that even without those facts, I think it is so clear on the face of the statute that this Court can decide the question in the interest of judicial economy. But with the addition of the '77 Amendments and with the Government's position that the '77 Amendments don't change anything, I

think that if this Court should conclude that there is jurisdiction, I don't see how there is any room for doubt as to the result.

If I recall correctly, in the Perkins case, which is cited in the Government's brief, this Court indicated that where the record was adequate to enable this Court to decide a question which had not been decided by the Court of Appeals, that it would do so in the interest of judicial economy. And I would suggest that would be appropriate in this case.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:44 o'clock, p.m., the case in the above-entitled matter was submitted.)