ORIGINAL



In the

# Supreme Court of the United States

DUKE POWER COMPANY AND
U.S. NUCLEAR REGULATORY
COMMISSION, et al.,

Petitioners,

v.

CAROLINA ENVIRONMENTAL
STUDY GROUP, INC., et al.,

Respondents.

No. 77-262 and
No. 77-375(Consolidated)

Washington, D.C.
March 20, 1978

Pages 1 thru 58



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| Petitioners, | : | |
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| CAROLINA ENVIRONMENTAL STUDY GROUP, INC., ET AL., | : | |
| Respondents. | : | |

Washington, D. C.

Monday, March 20, 1978

The above-entitled matter came on for argument at 11:36 o'clock, a.m.

BEFORE:

STEVE C. GRIFFITH, JR., ESQ., General Counsel, Duke Power Company, P. O. Box 2178, Charlotte, North Carolina 28201, for the Petitioner in No.77-262.

WADE C. McCREE, JR., ESQ., Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioners in No. 77-375.

WILLIAM B. SCHULTZ, ESQ., 2000 P Street, N.W., Suite 700, Washington, D. C. 20036, for Respondents.

# 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 Nos. 77-262 and 77-375, Duke Power Company and United States Nuclear Regulatory Commission against Carolina Environmental Study Group.

Mr. Griffith.

ORAL ARGUMENT OF STEVE C. GRIFFITH, JR., ESQ.,

ON BEHALF OF THE PETITIONER (No. 77-262)

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

The United States District Court for the Western District of North Carolina declared the limitation of liability provisions within the Price-Anderson Act to be unconstitutional. Duke appealed to this Court on two questions. First, is the cause justiciable under Article 3 of the Constitution and, two, whether the limitation of liability provisions is unconstitutional under the Due Process Clause?

The Atomic Energy Act of 1954 was passed by Congress to encourage the widespread application of the peaceful use of atomic energy in medicine, agriculture and industry, but particularly in the generation of electric power. By 1957, Congress had determined that economics was the foremost obstacle to the development of nuclear power plants.

I say this because of the "but for" argument which is so central both in Plaintiff's brief and in the opinion of the

court below. If there is a "but for" argument or cause in this matter, it is with the Atomic Energy Act of 1954 and not with the amendments that consist of the Price-Anderson Act.

But Congress determined that there was a further problem to the development of the nuclear power plant and that was the potentially great liability exposure for a large accident, although the probabilities of such an accident occuring were exceedingly small, so small, in fact, that they were not being creditable, although the possibility did exist.

The Price-Anderson amendment to the Atomic Energy Act of 1954 was the congressional solution to this problem. Price-Anderson has two objectives. The first is to protect the public against uncompensated loss resulting from the peaceful uses of atomic energy, and second to protect industry against the risk of unlimited liability in the unlikely and remote event that a catastrophic accident might occur.

Limitation of liability provisions is not peculiar to the United States with respect to nuclear power plants. Nineteen nations have legislated similar legislation, as shown in our Exhibit 19. The objective of protecting the public in Price-Anderson was accomplished in two ways, first, through mandatory insurance and, second, through governmental indemnity.

QUESTION: Does the Price-Anderson Act supersede all State law covering recoverability of damages in this area?

MR. GRIFFITH: Yes, sir. There were no State laws

passed with respect to the Atomic Energy Act of 1954, nor were there any limitations of liability provisions or special acts to compensate --

QUESTION: Well, I presume, under North Carolina law, if an atomic plant blew up it wouldn't have taken a special North Carolina statute to permit recovery for damages.

MR. GRIFFITH: No, sir, it would not have.

QUESTION: Did the Price-Anderson Act, in effect, pre-empt State damage remedies in this situation?

MR. GRIFFITH: Yes, it removed the common law remedy of unlimited liability.

QUESTION: Could each State do that on its own?

MR. GRIFFITH: I don't think so in this particular case, since Congress --

QUESTION: I should have narrowed it. Not as to atomic energy, but could each State on its own simply provide that there would be no actions for injuries of the described character?

MR. GRIFFITH: Yes, sir, I think so. The Workmen's Compensation laws are State laws. All States have those. There are limitations on common law rights.

QUESTION: Once the Price-Anderson Act had been enacted then you indicated there is a preemption of the whole field.

MR. GRIFFITH: Yes, sir.

QUESTION: Doesn't the Act say so in so many words?

MR. GRIFFITH: Well, sir, this Court has found that in the Northern States Power case that Congress has very clearly preempted this field.

QUESTION: My question was: Does the Price-Anderson Act say that to the extent of this limitation it preempts all State law? Does it say so in terms?

MR. GRIFFITH: I don't recall any specific words with respect to that, no, sir.

QUESTION: Certainly, it would not have materially advanced the purpose that you say it was intended to serve if it simply provided for a limitation of liability and diversity actions in Federal District Courts, but placed no limitation of liability on State courts, would it?

MR. GRIFFITH: No, sir. What it did, in effect, was to create a Federal fund, if I might, out of which claimants from a possible accident might proceed against, rather than the individual industries involved if the accident were unlimited liability.

QUESTION: Doing that, doesn't that have to preempt State --

MR. GRIFFITH: Yes, sir, I think it does, absolutely.

In 1966, Congress created absolute liability for any substantial nuclear accident by requiring mandatory waivers of defenses. Further amendments were made in 1975. The Statute

of Limitations waiver was extended further and a second self-insurance pool of liability insurance was established and this will phase out the governmental indemnity and will allow the limitation of liability, currently $560 million, to move upward. By 1985, that limit could be $1 billion.

Congress also expressly stated in the Act in 1975, with respect to the possibility that an accident might exceed $500 million that it will "take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude."

There are now 62 operating nuclear power reactors in the United States, producing approximately 10% of the nation's electricity, and there are approximately 150 either planned or under construction.

No accident at a nuclear power reactor, involving radiation injury, disease or death to a member of the public has ever occurred. A nuclear explosion at a power reactor is not possible. The only way that a catastrophic accident could occur would be coal melt which breaches the containment building and releases a large amount of radioactive material. Just like a coal-fired plant, a nuclear power reactor produces heat to turn water into steam to drive the turbines to produce electricity. A nuclear power reactor obtains its heat from its uranium fuel in two ways. Approximately 93% of the heat is obtained by way of nuclear chain reaction, and the balance,

about 7%, comes from the decay of nuclear material.

The nuclear chain reaction may be stopped in a fraction of a second, so that it produces no further heat. But the decay heat cannot be so quickly terminated. A coal melt would take place if the fuel were deprived of its normal and emergency cooling waters, so as to allow the heat to build up. This could cause the fuel to melt. The heat thereby created could be sufficient to melt through the bottom of the building, or possibly lead to a breach of the containment building.

Because a breach of the containment building poses the threat of a large-scale accident taking place, in terms of damages to the off-site public, the greatest care is taken of the design construction and operation of the reactor, in order to reduce to the absolute minimum the attendant risk to the public.

Congress passed Price-Anderson on the findings that the risk of a very large accident occurring was exceedingly small. This finding has been substantiated by further and extensive studies and the operating experience of the nuclear power reactors.

In 1965, the Joint Committee of the Congress reported that the likelihood of a major reactor accident was exceedingly low, and that no reactor would be licensed in this country if there was "a reasonable likelihood that its operation might result in an accident of the severity contemplated by the Price-

Anderson legislation.

The reactor safety study, under the direction of Professor Rasmussen of MIT and a professional staff of 60 persons, was published in October 1975. The study confirmed previous findings by Congress of the very low risk of a catastrophic accident occurring. Plaintiffs and other critics differ with this study in terms of the extent to which the study's estimates of an accident of such magnitude occurring might be in error. Plaintiff's own witness put the error at "like a factor of 10." Because he said, "For an error much in excess of 10 one would find a contradiction with the present operating experience." Now that was more than a year and a half ago.

While the court below said, "It is not a bookie," the unblemished operating experience of 300 reactor-years in this country and 1,000 years worldwide, received scant attention from the court below. As one witness put it, "If there were any higher probability of an accident scenario, we would at least have seen some damage to the public or the environment in all of the years of reactor operating experience."

Now, addressing the questions in this case. First, as to the justiciability issue, we have discussed the case or controversy issues in our main brief, pages 27 through 52, and in Appendix A. We stand on our arguments there and would not further argue them, except to say in our view the mere possibility of an injury from a postulated accident is not

enough to give standing.

Turning now to the arguments on the merits, Congress has legislated in a field in which it has undoubted power. It relied primarily upon the commerce power, but there are others, national defense, the general welfare and the bankruptcy power.

In the field of economic regulation, once Congress has acted within its power, the presumption of constitutionality attaches, and in a case like this the burden is on the complaining party to demonstrate that Congress has acted in an arbitrary or irrational way.

Plaintiffs have failed to carry this burden and, by implication we suggest, admit that they cannot meet the rationality standard when they suggest a higher standard of review. They first suggest that the issue here is similar to that decided in the sterilization case of Skinner v. Oklahoma. They then retreat from that position, advocating an intermediate level of review. But that position is not held for very long, for in the very next breath they revive the test of Skinner when they say that Price-Anderson is the "but for cause" of a nuclear catastrophy that is certain to occur. They say "the fact that the Government is a principal cause of the injury also makes this case like Skinner, since it was the State in Skinner that ordered the sterilization."

The implication of this argument is crystal clear. And that is that the decision by Congress to encourage the

peaceful applications of atomic energy in the private promotion of nuclear power plants to provide a diverse energy source for this country was a reprehensible decision. Therefore, they argue this Court should agree with them and substitute its judgment on this question of national policy for that of Congress. The decisions of this Court are clearly to the contrary.

This Court has repeatedly said that it is only concerned with the power of Congress and not with its wisdom. Only if the statute manifests a patently arbitrary classification utterly lacking in rational justification, is it unconstitutional. The test provided in Fleming v. Nestor. But, even assuming for the sake of argument, that a higher standard of review is necessary, the Price-Anderson amendments meet a carefully tuned balancing of alternative considerations.

Congress could have and did consider alternatives. Among those were unlimited governmental liability and a direct insurance program with a compensation plan.

QUESTION: You say it meets a carefully tuned balancing of competing considerations. That's for the nine of us to decide?

MR. GRIFFITH: Yes, sir. That is, if you go to a higher standard of review than the rationality test. The rationality test which I think -- and we urge very strongly in this case -- is simply one, was there any basis on which a

rational finding can be made for Congress legislating in this field? And certainly the evidence is clear that Congress had.

QUESTION: But when it comes to the fine tuning, then it's our decision, rather than Congress'.

MR. GRIFFITH: Yes, sir, and we submit that the Act does meet that fine tune.

The answer to the problems perceived by Congress to the development of the nuclear power industry was Price-Anderson, and that was to require industry to guard against accidents of a conceivable, though not expected magnitude, by available insurance, to assure the public of protection above that amount up to a point, but refused to commit in advance public monies to pay the cost of an almost inconceivable catastrophe. That result is eminently rational and reasonable.

But this Court has never applied either strict scrutiny or an intermediate standard of review to a statute which limits liability or otherwise modifies common law remedies for future torts. It has instead considered whether the statute serves a legitimate legislative purpose for dealing with a perceived problem. This, we contend, is the rationality test.

But if more than rationality is required, such as in the suggestions that this Court has required in the removal of common law remedies that a quid pro quo must be provided each place. We don't subscribe to that view, but if that is assumed

for argument sake, we suggest that the Act provides substantial quid pro quo. It assures a fund to pay claims. It imposes absolute liability. It waives short statutes of limitation. It provides for part payment of claims without releases. It provides for fair treatment of latent injuries, and it eliminates completely the rush to the courthouse door which would exist without the substitution of Price-Anderson for the common law State remedies. It eliminates the rush to the courthouse door to establish a claim and to perfect a judgment lien. And funds are available to pay claims without regard to who is liable.

Turning now to Plaintiff's argument that the remedy provided by Price-Anderson is inadequate, this argument is based upon two fallacious assumptions. The first assumption is that the catastrophic accident they describe is certain to occur. The second assumption is that following such a catastrophic accident Congress will do nothing.

The first assumption is contrary to the conclusion Congress reached in light of all of the information which was before the District Court, and much more. And the second assumption is contrary to the pledge of Congress stated in the law, and also contrary to the history of Congressional appropriations with respect to national disasters, which it is interesting to note Plaintiff's acknowledge in other contexts. Plaintiffs also attempt to explain away the analogy of the

limitation of liability in connection with ships and airlines, by suggesting that in the case of ships the injured bystander could have insured against the loss, and with respect to air lines, the injured person may receive up to the limit of $75,000 per claim.

But in the case of Price-Anderson, the insurance is provided not by the innocent bystander but by the industry and even with a limitation of liability of $560 million an accident with 5,000 claimants will yield up to $112,000 per claim.

QUESTION: If a quid pro quo were under a Constitutional law required in order to limit liability in this way, would you say that if all Congress had done was to say, "We'll take a careful look at the situation," after a catastrophic accident occurs would be enough?

MR. GRIFFITH: Well, sir, the quid pro quo would be provided if Congress acts after the fact.

QUESTION: But we'll never know.

MR. GRIFFITH: That's precisely the question we raised in our jurisdictional --

QUESTION: That goes to standing, too.

MR. GRIFFITH: We will never know. If Congress does act -- and I think it is more logical to assume that they will than they won't -- in the event of a catastrophe of the limits as described in this case, then it satisfies the due process requirement.

QUESTION: Can one Congress bind the next Congress? Can this Congress bind the future Congress?

MR. GRIFFITH: No, sir, I don't think it can.

QUESTION: You didn't really answer my brother Rehnquist's question, as indicated by my brother Marshall. His question was: Would a statement of good intention to consider this whole thing in the event of a catastrophe be enough of a quid pro quo, assuming that quid pro quo is constitutionally required? You said Congressional action would be, but that wasn't his question.

MR. GRIFFITH: The direct answer to that, in my opinion, is no.

Surely the limitation of liability of six additional and diverse energy suppliers by encouraging the private development of nuclear power is at least as rational as are the limitations of liability found acceptable in the shipping and airlines industries and in the Workmen's Compensation cases.

I will reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: We will resume at 1:00 o'clock with the next argument.

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

AFTERNOON SESSION

(1:02 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, you may proceed whenever you are ready.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE PETITIONERS (No. 77-375)

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

This appeal requires this Court to decide whether the provision of a comprehensive statutory program designed to protect the public and to encourage the development of nuclear powered electric generating facilities by providing for the licensing and regulation of such plants, by abolishing defenses and extending statutes of limitations, by providing for the establishment of financial protection for possible public liability, that imposed a limitation of liability, is unconstitutional is repugnant to the Fifth Amendment.

QUESTION: General McCree, when you say that this appeal requires this Court to decide the question, I take it that's on the assumption that we adopt your view of standing.

MR. McCREE: Indeed, and it was presumptuous to state it so categorically. But if the Court reaches the merits that would be the issue that the Court would address.

My brother has discussed the grounds set forth in the decision of the District Court for finding that this

provision of Price-Anderson was unconstitutional, specifically the due process ground and the equal protection ground that is implied in the Due Process Clause of the Fifth Amendment.

I would like to address myself to the issue that was not relied upon by the District Court, but that Appellees urge in their response at pages 22 through 26 and in their brief, that this limitation of liability constitutes a taking of private properties for public use without just compensation.

First, we submit that there is no protectable property here, within the meaning of the Fifth Amendment. There is perhaps an expectation of recovery in the event of an actionable wrong that has not yet occurred and may not occur. We submit that there is no vested right of recovery in something as supposititious as that, and that this is not protectable property within the meaning of the Fifth Amendment.

Further, we submit, that there is no taking here by the enactment of the Price-Anderson legislation. This is a regulatory measure and it does not even regulate property owned by Appellees. It regulates property that might conceivably, under some circumstances, affect property owned by Appellees.

QUESTION: In your view, could the Act have equally well and equally in compliance with the Constitution provided for no liability at all?

MR. McCREE: That's the question that really tests the rule. I can conceive of circumstances under which it

could, but with a different statutory scheme. For example, the Government, initially, had a monopoly of all fisionable material. Indeed, the statute provided that possession of facilities for the use of fisionable material and possession or transportation of fisionable fuel was a crime.

I suppose if the Government had kept its monopoly and had built these plants itself it would not have had to provide for compensation. I suppose then compensation would be obtained by anyone injured through the Federal Tort Claims Act. Whether the Federal Tort Claims Act is mandated by the Constitution, I am not quite sure.

QUESTION: Well, before the Federal Tort Claims Act, of course, there would have been no liability on the part of the Government.

MR. McCREE: Indeed, and, if the Court please, that's what I am suggesting. If the development of nuclear powered electrical plants had remained in the Government, I think there is a way where -- just to answer the Court's question -- as I said, goes to the limit in testing the proposition.

QUESTION: If no act had been passed at all, then injured persons would be -- Would they be left to their State remedies in each case?

MR. McCREE: I would, of course, suppose so, if the Court please.

QUESTION: But if the whole business had been left

with the Federal Government, there wouldn't have been any State remedies, presumably. There would have been an action against the Federal Government, but that would not have existed because of sovereign immunity, in the absence of something like a Federal Tort Claims Act.

MR. McCREE: I do not understand that premise to have been implicit in the Chief Justice's question, but I certainly agree with the Court. If the Federal Government had retained its monopoly of atomic power, that certainly could have resulted. But here there is regulation of property not owned by Appellees in which Appellees have no interest. And so, again, we say this is not a taking, in addition to their not being protectable property.

Finally, although Appellees don't make this argument fully, it might be urged that if their property was taken or if they were deprived of substantial enjoyment of it by the action of a regulated utility, that that might constitute a taking. We suggest that this Court has suggested that the taking of private property by State regulated facilities is not a taking by the State. Therefore, we think this argument, that the District Court did not make in support of its judgment, but that Appellees make in their brief, also must fail, as must their argument related to due process.

My brother spoke about the matter of whether there was an adequate quid pro quo, and he was asked to suppose that

a quid pro quo is required by due process, if a remedy is to be abolished or altered. We submit that this Court has never stated that a quid pro quo must be provided, but that in the event it is required that the Congress, by providing for $560 million that are immediately available to enable any one of these licensees to respond in damages for injury to person or property is more than an adequate quid pro quo for the elimination -- for the limitation that's placed upon a common law remedy here.

We also suggest that there is more than just the $560 million, of course. There are venue requirements that are advantageous. In partial response to the question put to my brother by Mr. Justice Rehnquist, there is not a preemption of State law by this litigation, but there is a grant of original -- not exclusive, but original -- jurisdiction in the District Court to hear actions arising out of incidents --

QUESTION: General, do you mean that the State courts, they have jurisdiction?

MR. McCREE: It is my understanding, from my reading of the Act --

QUESTION: Do you also mean that the statute does not make the case governed by Federal law?

MR. McCREE: I think the case is governed by Federal law.

QUESTION: In whatever court --

MR. McCREE: In whatever court it is filed.

QUESTION: Something like the FELA suits.

MR. McCREE: I would think very much like FELA, if the Court please.

And this grant of original but not exclusive jurisdiction is coupled with a grant of venue in a district in which the incident occurred, or in the case of an overseas incident in the District Court for the District of Columbia. And it also interestingly provides for removal by any person from any other court to the appropriate district court, that is to say the United States district in which the incident occurred or to the District Court of the District of Columbia. So, there again, it is something else that's given if a quid pro quo is required for whatever limitation has been imposed. And we believe there is no requirement, however, of a quid pro quo, and if there is in a situation like this its value cannot be calculated precisely to permit us to determine its adequacy.

We submit, in short, that the question here is whether this is a rational legislative means of removing a significant obstacle to the achievement of a valid Federal governmental purpose. We believe that it is and we believe that this is the test by which it should be measured and, as such, that it should be found constitutional.

QUESTION: Is this a statute of the Commerce Clause? Is that -- Congressional power -- the basis of congressional

power?

MR. McCREE: Certainly, that's one source of power, I would think. One source of --

QUESTION: This would be about power plants.

MR. McCREE: Yes, if memory serves -- and it may not be correct on this. I would like the privilege of correcting it if I am in error -- I am thinking of the TVA legislation, and I think this was partly under the war powers, if I am not mistaken.

QUESTION: It would be hard to justify this statute today under the war powers.

MR. McCREE: I am not so certain about that. If energy is necessary for national defense and the purpose of the statute is to encourage the creation of energy, I suppose that's the way I make the argument. And I suspect, if I am correct about the TVA and when the Mussel Shoals Dam was built -- but I would like to look at that legislation and correct it if I've misinformed the Court about it. I had frankly not thought of that.

QUESTION: Is there any attack on this statute on the ground that it was beyond the power, congressional power of Congress to enact?

MR. McCREE: I am not aware of any. As a matter of fact, as I understand Appellee's argument, it is not so much what Congress did, it's that it didn't do enough. I think

Appellees would say that there is some point at which Congress might impose a cap on liability. It was sufficient to take care of any anticipated harm. And I think the difficulty there proves the wisdom of the rule that requires the Court to uphold a rational legislative means of achieving a valid governmental policy.

We are in a new area. Nobody really knows what's going to happen to this atomic genie that's out of the box. The Congress must necessarily be given latitude to experiment in ways of controlling it.

QUESTION: But, nonetheless, Congress is a legislative body of the Government of limited and delegated power. But I hadn't understood that there was any attack upon the basic power of Congress, under the Constitution, to enact this legislation.

MR. McCREE: I am not either, and I misunderstood the Court if my answer was not responsive.

QUESTION: Getting back to the tangential reference, at least, of war powers, suppose in this present energy crisis the President decided to seize all of the existing nuclear power plants on the ground that the whole matter had to be consolidated with and coordinated with the energy program, in other words, reasserting its monopoly which it has surrendered piece-meal in a limited way. Do you think war powers would sustain the seizure at the present time?

MR. McCREE: I would have difficulty with the

proposition.

QUESTION: It would be pretty close to the steel mills.

MR. McCREE: It would be very close to the steel mills case.

QUESTION: There is no imminent crisis that would give --

MR. McCREE: I would have difficulty with that.

QUESTION: What about reasserting the control simply not under war power but on the power of its basic monopoly?

MR. McCREE: I suppose if it did that it would be required to afford compensation --

QUESTION: Adjust taking.

MR. McCREE: Adjust taking and the utilities that have expended large sums of money would be entitled to compensation.

The argument I was endeavoring to make about the rationality of this plan in a field about which no one really knows anything is illustrated somewhat by some of the dollars involved here. When the limitation was first provided -- and the limitation has three elements -- the licensed plant must acquire the maximum amount of liability insurance available from private sources. Then there is a secondary liability pool with a $5 million retroactive premium to be paid by every licensed facility. And then the balance of liability up to

$560 million is to be taken up by the Government.

When this was first started, the maximum amount of liability insurance available from private sources was $60 million. Now it is $140 million, because the insurance industry in the light of its experience of no accidents of the magnitude that concerns Appellee. Also the restroactive premium pool has grown to $315 million. So, currently, there are $455 million private dollars available for compensation under this plan. So, the Government guarantee of the difference up to $560 million is only $105 million. And it is projected that the Government's guarantee might be extinguished in 1980. There is a further projection that by 1985 there will be $1 billion of private insurance, if the same trend continues and the same experience obtains.

We submit that this proves the wisdom of the rule enunciated by this Court of allowing the Congress the freedom to use its judgment, as long as it is rationally informed, to achieve legitimate governmental ends.

QUESTION: When this Act was passed, Mr. Solicitor General, would there have been power in the Federal Government to require any or all of these licensees or any other persons to construct and operate these plants?

MR. McCREE: Could the Congress have required them to do it? I suspect not. That gets close to the Thirteenth Amendment. I don't know that anybody can be required to do

something he doesn't want to do. We encourage them by tax considerations --

QUESTION: Subsidies.

MR. McCREE: Subsidies. But I don't believe they could require it, if the Court please.

QUESTION: I at least caught an intimation that you suggested before that this plan was, in effect, a subsidy -- you didn't call it that -- a quid pro quo, if they were willing to take the risks.

MR. McCREE: It was a partnership between the Congress and the utilities community for the private development of nuclear fueled electric generating facilities, with strict provisions for the protection of the public. Not much has been said about these other provisions and, if the Court please, one thing that disturbed me a great deal about Appellee's brief was the suggestion that this -- and by the judgment below -- was that this was an invitation to irresponsibility. Before any plant can be constructed, it must have a construction license. And the construction license is issued only after very careful investigation, making certain that the very latest techniques are employed. But the construction license doesn't permit it to operate. After the plant is constructed, another inspection or series of inspections occur before an operation license is issued. An operation license is not issued in either of these cases --

QUESTION: You are undoubtedly familiar with the power reactor development case which came out of your old circuit.

MR. McCREE: At the Enrico Fermi Plant.

QUESTION: That was the first experiment, was it not?

MR. McCREE: Yes, sir.

QUESTION: That was a consortium of 40 or 50 --

MR. McCREE: Utility plants.

QUESTION: Utilities companies. Was there any limit on liability? That was not involved in that case, but was there any contract limiting liability then?

MR. McCREE: I prefer not to answer without being certain of the dates.

QUESTION: It wasn't at issue in the case.

MR. McCREE: Price-Anderson began in 1957.

QUESTION: The only issue in the power reactor development case was whether the Atomic Energy Commission had properly evaluated the risks, was it not?

MR. McCREE: I believe that was the question but I would like to be more certain in responding.

So, if the Court please, then, the Government asks that the judgment below be reversed.

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

Mr. Schultz.

ORAL ARGUMENT OF WILLIAM B. SCHULTZ, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The fundamental flaw in Appellant's argument is that they view the Price-Anderson Act as simply another regulatory statute, and argue that it is analogous to Government regulation of such activities as mining, or that it is analogous to Government imposed rent control.

However, a careful examination of the Act shows that it is not simply another regulatory statute, and that it has four features that distinguish it from other limitations on liability.

QUESTION: Mr. Schultz, are you going to address the standing question sometime during your argument?

MR. SCHULTZ: Yes, I was, and I will address it right now, if you would like.

QUESTION: You have 45 minutes to spend as you choose.

MR. SCHULTZ: With your permission, I'll discuss the statute and then address standing before I reach the merits.

In fact -- and this is a point I would like to stress in my discussion of the statute -- the Price-Anderson Act is a unique action by Congress which severely and arbitrarily limits recovery available to victims of a nuclear accident. Rather than involving a regulation of a business, such as Duke

Power Company, the Price-Anderson Act creates a situation which could deprive persons of their homes and cause them serious health injuries, while simultaneously precluding them from resorting to their state law remedies.

The thrust of the Act is two-fold. First, it creates a pot of money, $560 million, to cover damages arising out of a nuclear accident. Second, it limits all liability of all possible responsible parties to that pot of money.

To explain how the statute operates -- and this is important to the ultimate fairness and adequacy of the remedy -- I would like to use an example of a hypothetical victim, and look at the statute and ask the question -- two questions: How much would that victim receive in the event of an accident, and what are the chances that that hypothetical victim would be compensated?

So, for the purposes of the example, I'll assume that the victim sustains $1,000 in property damage or personal injury. First, let's look at how much money the victim would recover. If the accident causes $560 million in damages or less, then the victim would recover $1,000. This is an example of an accident where the limitation on liability would not come into play. And if all accidents were under $560 million, the limitation on liability would not be necessary. In fact, this case would not be necessary.

However, for a major accident, one exceeding $560

million, the victim's share becomes proportionately smaller, so that in the event of an accident causing $1 billion in damage, his share is half, or $500. If the accident causes $60 billion in damage, then his share would be $10, or less than 1% recovery for the damages incurred.

QUESTION: What's your view, on the question the Solicitor General addressed, if the Government had maintained its own monopoly and had not licensed these plants but had itself built all of these plants? Could it have excluded all liability as a modification of the Federal Tort Claims Act?

MR. SCHULTZ: In that situation, in the event of an accident, there would be a taking. Now, no one could force the Government to actually pay the money, but there would, in our view, be a taking without just compensation and the Constitution would place the same obligation on the Federal Government.

QUESTION: What about great disasters that occurred before the Federal Tort Claims Act, when sovereign immunity was absolute?

MR. SCHULTZ: Your Honor, it's true that even under the Taking Clause --

QUESTION: Was anyone allowed to make a case on the taking concept before the Federal Tort Claims Act, for injury of the kind we are talking about?

MR. SCHULTZ: I don't know that anyone did make that case. I am aware of no cases which say that they were

prohibited.

QUESTION: Kansas City Disaster case where the Government was claimed to be liable for millions and millions of dollars in damages. The majority of the Court held that it was within the discretionary exception, the Government was not liable for anything; didn't it?

MR. SCHULTZ: Yes, under the Federal Tort Claims Act, but it denied the -- but the decision was silent on the taking issue.

QUESTION: And when the suits were brought against the United States for negligence arising out of the Kansas City flood disaster, of something like $1 billion, back in the late '40s or early '50s, no recovery was allowed.

MR. SCHULTZ: Mr. Chief Justice, I am not familiar with the facts of that case.

QUESTION: The claim was the Government, the weather bureau, was negligent in predicting the rainfall and the engineers were negligent in not predicting the flood level.

MR. SCHULTZ: The argument for taking here would be much stronger than it would in that case, because here it is not simply a matter of Government negligence. It is a matter of Government promotion, regulation and licensing of nuclear power. And the most important difference is the limitation of liability in the Price-Anderson Act.

QUESTION: On your theory of taking, when the Kansas

City floods came, they took, in a sense -- in quotation marks -- they tock hundreds of thousands of acres of land that were under cultivation and destroyed all the crops and destroyed all kinds of plants and homes. Is that basically a different -- The Solicitor General said the atomic genie was let out of the bottle. Here it was the Mississippi River and its tributaries that were let out of the bottle, as it were, allegedly by the Government's negligence.

MR. SCHULTZ: In our taking argument, and assuming that the Government were building and operating nuclear power plants or looking at this case, we are not arguing that simply because the Government is a factor in damage that it is a taking every time. But in the situation where the Government passes the limitation on liability in the Price-Anderson Act which was a precondition to nuclear power, then there the Government involvement is much more substantial.

Mr. Chief Justice, I would submit it is not dissimilar from two cases which we cite in our brief. The first of those is Richards v. Washington Terminal Company. There the Government passed a statute authorizing a railroad company to build a railroad through the City of Washington. And the statute also had the effect of nullifying the State or the District of Columbia nuisance laws, of protecting the railroad from those actions. So that, in that case then, the railroad built the railroad, it built a tunnel. Mr. Richards was a nearby

property owner. He was unhappy because the soot and smoke from the railroad tunnel came onto his property and depreciated its value. The Court held that there was a taking there. In other words, even though Congress did not actually build the railroad, just as Congress does not build the nuclear power plant, what it did in authorizing the railroad, and most important, in immunizing the railroad company from nuisance action, is precisely analogous, I submit, to what has happened here, where the Government has immunized Duke Power Company from nuisance action, or from any action, by persons injured from a nuclear accident.

I would submit that Griggs v. Allegheny County is also similar. There the Court held there to be a taking when a private airplane was flying and caused damage from noise to private property. And the Court held there to be a taking because the airport was owned by the county and the county's involvement in building the airport and marking the routes for the airline was sufficient Government involvement for their to be a taking.

If I may, I would like to return to my example of the hypothetical victim and I want to look at what the recovery would be to a victim in the event of an accident.

I had just described an extremely minimal recovery in the case of a $60 billion accident. While $60 billion may sound like an incredibly high figure, it is not unrealistic in light of the most recent Government study on the subject. That study -- and it has been referred to previously --

QUESTION: Isn't that more than Duke Power has?

MR. SCHULTZ: Yes, it's more than Duke Power has.

QUESTION: And that's who you would have if you just had -- nobody else -- it would just be Duke Power?

MR. SCHULTZ: Mr. Justice Marshall, if we did not have limitation of liability, we would not have nuclear power. So if we didn't have the limitation, we couldn't have these accidents. And while $60 billion is more than Duke Power has $560 million is very close to what Duke Power has. And, the point is, if we are as well under the Act, I submit that in the event of an accident, victims could sue not only Duke, but they could sue the manufacturer of the reactor, which in this case is Westinghouse and in all cases is a corporation with billions of dollars in assets.

QUESTION: They could sue us, too.

QUESTION: Assume our coal mines run out and the oil wells run dry and the only major source of energy is atomic power. Assume further that we can't have atomic power plants without limitation of liability statute. Would you still say the Congress does not have the power to pass such a statute and make that source of power available?

MR. SCHULTZ: It would be a more difficult case.

QUESTION: Why?

MR. SCHULTZ: I don't think we have to make the assumption that the limitation on liability is necessary.

QUESTION: You just told us it was.

MR. SCHULTZ: It is necessary for nuclear power, but it's not the only alternative for promoting nuclear power.

QUESTION: What other alternative is there?

QUESTION: Excuse me. I was just going to say I think your answer is inconsistent to Justice Stevens' question, isn't it? You say it's necessary to have this in order to promote nuclear power and yet you say it is not the only alternative.

MR. SCHULTZ: If I said it that way, I wasn't as precise as I might have been. The limitation on liability -- and this you can see in the briefs of the industry in this case and the Government's briefs and the District Court's findings -- the limitation in 1957 was a precondition to nuclear power. And some system today would be necessary, some system to protect these companies from this potentially huge liability and would be necessary in order to have additional nuclear power plants built. But the system did not have to be the system in the Price-Anderson Act.

QUESTION: May I ask this question. Suppose the Government assumed total responsibility for all damage, would you still object?

MR. SCHULTZ: No. We would concede that --

QUESTION: Your position is you are not opposing the construction of nuclear power plants?

MR. SCHULTZ: That's precisely correct.

QUESTION: But you have, from the outset of these plants, haven't you?

MR. SCHULTZ: It is true my clients are opposed to nuclear power and they are opposed to the Price-Anderson Act.

QUESTION: But they are opposed to both.

MR. SCHULTZ: They are opposed to both.

QUESTION: And they oppose the initial licensing in this case.

MR. SCHULTZ: Yes, that's correct.

QUESTION: So your basic objective is to stop the operation of this plant.

MR. SCHULTZ: No.

QUESTION: What is it?

MR. SCHULTZ: Our basic objective is to get a system where our clients would receive full compensation in the event of a nuclear accident.

And, in response to Mr. Justice Stevens' question, I think your question is a response to that question. One alternative system would be for the Government to assume this liability and that would not be -- Well, another alternative would be to have a system which spreads it among the industry, so that each company which owns reactors would be required to pay $50 or $100 million to the victims of a disaster of this nature.

QUESTION: Suppose for the moment that the Government tried to solve this problem by taking over all of the plants which they have licensed and paying just compensation, so that all the plants were being operated, owned by the United States Government as a monopoly. And then the Tort Claims Act were modified, if that was thought necessary to say that for purposes of the Tort Claims Act this is a discretionary governmental operation and no liability, whatever. Any problem about the constitutionality of that? In other words, the restoration of the old sovereign immunity.

MR. SCHULTZ: There would be no problem about the constitutionality of it, but if there were an accident, I would submit, that the victims of such an accident could sue the government for just compensation.

QUESTION: On what theory?

MR. SCHULTZ: On the theory --

QUESTION: Taking?

MR. SCHULTZ: Yes.

QUESTION: In other words, you've taken my life. If I were one of the victims, "You've taken my life, you must may widow."

MR. SCHULTZ: They could always sue for their property damage. We are not arguing that they could sue for anything other than their property damage. But in that situation victims who incurred property damage could sue the Government

for just property damage.

QUESTION: Well, in the limitation that I have placed in my hypothetical question of no liability on the Government, on what basis --

MR. SCHULTZ: If the Government specifically provided that it would not pay, I am not certain that there is anything victims could do to make the Government actually pay out the money. But, nevertheless, I would submit that they would have a constitutional claim.

For example, if the Government specifically withdrew the Tucker Act remedy, for these individuals or any individuals, then there would be no recourse that they would have.

QUESTION: It would follow if they could eliminate all liability then they can define the liability and put limits on it. Is that not so?

MR. SCHULTZ: Mr. Chief Justice, I don't think that is so. I think the interest of federalism and the prior cases of this Court require that if the Government chooses to withdraw State tort remedies, the Federal Government chooses to withdraw a State tort remedy, and particularly when it is simultaneously encouraging the activity which would cause the damage, that it is required, under the Due Process Clause, to provide some adequate remedy.

In the Workmen's Compensation cases, that this Court went through the analysis, it looked at the legislative

judgment and it determined that there was an adequate remedy. Here, Congress did not even pretend to make a legislative judgment. Senator Anderson, for whom the bill is named, claimed authorship of the $560 million figure which limits all liability. And he testified in 1957 that he literally picked that figure out of the air. In his words, he chose it as a figure that "would not scare the country to death." Representative Holifield, also a charter member of the Atomic Energy Committee, testified in 1975 that he recognized, and everyone recognized, that the figure of $560 million is an arbitrary figure.

So there is no legislative judgment here that $560 million would be adequate in the event of an accident. One alternative to Congress would be to make that legislative judgment and adequately provide in any number of ways for the victims of such an accident.

QUESTION: Well, do you think there is the same inadequacy in legislative judgments in State Workmen's Compensation Acts where you have $60 a week for the loss of three fingers for the rest of your life, and that sort of thing? Do you think that necessarily represents a very particular determination that's just what the loss of three fingers is worth?

MR. SCHULTZ: I think it represents a rough determination, and the schedules for Workmen's Compensation increase as the severity of the injury increases. I think it does represent

a rough judgment. The Legislature makes that judgment. And in the cases of this Court even when the Legislature has made a judgment -- which I submit it did not make here -- the Court has looked at that judgment to see if there is a fair exchange, to see if the remedy provided is adequate. Here --

QUESTION: Well, I take it your position -- You are probably too young to remember, but in the late '30s and early '40s a number of States had actions for alienation of affections, breach of promise of marriage, seductions, and a number of State legislatures simply repealed those actions by legislative activity. They were being abused.

Is it your position that they would have to provide an alternative remedy?

MR. SCHULTZ: No.

QUESTION: Why is that case different from this?

MR. SCHULTZ: In those cases and in the case of almost every tort statute that the legislature passes, it is looking at the law and adjusting the remedies with the eye to prov ding a fair system of compensation for the victims of the remedy and a fair way of distributing the loss.

I submit that is what was determined there. The legislature determined that the remedy was being abused and it was just too inefficient to provide this remedy. But here --

QUESTION: What if a State decides tomorrow that an action for libel just threatens First Amendment interests so

much that we are not going to allow our libel action in the State any more.

Is that constitutional, or not?

MR. SCHULTZ: Yes.

QUESTION: How does it differ from this case?

MR. SCHULTZ: Because -- Well, I guess the primary difference is that, regardless of what the legislature does, you are going to have libel and you are going to have injuries caused by negligence, and so on. But here, the legislative action was a necessary precondition to the injuries. Here, without any legislative action, you could have no injuries from a nuclear power plant.

QUESTION: What if a newspaper went to the legislature and said, "Unless you abolish libel laws, we won't be able to publish any more. We are getting stuck with so many libel judgments."

Would that change your answer to the question about a State abolition of libel?

MR. SCHULTZ: The point I am trying to make is that the libel law, either way, has very little effect on what people say and, thus, it has very little effect on the injuries. Just as I think a law making it illegal to commit an assault, if anything, deters assaults. But none of those laws, none of those legislative actions actually encourage assault or encourage libel.

QUESTION: Well, if a bunch of newspapers in a State all, in fact, went out of business, I think there probably would be a lot fewer libels, wouldn't there?

QUESTION: Mr. Schultz, doesn't the existence of a libel remedy exercise some kind of deterrent effect on newspapers and what they say?

MR. SCHULTZ: I would think it does, and the point I am trying to make is in most cases the existence of these remedies has a deterrent effect. Here, the legislative action had just the opposite effect.

QUESTION: The same thing. You repeal the libel law and you give the newspapers carte blanche to say what it wants to and to say a lot more reckless and injurious things. It's quite clear. Here, you repeal the damage limitation. You build some atomic plants and one fails and somebody's going to get hurt. Same thing. At least I don't see the difference.

QUESTION: Do you see any parallel with the efforts of some State legislatures to enact statutes that make absolute, but limited, liability for all personal injuries, applying in general, the Workmen's Compensation principle to all automobile injuries?

MR. SCHULTZ: Those actions I see as being parallel to the Workmen's Compensation statute.

QUESTION: Some of them limit the liability, do they not?

MR. SCHULTZ: Yes, they do.

QUESTION: And much below the verdicts which are currently being rendered by juries in common law actions.

MR. SCHULTZ: Yes, they do. But the ones that I am familiar with provide for recovery -- the limits are $500,000, $200,000, but the point is --

QUESTION: There is a limit?

MR. SCHULTZ: There is a limit, and we are not arguing that any limit would be unconstitutional. But the point is that in those cases the recovery provided is substantial. It is not dependent on the total injuries to all victims of the accident, as it is here. Moreover, in every other case, and this includes -- I believe it would include certain libel injuries also -- victims can purchase insurance to protect themselves.

QUESTION: Let me follow through on that. There has been a lot of talk about limitation by statute on medical malpractice liability. Constitutional?

MR. SCHULTZ: The statutes I have seen are constitutional. A limit to zero, which I submit is not far from what happened here, would raise serious questions. Even there --

QUESTION: Where do you get off that slippery slope between half million dollars and zero?

MR. SCHULTZ: Well, here I think that at a minimum the legislature is required to make a judgment that the money provided is substantial. Moreover, in the medical malpractice

analogy, at least the victims have the option of buying insurance. At least it is a consensual relationship.

QUESTION: Well, there are limitations on the availability of insurance. We even had a case here --

MR. SCHULTZ: To doctors. But to patients, there is no limitation on the availability of insurance to patients.

QUESTION: There have been many instances of physicians giving up practice because of malpractice threats.

MR. SCHULTZ: Yes, I've heard of those, but as far as the patient is concerned -- and it is the patient who is analogous to the victim of a nuclear accident -- there is no limitation on the availability of insurance. It is a consensual relationship. The patient chooses to go to the doctor, moreover, those are State statutes.

QUESTION: Well, couldn't your clients take out insurance if they wanted to?

MR. SCHULTZ: No, Mr. Justice Rehnquist, they could not.

QUESTION: Why not?

MR. SCHULTZ: Because every home insurance policy contains an exclusion, excluding radiation caused by a nuclear accident.

QUESTION: Well, there is nothing that Government has done to prevent them from taking out insurance.

MR. SCHULTZ: Yes. The Price-Anderson Act, the scheme

of providing the $560 million in insurance requires the utilities to purchase the maximum insurance available. And the insurance industry has given that as its reason why it is unwilling to sell insurance to homeowners or any property owner.

QUESTION: Mr. Schultz, let me try another one.

Suppose North Carolina passed a law that said that in its State courts in any major catastrophe no person could be subject to more than $560 million in damages.

MR. SCHULTZ: The question is would that be constitutional?

QUESTION: Would there be anything wrong with it?

MR. SCHULTZ: No single person?

QUESTION: No, total.

MR. SCHULTZ: The total damages --

QUESTION: In any single catastrophe.

MR. SCHULTZ: If that statute did not have the precise purpose and effect of promoting nuclear power or catastrophe that could cause damages many times the limitation, then I think it probably would be constitutional. But here --

QUESTION: Well, take the next step. Could the Federal Government say, "Dear State of North Carolina, we will pick that tab up," the $560 million tab?

MR. SCHULTZ: It depends on whether the purpose and effect of the legislation is to promote an activity which, as is recognized, can cause injuries many times in excess of that

figure. If it doesn't promote such an activity, then you have a completely different case from this case --

QUESTION: You have what I've told you. That's all you have.

Okay, if North Carolina passed this bill in 1910, would that be okay?

MR. SCHULTZ: Passed this bill in 1910?

QUESTION: North Carolina said in 1910 that no single catastrophe should subject anybody to more than $560 million worth of damages. Would that be okay? And Congress in 1911 said we'll pick up the tab. Any utility that incurs $560 million we will pay it.

MR. SCHULTZ: You would still have a taking there, but as to the -- it's such a different case, I --

QUESTION: You take something that costs $560 million, you take it?

MR. SCHULTZ: I apologize. You wouldn't -- As long as the Federal Government -- I think you have to look at the facts of each case and look to see how involved the Government's role is in the accident. And it is simply difficult to answer the question without knowing whether the Government's role is critical to the injuries to the victims of the accident.

To keep my commitment to Mr. Justice Rehnquist, I suppose I'd better address rightness and standing.

MR. JUSTICE REHNQUIST: You will address your

commitment to me if you will answer a question which I am about to pose to you in connection with the malpractice cases.

Supposing that a doctor's office is located across the street from your client's house and your client thinks it is in violation of the zoning laws. Can he come into a Federal court and claim that the State's malpractice limitation law is unconstitutional on the grounds that if the malpractice limitation laws didn't exist the doctor would never have opened up a practice because he couldn't afford to do it?

MR. SCHULTZ: I think that that patient --

QUESTION: This is just a client who lives across the street. He's in perfect health.

MR. SCHULTZ: He's in perfect health, but he doesn't like having a doctor --

QUESTION: He doesn't like having a doctor's office instead of another residence across the street from him.

MR. SCHULTZ: Right. And it wouldn't matter whether it were a doctor or a nuclear power plant.

QUESTION: Except in each case you are relying on some statute that you say is necessary to enable that particular individual to function in the capacity that he has functioned in.

MR. SCHULTZ: That individual would show some small injury and would show a connection between the injury and the Act. But the question would be whether there were -- and I

submit there would not be in that case and there are here -- are there prudential considerations which make it important to decide the case and which should impel the Court to reach the issue? In other words, as a very basic matter, the issue of standing is a question of whether you've shown some injury, and it can be very small.

QUESTION: You say that anything that constitutionally -- my hypothetical -- is a case of controversy.

MR. SCHULTZ: The Court would have the power, yes. But I am not suggesting that the Court should decide that question in that case.

They feel the prudential considerations strongly militate toward reaching the merits, as the Nuclear Regulatory Commission has stated in its brief. The primary prudential consideration here is that the worst time for a reasoned decision on the constitutionality of the Price-Anderson Act would be after a nuclear accident.

QUESTION: Well, this is just an idea -- it's kind of a quick fix, isn't it? Typically, you will find parties vigorously opposed to one another on the merits, but they both want a decision on the merits. Nonetheless, we have held in some cases that Article 3 precludes such a decision, even though, perhaps, at a time when Article 3 wouldn't permit it is by no means an ideal time in the sense you use the phrase to decide it.

QUESTION: In fact, Mr. Schultz, wouldn't it be the best time after the accident because then we would know whether the fit was good or not, and also if the statute then should be held unconstitutional and the limitation invalid all the victims could recover their entire damages. So, isn't it the utility that takes the risk of unconstitutionality?

MR. SCHULTZ: I think there are two questions there.

QUESTION: Yes, there are. The first point is would we not be better able to decide whether the $560 million limitation is reasonable after we know the facts?

MR. SCHULTZ: The problem is most of the damages here are health injuries. Government studies show that as many as 40-some thousand people could die from cancer, but they would not actually incur that cancer for 10 to 40 years after the accident. Moreoever --

QUESTION: I don't understand how that responds to the question.

MR. SCHULTZ: I am trying to say that we would not know the size of the injuries after an accident.

QUESTION: But you would have more knowledge about it after than you do before.

MR. SCHULTZ: We would have somewhat more knowledge after the accident.

QUESTION: So, if you accept there is a difference between before and after, it's better to litigate it after.

MR. SCHULTZ: When we are looking at prudential considerations, that is on the side of waiting, that one is. But I think that in that situation there would be immense pressure on the Court to --

QUESTION: To invalidate the limitation.

MR. SCHULTZ: Yes.

QUESTION: Well, isn't that a reason why the Plaintiffs would prefer to wait also?

MR. SCHULTZ: We are not guaranteed the Court would invalidate the limitations.

QUESTION: No, but there is a greater likelihood.

MR. SCHULTZ: But here if the Court invalidates the limitation, the likelihood is that Congress will ask further legislation to provide substantial recovery for the victims. So, if we get the issue decided now, industry will know where it stands, the Plaintiffs will know where they stand --

QUESTION: And you will stop the building of atomic energy plants, which is what you want.

QUESTION: You mean you would rather -- I thought, perhaps, if you were going to lose, you would rather lose on standing than on the merits. I am not suggesting you are going to lose.

MR. SCHULTZ: Mr. Justice White, it is certainly in industry's interest to have the merits of this case decided.

QUESTION: How about in yours? For your client's?

MR. SCHULTZ: I also think it is in our client's interest to have the Court declare the statute unconstitutional because then either this nuclear plant will not be completed or Congress will act to provide a system with full compensation.

QUESTION: Mr. Schultz, if I understood one of your theories of standing that seemed to me to have some possible merit, the district judge found present injury in fact, as I understand it.

MR. SCHULTZ: Yes.

QUESTION: Now, granted there is no nexus -- to use an overworked word -- between that injury and the Price-Anderson Act, but there is a nexus between your basic objective, the Court also found that if you win these plants will not be completed and will not operate. And, therefore, the present injury would be relieved.

MR. SCHULTZ: Yes. Either the plants will not be operated or, if they are operated, it will be under a system that provides the Plaintiff substantial compensation. So he will be better off that way. Either they will be better off because there are no environmental injuries or they will be better off because --

QUESTION: Isn't that just like the house across the street from the doctor's office?

MR. SCHULTZ: Here are the environmental injuries -- as a matter of injury, I think, yes.

QUESTION: Now, isn't there another realistic limitation on liability? Let me give you this hypothetical.

However many millions of dollars are invested into an atomic energy plant -- and many millions and millions would be -- and then let's assume these dire predictions that have been mentioned occur and the terribly tragic results which would be a series of rings would produce liability far beyond the total assets of a particular corporation. Isn't that highly probable?

MR. SCHULTZ: Yes, of the particular owner.

QUESTION: Isn't there an economic limit on the liability already that you can't get any more money out of that plant than it has, and if their plant has been destroyed by the damage in the process, what chance has any claimant got of getting full recovery?

MR. SCHULTZ: The claimant would have two protections. The first would be the State tort laws would have deterred the construction of the nuclear power plant, so that without this limitation on liability the State --

QUESTION: My hypothetical was that you had a very daring enterpriser who had a lot of money -- a Howard Hughes type -- and so he said he didn't care so he put in $1 billion to build the plant, but the plant did damage that caused $3 billion worth of injury.

MR. SCHULTZ: With the understanding that that part of the hypothetical is inconsistent with the facts of this case--

QUESTION: It isn't inconsistent with reality, is it, that the damage coming from this hypothetical plant could vastly exceed the claims?

MR. SCHULTZ: No, no, but the judge below and Congress found that the limitation on liability was a necessary pre-condition. This is very clear from the legislative history. For example, the vice president of General Electric, which is one of the two major manufacturers of nuclear reactors, came to Congress in 1957 and testified that even though his company was in the middle of constructing the first reactor, that unless Congress acted to limit the liability his company would simply walk away from the project and not make the investment.

But, Mr. Chief Justice, the second part of the answer is that the victim could sue the manufacturer of the reactor which is Westinghouse here, which is a company that would have suffered no loss and would have billions of dollars in assets.

The Price-Anderson Act takes away not only the victim's right to sue Duke, but also the right to sue the manufacturer or any other responsible party. Moreover, I think it is important to point out that under the Price-Anderson Act it may be as much as 20 years before these victims would receive any recovery. And this is because the Act requires that before any compensation beyond a small amount of emergency funds may be paid out a district court judge must

come up with a plan of distribution to provide for the late claimants -- these are the health injuries -- that would not appear for 10 or 20 years after the accident. And if you don't know what the injuries are going to be it may simply be impossible to pay the early claimants until you know what the injuries of all the claimants are.

I think, Mr. Chief Justice, that the point you made earlier in the argument is critical. And that is if Congress had the power to promote nuclear power by limiting liability to $560 million then that argument would lead to the proposition that it would have had the power to limit the liability to zero dollars. In fact, it would lead to the proposition that the Federal Congress could eliminate all State law remedies for torts.

QUESTION: Mr. Schultz, on that very question, the corporate device itself is a method of limiting liability that promotes capital investment and the like. Supposing we held the statute unconstitutional and Congress passed a new statute and said that the power company convey the plant assets into a separate corporation whose liabilities shall be limited to its own assets and there shall be no piercing of corporate veil or anything like that. Would that be unconstitutional? The corporation shall not be liable for anything over and above its own net worth.

MR. SCHULTZ: That would be precisely the same as the

effect of the Price-Anderson Act.

QUESTION: It would be unconstitutional for Congress to pass a statute that a corporation's liability is limited to its net worth?

MR. SCHULTZ: And say -- no --

QUESTION: If it is engaged in hazardous occupation and enterprise.

MR. SCHULTZ: But to say that the nuclear industry may convey -- to encourage them to convey their reactors to corporations so that they can escape liability, and to do that so that --

QUESTION: They can limit liability, just like every other corporation does. New York Central has a lot of people it has hurt and it is not going to be able to pay them 100 cents on the dollar.

MR. SCHULTZ: No, but I submit that the remedy provided by the corporate limitation statute, if you look at it as a whole, is a substantial remedy. In most cases, victims are able --

QUESTION: Well, $560 million times the number of nuclear plants is a lot of money too. I take it is is per incident, isn't it, not just $560 nationwide?

MR. SCHULTZ: Yes.

QUESTION: Per plant?

MR. SCHULTZ: If there were three accidents, it is

unclear what would happen, but for the first two, anyway, in a year, it is per incident.

But if you look at the corporate remedy, as a whole, and look at its fairness, not to just a particular individual but to a group of victims that would be injured, that could be injured by the corporation, most of those victims are going to be able to recover. If the corporation is specifically organized for the purpose of avoiding liability, they have the option of piercing the corporate veil. And because of that -- and I think this brings us back around -- because of that the nuclear industry here -- the nuclear industry here on its own could do this -- it could simply incorporate each nuclear reactor and limit its liability that way.

QUESTION: That's the economic limit that I was suggesting to you before.

MR. SCHULTZ: But it's not willing to take the risk. This comes back around to the fact that the Federal action here, the limitation on liability, is absolutely necessary for the construction of these nuclear reactors. Even though the particular system chosen here isn't necessary, there are other ways that the Federal Government could do this and substantially provide for State citizens, the fact remains that the limitation here is necessary for the construction.

MR. CHIEF JUSTICE BURGER: Your time has expired now, Mr. Schultz.

MR. SCHULTZ: Thank you.

Do you have anything further on this side of the table?

You have two minutes remaining.

REBUTTAL ORAL ARGUMENT OF STEVE C. GRIFFITH, JR., ESQ.

ON BEHALF OF THE PETITIONER

MR. GRIFFITH: It simply boils down, as Plaintiffs suggest in their argument, that there were alternatives available to Congress which Congress considered, such as writing a blank check on the Treasury of the United States, but Congress decided that that was not in the public interest. It did have the power to limit the amount available for a creditable accident, one that they thought might have a chance of occurring, but for the uncreditable accident Congress did not feel that it had to go that far to cover that eventuality. And there is where Congress promised to act in the event -- although extremely unlikely -- that it would then consider the matter in an after the fact situation.

Similar, in fact, I think, where Plaintiffs admit that the Act would be constitutional if the Tucker Act remedies were available. The Tucker Act remedies for injuries more than $100,000 require a congressional appropriation, after the fact, which is, we think, the imaginative way, the realistic way, the way in the public interest that Congress acted in a rational manner.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:10 o'clock, p.m., the case in the above-entitled matter was submitted.)