ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-897

TITLE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Petitioner, v. PERINI NORTH RIVER ASSOCIATES, ET AL.

PLACE Washington, D. C.

DATE October 4, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v. : No. 81-897

PERINI NORTH RIVER ASSOCIATES ET AL.

- -x

Washington, D.C.

Monday, October 4, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:11 o'clock p.m.

APPEARANCES:

RICHARD G. WILKINS, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

MARTIN KRUTZEL, ESQ., New York, New York; on behalf of the Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in the Director of the Office of Workers' Compensation against Perini.

Mr. Wilkins, I think you may proceed when you are ready.

ORAL ARGUMENT OF RICHARD G. WILKINS, ESQ.,
ON BEHALF OF THE PETITIONER

MR. WILKINS: Thank you.

Mr. Chief Justice, and may it please the Court, the issue in this case is whether a worker injured upon actual navigable waters who would have been covered by the Longshoremen's Act prior to its amendment in 1972 retains that coverage, or whether Congress by amending the Act in 1972 restricted coverage for this class of amphibious worker.

Respondent Raymond Churchill was injured in 1974 while standing aboard a crane barge engaged in unloading a caisson from a supply vessel during the construction of the North River Pollution Control Project, which is a sewage treatment plant that extends over the Hudson River in New York City. He filed a claim for compensation under the Act, and after a hearing, the Administrative Law Judge denied that claim, concluding that he was not engaged in maritime

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employment.

The Benefits Review Board by a divided vote subsequently sustained the conclusion of the Administrative Law Judge, and the Second Circuit denied Churchill's petition for review, concluding that his employment was not maritime as it lacked a significant relationship to navigation or to commerce on navigable waters.

There can be little dispute but that prior to 1972, Respondent Churchill could have claimed coverage under the Act. Prior to that date, the Act covered all work-related injuries occurring on actual navigable waters.

QUESTION: Mr. Churchill did not petition for cert, did he?

MR. WILKINS: No, he did not.

QUESTION: Do you know why?

MR. WILKINS: I am uncertain as to the actual circumstances for that failure. He did file a brief supporting the director's petition, however.

QUESTION: Yes, I know, but he -- if there is jurisdiction here, it has to be because you petitioned.

MR. WILKINS: Yes.

QUESTION: But it would have been so simple for -- Is there any barrier to his petitioning for cert?

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MR. WILKINS: Not that I am aware of, Justice Blackmun.

Coverage prior to 1972 did stop at the water's edge, so Congress in 1972 amended the Act in part to eliminate the incongruities of this coverage rule by extending the coverage of the Act ashore for the first time to certain areas contiguous to the water's edge. The Act as amended also contained a second coverage requirement. Not only must the injury occur on a covered situs, but the employee must meet a status test. Section 2(3) of the Act defines a covered employee as any person engaged in maritime employment.

The proper application of this maritime employment status test to a traditionally covered amphibious worker is the question currently before the Court. Proper consideration and analysis of this question requires careful attention to three important factors. First, the term "maritime employment" itself has traditionally been construed as including all work actually taking place on navigable waters. Second, it is very clear from the legislative history of the 1972 amendments that Congress intended to retain this traditional coverage for longshore -- for maritime workers and amphibious workers injured on actual navigable waters.

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MR. WILKINS: Mr. Wilkins, could I go back for a moment to the point raised by Justice Blackmun? Is it the government's position that although the propriety of the director's appealing to the Court of Appeals may be very much open to doubt in a case like this, it is the propriety of the director's petition for certiorari to review a Court of Appeals judgment is perfectly clear?

MR. WILKINS: Yes, Justice Rehnquist.

QUESTION: Doesn't that strike you as rather strange?

MR. WILKINS: No. There is no Court of Appeals that questions the propriety of the director's participation in a petition for review as a respondent. The Second Circuit does not question that, and indeed we participated as a party respondent in this case. Once we are a proper party in the Court of Appeals, the certiorari statute, 2812.54, states that any party may apply for a writ of certiorari. So, we are clearly as a party respondent entitled.

QUESTION: You say it might be different if you had been the -- yourself seeking review in the Court of Appeals rather than supporting the judgment of the board.

MR. WILKINS: There is currently something of a conflict among the circuits. At least three circuits

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grant the director standing to seek a petition for review. Two circuits that I am aware of have raised a question regarding this. This question, though, is not presented in this case, as we were and we concededly were a proper party below.

The third important --

QUESTION: What did you lose?

MR. WILKINS: There is an important coverage question at issue here.

QUESTION: What did you lose?

MR. WILKINS: We --

QUESTION: How much did you lose?

MR. WILKINS: We didn't lose any monetary amount, if that is the question.

QUESTION: Well, what did you lose, prestige?

MR. WILKINS: No, we lost the ability to effectively administer and interpret -- to fulfill our administrative responsibilities under the Act.

QUESTION: Mr. Wilkins --

MR. WILKINS: Yes.

QUESTION: -- your argument about standing doesn't really address itself, though, to the Article 3 standing question for constitutional purposes, does it?

MR. WILKINS: To the exten that we -- we argue that we have administrative interests in interpreting

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the Act. That is historically in many cases from -- that are cited in our reply brief have found that an administrative interest that has been impaired by a decision below is sufficient to give a governmental entity injury.

QUESTION: But as I understand your administrative argument, it is to the effect that you have to give advice to employees, and you would be better able to do that if you could get an answer to these questions, and is that really not in the nature of asking an advisory opinion?

MR. WILKINS: Not really, Justice O'Connor. We also have other administrative responsibilities. For example, under Section 932 of the Act, we have to enforce the insurance requirements of the Act. We have to bring actions against employers who do not comply with the insurance requirements. Under the Second Circuit's decision, an entire range of employers, marine construction employers, for example, do not have to comply with that Act, yet under the decisions of the Fifth Circuit, for example, we have a responsibility to enforce 932 against these employers. So, the decision below does really impose differing enforcement responsibilities and different -- of a very severe and important nature.

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QUESTION: Well, certainly a lot of government agencies can come here without showing out of pocket loss. The Labor Board, the Federal -- you know, just all --

MR. WILKINS: Exactly. As far ago as the old In Re Debs opinion, this Court stated that the mere fact that the government cannot show monetary loss is insufficient to estop the government standing in federal court.

The third important consideration beyond the fact that the term "maritime employment" historically includes work on the water and Congressional intent, is the fact that the navigation or commerce test utilized below leads to a logical result, and has clearly been shown to be impracticable and unworkable as a means of delineating coverage under the Act.

Respondent Perini North River Associates would argue that the term "maritime employment" reaches only those activities that possess some substantial connection to commercial shipping or navigation. The term, however, has never been so strictly limited. The plain meaning, indeed, of the term "maritime employment" clearly reaches those occupations that are regularly performed on actual navigable waters.

Although there is virtually no explicit --

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QUESTION: May I stop you right there, Mr. Wilkins? It is generally assumed that the Act would apply -- anything over maritime, over navigable waters. If this were a pier extending out into the water, work on the pier would not have been covered.

MR. WILKINS: Prior to 1972, no, because the pier would have been considered land because it was permanently attached to land.

QUESTION: Why wouldn't a sewage treatment plant be like a pier?

MR. WILKINS: The sewage treatment plant itself might have been like a pier. Mr. Churchill, however, was standing on a barge floating on actual navigable waters, a barge that had four motors to navigate itself upon the water. He clearly would have been covered before the Act. He was not on an extension of land.

QUESTION: I see.

MR. WILKINS: Although there has virtually been no -- although there is no explicit discussion of the maritime employment requirement, or virtually none, prior to '72, the reported cases of this and other federal courts make it very clear that employment on the water was considered maritime. Indeed, all of the cases that were decided under the old maritime local doctrine proceed on the assumption that employment on the water

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is by itself maritime, although in particular cases it can be local.

Indeed, Professors Gilmore and Black state that workers who are not seamen but who nevertheless suffer injury on navigable waters, are no doubt engaged in maritime employment. Notwithstanding this historic construction --

MR. WILKINS: Mr. Wilkins, let me go back to that last quotation. Would that mean that a delivery man delivering something to Mr. Churchill on his barge would be covered?

MR. WILKINS: If he had to go aboard the barge to end the delivery, and he was required to do that in the course of his employment, under pre-1972 law and under the historic construction of the term, while he was on the barge, yes, he would have been covered.

QUESTION: So if he were bringing a pizza out to Mr. Churchill for lunch, he would be covered?

MR. WILKINS: If he was required to deliver that pizza in the course of his employment and go upon the actual navigable waters in the course of his employment, yes.

QUESTION: Mr. Wilkins, if you win, does Churchill get the money?

MR. WILKINS: Yes, he will, Your Honor.

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QUESTION: And he doesn't pay anything to get it?

MR. WILKINS: He has retained his own attorney, and his own attorney has filed various briefs.

QUESTION: You mean the attorney is going to get paid, too, for not doing anything but sitting still?

MR. WILKINS: No, Mr. Churchill's attorney has filed a brief in support of our petition for certiorari and a brief as a respondent in this Court. He did even request to argue.

QUESTION: Have we ever had any other cases like this?

MR. WILKINS: Yes, Your Honor.

QUESTION: Where a party that is not an actual party to the litigation is going to collect?

MR. WILKINS: The Court has indeed granted, for example, in the Walter Tanson case, cited in our reply brief, we filed a petition for certiorari without the claimant, and the Court granted our petition and reversed.

QUESTION: It is strange, isn't it?

MR. WILKINS: Well, I don't think it is strange when you consider that we have very important enforcement responsibilities that go beyond perhaps the individual interests.

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QUESTION: Well, you can litigate those, can't you?

MR. WILKINS: Excuse me?

QUESTION: Can't you litigate those other important positions that you take? Can't you litigate them when they come up?

MR. WILKINS: We certainly can, when they arise.

QUESTION: But the -- to this Court is to decide some other case?

MR. WILKINS: No, Your Honor, this case --

QUESTION: Please don't. Please don't take that position.

MR. WILKINS: There is no question but that this is a live controversy. Respondent Churchill is before this Court as a party respondent. The case is live. He will receive his benefits.

Notwithstanding the historic construction of the term "maritime employment" as including all employment on actual navigable waters, Respondents Perini contend that Congress restricted the coverage of the Act in 1972 by adding a maritime employment requirement. The legislative history of the 1972 Act is not extensive. However, the clear import of that legislative history is that Congress intended to extend the coverage of the Act to cover additional workers.

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Congress was concerned about the incongruity of workers crossing over the Jensen line from navigable waters to dry land and thereby walking in and out of coverage.

QUESTION: Mr. Wilkins, in this very case, if this employee worked sometimes on the barge and sometimes on the partially completed structure, would he be walking in and out of coverage under your view of the Act?

MR. WILKINS: Under our view of the Act, no. Indeed, the purpose of Congress in amending the Act in 1972 was to extend the coverage of Mr. Churchill ashore.

QUESTION: Well, if he had been working on the partially completed structure, he would not have been engaged in maritime employment.

MR. WILKINS: We contend that because of the substantial nature of his duties upon actual --

QUESTION: Well, take another employee with slightly different duties. Say he worked on the partially completed structure 60 percent of the time, but then had to go on the barge part of the time. Would that employee walk in and out of coverage?

MR. WILKINS: In that circumstance, no, because he still performs substantial duties of a maritime nature.

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QUESTION: Well, the pizza delivery person, though, would walk in and out of coverage?

MR. WILKINS: That is a question -- you may have a problem with walking in and out of coverage in that case. The director -- the Labor Department has taken the position that all employees are covered while they are on actual navigable waters, whether or not they --

QUESTION: I understand, but what percentage of their time has to be on navigable waters to avoid the walking in and out of coverage?

MR. WILKINS: I can't give you an exact percentage. It would require looking at each individual case to determine whether the work on the water was merely incidental to the work on the land, or whether the work on the land was more incidental to work on the water. If work on the water was extremely tangential, and incidental to his land-based duties, he may not retain coverage when he crossed to dry land.

It is important to remember that while Congress intended to restrict this problem of walking in and out of --

QUESTION: But your argument -- I want to be sure I understand it, because a big part of your argument is, we are talking about people who were

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clearly covered before the '72 amendment. Now, if we had somebody who spent 80 percent of his time on the partially completed structure, he would not have been clearly covered prior to the 1972 amendments for 80 percent of his time.

MR. WILKINS: No.

QUESTION: Prior to 1972, he would have walked in and out of coverage. Now, why doesn't he walk in and out of coverage now, again?

MR. WILKINS: Because Congress intended to extend coverage for clearly -- for amphibious workers ashore. It is important to remember that the --

QUESTION: But amphibious workers who build sewage treatment plants?

MR. WILKINS: Amphibious workers, period. The Act prior to 1972 covered amphibious workers. The purpose of extending the coverage ashore was to prevent the continual walking in and out of coverage. Congress stated, the purpose of the amendment was to permit a uniform compensation system to apply to employees who would otherwise be covered for part of their activities.

Churchill prior to '72 was covered for those injuries, for those activities afloat. Congress meant to cover those that took place on shore. But while

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covering those activities on shore, they recognized that they were opening up the possibility that many land-based, totally land-based workers could claim for the first time coverage under the Act.

QUESTION: Well, you don't need to win on this to win this case.

MR. WILKINS: No. This is just --

QUESTION: You don't have to decide that the worker on the sewage plant would be covered.

MR. WILKINS: Exactly. We only need to argue -- we only need to win that Mr. Churchill, because he was on actual navigable waters, is covered.

QUESTION: No, but your third argument is not valid unless you win that other case. Your third argument is, we get away from the walking in and out of coverage problem by adopting your construction.

MR. WILKINS: We alleviate to some extent the walking in and out of coverage problem.

QUESTION: Oh, okay.

QUESTION: Incidentally, Mr. Wilkins, does the legislative history have any references to Davis and Calbeck and those cases?

MR. WILKINS: It does not, Your Honor, and I hope to address those opinions very shortly, because they are crucial to our position in this case.

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Congress enacted the maritime employment requirement solely to limit the availability of the Longshoremen's Act to totally land-based workers who previously to 1972 had to rely solely upon state compensation acts. It did not intend to restrict coverage of amphibious workers. Indeed, the Senate reports state this conclusion forcefully. Amended Section 2(3) specifically includes any longshoreman or other person engaged in longshoring operations. It does not exclude employees traditionally covered.

The navigation or commerce test utilized below not only ignores the traditional content of the term "maritime employment" and the express Congressional intent behind the '72 amendments, but it leads to illogical results and has been shown by this Court to be impracticable and unworkable as a means of delineating coverage.

The illogical and doctrinaire results created by this test are well illustrated by the facts of this case. Respondent Churchill, unlike land-based workers who perform similar tasks, was constantly on, over, surrounded by navigable waters. He was faced with unique marine dangers. His work required the use of protective marine gear. It required knowledge of specialized techniques to deal with the exigencies of

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work on the water. He was constantly required to load and unload supply vessels.

Notwithstanding this unique marine nature of his activities, the court below looked to sewage treatment plant and asked whether it, not Respondent Churchill, had some connection to maritime activities. The illogic of this result is made patent when this case is considered with another case arising from this same construction project, Mattson v. Perini North River Associates.

There, the Second Circuit and the Benefits Review Board both upheld coverage for another worker involved in constructing this same sewage treatment plant who, like Mr. Churchill, was involved in driving caissons for the plant, doing very similar work. Why? Solely because Mr. Mattson was driving caissons at a portion of the plant that would subsequently be used to load processed sludge aboard vessels.

QUESTION: But you are going to get into some of those anomalies wherever you draw the line, aren't you? Aren't you going to find them on the pier, in adjacent areas, even though we decide this case in your favor?

MR. WILKINS: There may be some anomalies, Mr. Justice Rehnquist, but those anomalies will be greatly

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alleviated as the experience of this Court has shown. The test utilized below is an impracticable means of delineating the coverage of employment on the water.

QUESTION: How does the experience of this Court show that the anomalies would be alleviated?

MR. WILKINS: Well, I can answer that, but to do that I need to go into a little bit of history, and I would like to do that right now.

The test, the navigation or commerce test was first adopted post-enactment by the Ninth Circuit in Weyerhauser Company v. Gilmore. The Court in that case stated that it was no help to consider the prior decisions of this and other federal courts that had considered the question of the proper state and federal jurisdiction under the Act. The Court said that the 1972 amendments had instead instituted a clear line between state and federal jurisdiction, but in explicating this clear line, it explicitly relegated to limbo, in the words of the Court, the Davis and Calbeck decisions of this Court.

But in its hasty relegation to limbo of all prior experience under the Act, it failed to recognize that the navigation or commerce test has been shown to be completely unworkable and impracticable as a means of delineating coverage. For nearly 35 years following the

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original enactment of the Longshoremen's Act, this and other federal courts struggled under the maritime but local doctrine to determine which employments on the water were maritime or possessed a significant relationship to navigation and commerce, and therefore fell within federal coverage, and those that lacked that elusive connection and therefore were maritime but local.

In 1942, in the Davis decision, this Court noted that the lines that had been drawn over the water were so fine, the decisions so confusing, that, Mr. Justice Rehnquist, the Court stated that we could quote cases on either side, for recovery or against recovery, on the facts of the Davis case.

In light of this terrible morass of cases that developed, the Court was forced to create the twilight zone within which state and federal remedies overlapped. Twenty years later, in the Calbeck decision, this Court further overlapped state and federal remedies by declaring that federal jurisdiction extended to all injuries that occurred on actual navigable waters. The Court concluded that this was necessary to spare employees "the uncertainty, expense, delay of fighting out in litigation whether their particular cases fell within or without state acts under the local concern doctrine."

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In short, all of the cases prior to Calbeck under the maritime but local doctrine demonstrate, and this Court finally recognized, that it was completely unworkable and impracticable to draw a navigation or commerce line between state and federal jurisdiction. This Court, moreover, has been unwilling to relegate this experience to limbo. Two years ago, in the Sun Ship decision, the Court declined to draw a similar line between state and federal jurisdiction over land-based injuries.

This case is very similar to the Sun Ship decision, and should be decided as the Court decided the Sun Ship decision, by harkening to the clarifying opinions in Davis and Calbeck, and refusing to recreate the jurisdictional monstrosity that those cases eradicated.

QUESTION: Mr. Wilkins, may I ask you one other question on this point?

MR. WILKINS: Yes.

QUESTION: Does sustaining the government's position in this case mean that there would be no recovery under a state workmen's compensation statute for this --

MR. WILKINS: No, certainly not. The entire teaching of the Davis and Calbeck line of cases is that

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state and federal jurisdiction is concurrent.

QUESTION: Even over navigable water?

MR. WILKINS: Even over navigable waters in those areas that are within the maritime but local sphere. So this does not displace state jurisdiction to any degree. It simply alleviates the problems and the confusion that are inherent in forcing workers to decide in advance of litigation questions that courts will regularly divide upon.

Indeed, unless this Court adopts the position, the common sense position that all work on the water is by its very nature maritime, thereby conforming the judicial construction of the Act with the express Congressional intent behind the 1972 amendments --

QUESTION: Would you tell me what case it is that holds that state recovery is all right even if it is seaward of the Jensen Line?

MR. WILKINS: The Calbeck decision.

QUESTION: Calbeck.

MR. WILKINS: The Davis decision. Both of them state that.

QUESTION: Clearly Sun Ship doesn't say that.

MR. WILKINS: Sun Ship alludes to the history in those cases, yes.

QUESTION: Calbeck and Davis.

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MR. WILKINS: Yes, exactly.

Unless this Court conforms its interpretation of the Act with the express Congressional intent, it will once again be embroiled in case by case determinations of whether particular discrete factual employments possess an elusive connection to navigation or commerce. For example, the court below rejected the argument that Respondent Churchill was engaged in maritime employment as a person engaged in longshoring operations -- that is the statutory language -- because he was required to load and unload caissons from supply vessels.

The Fifth Circuit, however, on virtually identical facts, has concluded that such employees are engaged in maritime employment, and two petitions currently before the Court ask this Court to settle this particular controversy.

Another petition currently pending before the Court questions the Fourth Circuit's conclusion that workers injured on actual navigable waters while building a bridge are engaged in maritime employment. The Ninth Circuit has very recently determined that workers injured on navigable waters building bridges are not engaged in maritime employment.

In short, if this Court affirms the decision

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below, this and other federal courts will once again become embroiled in determining the outer limits of the navigation and commerce test, an attempt that will almost certainly be doomed to failure because, as the Court noted in Calbeck, there has never been any method of staking out those limits except in litigation in particular cases.

As noted in a leading treatise on the basis that there can be nothing more maritime than the sea, every employment on the sea or other navigable waters should be considered maritime employment.

If there are no further questions --

QUESTION: Mr. Wilkins, I do have one. Is it settled that if the employee is not covered by the Act, he retains his Seriacki seaworthiness action? There seemed to be a split maybe on that.

MR. WILKINS: There is something -- it is unclear. Decisions out of the Fifth Circuit most recently in the Drow opinion, which adopts our position in full, state that if employees are not covered under the Act, they would retain their Seriacki cause of action.

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CHIEF JUSTICE BURGER: Mr. Krutzel?

ORAL ARGUMENT OF MARTIN KRUTZEL, ESQ.

ON BEHALF OF RESPONDENTS

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

Two issues are presented for your consideration today. The first is whether the Director of the Office of Workers Compensation Programs is a proper party to seek review of the Second Circuit decision below in this Court. The second is whether Raymond Churchill was at the time of his involvement in the construction of a substructure for a sewage treatment plant engaged in maritime employment within the meaning of the federal Act.

We submit that the Article III, Section 3, case and controversy requirement must -- in satisfying that requirement, the Director must show that he has suffered an injury in fact or have a personal stake in the outcome of the decision in order to have standing. In this particular case, the Director must have some pecuniary or administrative interest which has been adversely affected by the decision below.

The Director concedes, I believe, that there was no pecuniary involvement on behalf of the Office of Workers' Compensation Programs and no pecuniary interest

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which could be adversely affected by the outcome of this case.

QUESTION: But isn't Mr. Churchill here as a party?

MR. KRUTZEL: Mr. Churchill is here as a Respondent. If the Director is found not to have proper standing to seek review in this Court, no benefits could be paid to Mr. Churchill.

The clear fact is that, even if Mr. Churchill were a Petitioner, the Director would not be the party, and the Government would not be the party, to pay any benefits regardless of the outcome of the case. That becomes solely the responsibility of the employer and the insurance carrier.

QUESTION: So you would eliminate Mr. Churchill by reason of the fact he didn't petition for cert?

MR. KRUTZEL: That is correct.

The Director does, however, point to two sections of the Longshore and Harbor Workers' Compensation Act for authority for the proposition that he has an administrative interest which provides him with the requisite personal stake in the outcome of the action. He points specifically to Section 39(c), which requires that the Director provide information and

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assistance to potential claimants under the Act.

However, that section does not require that the Director has to agree with the information that he provides to employees or potential compensation claimants. In fact, that section does not require that the Director has to give information which is entirely free from doubt. It simply provides that he must give information, and that information, we presume, would be based upon the state of the existing law.

QUESTION: Well, as a matter -- I take it your argument is resting on Article III, not on a particular statutory provision.

MR. KRUTZEL: That is correct.

QUESTION: Hasn't our general practice been when a federal agency loses a case in which its actions are being reviewed in a Court of Appeals that there's no question from an Article III standpoint that the agency can seek review of the Court of Appeals' judgment here?

MR. KRUTZEL: In this particular case, Mr. Justice Rehnquist, I don't believe that the federal agency has in fact lost the case. What they did was appear -- they did not take part in the trial of the case before the administrative law judge to any extent. They petitioned for review before the Benefits Review Board as a party in interest before the administrative

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agency, and upon the Benefits Review Board's affirmance of the fact that Mr. Churchill was not an employee engaged in maritime employment the Director did not proceed further as a Petitioner.

He appeared merely as a Respondent, obviously in recognition of the Second Circuit's position that he did not have standing to seek review in the federal courts as a Petitioner.

Should the Court in this case not reach a decision on the merits, the Director can still give the same information and advice to compensation claimants pursuant to his responsibilities under Section 39 of the Act.

In addition, the Director has argued today and in his reply brief that self-insured employers who are required to make certain showings to the Secretary of Labor and his designee the Director pursuant to Section 32 of the Act in some way create an interest in the Director which would satisfy the standing requirement.

However, certainly that section of the law is not relevant to the facts in this case, as the employer, Perini North River Associates, was covered by insurance contracts. In addition, that section creates no affirmative duty on behalf of the Director to do anything. That section, rather, requires employers to

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come forward and provide evidence that they are, if going to be self-insured, capable of paying compensation claims.

And certainly even that section, which if it were interpreted to require the Director to provide information to potential employers under the Act, is subject to the same interpretation in that the Director does not have to agree with the information he imparts. That is not what the law requires.

The Director's ability to dispense information in this case will not be enhanced if standing is accorded in this case. The Courts, not the Director, will ultimately determine the meaning of the law.

The federal courts, in order to hear a case, must have and must require that concrete adverseness which is not demonstrably present in this case. We do not argue that the Director won't, as a result of a decision on the merits, be able to give more certain advice and information, but merely that his function as the transmitter of that information will not be affected by the outcome of the decision below.

QUESTION: Do you think that the Court has either impliedly or expressly decided this point before?

MR. KRUTZEL: I think that the Court has

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certainly appeared to take jurisdiction in three cases: The Director against --

QUESTION: In cases where the issue was called to its attention?

MR. KRUTZEL: So far as we know according to the Director's reply brief, in a footnote of the Director,, in the Matter of Rasmussen the question of the Director's standing may have been addressed. To our knowledge, there has been no full briefing and arguments on the question of the Director's standing.

QUESTION: Well, how about -- didn't we vacate and remand a case --

MR. KRUTZEL: Director v. Walter Tanzen. That is the one case that we are aware of where the Director was the sole --

QUESTION: And the Respondent claimed there was no jurisdiction for him to bring the case here at all.

MR. KRUTZEL: As I understand it, the decision of this Court vacated and remanded based upon a petition for certiorari.

QUESTION: Which wasn't a holding that there was no jurisdiction or there was no standing.

MR. KRUTZEL: I do clearly concede that it appears that the Court has taken jurisdiction of those

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matters.

QUESTION: Well, after it having been claimed that the Director had no standing.

MR. KRUTZEL: That is correct. However, as I understand it that decision did not involve full briefing and oral arguments.

QUESTION: Tanzen was just a summary disposition.

MR. KRUTZEL: That is my --

QUESTION: Without any written treatment from this Court of the jurisdictional issue.

MR. KRUTZEL: That is my understanding. In addition, the Second Circuit, upon remand of the Fusco case, which had initially been decided the same day as -- had been argued, excuse me, the same day as Director against -- as the Tanzen case, reaffirmed its position that the Director was not a proper party to petition this Court for review.

In addition, the United States Court of Appeals for the Fifth Circuit in the Donzi Marine case, which held that the Director could not properly petition a federal court for review, that circuit reaffirmed that analysis just recently in 1982 in the Miller case. Those decisions would seem to indicate that the Court of Appeals, at least the Second and the Fifth Circuit, have

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not seen this Court's action with respect to Director v. Tanzen as resolving the question of the Director's standing to seek review.

The Director in his reply brief has argued that his interest in the proper construction and application of the Act is in and of itself sufficient to grant him standing each and every time that he, the Director, is of the opinion that a court has incorrectly adjudicated a particular claim. By this argument he is asking no more than the right to seek the Court's advisory opinions whenever he disagrees with the lower court decision.

In this case, the parties with a personal stake in the outcome of the action have chosen not to litigate further. In essence, what the Director is requesting is the right to certify questions to the Court without a case or controversy.

The second issue presented today is whether Raymond Churchill, engaged in the construction of a substructure for sewage treatment plant, was engaged in maritime employment. We submit that the decision of the United States Court of Appeals for the Second Circuit in denying federal coverage because Mr. Churchill's activities did not bear a realistically significant relationship to navigation or commerce on navigable

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waters was correct and it appropriately applied the occupational status test of maritime employment.

The Congressional language in the 1972 amendments clearly shows that coverage was premised upon an occupational status test and the geographical situs test. Simply stated, the Act requires that an injured worker be engaged in maritime employment on navigable waters. The legislative history and the Court, citing language from the legislative history in the Computo and Pfeiffer cases, clearly shows that some workers injured upon the covered situs would not be covered under the Act because they were not engaged in maritime employment.

The occupational status test cannot, we submit, appropriately be defined with respect to situs, and that is what the Director argues. It is the Director's contention that maritime employment includes employment upon navigable waters. In fact, the Director and the Fifth Circuit in the Thibodaux case appear to take the position that employment upon pre-1972 navigable waters was in and of itself maritime employment.

We submit, however, that this particular assumption, which was the basis for the Thibodaux decision, cannot be sustained by resort to the actual

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wording of the statute, nor can it be sustained by resort to an analysis of the decisions of this Court.

I call your attention to this Court's decision in Pennsylvania Railroad v. O'Rourke, wherein it was specifically stated that the coverage of the Act was not based upon the relationship of the employee to maritime employment, but rather based upon injury over navigable waters. The Court in that decision stated clearly, especially when it discussed the case of Parker v. Motor Boat Sales, that that individual would not be covered if the test focused upon the job that the employee was engaged for.

Historically, the maritime employment standard clearly required some nexus to navigation and commerce over navigable waters. I think it is important, though, that a review of the statutory language itself does not support the Director's argument. If we define navigable waters by seeing that -- excuse me.

If we define maritime employment by analyzing the term and stating that it is employment upon navigable waters, we do a serious disservice to Section 2, subdivision (4) of the Act, which uses both terms, "maritime employment" and "navigation and commerce." Section 2(3) always discusses maritime employment by resort to the nature of the injured worker's occupation

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and never based upon where the injured employee suffers that injury in the covered situs.

QUESTION: Mr. Krutzel, how do you explain the language in the Senate report to the effect that the 1972 amendments were not intended to exclude other employees traditionally covered? And isn't it clear that Congress was concerned about the Davis and Calbeck decisions?

MR. KRUTZEL: The Congressional language with respect to "traditional covered" has to be analyzed in context of the history of the Act. Throughout the history of the Act, and I think the argument of the Petitioner makes clear, the coverage of construction workers was not taken for granted to be the subject of the Act.

As a matter of fact, since the inception of the Act from 1927 at least to the advent of the Davis decision, there was clearly a controversy concerning whether or not those employees could be provided a remedy by a valid state act and thereby not be within the reach of the federal act.

QUESTION: Well, Congress explicitly deleted the requirement that coverage was contingent on a state not being able to provide a valid remedy, isn't that so?

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MR. KRUTZEL: That is correct.

QUESTION: And isn't that the very language that Calbeck found was responsible for the emphasis on the troublesome maritime but local inquiry?

MR. KRUTZEL: That is correct. The Calbeck decision states that within the limits of federal admiralty jurisdiction, the Act could reach injuries over navigable waters, because that was the area of federal concern, that being the area where navigation and commerce takes place.

This does not -- the Calbeck decision in our view does not overrule the cases which preceded it in terms of maritime but local, but only serves to reinforce the then accepted principle that the admiralty tort jurisdiction, since the Act is based in admiralty, tort and contract jurisdiction, could apply to injuries over navigable waters, that being the area of the federal concern.

The navigation and commerce test employed by the Second Circuit below does satisfy the clearly expressed Congressional intention to cover those workers in the class of its concern, again the class being those involved in industries relating to navigation and to the movement of cargo from water to shore.

The examples of maritime employment contained

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in Section 2, subdivision (3) of the Act clearly show, although they may not be all-inclusive, that maritime employment is related to that industry. To read the Act as the Director suggests does harm, irreparable violence, in our view, to Section 2, subdivision (4), which now states that: "The term 'employer' means an employer any of whose employees are employed in maritime employment in whole or in part upon the navigable waters of the United States."

To read that section with the Director's interpretation of the Act would change the language to be: "The term 'employer' means an employer any of whose employees are employed on navigable waters as previously existed before 1972, in whole or in part upon the navigable waters of the United States."

We submit that Congress in enacting the 1972 amendments and in using the two phrases, "maritime employment" and "navigable waters", intended to provide distinct and separate meanings to those phrases.

Historically, the area of federal concern did relate to navigation and commerce. There is no question that in a number of decisions interpreting the 1972 Act this Court has, particularly when discussing the maritime but local cases, required a nexus between the activity and traditional concepts of navigation and

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commerce on navigable water.

This Court's decisions in Calbeck and Nacirema make it clear that the scope of the 1927 Act required coverage for employees injured over actual navigable waters. It was clearly stated in the Nacirema decision that the language of the statute -- that is, the language that Congress in 1927 employed -- arbitrarily eliminated from coverage many employees whose work did affect navigation and commerce, particularly so in view of the advent of modern cargo-handling techniques which brought much of the longshoremen's usual work onto shore.

The Court in Nacirema suggested that Congress could extend coverage shoreward based upon its power over admiralty contract jurisdiction, providing that the parties cover the status of the longshoremen performing that maritime contract.

And this Court's decisions in Executive Jet, decided after the 1972 amendments in 19 -- later that year -- showed that the admiralty tort jurisdiction has now been rationalized with this Court's discussion of admiralty contract jurisdiction, so that both require a nexus to traditional navigation or commerce over navigable waters.

The 1972 amendments show that Congress

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accepted this Court's invitation in Nacirema to cure the arbitrary application of the Act by providing that they will cover now for the first time the status of the injured worker and not simply refer to the location of that injury. Congress therefore expanded the situs of coverage to eliminate the situation of shifting and fortuitous coverage, as was renounced certainly in the dissent in Nacirema and also alluded to by the majority opinion.

For the first time, Congress confined the recovery to those individuals which it affirmatively described as the subject class of its concern, and the examples make clear that that class was individuals whose work affected navigation and commerce over navigable waters.

Now, the Director has argued that the standard adopted by the court below, which is that the work must have some relationship, significant relationship to traditional navigation and commerce over navigable waters, is unworkable. But it is clear that in adopting the occupational status test Congress required that the inquiry be made in each case regarding whether this employee's activities are in the area that Congress was concerned with protecting.

Even the Director's test would seem to

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indicate that the navigation and commerce test would be required at least, in his view, to those employees who were injured on the covered shoreside area, although he intends that a different test, a situs test of maritime employment, be used to determine coverage for injuries over pre-1972 navigable waters.

The Director's test would arbitrarily, apparently, exclude from coverage an employee whose status -- who would fail the maritime occupational status test while on shore, but apparently cover the same employee if he happened to fall into the water. That is precisely the dilemma that Congress attempted to cure in the 1972 amendments by no longer focusing the area of concern on the situs, but rather looking to the actual work that the injured worker performed.

We submit that the standard adopted by the court below is flexible enough to accommodate any new changes in cargo-handling techniques that injured workers may come into effect with, and we submit that the standard focuses upon the industry, the purpose of which Congress was concerned, that being the movement of goods in maritime commerce or navigation.

I should also like to point out that the Director has made reference to one particular case in the Second Circuit which he indicates creates some

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conflict even within the circuit concerning coverage for employees at this construction project. He mentions specifically Matson v. Perini North River Associates, but I think it is clear that the Second Circuit did not reach a decision on the merits in that case.

Thank you.

CHIEF JUSTICE BURGER: Mr. Wilkins, do you have any further?

REBUTTAL ARGUMENT OF RICHARD G. WILKINS, ESQ.,
ON BEHALF OF PETITIONER

MR. WILKINS: Just a few points, Mr. Chief Justice.

We'd like to make certain that there's no misunderstanding regarding the standing of the Director in this Court. 28 U.S.C. 1254 plainly allows the Director as a party to petition for a writ of certiorari. We were a party respondent below.

There's no serious case or controversy question in this case because Respondent Churchill is before the case -- is before the Court. He will either receive or be denied benefits. This is not, as the Valley Forge case, as in the words in the Valley Forge case, a mere college debating forum.

We have very little to add on the merits of our case except to note that the Fifth Circuit in a

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recent en banc decision voted 12 to 2 to adopt in full the position of the Director.

As Mr. Justice Frankfurther noted in his concurring opinion in Davis: "Any legislative scheme that compensates workmen or their families for industrial mishaps should be capable of simple and dependable enforcement." We urge this Court to adopt the commonsense view that employment on the water is maritime, rather than becoming embroiled in formalistic inquiries as to whether particular employments possess that elusive connection.

Thank you.

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

(Whereupon, at 2:02 p.m., the case in the above-entitled matter was submitted.)

* * *

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

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#81-897

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY _____

(REPORTER)