ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1448

TITLE UNITED STATES OF AMERICA, Petitioner v. STAUFFER CHEMICAL COMPANY, Respondent

PLACE Washington, D. C.

DATE November 2, 1983

PAGES 1 thru 46

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA, :

Petitioner, :

v. : No. 82-1448

STAUFFER CHEMICAL COMPANY, :

Respondent. :

- x

Washington, D.C.

Wednesday, November 2, 1983

The above-entitled matter came on for oral argument befcre the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

LOUIS F. CLAIBORNE, Esq., Washington, D.C.; on behalf of Petiticner.

CHARLES F. LETTOW, Esq., Washington, D.C.; on behalf of Respondent.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Claiborne, I think you may proceed when you're ready.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF PETITIONER

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

The question on the merits in this case is whether, in carrying periodic inspections of stationary emissions sources under the Clean Air Act, EPA may avail itself of the help of retained independent contractors under a provision of the Clean Air Act that permits the use of authorized representatives of the Administrator for this purpose.

But before reaching that question on the merits, there is a threshold question, which is whether EPA was barred in this particular suit from asserting the affirmative of the question on the merits because in an earlier suit arising out of an attempted inspection of another plant belonging to the same company, but located in a different state and a different judicial district, another Court of Appeals had rejected that position.

This case, which is referred to in the papers as Stauffer II, arises out of an attempted inspection of

Respondent's phosphorus plant in Tennessee some time in March of 1980. EPA personnel, accompanied by state officials and also by retained independent contractors, experts in the field, sought entry to that plant. The company refused entry to the independent contractors. Negotiations followed.

An impasse was reached, and some weeks later, in August, EPA secured a warrant to enter the plant. That warrant specifically authorized that they, EPA personnel, be accompanied by the independent contractors. Nevertheless, the company again refused entry to the contractors.

EPA then moved to hold the company in contempt for disobedience of the warrant, and in turn the company moved to have the warrant quashed.

Now, by this time Stauffer, Respondent here, had won this same issue in a district court in Wyoming, in the Tenth Circuit. This decision is referred to in the papers as Stauffer I.

Interestingly, in this case, the case before the Court today, when it was in the district court it was not argued, and indeed it seems to be common ground that it could not have been argued, that Stauffer I was any bar to reaching the merits in the present case. That is because not only was that district court

decision in Stauffer I not final -- indeed, it was appealed -- but also because the holding on the issue that concerns us here was merely an alternative holding, and in those circumstances estoppel would not apply.

Accordingly, the district court in our case considered the matter on the merits. But it considered it for several months, only issuing its opinion in April 1981.

In the meanwhile, two other district courts elsewhere had decided the same issue. One was in the Fourth Circuit, what is called the Alcoa case; another was in the Ninth Circuit, the Bunker Hill case. In both instances the decision had gone in favor of EPA, allowing the use of these independent contractors to perform or to aid in the performing of these inspections.

The district court, noting this conflict among -- the district court in our case, noting the conflict among these other district court decisions, Stauffer I in favor of the company, Alcoa and Bunker Hill in favor of EPA, determined to consider the matter afresh. In its words, it was writing on a clean slate in this circuit, the Sixth Circuit.

In what can only be fairly described as a carefully reasoned opinion, the district court rejected

the company's arguments and held that the statute does indeed permit EPA to use independent contractors to aid it in these inspections.

The Respondent obtained a stay and filed an appeal to the Sixth Circuit. While that appeal was pending -- and it was pending for some time, 14 months -- there were two further developments. Two of the cases I've mentioned, Stauffer I and Bunker Hill, were decided by their respective Courts of Appeals. Stauffer I was decided by the Tenth Circuit in favor of the company, whereas Bunker Hill was decided by the Ninth Circuit in favor of EPA.

The Government did not seek certiorari from Stauffer I, that being the first appellate decision, and obviously there was then no inter-circuit conflict, and in turn when, six months later, Bunker Hill was decided by the Ninth Circuit the other way, that company did not seek certiorari to this Court.

It was against this background that the case was decided by the Sixth Circuit in the matter before the Court today. The court held, first, that EPA was collaterally estopped by Stauffer I from relitigating against the Stauffer company the independent contractor issue.

Two judges of the panel of the Sixth Circuit

so held. One of those two judges stopped there. The other went on and reached the merits, holding against EPA on the merits as well.

The third judge disagreed with the estoppel ruling but, reaching the merits, he likewise ruled against EPA. The upshot is that the Government lost on both issues and, after a hearing was denied, filed its petition of certiorari on both questions.

I take the estoppel question first. In light of the argument just had, it would be needless of me to repeat the general principles which Mr. Geller has fully and adequately outlined. I stress that here, as there, we're dealing with a pure question of law. We're dealing with a question of public law. We're dealing with a question of public law that affects the welfare of the general citizenry.

We're dealing with a question of public law in which a broad category of competing operators are controlled by the legislation. We're dealing with a public law that is administered on a continuing basis by a governmental agency throughout the nation.

Now, in those circumstances, as Mr. Geller says, it is common ground, and certainly common ground between counsel for Stauffer and myself, that the rules of estoppel must be applied in a more limited way than

would otherwise be true, I would say with special caution; and all the reasons with respect to freezing a possibly erroneous rule of law, burdening this Court and the Courts of Appeals with unnecessary appeals, apply fully here as they do in the previous case.

Indeed, here no one argues that EPA should be barred from relitigating the same issue against another company merely because it lost the first appellate court test in Stauffer I. Nor is it argued that the Government is estopped because it failed to petition for certiorari in Stauffer I. Presumably, had it petitioned this Court would more likely than not have denied that petition, there being no conflict at the time, and the denial of the writ would have made the decision no more, no less final than the failure to petition in the first place.

And indeed, the Ninth Circuit's conflicting decision in Bunker Hill, rendered after Stauffer I, sufficiently illustrates the proposition that no one suggests that the rule is frozen by the first appellate decision in Stauffer I.

The only serious question presented in this case in this respect differing from the previous case is whether the original party, here Stauffer, ought to be insulated nationwide because it won in the first test in

the Court of Appeals, as it happens in the Tenth Circuit.

QUESTION: Could you have gone back in the same circuit?

MR. CLAIBORNE: After a time, my answer must be yes.

QUESTION: I would think you should be able to relitigate with Stauffer at the same plant?

MR. CLAIBORNE: We say we could.

QUESTION: Yes. And if you couldn't?

MR. CLAIBORNE: I'm sorry?

QUESTION: And if you couldn't, you couldn't elsewhere, either?

MR. CLAIBORNE: I don't know that that follows. But it seems to me illogical to draw a line which permits the Stauffer company to be specially insulated for all time within the Tenth and the Sixth Circuits and not elsewhere.

Now, we readily concede that even in this special context of public law involved here, a final judgment just afford the prevailing party some degree of insulation. There is first the protection against unduly harrassing repetitive litigation. As we view it, that is the core of the Montana decision, because there --

QUESTION: Well, isn't that doctrine, though, served by saying that one bite at the apple is enough? How soon does it become too repetitive?

MR. CLAIBORNE: Well, it depends on the context, and it may be difficult to gauge in some circumstances. But the Montana case illustrates what must have appeared to this Court as an abuse of the attempt to relitigate. There were there two lawsuits against the state for a refund in rapid succession by the Government contractor, followed immediately by a suit by the United States, who had controlled and financed the prior litigation, which was in important respect overlapping of not only the facts -- not only the law, but the facts of the two previous cases. That case had been held in the wings pending the outcome of the state court litigation. The Government was satisfied with the result there, then reactivated its own lawsuit. The Court viewed that sequence of lawsuits as beyond the permissible bounds.

Where one draws the line at the other end does very much depend on the context. In the tax law, the rule seems to be that a determination of status as exempt or otherwise is good only for the given tax year. In other contexts, that determination may be good on a permanent basis.

Now, turning to not the question of time so much as the extent to which the first judgment insulates he who prevailed in that first litigation, we say that the prevailing party ought to be secure for the time contemplated by the controlling law or contract against an attempt to redetermine the distinct right or title or status that was adjudicated in his favor, even though that right, title or status depends entirely on an overriding question of law, but that he has no vested right in the underlying rule of law.

He has a vested right in the resulting title or entitlement or right or status which came to him personally as a result of applying that rule of law, and no challenge to that resulting title or right can properly be brought until its normal period has expired.

As I've suggested, in the tax law that is one year. One cannot relitigate whether or not a taxpayer is or is not owing certain taxes or is entirely exempt within the given tax year.

In the context of the previous case, one could never relitigate the question of whether the 68 veterans are or are not entitled to citizenship. That is -- becomes a vested right in the judgment.

But the underlying rule of law that led to

that result is fully open to relitigation, even as against the same party if occasion should arise. Now, this is saying something more than merely giving res judicata effect to the first judgment, because that entitlement to citizenship, for instance, in the case of the 68 veterans, works not only to prevent the Government from bringing another lawsuit to immediately challenge the citizenship, but it prevents the Government from denying on a wholly separate lawsuit the benefits that may flow from citizenship, even though it's a quite distinct context.

That is, it seems to us, the same rule that was applied in the Moser case. Mr. Moser was declared to be entitled to a pension by applying a rule of law, arguably erroneously. That was secure against relitigation. The rule of law, however, which was a matter of construing two statutes of Congress and nothing more, was something in which he had no vested right. His vested right was in the declaration that he was a Civil War pensioner. How the court got there was not what the judgment protected him against.

QUESTION: May I ask a question about that case? As I understand it, there were both -- in the prior Moser litigation, there both was a question whether he was entitled to this installment of pension

based on the higher rate because his service at Annapolis was Civil War service, and also his salary during his World War One service, which presented a different claim than the claim to a pension. And both of those were held to be governed by the issue preclusion.

Now, why isn't that just like --

MR. CLAIBORNE: I'm sorry, Justice Stevens, I must have read the Moser case too quickly. I had thought --

QUESTION: It only appears -- I happen to have a very diligent law clerk. It appears in the Court of Appeals report, but not in the Supreme Court report.

MR. CLAIBORNE: Oh, well. I did not dig deep enough.

I don't know how to explain that. As this Court's report recites the facts, Mr. Moser -- the legal issue was whether his service as a cadet at the Academy counted as far as service towards the 40 years, and that had been determined in his favor by the Court of Claims in Moser I.

It apparently had been redetermined in his favor in two subsequent cases, but in the interim there had been a conflicting decision by the Court of Claims in someone else's case, and in the third of those cases

in the Court of Claims, the one that reached this Court, the Court of Claims had said, estoppel prevents us from re-examining it, but as a matter of fact we will go on and do so and overrule the conflicting case.

This Court said, we don't reach the merits, we agree that estoppel bars it.

But I thought all that was entitlement to his pension as a Civil War veteran, rather than a First World War veteran.

QUESTION: He was recalled to active duty in World War One, which was an ironic fact.

MR. CLAIBORNE: That may be. I can't explain.

At all events, the distinction I seek to draw is easy enough in cases like citizenship, tax status, entitlement to a pension. It is more difficult in the present case, where the alleged exemption and the rule of law seem to merge in an almost indistinguishable way. But the effort must nevertheless be to try to preserve something for the beneficiary of the judgment without the risk of stultifying the rule of law in which may be an erroneous decision.

Here, therefore, we're left with two choices. One is to say that Stauffer, the Stauffer company, has won a permanent exemption from inspection by EPA's

retained contractors for all its plants nationwide for all time; or that what it has truly won is an exemption from the enforcement of a particular warrant, addressed to a particular inspection at a specific plant.

Faced with those choices --

rWould it be different, Mr. Claiborne, if only one plant were involved? You mentioned the number of plants of this company. Would that plant be immune from subsequent relitigation of the same issue?

MR. CLAIBORNE: Well, that, Justice Powell, I think is the same question in which I gave an answer to Justice White, which is that --

QUESTION: I think it was, but more recently you've been talking about multiple plants.

MR. CLAIBORNE: Yes. I am driven to say that after an appropriate lapse of time, even with respect to the single plant, the Government cannot be estopped. And here the appropriate length of time I would analogize to the rule in tax law, which in that case is the taxable year. Here the appropriate length of time to avoid any claim of harrassment would seem to be the time within which, probably a year, in which as a matter of random selection of inspection sites this plant should once again come on the roll.

But in the interim this plant would indeed be

immune.

QUESTION: Would the appropriate time be one year?

MR. CLAIBORNE: Well, it may or may not be one year, but it's whatever time in normal course this plant might be due for inspection again. As it happens, there are no set rules as to how often a particular plant is inspected.

QUESTION: This case is very different from the preceding one, in that you have identical parties and identical issues, don't you?

MR. CLAIBORNE: Indeed.

QUESTION: And all of the policy arguments that the Government makes seem to me to be considerably stronger in the earlier case than they do here. Do you agree to that?

MR. CLAIBORNE: Concededly, to hold in favor of the Stauffer company here would not present the full array of problems that would be involved in a comparable decision in the previous case, because the Government would remain free to relitigate this issue as against other companies in other circuits and, as has been the experience, and produce a conflict which ultimately could reach this Court. There presently is such a conflict between the Bunker Hill case and the Stauffer

case.

But nevertheless, the consequences of holding that because there is mutuality here there is an estoppel running to this company for all its plants nationwide would be most disturbing. Let me give the following illustrations of the consequences of holding for Stauffer according to its argument here.

Let us suppose that Bunker Hill, the company whose plant in the Ninth Circuit was found to be subject to inspection with the aid of independent contractors, had a plant located in the Sixth Circuit. Now, is it precluded, because it lost in the Ninth Circuit and failed to apply for certiorari, from claiming the exemption which is the law of the Sixth Circuit or the law of the Tenth Circuit at present? And if not, it's at a competitive disadvantage which seems only inappropriate in this area of public law.

The same problem in reverse arises if, as is the case, Stauffer has plants in the Ninth Circuit. We're told it has eleven plants in the Ninth Circuit. The law of the Ninth Circuit is that independent contractors may enter to help EPA personnel conduct the inspection.

Well, must the Ninth Circuit ignore its own rule and apply estoppel to the Stauffer plants, uniquely

the Stauffer plants?

QUESTION: Mr. Claiborne, I suppose that so long as the rule were limited to mutuality that eventually this Court's practice of granting certiorari when a conflict emerges would make the kind of problems you're describing fairly short-lived.

MR. CLAIBORNE: Well, I'm not so sure, Justice Rehnquist. Suppose this case -- this Court, in this case or in another case, does resolve the conflict. Does that wipe away -- I don't think my opponent concedes that it does -- the estoppel effect of their judgment in the Tenth and Sixth Circuits? They would, I suppose, maintain that, notwithstanding that the law had been authoritatively declared to be otherwise, estoppel still protected them nationwide because the Government had lost the first case against them.

QUESTION: Is there any exception to collateral estoppel for a change in the controlling law?

MR. CLAIBORNE: There is, though I'm not clear that that rule is of peculiar relevance in the situation of mutuality. There certainly is with respect to non-parties.

QUESTION: If you litigated the same issue with another company and won --

MR. CLAIBORNE: As we have done.

QUESTION: -- that employees, non-employees could inspect, if there were collateral estoppel forever Stauffer would be permanently exempt from the rule.

MR. CLAIBORNE: Exactly so, and that is why that cannot be the result. We have, of course, litigated with another company and won in the Ninth Circuit in the Bunker Hill case.

QUESTION: And suppose it came here and it was affirmed, the Ninth Circuit was affirmed, and the rule was then established that the Court of Appeals decision in this case was wrong.

MR. CLAIBORNE: Well, I suppose that Stauffer would still maintain that in the Sixth and Tenth Circuit it was immune because --

QUESTION: Or anywhere.

MR. CLAIBORNE: Or anywhere. Or anywhere, indeed, because this hasn't arisen in the First and Second and Third and Fifth and Eighth Circuits. In those circuits, according to my opponent, the courts must give one rule to Bunker Hill plants and another rule to Stauffer plants, and with respect to the plants of third companies they may apply either rule. Now, that cannot be a result which is tolerable, even pending the resolution of the matter by this Court.

QUESTION: Of course, if it's really a matter of some national importance I suppose Congress could pass a clarifying amendment and that whole problem would go away, because after a Congressional change there would surely be no right to claim a vested interest in the judgment.

MR. CLAIBORNE: I think so, but to require or to anticipate that Congress will resolve -- as this Court is only too painfully aware, it is this Court and not Congress that most habitually resolves these kinds of problems.

QUESTION: I happen to believe that need not always be so.

MR. CLAIBORNE: I have said nothing on the merits and wish only to -- I must rely to a large degree on our briefs for that point. Let me simply quickly outline the five points we would make on the merits.

The relevant section says on its face that authorized representatives of the Administrator may perform these inspections. That is different from saying officers and employees. Another subsection enacted contemporaneously of the same section, according to the Court of Appeals itself, quite plainly uses the words "authorized representative" as not meaning simply officers and employees, since they are listed and the

listing would be redundant.

The legislative history supports our conclusion because we have a House version far more restrictive with respect to inspections, which spoke of officers and employees only to conduct these inspections, the Senate version spoke in the terms of the ultimate enactment, and it is clear that the conference preferred the Senate version on this question of the provisions for inspection. There was presumably a point to that, the difference.

There's nothing unusual, of course, about securing the aid of independent contractors to perform like inspections. It was authorized by Congress most recently in 1980 with respect to inspections under the Solid Waste Fuel Act.

And finally, there has been a consistent agency practice since 1970 of using such independent contractors, and Congress when it revisited the law in 1977 apparently endorsed that preexisting practice.

CHIEF JUSTICE BURGER: Mr. Lettow.

ORAL ARGUMENT OF CHARLES F. LETTOW, ESQ.

ON BEHALF OF RESPONDENT

MR. LETTOW: Thank you. Mr. Chief Justice and may it please the Court:

EPA in this particular case has been a

persistent plaintiff, at least as far as Stauffer is concerned. As Mr. Claiborne has discussed with you, the successive proceedings in Stauffer I and then in Stauffer II arise on virtually indistinguishable facts.

QUESTION: Would you raise your voice a little, Mr. Lettow.

MR. LETTOW: Yes.

The only differences between the Stauffer I case and this case are that the contractors in both cases were different and the particular location of the plants was in different states. Otherwise, the cases themselves arise on identical facts.

As it happened, in Stauffer I EPA planned to use a private contractor, GCA Corporation, to conduct that inspection of the plant in Wyoming. It followed the same pattern in Stauffer I that Mr. Claiborne has described for Stauffer II. EPA, accompanied by its contractor, approached the people at the plant in order to carry out the inspection. Stauffer welcomed the inspection by EPA officials.

The Wyoming state officials were accompanying EPA. EPA's intent in actually inspecting the plant was to audit the state enforcement efforts. There wasn't anything in particular directed against Stauffer in this particular instance.

But Stauffer would not willingly allow GCA Corporation, in Stauffer I, to inspect the plant, at least absent a written trade secret agreement or an agreement to protect those trade secrets that were in use at the plant and the processes that were employed there.

When EPA obtained a search warrant, it did so ex parte. The search warrant called on the GCA men to make the inspection accompanied by EPA officials. When they came to the plant to execute the warrant, Stauffer again said: We will welcome the inspection by EPA and Wyoming officials; we will not willingly admit ithe GCA men, again absent an agreement to protect trade secrets. And at that point EPA decided not to make the inspection using its own people, even though the people it had on hand were qualified to make that inspection.

Stauffer moved that same day to quash the warrant in Wyoming federal district court. The court held a two-day evidentiary hearing and it decided two things. It quashed the warrant on two grounds: first, that EPA was not entitled to rely on the Clean Air Act as a basis for using independent contractors to make that search. It had no such power under the Act. And then secondly, because of the interchange between Stauffer and EPA, EPA was not authorized to use an ex

parte procedure to get the warrant.

At that point Stauffer had a judgment that applied to that plant in Wyoming. But then, about six weeks after the Wyoming district court had ruled, EPA went to the federal magistrate sitting in Nashville and obtained a warrant in this case, Stauffer II, calling for a different contractor, PEDCo Environmental, Inc., accompanied by EPA to enter the Stauffer plant at Mount Pleasant, Tennessee, and carry out an inspection there.

The scenario, as Mr. Claiborne has described it, in Stauffer II is a replay of what happened in Stauffer I. The Sixth Circuit concluded that EPA had a full and fair opportunity to litigate the question of statutory authority to use contractors to make searches in that first Stauffer case. It lost. When it took an appeal to the Tenth Circuit, the Tenth Circuit affirmed the district court's ruling against EPA.

Under this Court's decision five terms ago in Montana, that was enough such that EPA should be collaterally estopped from asserting that same right -- that is, the right to use private contractors in searches -- against Stauffer in any other plant that Stauffer has in the United States.

QUESTION: Would you say that would last forever?

MR. LETTOW: No. Justice White, I don't think it would last forever, but it would last as long as the circumstances were comparable, and I think that's the import of this Court's rulings in Moser and Montana.

QUESTION: Well, but what about the circumstance, what if in litigating with other parties the EPA established the controlling law in this Court that was contrary to the decision you want?

MR. LETTOW: I think both under the ruling in Moser, which has already been discussed, and Montana, which explained Moser, we would not be able any longer to assert collateral estoppel against the Government.

QUESTION: Until the controlling law was changed, though, you think --

MR. LETTOW: That's correct.

QUESTION: -- that during that time you should be entitled to your judgment?

MR. LETTOW: That's correct, as long as there is nothing in the factual circumstances that arise in the successive case that would change how the rule of law arises. Is it the same question of law? And in this case it's clear, I think, that in Stauffer II the question is the same as in Stauffer I.

QUESTION: Well, it might be the same question of law, but if the controlling law has changed you just

shouldn't be entitled any longer to rely on that Court of Appeals opinion.

MR. LETTOW: No, we would agree. And in fact, that also is the position the Restatement takes on this very point. We would concede that.

But that, of course, hasn't happened. In fact, there are two rulings on the merits by Court of Appeals. They're both in Stauffer's favor. They're both Stauffer cases. There's one ruling against and that's the Bunker Hill situation.

QUESTION: What if the Sixth Circuit in this case had thought you were wrong on the merits, but nevertheless affirmed on estoppel grounds, so that we wouldn't really be changing the law then?

MR. LETTOW: Well, in that particular instance I don't think the Sixth Circuit would have said anything at all about the merits. I think it would have stopped with the collateral estoppel ground. It was a very unusual procedural setting in the Sixth Circuit that led to the dual decision.

QUESTION: Well, they might have had a panel decision that went off on the merits and then heard the case en banc and decided en banc that estoppel applies.

MR. LETTOW: Well, again, I don't think it would have done that in this case, in Stauffer II. I

think what you're raising as a hypothetical might be what might happen in the Ninth Circuit if EPA were to try to use a contractor to inspect a plant in the Ninth Circuit. And there we would say EPA is collaterally estopped only as to Stauffer because of the prior decision in the Wyoming district court, as affirmed by the Tenth Circuit.

QUESTION: You say that the EPA is not entitled to try to change the controlling law by litigating with you.

MR. LETTOW: That's correct. It can apply it against anyone else at least once, because that's the opportunity that Stauffer had.

QUESTION: But let's follow up on your Ninth Circuit. You're right, that is a better example. But there would be -- if we decided the issue on the merits and you lost on the merits, the Ninth Circuit's controlling law would not be changed.

MR. LETTOW: Well, but if you decided --

QUESTION: Would you nevertheless agree you would not be able to plead collateral estoppel?

MR. LETTOW: I agree. If you decided that the law was on the merits as EPA says it is, then, as Justice White posed earlier, we would not any longer be able to assert collateral estoppel.

QUESTION: Even in the Ninth Circuit --

MR. LETTOW: Even in the Tenth Circuit.

QUESTION: -- even though there's no change in the controlling law?

MR. LETTOW: That's correct.

QUESTION: Even with respect to the very plant?

MR. LETTOW: Yes, that's correct.

QUESTION: On the other hand --

MR. LETTOW: It's a very narrow application of collateral estoppel.

QUESTION: -- if we rule on collateral estoppel we don't have to get to the merits.

MR. LETTOW: Well, that's a prudential rule. I think the Sixth Circuit was right that it had jurisdiction and power to reach the merits if it wanted to. It didn't have to.

QUESTION: Well, what do you urge us to do?

MR. LETTOW: I'm sorry, Justice Marshall? I didn't hear.

QUESTION: What would you urge us to do?

MR. LETTOW: Well, that is entirely up to you. If you want --

QUESTION: I realize that.

MR. LETTOW: -- also to go on to the merits

--

(Laughter.)

QUESTION: But don't you want to help us a little?

MR. LETTOW: Justice Marshall, just as in the Sixth Circuit, we're not in a position to say you should or should not reach the merits in this case if you're comfortable ruling for Stauffer on the collateral estoppel issue. That's an entirely prudential issue that's up to this Court to decide. I don't think it's within the power of a private counsel to advise --

QUESTION: Well, I know. But if we go on to the merits and we change the controlling law, your estoppel argument goes out the window.

MR. LETTOW: Well, it does, but what you're saying then is we couldn't estop the Government.

QUESTION: In this case?

MR. LETTOW: Yes. So we couldn't in any other case either, because you've changed the controlling law.

QUESTION: What good is your estoppel argument if you just concede a court may nevertheless -- even though the Government is estopped, it really isn't estopped if you can go over and reach the merits in litigating with you?

MR. LETTOW: Well, that's the issue that the Sixth Circuit would have had if it had disagreed with us on the merits. But I don't think that's presented in this particular case, because you have to face the collateral estoppel issue first and you only get to the merits if you've ruled against us on collateral estoppel.

EPA suggests fairly straightforwardly in this particular case that it wants the Montana precedent limited and it wants it limited in two particular respects. Its first claim is that collateral estoppel shouldn't be applied because the facts in the two cases, Stauffer I and Stauffer II, aren't identical in all respects, not just in all legally significant respects. Remember, we do have these two factual differences that really don't have any bearing on the applicability of the legal question in the case.

And there EPA or the Government bases its argument on the decision in United States versus Moser and the exception that it announced there for a principle of law that was decided arising on a different demand. What EPA is saying is that by different we mean in any respect whatsoever, not just legally significant differences.

QUESTION: Mr. Lettow, does that distinction

in the Moser case about a question of law, do you think it really makes a great deal of analytical sense?

MR. LETTOW: Well, in this case, in Montana the Court didn't think it made so much sense that the Government was right in arguing for complete factual stasis, because it said there: No, that's not really what we mean; what we mean is you want to look to see whether the question of law is in substance the same as was resolved in the prior litigation against the United States.

So essentially, in Montana the Court explained Moser, and perhaps it has to do with the way the Moser case is reported, because if Justice Stevens is correct then Moser basically held that anyway. But I think that has given rise to some confusion. I don't think there's any doubt about that.

QUESTION: Can you think of any litigation between two parties that wouldn't give rise to a question of law?

MR. LETTOW: Well, that's true. But in this particular case the question of law is really the turning point in the case. You can have a lot of cases that turn on facts or factual determinations. That's not so in this case. The Government is just asserting flatly that it has a right to bring private contractors

into plants. The whole focus of the case is on that particular instance. It's not a tort case, where you might have claims of negligence that turn on facts or that sort of thing.

And in fact, the 1982 Restatement of Judgments -- that's the Restatement of Judgments Second -- concurs basically with this Court's explanation of the Moser case in Montana, because the Restatement takes the position that the test is whether the facts are sufficiently similar or identical for purposes of the applicable rule of law. I think that really is the test.

And indeed, if EPA's position were adopted we'd be remitted to the separable facts doctrine that this Court announced in the 1948 tax case of Commissioner versus Sunnen. I think that was what Mr. Claiborne was referring to when he was talking about the IRS deficiencies focusing on a particular tax year or not.

But this Court there had announced that rule in a tax case. Even commentators or subsequent courts had great difficulty in applying it even in the tax area, let alone other areas of law, and we would take the position that this Court in Montana limited Sunnen to accord with its views regarding Moser, and there's no

reason now to go back to the old Sunnen test and to apply it or just sort of resurrect it and apply it not just in tax areas, but to all areas of law.

So we would argue that the Montana test makes sense, it ought to apply to this case, and the Sixth Circuit indeed correctly applied it.

EPA has a second suggestion, though, for limiting Montana, and it's equally as wide-ranging. It asks the Court to adopt an exception for what it calls "recurring questions of law". We acknowledge that the courts traditionally have given the Government substantial latitude to relitigate legal issues. We acknowledge that the Restatement of Judgments notes that the Government's special role is entitled to weight in deciding whether or not to apply collateral estoppel in the particular case.

We question whether anybody has concluded that the Government's role is dispositive, and it would have to be dispositive to rule against us on collateral estoppel in this particular case because this is the most traditional application of collateral estoppel. This is defensive collateral estoppel by the party to the prior case. That is, mutuality is present.

Stauffer was subject to repetitive claims, excessive claims by EPA, not the other way around. And

accordingly, you have both the values of conservation of judicial resources, which you discussed in the Mendoza argument, and the protection of that prevailing party against the vexation and expense of successive litigation that come to bear.

QUESTION: You don't suggest that this is res judicata?

MR. LETTOW: No.

QUESTION: Because?

MR. LETTOW: It's a different claim technically, just like --

QUESTION: It's a different plant.

MR. LETTOW: That's correct.

QUESTION: Different facts.

MR. LETTOW: Insofar as a different time, a different warrant was actually obtained by the Government.

QUESTION: Aren't you really here arguing that -- I would think you're really saying you ought to treat this as res judicata.

MR. LETTOW: No, you shouldn't treat this as res judicata any more than you treated the Montana case as res judicata, because there you technically had in the second claim by the Government a different contract. Same facts, almost identical facts, but a

different contract.

We're in the same position that the State of Montana was in that litigation.

QUESTION: So this is just one case, one situation, as you have already said, where collateral estoppel should apply to an issue of law?

MR. LETTOW: Yes, because the facts are so close that you have precisely the same issue presented. You can assure yourselves of that using the test in Montana, which explained Moser and Sunnen. I think that's a fairly clear exposition of what the existing law is. That's all we're asking be applied.

QUESTION: Res judicata in your view really applies only to what you might call an effort to reopen a judgment?

MR. LETTOW: That's correct, it's same claim preclusion --

QUESTION: Same claim.

MR. LETTOW: -- it's not same issue preclusion. That's what collateral estoppel is.

Defensive use of collateral estoppel has been something that this Court has traditionally favored, as indeed all courts have. Back to the 1971 decision in the patent case, Blonder-Tongue, that involved application of defensive use of collateral estoppel by a

non-party. But the Court there noted that defensive use was a favored application, as contrasted to offensive use.

And then in Parklane Hosiery, which allowed offensive use by a non-party, the Court also observed, though, that defensive use didn't pose the same problems that offensive use did. And this case illustrates that, especially because defensive use is confined only to the prevailing party in the prior case. EPA was precluded from bringing its claim only against Stauffer. It can relitigate it against anyone else at least once.

The experience that the Courts of Appeals have had in deciding cases after the Montana and Parklane case is we think instructive. We have cited a series of those cases in our brief. Uniformly, the courts have applied collateral estoppel where you had successive suits by the Government, even on recurring issues of law, where the private party, the prevailing party in the prior case, was applying collateral estoppel defensively.

We have cited Continental Can, which is a case by the Seventh Circuit which held that OSHA couldn't successively sue a company for a series of noise violations arising at different plants in the country, and it's obviously very close on its facts to this

case.

Then there was ITT-Rayonier in the Ninth Circuit. The court there barred successive claims by Government agencies against a company alleging violations of one water discharge permit.

Then there was the Union Carbide case in the Second Circuit. There the IRS was barred from asserting a deficiency against Union Carbide for the 1971 tax year where it had previously litigated and lost the same issue against the company regarding the 1967 tax year.

And then in the Starker case, in the Ninth Circuit as well, you had again an IRS tax deficiency assessed against a father where the IRS had litigated previously against the son on transactions arising out of exactly the same contract.

Now, based on this experience in the Courts of Appeals since you decided the Montana and Parklane Hosiery cases, Judge Jones, who wrote separately in the Sixth Circuit, thought he was able to distill a consensus. We think that consensus is instructive. What he said was: I don't favor precluding a federal agency's ability to test its policy decisions in more than a single circuit in circumstances. But while he didn't do that, in circumstances where the same defendant is sued in seriatim without the agency

attempting to exhaust its appeals on the previous judgment, the equities favor application of collateral estoppel and not its abdication.

And you also have, along the same line, an expression of view in the American Medical case in the D.C. Circuit, which both the Government and we have argued extensively, which said that there aren't any national shockwaves that are going to be generated if the court applies collateral estoppel defensively against the Government on a recurring issue of law only against the party that prevailed in the prior litigation.

We think that the Government's special role might be enough to turn aside an offensive use of collateral estoppel, whether it be by a party or a non-party. It might be enough to turn aside defensive use of collateral estoppel by a non-party. But we don't have those cases here. This is at the core of the doctrine of collateral estoppel, and the courts that have denied, the Courts of Appeals that have denied, use of collateral estoppel in these other circumstances have uniformly distinguished this case.

QUESTION: Well, I don't know how you can really say it's at the core of collateral estoppel if you concede the general rule that you aren't

collaterally estopped on issues of law.

MR. LETTOW: Only -- we can collaterally estop the Government on an issue of law arising on identical facts or virtually identical facts. That's our argument.

QUESTION: That isn't very -- if you're going to have to go through that routine, it's hardly so clear that it's, say, at the core of collateral estoppel.

MR. LETTOW: But it's been applied by this Court for almost 60 years. You can go back to the Moser case and it was applied there. We aren't really asking for anything different than what this Court did in Moser.

QUESTION: Or Montana, you say.

MR. LETTOW: Or Montana.

I'd like, if I could, to turn briefly to the search warrant question, although there we think that Judge Weick's opinion in the Sixth Circuit fairly and adequately covers all the relevant points. He concluded, as the Tenth Circuit -- for the Sixth Circuit in his opinion for himself and Judge Siler, as the Tenth Circuit had earlier in Stauffer I, that private contractors were not to carry out searches at private plants for EPA under the Clean Air Act, that EPA had no power to designate them to do that.

He concluded that that was Congress' intent when it adopted the statutory provision with which we are concerned, and he concluded also that it was important to note that in centuries of Anglo-American jurisprudence private parties had never been allowed to carry out governmental searches. This was a rare exception. It was almost unprecedented, and that had a role to play in how one should look at the particular statutory provision that's at issue here.

That provision is Section 114(a)(2) of the Clean Air Act. As Mr. Claiborne pointed out, it was adopted by Congress, it was added to the statute in 1970.

At the time of its adoption, the House had provided in its bill that officers and employees of the Department of Health, Education and Welfare, which was then charged with the responsibility for administering the Act, could enter and inspect plants. The Senate's bill had provided the "authorized representative" language which now appears in the final text.

In the Conference Committee report which describes the conferees' effort to resolve the differences, the cenferees describe the House provision as authorizing DHEW investigatory personnel to enter and make searches of plants. It described also the Senate

provision, the "authorized representative" language, as authorizing DHEW personnel to enter and search plants. In other words, it used exactly the same language to describe those persons who could implement the authority.

Judge Weick in the Sixth Circuit, like the Tenth Circuit had, viewed this declaration of equivalence between the terms by the conferees as indicating the Congressional intent not to ascribe any particular difference in interpretation or construction between the choice of the two terms.

And indeed, there is also other evidence which indicates that the Senate did not have in mind any broader reach in using the term "authorized representative" than the House did when it used the term "officers and employees". The Senate had used generally the term "authorized representatives" and the House generally had used the term "officers and employees" throughout the bills that it had adopted in 1970.

There was, however, a section of the Senate bill, Section 209(a), at least it was then, which dealt with EPA's access to the records of auto manufacturers, and that section provided specifically that, upon request of an authorized representative of the Secretary, again of HEW at that point, the auto

manufacturer must permit such officer or employee to have access to the records.

This was direct evidence of what the Senate had in mind. It meant officers and employees when it used the term "authorized representatives" in the statute.

And indeed, this intent on the part of Congress was confirmed very shortly thereafter. After the Congress had completed work on amendments to the Clean Air Act in 1970, it then turned, or the same committees turned, to the Clean Water Act, and they proposed to add terms to the Clean Water Act which would authorize the agency to inspect and search plants. They used when they did that as a model the provisions which they had just adopted in the Clean Air Act. In fact, the terms in the Water Act, that Section 308(a), are almost identical with those which appear in Section 114(a)(2).

QUESTION: But they're not identical.

MR. LETTOW: They are not identical, but they are in this particular respect. And at the time, the Senate report of the Water Act provision stated that:

"It should also be noted that the authority to enter, as under the Clean Air Act, is reserved to the Administrator and his authorized representatives, which

such representatives must be full-time employees of the Environmental Protection Agency. The authority to enter is not extended to contractors with the EPA in pursuit of research and development."

QUESTION: Of course, that's not in the Clean Air Act, is it?

MR. LETTOW: No, it's not. And indeed, the Tenth Circuit and the Sixth Circuit in this case both observed that the statement by the later Congress ordinarily would have little weight regarding what an earlier Congress had meant. That's quite correct, Justice Blackmun.

But, as Judge Weick found in this case, you have the situation where the Clean Water Act provision was very specifically and expressly modeled after the Clean Air Act, Congress in fact wanted the two provisions to be construed in para materia, one with the other. And indeed, the statements were also very closely contemporaneous in time. The one followed the other by only ten months.

We think also, in addition to that, the statutory context also supports the construction that the Sixth Circuit adopted. There is a sister provision to Section 114(a)(2) and that is Section 114(d). Section 114(d) says that where searches by EPA are being

carried out at plants in a given state, the Agency or its authorized representatives should give notice to the affected state that these inspections are being carried out.

As both the Tenth Circuit and the Sixth Circuit found, it almost passes understanding that the Congress would have had in mind in adopting that provision that you'd have notice given, such a sensitive intergovernmental communication, by a contractor and not by the responsible Government official.

What EPA does is point to a different section, that's Section 114(c), as support for its position. But that section doesn't even relate to searches. Instead, what it does is authorize disclosure of confidential information to, in the words of that particular section, "authorized representatives of the United States".

This is a broader reference. What it does in effect is serve a completely different purpose. It allows EPA to pass confidential information to federal and state agencies who are responsible for carrying out the Clean Air Act in circumstances where they otherwise wouldn't be able to because of constraints that would apply in the Trade Secrets Act and in the Federal Reports Act. And as a consequence, that provision was needed to allow that exchange of information.

There is one occasion that we're aware of ever when Congress has permitted a private party to carry out searches, and that sole occasion arises in the 1980 amendments to the Solid Waste Disposal Act. It allows EPA to designate contractors as its representatives only for purposes of that Act.

It's instructive that at the time Congress did that it also imposed criminal sanctions on contractors who abused that authority. Those criminal sanctions apply where a contractor gains confidential trade secret information during its inspection and then might use it itself or otherwise disclose it. What that criminal provision actually does is apply provisions or sanctions to that contractor that are equivalent to the Trade Secrets Act.

That doesn't happen in the Clean Air Act. There's absolutely no evidence of that, and it confirms Congress' intent that it didn't want private contractors carrying out searches.

We've also discussed the one common law exception in our briefs. That goes back to the 1660's and the reign of Charles the II, and indeed writs of assistance. And I will leave that to the briefs, but I think it's clear that indeed writs of assistance as they were applied in the American colonies were one of the

causes not only of the Revolution, but also led directly to the Fourth Amendment, and it indicates that there is still a reason for insisting on the traditional rule that Government searches be carried out only by Government people.

As one judge put it, Government officials have the normal discipline that's applicable to public officials, and certainly a private contractor doesn't have that discipline.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:58 a.m., the argument in the above-entitled matter was submitted.)

* * *

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that th 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:

82-1448 - UNITED STATES OF AMERICA, Petitioner v. STAUFFER CHEMICAL COMPANY, Respondent

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BY Pixie Hammond

(REPORTER)