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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-728

TITLE HERB'S WELDING, INC., ET AL., Petitioners v.
ROBERT H. GRAY, JR., ET AL.

PLACE Washington, D. C.

DATE October 3, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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HERE'S WELDING, INC., ET AL., :

Petitioners, :

v. : No. 83-728

ROBERT H. GRAY, JR., ET AL., :

Respondents. :

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Washington, D.C.

Wednesday, October 3, 1984

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:00 o'clock a.m.

APPEARANCES:

WOOD BROWN, III, ESQ., New Orleans, Louisiana; on
behalf of the petitioners.

CARCLYN F. CORWIN, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.;
on behalf of the federal respondent.

T. GERALD HENDERSON, ESQ., Alexandria, Virginia; on
behalf of respondent Gray.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Herb's Welding against Gray.

4 Mr. Brown, you may proceed whenever you are
5 ready.

6 ORAL ARGUMENT OF WOOD BROWN, III, ESQ.,

7 ON BEHALF OF THE PETITIONERS

8 MR. BROWN: Mr. Chief Justice, and may it
9 please the Court, this is the case of Herb's Welding
10 versus Gray. It is a case involving the coverage under
11 the Longshoremen and Harbor Workers Act to workmen on
12 fixed platforms in inshore Louisiana waters.

13 Our position is that Congress did not provide
14 for the coverage of this particular class of claimant,
15 and that there is no justification for extending
16 coverage to him and those like him.

17 The facts are stated in the Court of Appeals
18 opinion. The person was working as a welder on an oil
19 production platform within the three-mile limit offshore
20 Louisiana. There was a gas explosion. He was injured
21 while he was welding. From the record, we find that he
22 did nothing on this work -- on this platform except to
23 weld, and he welded generally on everything, including
24 gas lines, gradings, railings, and things like that.

25 The record establishes that he was doing some

1 welding on a gas lift line and at one place in the
2 recrd, and a gas flow line in the other. That is
3 significant because a lift line has absolutely nothing
4 to do with transportation of the gas; a gas flow line
5 conceivably could.

6 The question here, Your Honors, is not situs.
7 In other words, in a Longshoremen and Harbor Workers Act
8 case, the Court has considered both situs and status. We
9 concede that if this person is found to be a maritime
10 worker, that the platform itself is a place where this
11 particular type of work is performed, and therefore
12 situs would exist. The question in the case is status.

13 In saying that, I have to start off by saying
14 that there is really nothing maritime in the traditional
15 sense about this type of platform. I would like first
16 to get into the concepts and the differences between the
17 opponents and the applicants with respect to the details
18 in the litigation.

19 I suggest to the Court that the case here, the
20 decision in this case is controlled by the Court's
21 previous decision in Rodrigue versus Aetna Casualty and
22 Surety Company. The opponents take the position that
23 Rodrigue was a jurisdictional case.

24 I suggest that it is not. I suggest that at
25 that particular point makes no difference, because in

1 Rodrigue this Court clearly decided that platform
2 oilfield labor was no different from labor in the
3 oilfields on land or anywhere else.

4 In other words, the type of work that this guy
5 was doing at the time he was hurt is no different from
6 oilfield labor anywhere else, either offshore on the
7 Outer Continental Shelf, on the platforms inshore, or in
8 Wyoming.

9 QUESTION: Mr. Brown?

10 MR. BROWN: Yes, ma'am.

11 QUESTION: Did Mr. Gray spend some time doing
12 work on movable platforms as well?

13 MR. BROWN: The record does not establish
14 that. To the contrary, Justice, it says that he
15 considered himself permanently assigned to this
16 particular field, which would have been on fixed
17 platforms.

18 To completely answer your question --

19 QUESTION: If he did spend time doing this
20 kind of work also on movable platforms, would he be
21 covered because of the Caputo doctrine and holding?

22 MR. BROWN: No, ma'am. There is a problem
23 with your question, because the term "platform" and the
24 term "movable" are self-distinctive. If the man worked
25 on --

1 QUESTION: A movable --

2 MR. BROWN: -- a movable rig, which is usually
3 a vessel -- the fact of the matter is, it is all the
4 time a vessel in the offshore -- he would stand a very
5 good chance to be a seaman.

6 QUESTION: And probably it would be maritime
7 coverage, even if he were doing the same type of work?

8 MR. BROWN: Yes, ma'am. If he was hurt on a
9 vessel under your decision in the Director versus
10 Perini, there is no question that that is all it would
11 take.

12 QUESTION: Well, how are the hazards
13 different --

14 MR. BROWN: Your Honor, the hazards are no
15 different --

16 QUESTION: -- in working on a movable rig and
17 a fixed platform?

18 MR. BROWN: There are no difference at all.
19 There is absolutely no difference between a person who
20 is more or less permanently assigned to a vessel and
21 drilling or a person who is more or less permanently
22 assigned to a platform and drilling.

23 QUESTION: Well, then, why isn't it logical to
24 assume that Congress intended coverage here?

25 MR. BROWN: Because, Your Honor, in the case

1 of a person more or less permanently attached to a
2 vessel, Congress had before it in the Tower bill in --
3 in consideration of the Tower bill in 1972 if -- whether
4 or not to cover that person under the Longshoremen and
5 Harbor Workers Act, and deliberately chose not to.

6 QUESTION: Well, I think that the nonaction by
7 Congress doesn't either help you or hurt you in this
8 particular regard.

9 Let me ask you how many platforms and workers
10 this decision is likely to affect. How many fixed
11 platforms and workers are we talking about overall?

12 MR. BROWN: The State of Louisiana thinks, and
13 I have called the Department of Natural Resources, they
14 think that there are 20,000 workers working on inshore
15 platforms. They think there are 800 platforms offshore
16 Louisiana, and 200 platforms offshore Texas.

17 The Department of the Interior, I called
18 them. There is no hard facts on these. These are all
19 estimates.

20 QUESTION: But you would estimate 20,000?

21 MR. BROWN: Yes, ma'am. That's what the State
22 of Louisiana thinks, working offshore. The Department
23 of the Interior thinks there are nearly 60,000 people
24 working on the Outer Continental Shelf, and another
25 70,000 in what they refer to as secondary and tertiary

1 employment.

2 QUESTION: Well, if they were working on a
3 fixed platform on the Outer Continental Shelf,
4 presumably coverage would be extended by the OCSIA.

5 MR. BROWN: OCSLA.

6 QUESTION: OCSLA.

7 MR. BROWN: Yes, ma'am.

8 QUESTION: However you want to pronounce it.
9 Right?

10 MR. BROWN: Yes, ma'am.

11 QUESTION: They would be covered. We know
12 that.

13 MR. BROWN: No question about them. They are
14 covered because of the specific act of Congress which
15 says they are covered. Now, in reviewing those acts,
16 Justice, keep in mind that there was a change in the
17 text of the OCSIA in 1978, but if you go to the
18 legislative history, it says that they didn't intend to
19 change this particular doctrine or this particular
20 application.

21 QUESTION: Mr. Brown, Congress has just in the
22 last few days enacted an amendment --

23 MR. BROWN: Yes, ma'am.

24 QUESTION: -- to the statute, has it not, to
25 define employees, and who is covered and who isn't?

1 MR. BROWN: Yes, ma'am. That was signed by
2 the President, I understand, over the last weekend.

3 QUESTION: Now, would you plan to address
4 yourself to the effect, if any, on this case of those
5 amendments?

6 MR. BROWN: Those amendments, as I read them,
7 Justice, I don't believe they have any effect whatever
8 on this case at all.

9 QUESTION: Certainly this was filed earlier,
10 but assuming that it applied, would it affect in any way
11 the resolution of a case like this in the future?

12 MR. BROWN: I don't believe that those
13 amendments -- I have read them carefully, and I don't
14 believe those amendments have anything to do with the
15 issues before the Court in this case.

16 Now, it did address another opinion of this
17 Court, and we are going to -- probably one of us is
18 going to be back in front of you as to whether it is
19 retroactive or not. I don't have any opinion on that
20 point at this point, because I haven't researched it. I
21 don't know that.

22 Returning to the Rodrigue decision, Your
23 Honors, if you read through the opinion itself, it is
24 manifest that the Court's decision in Rodrigue was based
25 on what it felt Congress had intended, but it justified

1 Congress's intention on innumerable places throughout
2 the opinion by references to this particular type of
3 work as not being maritime or admiralty type work.

4 And if you look specifically at the comment on
5 Page 360 of the Court's opinion, it said that the
6 accidents in Rodrigue and Dory, which were the two cases
7 before the Court at that time, the Court uses the word,
8 this is not "the ordinary stuff of the admiralty."

9 In other words, this type of work is not the
10 type of thing that you usually think of when you think
11 of a maritime setting.

12 Now, of course, there is no question that the
13 Rodrigue case involved a platform three miles out, so
14 this guy with respect to his claim under some
15 compensation Act would have been covered under the
16 Longshoreman and Harbor Workers Act because of OCSIA.
17 There is no question about that.

18 But when the Court talks about his work being
19 nonmaritime, there is no difference between the type of
20 work that -- the wire line work that was being done in
21 Dory and Rodrigue and the wire line work that is done
22 inside the three mile limit.

23 So that if the work that is done -- described
24 in Rodrigue and Dory is nonmaritime because it is
25 nonmaritime, then it is nonmaritime because it is

1 inshore as well as offshore.

2 QUESTION: Well, except for those covered by
3 the Outer Continental Lands Act, prior to '72, none of
4 these workers on these drilling platforms were covered
5 by the Longshoremen's Act. Isn't that --

6 MR. BROWN: The ones offshore were, Justice.

7 QUESTION: Yes, offshore because of the --

8 MR. BROWN: Because of OCSLA, which was passed
9 in 1953.

10 QUESTION: Yes, that's what I say, but aside
11 from that, it is agreed that you either -- they are
12 either covered by the '72 amendments or not at all.

13 MR. BROWN: That's correct.

14 QUESTION: And the question is, then, what did
15 Congress intend by the amendments in '72.

16 MR. BROWN: Yes, sir. I think you would have
17 to go back to the original passage of the Act, because
18 the question of situs and status -- you are right. The
19 question of situs and status is one developed --

20 QUESTION: It has to be changed by '72.

21 MR. BROWN: Yes, sir. There would have been
22 no coverage --

23 QUESTION: Because it is agreed that there
24 weren't any coverage before that except under OSHA.

25 MR. BROWN: That's what the difference between

1 this case and the Director versus Perini case is. And
2 that is that in Director versus Perini, the decision
3 was, there is coverage now because there was coverage
4 before 1972. In this case, you can't use that
5 rationale.

6 QUESTION: Well, the '72 Act at least extended
7 coverage to those people who would have been covered if
8 they were working on the ship, but they were working on
9 the shore, too, and they certainly extended the coverage
10 to them.

11 MR. BROWN: Yes, sir. In other words, a
12 person working on a vessel is clearly covered.

13 QUESTION: Well, even if he is working on a
14 beach.

15 MR. BROWN: Well, he is not covered under
16 Director versus Perini.

17 QUESTION: No, no, I mean under the '72
18 amendments.

19 MR. BROWN: Yes, sir. He is covered on land
20 or on the beach or ashore if he is doing "maritime
21 work."

22 QUESTION: Exactly. Exactly.

23 MR. BROWN: And that is the key to this case.
24 In other words, you have got to get to the point of
25 whether or not this Court agrees with the Fifth Circuit

1 in its holding that oilfield labor is "inherently
2 maritime in nature." I don't believe it is, and I think
3 that such a decision is contrary to what this Court said
4 in Rodrigue.

5 QUESTION: Wouldn't -- if work on these
6 platforms had been maritime in nature, wouldn't there
7 have been coverage before 1972 --

8 MR. BROWN: Absolutely.

9 QUESTION: -- wholly aside from OSHA?

10 MR. BROWN: Absolutely. OCSLA, sir, not
11 OSHA.

12 QUESTION: OCSLA. I am sorry.

13 MR. BROWN: Yes, sir. I say that because I
14 realize we are being recorded, and I want to be correct
15 about that. But, no, you are absolutely correct. If it
16 was maritime in nature, if this sort of work was
17 inherently maritime, then there would have been coverage
18 prior to 1972.

19 QUESTION: Well, Mr. Brown, I guess even
20 before '72 there might have been coverage for any injury
21 received if he had been working on a movable rig,
22 right?

23 MR. BROWN: Well, Your Honor, I have to
24 qualify the answer. If a man is not a seaman, then the
25 answer is yes. That's correct.

1 QUESTION: Right.

2 MR. BROWN: But if a man is a seaman, then of
3 course by definition there is no coverage under the
4 Harbor Workers Act.

5 QUESTION: Yes, right, but we are assuming he
6 is not a seaman, he is a welder on a movable rig.

7 MR. BROWN: Yes. Well, that doesn't
8 necessarily preclude him from being a seaman.

9 QUESTION: Well, all right. Okay. But making
10 that assumption.

11 MR. BROWN: At least not in the Fifth Circuit.

12 QUESTION: And he also would have been covered
13 had he been injured going over the water to and from the
14 platform before '72.

15 MR. BROWN: Well, Your Honor, perhaps this is
16 not the case, because the facts don't support it, but
17 perhaps you are going to have to write us a postscript to
18 Director versus Perini, because that particular thing is
19 left over.

20 In other words, that is a matter, I think, for
21 future litigation, whether a person who is strictly --
22 in other words, he uses the boat strictly as a taxicab.
23 Is he covered as a result of an injury which occurs
24 while he is using that boat as a taxicab. I don't think
25 Director versus Perini goes quite that far, although it

1 may. I don't know the answer to that.

2 QUESTION: It may. Yes. Okay.

3 MR. BROWN: The question to be answered is
4 whether or not this Court agrees with what the Fifth
5 Circuit said in Pippin versus Shell, Budrough versus
6 Amerian Workover, and Thornton versus Brown and Root,
7 all of which are cited, and that is whether or not there
8 is any support in the jurisprudence or otherwise for the
9 proposition that oilfield work is inherently maritime.

10 If you go back to Pippin and Budrough, you
11 will find that that was one of the rationales of the
12 Fifth Circuit's decision. They held first that there
13 was coverage because there was coverage pre-1972, yet
14 there was also coverage because oil field work is
15 inherently maritime.

16 I was counsel in the Budrough case. I brought
17 that case to this Court. It was pending when the
18 Director versus Perini was decided, and of course once
19 this Court decided that there was coverage if there was
20 coverage before 1972, then of course my writ got denied
21 because it was unnecessary to consider the rest of the
22 decision.

23 But that is before the Court this time, the
24 question of whether or not oilfield work is inherently
25 maritime, and I suggest to you that as previously stated

1 in light of the Rodrigue decision, it is not so
2 covered.

3 QUESTION: Of course, Rodrigue might raise
4 some question even about your concession about situs,
5 because Rodrigue said that -- at least it recited that
6 these were islands.

7 MR. BROWN: Yes, sir, but --

8 QUESTION: Not piers.

9 MR. BROWN: -- in that particular point,
10 Judge, you've got to remember that Rodrigue was decided
11 pre-1972, when situs wasn't an issue, and when piers and
12 wharves weren't covered under Victory Carriers versus
13 Law and Nacirema versus Johnson.

14 QUESTION: I know, but just extending the
15 coverage to piers and wharves doesn't extend coverage to
16 Iowa.

17 MR. BROWN: Exactly. Precisely.

18 QUESTION: So I don't know why you want to
19 concede situs, but nevertheless you have.

20 MR. BROWN: Well, yes, sir. I thought about
21 it a long time, Judge, because the Act itself is fairly
22 specific in its listing of the areas which are covered,
23 but it seemed to me to be counterproductive to try to
24 convince you that --

25 QUESTION: I don't want to have to deal with

1 things you don't want us to deal with.

2 MR. BROWN: Well, I don't think you need to
3 deal with it. I think I would lose it if I forced you
4 to deal with it, Judge.

5 QUESTION: I don't know.

6 QUESTION: Mr. Brown?

7 MR. BROWN: Yes, sir?

8 QUESTION: I don't know at all.

9 QUESTION: Mr. Brown?

10 MR. BROWN: Yes, sir.

11 QUESTION: The respondent here has recovered
12 under the Louisiana Workmens Compensation Act, has he?

13 MR. BROWN: Yes, sir.

14 QUESTION: What is the amount of that
15 recovery, or what is the nature of it, in the first
16 place?

17 MR. BROWN: Well, the nature of the recovery
18 is exactly the same as the Longshoremen and Harbor
19 Workers Act when Mr. Gray was injured in 1972, the
20 benefits were substantially less than the Longshoremen
21 and Harbor Worker Act benefits. I think they were like
22 \$85 a week.

23 The Louisiana Act at that point was in the
24 process of amendment, and now the benefits are, while
25 they are not as handsome as the benefits under the

1 Longshoremen and Harbor Worker Act, they are close. The
2 provisions, the computation is the same. The only
3 difference is that the maximums under the Longshoreman
4 and Harbor Workers Act are substantially greater than
5 the maximums under the Louisiana Compensation Act, a
6 difference of -- I believe the last figure, the maximum
7 under the Harbor Workers Act is a little over \$350, and
8 the maximum under the Louisiana Act is a little over
9 \$200.

10 QUESTION: I ought to know the answer to my
11 next question, but I don't recall it. If respondent
12 wins this case, would he be entitled to return to
13 Louisiana what it has paid him, and what it will in the
14 future?

15 MR. BROWN: No, sir. No, sir.

16 QUESTION: Would there be a double recovery?

17 MR. BROWN: No, sir.

18 QUESTION: What would happen?

19 MR. BROWN: If he wins this case, the only
20 thing currently at issue is whether or not we get some
21 money back which we paid him in response to the BRE's
22 decision, and his attorney would get paid, because we
23 haven't paid the attorney's fees.

24 Those are the two things at issue in respect
25 to Mr. Gray. The larger issue is the nearly 150,000

1 workmen in this area that I defined before. That is the
2 larger issue before the Court.

3 QUESTION: I thought you said 20,000. Now it
4 is 150,000.

5 MR. BROWN: Yes, ma'am, 20,000 working in the
6 offshore Louisiana area alone, but the secondary and
7 tertiary employment -- in other words, once you get on
8 the beach, as I appreciate what the government is
9 talking about when it gives these figures, it is talking
10 about people in the transmission areas onshore, the
11 refinery areas, in other words, as far out as you get,
12 and you are talking about a lot of people.

13 QUESTION: That is not what this case
14 involves, is it?

15 MR. BROWN: No, ma'am. This particular case
16 talks about those 20,000 workers in Louisiana and
17 another corresponding number of workers in Texas.

18 QUESTION: We are talking about movable rigs
19 and not the CA5's decision having to do with building a
20 platform onshore.

21 MR. BROWN: We are not talking about that.

22 QUESTION: No.

23 MR. BROWN: No, ma'am, except that if the
24 maritime worker is not -- except that if a maritime
25 worker is not -- excuse me, an oilfield worker is not

1 inherently maritime, then the underpinning of the
2 Thornton case falls, too, because Thornton is the one
3 that said -- it postulated from Pippin and Budrough that
4 an oilfield worker is maritime, and it said when you are
5 building a platform where you are going to do this
6 maritime work, that is maritime work. So if this -- if
7 I am right in this case, and oilfield work is not
8 maritime, then Thornton falls, too.

9 QUESTION: Well, suppose you are wrong in this
10 case.

11 MR. BROWN: Then I lose.

12 QUESTION: Does that necessarily affect the
13 other situation of building platforms on the shore?

14 MR. BROWN: No, ma'am. If this Court affirms
15 what the Fifth Circuit did, then Thornton is a correct
16 result. Yes, ma'am. That's right.

17 The second point that the opponents make is
18 that there is this argument that a person should not be
19 forced to walk in and out of coverage, and that there
20 should not be checkered coverage. I suggest to the
21 Court that checkered coverage and walking in and out of
22 coverage is a fact in the oilfield today. It has been a
23 fact since the oilfields started.

24 And it will be a fact regardless of what
25 happens in this case, and that is so because these men

1 who work on platforms and then move to a vessel, in
2 other words, a roughneck who is working on a platform is
3 not a seaman, he is a longshoreman and harbor worker if
4 he is working more than three miles out.

5 If he goes out for his next seven-day hitch
6 and gets assigned to a jackup rig five miles away, he is
7 a seaman, and there is no question under those
8 circumstances that he would have no right to be
9 compensated under the Longshoremen and Harbor Workers
10 Act.

11 The gray area, of course, occurs when he moves
12 back to the platform, because then if he has got a right
13 of action and damages, he would take the position that
14 he would still be a seaman, and the Fifth Circuit has
15 looked with favor on that sort of contention in a number
16 of cases.

17 But the point of the argument is that
18 checkered coverage and walking in and out of coverage is
19 a fact of life in the oilfield, and it always has been.
20 Congress, I suggest to the Court, has authorized or
21 permitted that to continue when the Congress failed to
22 pass the Tower bill, because the Tower bill would in
23 fact have prevented that sort of thing from happening.

24 There has been a suggestion that somehow it
25 hasn't.

1 QUESTION: Mr. Brown, may I ask you a
2 question? I want to be sure I understand your thinking
3 on the case.

4 MR. BROWN: Yes, sir.

5 QUESTION: You are primarily arguing status
6 rather than situs --

7 MR. BROWN: Yes, sir.

8 QUESTION: -- if I understand your dialogue
9 with Justice White, and do I also understand that you
10 would not think your case would -- your situs case, you
11 would also take the same general position if this man
12 never went out on the Outer Continental Shelf, but he
13 was always within state waters. Would you still not
14 argue situs very forcefully?

15 MR. BROWN: Your Honor, intellectually -- I am
16 trying to be intellectually honest with myself. I
17 cannot argue situs, because if you -- unless you figure
18 that the section, that the words of Section 3 are
19 exclusive, and I don't believe Congress intended them to
20 be.

21 QUESTION: Right.

22 MR. BROWN: And as soon as you say that if
23 maritime work is performed in a particular identifiable
24 area, which I think you have to do on a platform, you
25 have to say that, and once you say that, then they are

1 situs, if oilfield work is inherently maritime. I don't
2 believe it is.

3 QUESTION: Yes, I see. I understand. But you
4 would -- in other words, his situs would be, he would
5 satisfy the situs test even if he didn't occasionally or
6 about half the time --

7 MR. BROWN: Absolutely.

8 QUESTION: Yes, okay. Thank you.

9 MR. BROWN: To focus the situs argument,
10 Judge, we all know that where longshoring work is done
11 and it is done on a wharf, on a wharf -- get away from
12 the platform business for a second -- it is done on a
13 wharf, that is a maritime situs, but not everybody on
14 the wharf is covered by the Longshoremen and Harbor
15 Workers Act because he is not doing maritime work.

16 For instance, if you put an oil well on the
17 end of a wharf and drilled a well under it, those
18 oilfield workers wouldn't be covered under the Harbor
19 Workers Act simply because they were on a wharf. That
20 being so, they are not covered by this platform. That
21 is the point.

22 QUESTION: I understand.

23 MR. BROWN: One other thing that I would like
24 to mention. There is an argument by Gray's counsel to
25 the effect that somehow there is an extension of the

1 Outer Continental Shelf Lands Act.

2 I suggest to the Court that that is a
3 meritless issue, because the Fifth Circuit had it before
4 it and failed to reach it, and they reached coverage in
5 this case because of their finding that the Longshoremen
6 and Harbor Workers Act applied under its own force.

7 I suggest to you that you will not find any
8 cases on point that deal with this particular issue.
9 There are, as I count them, four cases which talk about
10 what the words "as a result of operations" mean, and all
11 of those cases have to do with flights to and from the
12 platform either on seaplanes or helicopters, and I think
13 the result in those cases are correct.

14 Your Honor, I would like to reserve whatever
15 time I have left for --

16 QUESTION: Mr. Brown, may I just ask you one
17 more question before you do?

18 MR. BROWN: Yes, ma'am.

19 QUESTION: Some of the oil and gas lines that
20 Mr. Gray was working on presumably were lines that were
21 used to transfer oil or gas from under the bed of the
22 water into whatever vehicle is going to take the oil
23 away. Isn't that right?

24 MR. BROWN: You would have a hard time,
25 Justice, in delving that out of this record, but I have

1 to admit to you that some of the lines which fed into
2 this platform were in fact coming from offshore. If you
3 look at the transcript which was made up before the
4 Administrative Law Judge, you will see a map, and in
5 that map it shows Mike platform, and it is in one
6 definable area, and you will see platforms coming in
7 from outside the three-mile limit.

8 QUESTION: You mean lines?

9 MR. BROWN: Lines, yes, sir. Excuse me. I
10 did say platforms. The reason that I have trouble with
11 making the conclusion that this man at the time of his
12 injury was working on one of those lines is the fact
13 that that map shows that those lines were four-inch
14 lines, and he said specifically on three cases that they
15 were two-inch lines.

16 QUESTION: Presumably he would be working on
17 it part of the time.

18 MR. BROWN: Presumably.

19 QUESTION: And I just wonder if that doesn't
20 bring this individual pretty close to the business of
21 being really involved in loading or transferring oil and
22 gas.

23 MR. BROWN: Well, Your Honor --

24 QUESTION: For the purpose of maritime
25 employment.

1 MR. BROWN: Well, in one sense I guess you
2 could say that, but in the same sense you would have to
3 say that a railroad worker is in the same business as a
4 barge worker with a barge going down the Mississippi
5 River because they are both transporting goods from
6 Minneapolis to New Orleans.

7 I don't think the analogy, with all possible
8 respect, I don't think the analogy carries.

9 QUESTION: Mr. Brown, is there anything in the
10 record that shows this particular respondent was in fact
11 working on two-inch line?

12 MR. BROWN: Yes, sir. On Pages -- the
13 specific reference is on Page 55 of the transcript, and
14 there is another reference on Page -- I can't find it
15 right now.

16 QUESTION: That shows he was working on
17 two-inch line?

18 MR. BROWN: It says he was working on a
19 two-inch line. Yes, sir.

20 QUESTION: Not four-inch line?

21 MR. BROWN: Yes, sir, and it is a particularly
22 good quote, because it is not -- nobody led him into
23 it. They said, what happened to you? He said, I was
24 working on a two-inch line.

25 QUESTION: Is there anything in the record

1 that shows he was working on four-inch line?

2 MR. BROWN: No, sir.

3 QUESTION: Well, then, why do you say
4 presumably he was -- we are talking about a record, not
5 what you may know outside the record.

6 MR. BROWN: I said that, Judge, and perhaps it
7 was a concession that I shouldn't have made. I would
8 suspect that in reading the record, you could draw the
9 conclusion that at one time or another he worked on the
10 flow line going from offshore onshore. He wasn't
11 working on that particular flow line at this particular
12 time, according to this record.

13 QUESTION: Did any of the fact finders below
14 draw that conclusion?

15 MR. BROWN: Yes, sir, the board -- Benefits
16 Review Board drew it, and I don't know where they got it
17 from. It is not in the record. In other words, it is
18 not supportable in the record. But of course we are not
19 dealing with what the Benefits Review Board found
20 because the Court of Appeals simply rejected or ignored
21 its rationale.

22 QUESTION: If we agree with you, I suppose we
23 would remand for the Court of Appeals to reach the other
24 possible ground.

25 MR. BROWN: Well, sir, you would -- I would

1 suggest to the Court that -- I know the Court is in the
2 business sometimes of --

3 QUESTION: That is a possibility.

4 MR. BROWN: I understand that. I realize that
5 the Court is in the business of drawing lines, but I
6 would suggest to you that Congress when it passed the
7 OCSIA and then repassed it again in 1978 and made it a
8 strict geographical test for those areas outside the
9 three-mile limit, that the Court ought to respect that
10 which Congress has stated and not extend OCSLA to
11 areas --

12 QUESTION: That may be right, but wouldn't we
13 want the judgment of the Court of Appeals first on the
14 issue that -- on the ground that the Benefits Review
15 Board reached?

16 MR. BROWN: I suspect that there could be some
17 -- if the Court found that there was any merit to that
18 issue. Of course, the Court has got to realize that
19 once you extend OCSLA beyond its limits as a result of
20 these operations and the result of that language, where
21 is that line?

22 QUESTION: Well, you suggest we would decide
23 that issue on the merits here? It hasn't been briefed.

24 MR. BROWN: It has not been briefed. That is
25 correct.

1 QUESTION: I don't know why we would want to
2 just do it on our own.

3 QUESTION: Mr. Brown, may I ask you one
4 unrelated question?

5 MR. BROWN: Yes, sir.

6 QUESTION: You mentioned the new statute that
7 was just passed does change one of our decisions and
8 there may be a question of its retroactivity. Would you
9 mind telling me what decision?

10 MR. BROWN: Washington Metropolitan, Judge.

11 QUESTION: Thank you.

12 (Pause.)

13 CHIEF JUSTICE BURGER: Ms. Corwin.

14 CRAI ARGUMENT OF CAROLYN F. CORWIN, ESQ.,

15 ON BEHALF OF THE FEDERAL RESPONDENT

16 MS. CORWIN: Thank you, Mr. Chief Justice, and
17 may it please the Court.

18 There is no doubt that in 1972 Congress
19 expanded the coverage of the Longshoremen's Act so that
20 it would encompass more than injuries that took place on
21 actual navigable waters.

22 QUESTION: Didn't it also contract the
23 coverage in some areas?

24 MS. CORWIN: Perhaps you are referring to the
25 status requirement that was imposed in connection with

1 the expansion of coverage. I think the Court
2 established at least to a considerable extent in Perini
3 that there was no intent to withdraw coverage, but that
4 imposition of the status requirement was merely a way to
5 limit the expansion that was -- that took place under
6 the situs requirement.

7 QUESTION: Weren't the '72 amendments supposed
8 to be kind of a compromise that gave some things to the
9 plaintiff's side and some things to the defendant's
10 side?

11 MS. CORWIN: Overall, I am sure that is the
12 case. There were a number of provisions in the
13 amendments.

14 QUESTION: We have had about half a dozen
15 rather close cases here since then, haven't we,
16 involving the '72 amendments?

17 MS. CORWIN: In terms of the scope of
18 coverage, there were a lot more provisions in the '72
19 amendments --

20 QUESTION: Yes, and we have decided every one
21 of them in favor of the plaintiff. Isn't it about time
22 we decided a case in favor of the defendant?

23 (General laughter.)

24 MS. CORWIN: I would suggest not. I suggest
25 maybe the balance was struck in other parts of the

1 statute, and that you shouldn't be concerned about
2 striking your own balance here in that respect.

3 The question here is whether Congress in
4 expanding the coverage meant to bring within the Act the
5 sort of injury suffered by Mr. Gray in this case. That
6 is, an injury to an offshore oil worker, here a welder
7 who happens to be at the time that there is injury on a
8 fixed platform that rests in waters inside the
9 three-mile boundary.

10 Now, Mr. Gray is the sort of worker who would
11 have been walking in and out of coverage prior to 1972.

12 QUESTION: Why would he?

13 MS. CORWIN: He would have for several
14 reasons, and this is true of many offshore oil
15 workers.

16 QUESTION: You have to establish that, I take
17 it. You think that is critical to your case. Namely,
18 the '72 amendments didn't intend to cover anybody who
19 never would have been covered before '72?

20 MS. CORWIN: Well, I think Congress's intent
21 in expanding the coverage was to solve the problem of
22 the amphibious worker, the worker who is sometimes --

23 QUESTION: Walking in and out. Walking in and
24 out.

25 MS. CORWIN: Right, sometimes on navigable

1 waters in the course of his employment, sometimes in
2 these areas adjoining the waters, and I think you have
3 in Mr. Gray a prime example of someone like that, and
4 Mr. Brown himself has suggested that the entire offshore
5 oil industry involves people who are walking in and out
6 of different working situations, different locales,
7 different sorts of structures.

8 So, I think Congress was faced in 1972 with a
9 number of these sorts of situations, and it wanted to
10 provide uniform coverage to solve that sort of anomaly.
11 I think here you have the sort of employee who presents
12 precisely that anomaly.

13 Now, I think, Justice White, you asked earlier
14 of Mr. Brown about the situation before 1972 for this
15 particular individual. Had he been injured on a fixed
16 platform prior to 1972, it appears that he would not
17 have been covered, because he would not have met the
18 actual navigable waters requirement of the statute.

19 QUESTION: Even if he was walking in and out
20 of coverage or anything else.

21 MS. CORWIN: Even if he had been walking in
22 and out of coverage. That was the problem that Congress
23 faced. It just appeared that there was this very strict
24 situs requirement under the pre-1972 statute, so there
25 was this problem for people like Mr. Gray.

1 QUESTION: I know, but the problem was not
2 just situs.

3 MS. CORWIN: Well, I am not sure that is so,
4 but I think Congress was concerned about the sort of --

5 QUESTION: Well, let's assume it is. Let's
6 assume it is, just for the moment, that prior to '72
7 this kind of employment was not considered maritime
8 employment.

9 MS. CORWIN: Well, there was not --

10 QUESTION: Let's just assume that. And you
11 think Congress intended to change the definition of
12 maritime employment by the '72 amendments?

13 MS. CORWIN: Well, there was not a requirement
14 that someone be in maritime employment prior to 1972.

15 QUESTION: I understand that. I understand
16 that. But nevertheless, let's assume it was not
17 considered maritime employment. Unless you answer that,
18 you are not really meeting the argument of your
19 adversary.

20 QUESTION: Well, I am not sure what you would
21 mean by who was considering it to be maritime
22 employment. I think we have to look at what Congress
23 had in mind in 1972 in terms of the sort of employee it
24 was trying to bring within this statute.

25 QUESTION: Well, then, you just don't want to

1 assume that it was not maritime employment prior to '72.

2 MS. CORWIN: Well, I --

3 QUESTION: That is all right with me, if you
4 don't --

5 MS. CORWIN: Well, I don't want to really
6 assume anything, but I am suggesting that when Congress
7 spoke of maritime employment in 1972, you have to look
8 at what it was trying to accomplish, and you have to
9 look at kind of a common sense understanding of what
10 they would have meant.

11 I don't think the term maritime has some fixed
12 and immutable meaning.

13 QUESTION: I will just put it to you this
14 way. Do you think that whatever maritime employment was
15 prior to '72, do you think Congress intended to change
16 the definition of maritime employment in '72?

17 MS. CORWIN: Well, I just don't think there is
18 some immutable definition of maritime employment. I
19 think you have to look at the --

20 QUESTION: Well, I guess nobody had to define
21 it before 1975. It wasn't a requirement, was it?

22 MS. CORWIN: Well, before 1970 --

23 QUESTION: So nobody had to decide that
24 question. Before '72, I mean. Isn't that right?

25 MS. CORWIN: Prior to 1972, the term maritime

1 employment showed up only in the definition of employer,
2 not employee, and it was an issue the courts rarely
3 reached, because if something happened on navigable
4 waters, it almost always turned out to be maritime in
5 nature.

6 But I am suggesting that when you are talking
7 about the term maritime, you don't necessarily go back
8 to the Rodrigue case and say what did the court say
9 about maritime there.

10 QUESTION: Your adversary says that the prior
11 cases in this Court and others indicate that this is not
12 maritime employment prior to '72 and afterwards.

13 MS. CORWIN: Well, I think those cases simply
14 don't relate to what Congress was talking about in 1972
15 when it amended the Longshoremen's Act. I think you
16 have to look at what Congress might have had in mind at
17 that point in terms of what it must have meant by
18 maritime employment.

19 Now, we know that Congress was interested in
20 solving this sort of anomaly of walking in and out of
21 coverage in 1972. The language that Congress used in
22 amending the statute on its face is clearly broad enough
23 to encompass someone in Mr. Gray's situation, and we
24 suggest that even if it weren't crystal clear on the
25 face, that the language ought to be read to cover a

1 situation like this one in view of Congress's
2 overarching purpose of solving this anomaly of walking
3 in and out of coverage.

4 QUESTION: Ms. Corwin, may I ask, your
5 opponent suggests, and I think he is probably right on
6 this, that even under your view you will still have a
7 problem of walking in and out of coverage. It is just
8 that the boundary has moved farther landward.

9 MS. CORWIN: Well --

10 QUESTION: Because there are a lot of welders
11 who do some welding on shorebased oil wells, and some
12 who do them out on these rigs, and aren't they walking
13 in and out of coverage?

14 MS. CORWIN: Well, I suppose to some extent
15 you can never completely solve the walking in and out of
16 coverage problem, because coverage determinations under
17 compensation systems by their nature are always going to
18 have these fringe areas. I think what Congress was
19 trying to do in 1972 was to eliminate at least some of
20 that anomaly to get rid of these rather obvious
21 situations of the amphibious workers who in the course
22 of their employment were regularly going back and
23 forth.

24 I am sure that Congress knew that it couldn't
25 precisely solve every last limit on this issue, but I

1 think the intent was to go after this sort of anomaly to
2 the extent they could do something practical about it.

3 Now, Justice O'Connor, you had raised the 1974
4 amendments, the ones that were signed by the President
5 on Friday, I believe.

6 QUESTION: The 1984.

7 MS. CORWIN: Excuse me, the 1984 amendments.
8 They don't address this case. Congress did suggest it
9 realized that in using the term maritime employment in
10 1972 it had created some problems that had generated
11 litigation. It enacted some exemptions to the maritime
12 employment definition, things it said it really didn't
13 consider to be maritime. It did not address the
14 offshore oil industry.

15 There was a proposal to reverse the Thornton
16 decision, the Fifth Circuit decision about fabrication
17 on land of these offshore platforms. Ultimately that
18 was not enacted, so there is nothing in the bill.

19 QUESTION: What is your view on that? And
20 would the substantial relationship test of the CAS which
21 you are supporting lead to approval of the result of
22 coverage as well for workers onshore building a
23 platform?

24 MS. CORWIN: Well, I don't -- I think that
25 there is a pretty consistent line of cases that deals

1 with marine construction workers and finds that to be
2 within the maritime area, but I really don't think you
3 have to reach that in this case. I think that what you
4 have got --

5 QUESTION: Well, but if you adopt the
6 substantial relationship test, that is precisely the
7 test which CA5 has used to reach that kind of worker as
8 well.

9 MS. CORWIN: Well, that is so, although I
10 think then you get into the question of whether they
11 have correctly applied the substantial relationship
12 test, and I think clearly as to the body of offshore oil
13 workers that we are talking about in this case, there is
14 really no question that they have properly applied that
15 test.

16 But I don't think the '84 amendments really
17 tell you much one way or the other about the case we
18 have here.

19 Now, this Court has recognized that Congress
20 in 1972 clearly intended to end this anomaly of walking
21 in and out of coverage with respect to longshoremen and
22 ship repair types, the people who are the more familiar
23 sort of employees covered by the Act, but there were
24 always other employees covered by the Act, including
25 people like, of course, the construction worker in

1 Perini, including people like Mr. Gray, who by necessity
2 is on water part of the time as a regular part of his
3 employment.

4 It is of necessity in the offshore oil
5 industry because these structures are out in the middle
6 of the ocean. They are surrounded by water on four
7 sides, and it is inevitable that in the course of
8 performing duties, people are going to be going on and
9 off the water.

10 We don't think there is a reason to think that
11 Congress meant to eliminate the anomaly of walking in
12 and out of coverage with respect to these more familiar
13 longshoremen and ship repair people, but to leave that
14 same sort of anomaly, the walking in and out of
15 coverage, with respect to these other employees who have
16 been found by the courts to be covered during part of
17 their activity, while they were on actual navigable
18 waters.

19 I think that is precisely the sort of thing
20 Congress was trying to get away from in 1972. Now,
21 offshore oil workers like Mr. Gray are inherently
22 amphibious, as I have said. They are a far cry from the
23 truck driver who comes from an inland point, who drops
24 off his cargo in the terminal, and who goes back to the
25 inland point.

1 Congress wanted to exclude those sorts of
2 people when it used the status requirement, the maritime
3 employment requirement. Here we have got somebody who
4 is in a much different situation, who works constantly
5 on or directly adjoining water virtually the whole
6 time.

7 And I think it may be worth noting in response
8 to Justice Powell's question about the Louisiana
9 compensation statute, at the time Congress was
10 considering this problem, it noted that the state
11 compensation benefits were quite low, and I would point
12 out that Louisiana in fact was the lowest of the examples
13 that Congress set out in its report.

14 So, if you are concerned about that sort of
15 discrepancy, so was Congress.

16 By way of perspective, I think it is useful to
17 take a minute to look at the pre-1972 situation of
18 offshore oil workers. Substantial categories of these
19 workers were covered, as Justice O'Connor's questions
20 have suggested, and I think it is worth noting that the
21 suggestion in some of the briefs in this case, the
22 amicus briefs, that somehow by finding coverage for Mr.
23 Gray, the Court would be bringing a whole new industry
24 within the Longshoremen's Act, is not so at all. It is
25 really inaccurate to say that.

1 Obviously, most directly, Congress had
2 provided under the Outer Continental Shelf Lands Act for
3 coverage, so if you had an oilfield that spanned both
4 sides of the three-mile line, the employer knew that he
5 would be subject at least outside that three-mile
6 boundary to the longshoremen's regime.

7 But you also had people who were inside the
8 three-mile boundary. You had the people on these
9 movable rigs. And some of these movable rigs, while
10 they qualify as vessels, look very much like fixed
11 rigs. There are these jackup rigs that have legs that
12 extend and retract, and they can sit right down on the
13 seabed floor.

14 Those people, if they did not qualify as the
15 crew of a vessel, would in fact come under the
16 longshoremen's scheme, and you would also have
17 situations like that of Mr. Gray in which you had
18 someone who was traveling between fixed platforms, and
19 who would be covered if his injury was on actual
20 navigable waters during that sort of travel.

21 All of these people were covered before 1972,
22 and they would continue to be covered under the Perini
23 decision. The one other group of injuries that I
24 haven't mentioned are those like that of Mr. Gray, who
25 was injured while he was working on a fixed platform

1 inside the three-mile limit. He would be sort of an odd
2 man out before 1972.

3 Because the rig wasn't classified as a vessel,
4 it probably wouldn't have been on actual navigable
5 waters. But his situation in which he was having to go
6 back and forth on actual navigable waters and on the
7 fixed platforms, and depending on the circumstances,
8 possibly to a movable rig, and certainly to the Outer
9 Continental Shelf, certainly suggests that Congress
10 would have wanted to solve his situation.

11 Mr. Shelton of the Drilling Contractors
12 Association testified before Congress when it was
13 considering these amendments, and he said the same thing
14 that Mr. Brown has said. This is an area in which
15 people are subject to job by job assignments. You have
16 workers going out to different structures. The
17 employers are confused because there is the series of
18 compensation systems, and whether an employee is covered
19 under one as opposed to the other may depend on what
20 kind of structure he is on.

21 Extending coverage to a situation like this is
22 clearly consistent with the sort of rationalization that
23 Congress was attempting to achieve in 1972.

24 QUESTION: May I ask you, are there any words,
25 any language in the 1972 amendment that supports your

1 position?

2 MS. CORWIN: Well, we think that this Court
3 has noted that Congress used some broad language in
4 amending the statute in 1972, and we do think it is
5 clearly broad enough to encompass a situation like this
6 one.

7 QUESTION: Which specific words?

8 MS. CORWIN: Well, since we are focusing on
9 the status requirement here, I guess, maritime
10 employment is the category that we have to define. Now,
11 I think the Court and Congress have recognized that that
12 is a broader category than the enumerated occupations
13 that follow it.

14 I think as a matter of common sense you would
15 find this sort of employee to be maritime in the sense
16 that these employees are always on the water or right
17 next to the water. Indeed, the whole industry has an
18 intimate connection with the ocean, with the water, with
19 the vessels that are used in a variety of operations.

20 So, I think, you know, if you are trying to
21 think of what Congress might have thought when it used
22 that term, sort of as a matter of common sense, you
23 would think that. In addition, you had people
24 testifying before Congress about the Tower bill, and
25 talking about marine petroleum workers and maritime

1 extractive operations.

2 But I think if you go beyond that, you also
3 look to the intent of Congress, and this question of the
4 amphibious employee, and there I think the maritime
5 employment is also in existence here.

6 QUESTION: Is there anything specific in the
7 legislative history relating to offshore platforms?

8 MS. CORWIN: Well, not with respect to the
9 statute that was finally enacted. There was much talk
10 during the hearings about the Tower bill, which was the
11 proposal to bring all offshore oil industry workers
12 within the statute, and that that would include the
13 people who had qualified as seamen and who were entitled
14 to the Jones Act remedy.

15 The people who wanted that Act characterized
16 it in terms of needing to cut back on the Jones Act
17 remedy to avoid the seamen member of the crew remedy.
18 The people who opposed the bill said, no, we want to
19 retain that. There wasn't that much focus on this other
20 end of the spectrum of the --

21 QUESTION: Do you think it was just sort of
22 oversight that there was no mention made of workers in
23 this category, even though there were apparently
24 20,000?

25 MS. CORWIN: Well, I am not sure, I am not

1 sure it was oversight, and the number 20,000 was used in
2 the hearings, at least. I think that Congress used a
3 typical example when it was talking in the legislative
4 history and the reports. It used the example that
5 people are familiar with of the longshoreman, who is
6 sometimes on the boat and sometimes on the dock.

7 But I think that Congress was told in the
8 course of these hearings by the drilling contractor
9 representatives that a number of these offshore oil
10 people were already covered under the Act. I think it
11 did not necessarily feel that it ought to enumerate each
12 and every sort of employee.

13 I think we have to assume that Congress was
14 aware that there were some other people out there other
15 than longshoremen and ship repair people, but I don't
16 think it is really unnatural for Congress to
17 specifically refer to those more familiar types of
18 employees, and to have assumed that it could sort of
19 wrap up the others in this broader term.

20 QUESTION: Is it fair to say that your
21 argument is based on broad principles of common sense
22 rather than any specific language either in the
23 legislative history or the statute?

24 MS. CORWIN: Well, I think to the extent we
25 would rely on the legislative history, I would go back

1 to the language in the reports in both Houses, in which
2 Congress said, the purpose of this amendment is to
3 provide a uniform compensation system for those
4 employees who were covered for part of their activity
5 under the old Act.

6 I think that in a nutshell really expresses
7 what Congress intended then.

8 QUESTION: Well, this fellow wouldn't have
9 been covered prior to '72.

10 MS. CORWIN: He wouldn't have been covered in
11 this particular fact circumstance when he was injured on
12 a fixed drilling platform, but during the course of his
13 employment there were a number of different situations
14 in which he would be covered.

15 He would be covered when he was on the boat
16 between fixed platforms, which he did sometimes several
17 times a day. If he were assigned to a drilling barge to
18 do some welding on that he would clearly be covered,
19 because he was on actual navigable waters. He is
20 covered when he is on the Outer Continental Shelf, which
21 he was at least part of the time.

22 QUESTION: Isn't the heart of the -- don't you
23 think the heart of the Fifth Circuit's holding in this
24 case is their statement that offshore drilling, the
25 discovery, recovery, and sale of oil and natural gas

1 from the sea bottom is maritime commerce? It goes on to
2 say that this is -- and Gray's activity was part of that
3 commerce.

4 MS. CORWIN: Well, yes, I think that is what
5 the Fifth Circuit said.

6 QUESTION: If they had come out the other way,
7 that offshore drilling is not maritime commerce at all,
8 the result would have been different in this case, I
9 suppose.

10 MS. CORWIN: I suppose that is so. I think
11 they looked at the common sense, and I suggest we look
12 at that plus what Congress had in mind.

13 QUESTION: But we don't have any cases that
14 are addressed to this, I don't suppose.

15 MS. CORWIN: Well, I don't think so. You have
16 addressed the longshoremen and ship repair situation.
17 You have addressed Mr. Churchill in the Perini case on
18 actual navigable waters. And this is really, I guess,
19 the next step in what you would consider in that line.

20 CHIEF JUSTICE BURGER: Mr. Henderson?

21 ORAL ARGUMENT OF T. GERALD HENDERSON, ESQ.,

22 ON BEHALF OF RESPONDENT GRAY

23 MR. HENDERSON: Mr. Chief Justice, and may it
24 please the Court, Robert Gray was injured, as has been
25 noted, on a fixed gas and oil production platform

1 located in the Bay Marshan Field, which is divided by
2 the three-mile line separating Louisiana territorial
3 waters from the OCS waters.

4 Gray estimated that approximately 25 percent
5 of his work in the year preceding the accident had been
6 conducted on the OCS, and a review of the map which was
7 entered into evidence before the administrative
8 proceeding indicated that the platform field is an
9 interrelated field with gas operations covering waters
10 that otherwise are not distinguished at all except for
11 the line that runs through that.

12 In that regard, I think some of the figures
13 that were given by Mr. Brown this morning, the number of
14 workers, 20,000 workers, 60,000 nationwide, I would
15 imagine that those aren't workers that are strictly in
16 state waters.

17 Those are workers who work offshore. And I
18 would imagine that the overwhelming number of them are
19 already covered under the Longshoremen's Act pursuant to
20 the OCSLA provisions.

21 The workers also, like Gray, are moving in and
22 out of coverage in these waters. Gray could be on the
23 OCS as easily as he could be in state territorial
24 waters.

25 It has also been noted that Gray would have

1 been covered had he been on the OCS through the
2 Extension Act, that he would have been covered on
3 transit through the oilfields, and that had he had work
4 on a movable rig, he would have been covered.

5 But because of the combination of the injury
6 in territorial waters and the fixed platform situs, the
7 issue becomes a question about whether Gray is entitled
8 to longshoremen's benefits.

9 In looking at status, it is necessary to
10 examine the nature and purpose of Gray's activities,
11 whether those activities have a significant connection
12 to maritime navigation or commerce, and whether the
13 purpose of the activities was to facilitate maritime
14 commerce.

15 In *Caputo*, the Court noted that with respect
16 to landward extension the language of the '72 amendments
17 is broad, and suggests that the Court should take an
18 expansive view of the extended coverage, as well as the
19 focus on maritime connected nature and purpose of the
20 job rather than the location also serves this particular
21 purpose.

22 Focusing on Gray's work, the map introduced in
23 evidence during the administrative proceedings depicts
24 the number of platforms existing in both state and CCS
25 waters, and Gray was responsible for welding maintenance

1 work on all these platforms, and was required daily to
2 travel among them in the performance of his duties.

3 On some days, he would have to travel to
4 perhaps two or three or four platforms, and on other
5 days he would have work duties on, for example, like the
6 E structure of the platform where he was hurt. He was on
7 that for approximately three or four days.

8 But in any event, he would have to be
9 transported back to the M structure, the Mike structure,
10 where he was housed daily.

11 In addition to the regular and recurring
12 travel by boat, Gray was required to board the
13 structures, load and unload his equipment. His work
14 records document repair work that he did on swing ropes,
15 which is the method by which one gets from a crew boat
16 onto the structure.

17 He did repair work on boat bumpers, life raft
18 launches, cranes, and decking. But primarily he was
19 responsible for maintaining and repairing and installing
20 oil and gas lines connecting the Bay Marshan Field.

21 As noted by the court below, the maintenance
22 of these lines is vital to the drilling and removal of
23 gas and oil, and offshore oil and gas activity should be
24 construed as maritime commerce because of its primary
25 relationship with the sea. It takes place on structures

1 located in the sea. It involves transportation across
2 water. And it of course poses hazards which are
3 complicated by the maritime location.

4 Certainly Gray meets this test because his
5 work activity is involved in each one of those
6 requirements. The test as formulated by the Fifth
7 Circuit for land-based workers, drawing on the earlier
8 Second Circuit case, is whether the work bore a
9 realistically significant relationship to traditional
10 maritime activity involving navigation and commerce on
11 navigable waters.

12 QUESTION: Mr. Henderson, could I ask this
13 question? This case is kind of like a jigsaw puzzle.
14 But supposing Congress had never enacted OCSLA. Would
15 your case be exactly the same? Did they accomplish
16 anything at all insofar as coverage under the
17 Longshoremen's Act is concerned by OCSLA?

18 MR. HENDERSON: Under OCSLA they brought
19 coverage to the OCS worker.

20 QUESTION: But wouldn't he have been covered
21 anyway under your approach to the case?

22 MR. HENDERSON: Yes, I think he would.

23 QUESTION: So really they were wasting their
24 time when they enacted that statute?

25 QUESTION: Yes, but OCSLA was before.

1 MR. HENDERSON: That was in 1953.
2 QUESTION: Pardon me?
3 QUESTION: That was before the '72
4 amendments.
5 MR. HENDERSON: CCSLA was passed in 1953,
6 bringing coverage --
7 QUESTION: I understand.
8 MR. HENDERSON: -- to the offshore oil
9 worker.
10 QUESTION: But you would -- do you agree that
11 he would not have been covered prior to 1972, your
12 client?
13 MR. HENDERSON: My client would not have been
14 covered.
15 QUESTION: And nobody even on the --
16 MR. HENDERSON: Not at the time of that
17 particular injury. He may have had coverage --
18 QUESTION: Supposing we were talking about an
19 injury to a person on the Outer Continental Shelf doing
20 exactly the same kind of work. Would he have been
21 covered before 1972?
22 QUESTION: Yes.
23 QUESTION: Apart from CCSLA?
24 QUESTION: Oh, no.
25 MR. HENDERSON: Oh, on the OC -- if he --

1 QUESTION: Under your view.

2 MR. HENDERSON: You are saying he is injured
3 on the CCS without OCSLA?

4 QUESTION: Yes.

5 MR. HENDERSON: There would be --

6 QUESTION: Wouldn't you still argue there was
7 a substantial relation to maritime employment and all
8 the rest of it?

9 MR. HENDERSON: Well, yes, but given the case
10 of Rodrigue, if he were injured on the platform, he
11 wouldn't be covered, but for the --

12 QUESTION: Of course, Rodrigue didn't construe
13 the statute. It was really dealing with the question
14 under the Jones Act.

15 MR. HENDERSON: Which is that, Your Honor?

16 QUESTION: Well, Rodrigue didn't say a word
17 about the Longshoremen and Harbor Workers Act.

18 MR. HENDERSON: No, Your Honor. The -- and I
19 wanted to get to Rodrigue for a minute. Rodrigue dealt
20 with the Death on The High Seas Act.

21 QUESTION: Right. Let me just phrase my
22 question narrowly. If -- under your view, would there
23 have been, apart from CCSLA and all other statutes, if
24 this incident had occurred before 1972 on one of these
25 rigs on the Outer Shelf, would the worker have had

1 coverage under the Longshoremen Act?

2 MR. HENDERSON: Without the provisions of
3 OCSIA --

4 QUESTION: Yes.

5 MR. HENDERSON: -- he would not have.

6 QUESTION: Okay. Thank you.

7 MR. HENDERSON: Rodrigue --

8 QUESTION: Just like he wouldn't have had if
9 he was in state waters.

10 MR. HENDERSON: If he were injured on the
11 fixed platform, that's correct, without the exception of
12 OCSIA. The Rodrigue case is not a maritime labor case,
13 as has been argued here this morning. It is no
14 different. I don't think there was any mention of labor
15 in that particular case. It was not in consideration of
16 the kinds of maritime employment. Of course, it was
17 decided in 1969, prior to the 1972 amendments.

18 The Rodrigue case simply held that platforms
19 were not vessels, and there was no discussion about what
20 maritime employment was, but the argument that is
21 brought here this morning is that because it occurred on
22 a platform, hence it is not maritime employment, and I
23 think what the petitioner does is the same theory that
24 was brought before the Court by the employer in Pfeiffer
25 versus Ford, where the employer attempted to build in

1 another status or situs test on the issue of status,
2 that is, whether there would be further geographical
3 limitations in your consideration of whether an employee
4 had status.

5 QUESTION: Do you think to recover Gray has to
6 -- you have to hold that Gray was injured in an area
7 that is customarily used by an employer in loading,
8 unloading, repairing, or building a vessel?

9 MR. HENDERSON: On the situs requirement? I
10 think he has to meet the situs requirement.

11 QUESTION: Well --

12 MR. HENDERSON: He has to be injured on an
13 area --

14 QUESTION: That is used by his employer.

15 MR. HENDERSON: Customarily used for loading
16 and unloading a vessel.

17 QUESTION: Well, what vessel? What was this
18 employer doing to load or unload or repair a vessel, or
19 building a vessel? Don't they take this oil and gas in
20 by pipes?

21 MR. HENDERSON: It is done by pipes. That's
22 correct.

23 QUESTION: They don't load it on the ships.

24 MR. HENDERSON: I don't believe there is any
25 evidence in this case of that.

1 QUESTION: Well, what -- is this area
2 customarily used in loading and unloading or repairing a
3 vessel?

4 MR. HENDERSON: This area is customarily used
5 in loading and unloading crews, supplies, and oil from
6 the crew boat to the platform.

7 QUESTION: But he doesn't have to be engaged
8 in any activity that is related to loading or unloading
9 a vessel?

10 MR. HENDERSON: No.

11 QUESTION: Because he certainly wasn't.

12 MR. HENDERSON: Well, he was.

13 QUESTION: Was he repairing a pipe?

14 MR. HENDERSON: He was loading and unloading
15 his equipment in and out of the crew boat.

16 QUESTION: Every day, but not when the
17 accident occurred.

18 MR. HENDERSON: Not when the accident
19 occurred.

20 QUESTION: I mean, this is something that he
21 did in the ordinary course of events, every day. He
22 traveled over water where he would be covered, and he
23 would load and unload, but when he was injured, he was
24 welding on a line.

25 MR. HENDERSON: On a gas line.

1 QUESTION: Yes.

2 MR. HENDERSON: That is correct.

3 Thank you.

4 CHIEF JUSTICE BURGER: Do you have anything
5 further, Mr. Brown?

6 ORAL ARGUMENT OF WOOD BROWN, III, ESQ.,

7 ON BEHALF OF THE PETITIONER - REBUTTAL

8 MR. BROWN: Yes, Your Honor.

9 CHIEF JUSTICE BURGER: You have five minutes
10 left, and we will hear you out before we rise.

11 MR. BROWN: I won't take the time, Judge.

12 I think that what the Court has to look at,
13 and I think what is apparent in reading the Act and the
14 cases which have arisen under the Act arising from --
15 coming from this Court is that the Longshoremen and
16 Harbor Workers Act deals essentially with vessel-related
17 activity, and this is not a vessel-related case.

18 I think that takes this case out of the
19 coverage under the Longshoremen and Harbor Workers Act.

20 Justice White, you asked the question of
21 whether there was any change in maritime employment in
22 the 1972 Act. The forthright answer is, no, sir, there
23 was not. They did not change that definition. So the
24 definition that this Court came down with before 1972
25 presumably still applies.

1 QUESTION: And before '72, for coverage, the
2 employer had to be in a maritime activity.

3 MR. BROWN: That's correct. And counsel says
4 that Mr. Gray was an odd man out. Well, he was an odd
5 man out before 1972, and if Congress wanted to take him
6 out of the category of being an odd man out, Congress
7 had the opportunity in 1972, and they had the
8 opportunity again in 1984.

9 That doesn't really apply to this case, but
10 there is no action by Congress in either case to take
11 him out, and under those circumstances the failure to
12 pass, whether it was conscious or just a refusal or
13 somebody didn't get around to it, the failure to pass
14 the Tower case is, I believe, significant.

15 If there is a problem with respect to this
16 worker's coverage, Congress should correct it, I
17 suggest, and Congress has that power, as this Court
18 noted in Victory Carriers versus Law under Articles I
19 and III of the Constitution to do so.

20 That is all I have. Thank you, sir.

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

23 (Whereupon, at 12:00 o'clock p.m., the case in
24 the above-entitled matter was submitted.)
25

CERTIFICATION

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

83-728 - HERB'S WELDING, INC., ET AL., Petitioners v. ROBERT H. GRAY, JR., ET AL.

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BY

Paul A. Richardson

(REPORTER)

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