OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

ORIGINAL

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-497

TITLE LEE M. THOMAS, ACTING ADMINISTRATOR, UNITED STATES ENVIROMENTAL PROTECTION AGENCY, Appellant V. UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.

PLACE Washington, D. C.

DATE March 26, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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LEE M. THOMAS, ACTING ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Appellant, : V. : No. 84-497

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL. :

- -x

Tuesday, March 26, 1985

Washington, D.C.

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:54 o'clock p.m.

APPEARANCES:

LAWRENCE GERALD WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Appellant.

KENNETH WARD WEINSTEIN, ESQ., Washington, D.C.; on behalf of the Appellees.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Thomas against Union Carbide.

Mr. Wallace, you have lost your audience. You may proceed whenever you are ready.

ORAL ARGUMENT OF LAWRENCE GERALD WALLACE, ESQ.,

ON BEHALF OF THE APPELLANT

MR. WALLACE: Thank you, Mr. Chief Justice, and may it please the Court, this is a follow-up to last term's decision in Ruckelshaus against Monsanto Company in which this Court sustained the constitutionality of the data use and disclosure provisions of the federal statute regulating the marketing and sale of pesticides, known as FIFRA.

The Court will recall that the data involved are not formulas of pesticide products, but they are health and safety testing data, and those are used by EPA in granting registrations to subsequent applicants. Under the statutory scheme they are not required to duplicate the testings, but are to share in the cost of generating the test data.

There is no issue in the present case with respect to public disclosure of the data. That portion of FIFRA is not involved here, because the compensation scheme which is at issue does not relate to public

disclosure. It relates only to use of the data within EPA in support of the subsequent application.

The subsequent applicant is not given access to the data for that purpose. He marely cites the existence of such data from an index.

This Court last term held that the District Court had acted prematurely in the Monsanto case in holding that the system for sharing the costs of generating the data, the system of compulsory arbitration that is provided for if the parties cannot reach agreement violated Article 3 of the Constitution.

The Court held that that issue was not ripe for review. It then vacated and remanded the present case, and the District Court held that that issue was ripe in the present case, and that those provisions did violate Article 3, and enjoined the enforcement of the entire licensing, if one might call it that, and compensation system for registering subsequent applicants, and the case is on appeal from that holding.

Now, except for the Stauffer Chemical Company, the remaining appellees are in the identical situation that Monsanto was in last term. None of them has been a party to any arbitration proceeding, and their situation is squarely controlled by the holding that the issue was

not ripe with respect to Monsanto.

And our first contention is that here, too, the issue is not ripe for adjudication, but we also have contentions on the merits to follow through with.

The question as to whether it is ripe with respect to Stauffer Chemical Company is only a little more complicated, but we believe that the same result should follow.

Stauffer has been a party to one arbitration proceeding under the statute against PPG Industries, but Stauffer has not either in the present case or in a case that is pending between the two companies in the District Court for the District of Columbia contested the result of that arbitration award as not meeting the statutory standard.

The Court said in the Monsanto case that the operation of the arbitration procedure affects only in that case Monsanto's ability to vindicate its statutory right to obtain compensation.

It is PPG which claims that Monsanto has been overcompensated by the artibrator's award, and while Monsanto is asking that the entire system of allowing a competitor a registration be struck down so that it can still market its no longer patented product free of competition, it is not asking that the award be set

aside or augmented in any way.

Presumably this is a tactical decision to restrict the scope of review, and I think if one turns to the award itself, one can understand that it is really Stauffer that has won the award for all practical purposes, and at least is taking that stance in the proceedings.

I should point out that the District Court in this case on remand, and this is printed at Page 30 of the Jcint Appendix, the appellees specifically said that plaintiffs do not in this case challenge the result of an arbitration, nor does the adjudication of plaintiff's claims depend in any manner on the outcome of an arbitration.

And in the case pending in the District Ccurt for the District of Columbia, Stauffer is asking for enforcement of the award, or in the alternative, that PPG not be allowed to market the product at all, and that Stauffer be awarded damages in the amount of the arbitrator's award.

The award is set forth in the Joint Appendix, and if one turns to Page 54 of the Joint Appendix, one can see what was awarded to Stauffer by the arbitrators. There are two elements to the award. Paragraph A awards the sum of $1,465,000, which is

explained two page earlier to be one-half the sum of $2,930,000, which was the cost generated in getting the data that were submitted to EPA.

And then there is the plus, Part B, running compensation for the calendar years 1983 through 1992 of 15 cents per pound, for every pound of product that PPG sells, and there is a fraction there which is intended to be an inflation adjustment, which so long as the Consumer Price Index continues to rise will have the effect of increasing the 15 cents slightly.

And on the preceding page, Page 53, the arbitrators estimated that during the first five years of that ten-year period, PPG would sell 47,250,000 pounds. If one multiplies that by 15 cents, it comes to about $7 million, and that is only for the first five of the ten years. Obviously, added to the $1,465,000, it would exceed the total cost of generating the data many times over.

Now, our own view of the legislative history set forth on Page 4 of the reply brief that we have filed in this case indicates that Congress was quite clear that it meant the awards in these cases to be a device for sharing the cost of generating the data and not to include something extraneous which is really in the nature of a patent royalty.

Even though there has been no claim that a patented process was used in generating these test data, we don't know of any instance in which anyone has gotten a patent on any process used in generating the data.

QUESTION: Mr. Wallace, are you suggesting that Part B of the award is improper?

QUESTION: That is the view that we have taken about what the proper statutory standard is, but the Court -- I am not saying the Court should reach that question.

My point is that there may well be reason why Stauffer would be fearful of having the question of modifying the award or setting it aside addressed in Court, because Stauffer, while it made a larger claim to the arbitrators, has steadfastly refrained from making an effort to set aside or augment the award in any court because it would imply that the award could be modified in the other direction.

QUESTION: Well, Mr. Wallace, how much judicial review of permitted of these awards from the statute?

MR. WALLACE: That is the question at issue in the District Court for the District of Columbia in the case between Stauffer and PPG, and we have not taken a position on that precise question yet.

QUESTION: I thought the statute limited it to fraud.

MR. WALLACE: Well, we thought the same thing in a case decided last Wednesday, Lindahl against the Office of Personnel Management, but statutes are subject to construction on the question of the scope of judicial review, and --

QUESTION: I don't know what Lindahl has got to do with this.

MR. WALLACE: Well, it was a construction of that particular statutory provision.

QUESTION: He is just bruised. He is just bruised.

QUESTION: You are just bruised, are you, Mr. Wallace?

(General laughter.)

MR. WALLACE: As it happens, in this particular arbitration award, the arbitrators themselves suggested a scope of judicial review that is perhaps debatable under this statute in Footnote 1 on Page 43 of the Joint Appendix.

They say misconduct within the meaning of the judicial review provisions on the part of the arbitrators can include their acting in excess of their powers or perversely misconstruing the law, which would

suggest some review of legal questions in a reviewing court.

QUESTION: A little broader than just fraud.

MR. WALLACE: That is correct, and the statute does say that the awards are reviewable only for fraud, misrepresentation, or misconduct on the part of the parties or the arbitrators, which leaves --

QUESTION: Well, what puzzles me about that footnote, that kind of assumes there is a law to be applied in determining the amount, and I don't know what that law the arbitrator is supposed to apply is. The statute doesn't contain any standards at all, does it?

MR. WALLACE: Well, we have pointed out on Page 4 of our reply brief that the legislative history seems just quite clear that the compensation provision is intended to effect an equitable sharing of the costs of generating the data.

The theory of the statute is that it is economically inefficient to require a subsequent application for a registration of the same pesticide to have to go through the whole testing procedure over again and incur in this case more than $2 million of costs.

QUESTION: It was that part of your brief together with your argument that made me wonder whether

you were questioning Part B of the award.

MR. WALLACE: Well, what -- for purposes of this case, obviously the accuracy of the award is not at issue. What I am pointing out is that there is a sufficient basis for questioning Part B of the award, that it seems to us not at all inadvertent that Stauffer has not sought to have the award set aside or modified in any way, and is steadfastly taking the position that the award should be enforced as is if it cannot prevent competition altogether within the statutory scheme. Stauffer has not in any --

QUESTION: It is your position that you have a right to question B, but you haven't got any place to question it, any forum.

MR. WALLACE: Well, that is to be litigated in this next case.

QUESTION: What forum are you going to question it in?

MR. WALLACE: Well, that is now in the District Court for the District of Columbia, Justice Marshall.

QUESTION: Well, it is not here.

MR. WALLACE: It is not here, no. What is here is whether Stauffer is in a different position from Monsanto last term with respect to ripeness of the

Article 3 issue, and Stauffer says, yes, they have suffered injury and are seeking redress for that injury because they claimed more before the arbitrators than the arbitrators gave them.

But they have not sought to upset the arbitrator's award either in this case or in the case where they have an opportunity to seek to do that in the District Court for the District of Columbia.

They are standing by that award. The only possible outcome of that case could be to diminish the award or to keep the award as it is, so Stauffer is not taking the position that the award doesn't fully reflect what they are entitled to within the meaning of the compensation provision of the statute.

So, they are not in a position where they have been injured by an award and are seeking redress for that injury. That is our plight on ripeness. Their position is really no different from Monsanto's.

QUESTION: Mr. Wallace, may I ask you -- maybe this is foreign to this case, but I would be very much interested in your answer.

Supposing a party who is ordered to pay an award, not the subsequent data, thinks the award is too high, and doesn't like the review it gets. May it refuse to pay, and just withdraw its registration? Or

is it committed, so that it has to pay?

MR. WALLACE: Well, under the statute, they can start marketing prior to the resolution of the compensation issue, so they can market once they have the registration, and if they have made an offer to compensate, no matter how long it then takes to resolve the amount of compensation.

And if they have entered the market and actually sold the product, I think it would be hard for them to pull back, but of course this has never been resolved. This particular arbitration award is the only one that has occurred so far, and it is being contested in the District Court for the District of Columbia.

So, I can't really give you a definitive answer. If they had not yet marketed the product, if they had just gotten a registration, I don't see that they would have incurred any liability.

That is a common practice that people are getting the me-too registrations for products while they are still under patent, with the idea of being ready, having the federal approval to market the product when the patent expires.

Stauffer had a patent on this particular product which has expired, and PPG is marketing the product.

Well, factually, the case is obviously a little different from previous ripeness cases that the Court has had, but we think it falls within the principle that this kind of constitutional challenge should not be heard by a party who doesn't show injury in fact and isn't seeking redress for that injury.

QUESTION: Well, it is really not a question of lack of ripeness as to Stauffer. Stauffer can never challenge if it does what you say it has done here, asks to have the award confirmed.

MR. WALLACE: That is our position. Stauffer has to be taking the position that it has gotten less compensation than what it was entitled to. The point of the ripeness holding was that perhaps the arbitration would meet the statutory standard, and it was speculative to assume that it would not.

And if Stauffer is not in Court taking the position that the one arbitration it has had did not meet the statutory standard, then it is in the same position Monsanto is in. It just happens that it had an arbitration. That is our point. And Stauffer has refused to take that position, even though it has had the opportunity to do so in two courts.

Now, beyond the fact that we think the issue is not ripe for review in this case, and that should end

the case, in the event the Court or some members of the Court may disagree with us, then we do think that on the merits the District Court erred, and that there is nothing incompatible with Article 3 of the Constitution and this statutory scheme.

In our view, this question does not require the Court to consider the broad spectrum of issues that were discussed in the Northern Pipeline case. This case falls at one end of the spectrum.

It is not merely that the case does not involve a common law type of claim under state law, but the fact of the matter is, this case not only involves a claim only under a federal statute creating a recently claimed right, a recently created right, but it involves a relationship between the two parties which itself would not exist were it not for the federal statute.

The very relationship between the two parties is a creature of the federal statute. These are not people who are doing business with one another. They don't have a relationship that could give rise to a claim. All that is happening is that they are competing in selling an unpatented product which itself would not give rise to a legal claim.

The nearest analogy would be under a state law of unfair competition, but obviously it cannot violate

state law merely to compete in the sale of an unpatented product. The federal antitrust laws and patent laws would preclude that kind of a state law.

QUESTION: Mr. Wallace, would you characterize the rights of the claimants here as public or private rights?

MR. WALLACE: Well, they don't fit conveniently into either of those labels. The right immediately at issue is not a right against the government, which is the way the public rights doctrine was described in Northern Pipeline.

On the other hand, it is only the government that is using the testing data for purposes of conferring the second registration, and the statutory scheme is based on the idea that the public will benefit from competition, that the public health and safety will be adequately provided for without duplication of the testing, if the testing was adequately done in the first place, but that the innovator who went through the testing should not be discouraged from that, and should have the costs shared with the competing registrant who is going to enter the market and compete against him.

All of that is for a public purpose, and the duty to compensate arises wholly from the statute, and the use of the data arises wholly from the statute.

Congress could have said that once we have registered a particular pesticide product on the basis of test data by the innovator, anyone else is free without a registration to market that product so long as it isn't patented.

Congress conditioned the ability to market that product on a sharing of the test generating costs, and that is the sole basis for the claim here. It is a creature of statute, and what Congress conferred on the original applicant was the right to get a share of those costs as determined by the arbitrators, and there is nothing in Article 3 under the analysis taken in any of the opinions in Northern Pipeline that precludes that. In fact --

QUESTION: You don't think that these look like the kind of private federally created rights that require adjudication as to law and procedural issues in Article 3 courts as suggested in the North Pipeline plurality opinion?

MR. WALLACE: Well, we think not. We think that it instead comes squarely within the exception that was recognized on Page 83 of that opinion for a statutory right created by Congress which prescribed specific remedies and provides the person seeking to vindicate that right must do so before particularized

tribunals, and it goes on to describe that. We have quoted that paragraph on Pages 21 and 22 of our brief.

It says that such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress's power to define the right that it has created, and the only right to compensation that Congress created here was the right either to agree on compensation between the parties or to get it from this tribunal of arbitrators as they would see fit to equitably divide the costs of generating the test data.

And both parties would be better off than if each one had to bear the cost of generating such test data on their own, which is part of the reason that Congress sought to confer this on arbitrators.

QUESTION: Mr. Wallace.

MR. WALLACE: Yes?

QUESTION: I still am at a loss. If the arbitrator just makes an obvious, big mistake, what, if any, remedy do we have?

MR. WALLACE: Well, the government hasn't taken a position on that, but certainly the statute is capable of a construction that that would be subject to judicial review. That is to be resolved in this case in the D.C. Circuit.

QUESTION: The statute doesn't tell me that.

MR. WALLACE: Well, that is an arguable construction of what misconduct by the arbitrator means.

QUESTION: That is the nearest you can get tc giving some relief?

MR. WALLACE: That is correct. And the alternative, of course, if there were an Article 3 problem, would be to follow the mandate of the severability clause and to eliminate whatever it is that creates the Article 3 problem.

Now, both sides of this litigation agree that the statute is separable. The appellees agree on that implicitly, because they are depending on FIFRA to prevent their competitors from marketing their product. There is nothing else that can prevent it. They just want to sever more off of FIFRA than we think is appropriate.

Part of the axiom that the courts are to save rather than to destroy is that they should save as much of the scheme that Congress preferred.

QUESTION: Mr. Wallace, what about other forms of arbitration such as under the Federal Arbitration Act? Or is your answer that those are all voluntary arbitrations?

MR. WALLACE: I would say so. They are distinguishable on that basis.

QUESTION: Or here you don't have to go into this system, but if you do, then you are stuck with arbitration if you can't agree. Is that it?

MR. WALLACE: That is --

QUESTION: Does that make a distinction from the Article 3 argument?

QUESTION: What about the National Labor Relations Act? What about arbitrating collective bargaining contract disputes?

MR. WALLACE: Those --

QUESTION: Those, you certainly don't go into court every time you lose an arbitration.

MR. WALLACE: That is correct.

QUESTION: And you can.

QUESTION: They arise out of a contract, do they not?

MR. WALLACE: They arise out of a contract.

QUESTION: These people weren't forced to do this.

MR. WALLACE: They were not forced to get registrations, but of course they are commercially valuable.

I would like to reserve my remaining time.

CHIEF JUSTICE BURGER: Mr. Weinstein.

ORAL ARGUMENT OF KENNETH WARD WEINSTEIN, ESQ.,

ON BEHALF OF THE APPELLEES

MR. WEINSTEIN: Mr. Chief Justice, may it please the Court, under our system of government, it is the courts, not arbitrators, who have the constitutional responsibility to interpret and apply the law.

QUESTION: What about parties, as Justice Brennan just suggested, who consented to go into an arbitration?

MR. WEINSTEIN: I think that is a distinguishable situation, because here the appellees have not consented. They have been forced to do this. The statute --

QUESTION: Were they forced to go into the program?

MR. WEINSTEIN: Yes, they were forced because --

QUESTION: Forced to enter the program in the first place?

MR. WEINSTEIN: In the first place, no, but the statute was passed after my clients submitted most of the data that are at issue here. The statute was passed or amended in 1978. That is when -- Prior to 1978, we had appellate review in the federal courts.

QUESTION: In other words, are you saying that if the government sets up a grant program of some kind,

hypothetically now, and provides that all disputes between these private parties should be resolved by arbitration, final and binding, that can be done prospectively?

MR. WEINSTEIN: I would suggest that it cannct be done prospectively.

QUESTION: Well, perhaps I haven't made my hypotetical clear. But when the parties entered the program, the law already required them to submit as one of the conditions of participating in the program, the arbitration. In your case you say that was sort of an ex post facto.

MR. WEINSTEIN: That's correct.

QUESTION: But what about the other situation?

MR. WEINSTEIN: Well, the other situation is prospective, and I would submit that Article 3 of the Constitution says that when you have an exercise of judicial power, whether it is prospective or retrospective, that has to be done by Article 3 courts.

Half of Article 3 is a question of the appellee's right to an Article 3 tribunal, but the other half is a question of separation of powers, and that doesn't depend upon whether this is retrospective or prospective.

QUESTION: Well, say you win here. Say you win, your view prevails. Do you think you would then -- do you think Congress could deprive you of a jury trial?

MR. WEINSTEIN: A jury trial, I have not examined whether a jury trial would --

QUESTION: Well, that is a constitutional right.

MR. WEINSTEIN: It may or may not be in this particular situation. But the right to an Article 3 adjudication is not the same as a right to a jury trial.

QUESTION: Well, it is -- a right to a jury trial says you are going to have your facts determined by a particular tribunal, tribunals.

MR. WEINSTEIN: Yes, but in this case I think the constitutional right that we are discussing is Article 3. If Congress can prohibit the judiciary from deciding money claims --

QUESTION: An Article 3 court composed like some other -- like some other provision requires it to be composed? The Sixth Amendment or the Seventh Amendment requires a jury trial?

MR. WEINSTEIN: We are not -- I don't understand the question. We are not asking for a jury

trial.

QUESTION: Well, you are asking for an Article 3 court --

MR. WEINSTEIN: Yes.

QUESTION: -- and an Article 3 court in a civil case is, whoever wants it gets a jury trial.

MR. WEINSTEIN: I am not an expert on the Seventh Amendment and the Sixth Amendment, but I believe that a jury trial does not apply to all actions necessarily that the federal courts have cognizance over, and we are not asking --

QUESTION: It is because Congress can define a statutory right, a special right, and assign it to a particular agency that doesn't give jury trials.

MR. WEINSTEIN: Congress may be able to do that, and we are not asking for a jury trial. We are asking for an adjudication by an Article 3 court. What we have here is a situation where there is no law and nc judicial review.

This is an exercise of judicial power. It is a determination of legal issues and factual issues by an arbitrator, and he has the final word. Article 3 of the Constitution says the judicial power of the United States is vested in the courts, in the judiciary.

Here, we have Congress prohibiting the Courts

from deciding legal issues or factual issues. The arbitrator has the final word.

QUESTION: Well, Mr. Weinstein, even the plurality in Northern Pipeline recognized some exceptions to the requirement for Article 3 courts, did it not?

MR. WEINSTEIN: Yes, it did recognize exceptions, and --

QUESTION: Do you think it did so correctly?

MR. WEINSTEIN: I would say that they did so correctly, that the plurality is correct.

QUESTION: All right. Then do you think that this situation might fit within the language read by Mr. Wallace of being a Congressionally created statutory right at issue here?

MR. WEINSTEIN: It is a --

QUESTION: In which Congress has provided that it will be resolved in a particularized tribunal?

MR. WEINSTEIN: Yes, Justice O'Connor, that is correct, that the right arises under federal law, but the plurality in Northern Pipeline made a very important point. It said there are two principles that deal with federal rights.

When a right arises under federal law, it is clear that Congress has a lot of discretion to say how

it should be adjudicated, but the second point was, and I will quote from the opinion in Northern Pipeline on Page 81, "Second, the functions of the adjunct must be limited in such a way that the essential attributes of judicial power are retained in the Article 3 courts."

What the Court said in Northern Pipeline was, when you are adjudicating a private right, for example, a money claim between individuals, the kind of claim that courts historically have always adjudicated, the liability of one person to another under the law, that is a private right. That is an exercise of judicial power, and it must be decided by an Article 3 court.

But when Congress creates that right, it has something to say about how it is going to be adjudicated, and it can specify the kind of tribunal, but Article 3 says that the ultimate control, the essential attributes of judicial power must be vested in the Article 3 court.

QUESTION: Why couldn't you call it an arbitration court, c-o-u-r-t?

MR. WEINSTEIN: You could if they were Article 3 judges. The problem is that the arbitrators are not.

QUESTION: And if it was an arbitration court withan Article 3 judge, it is all right?

MR. WEINSTEIN: I think that if the person who

is deciding the case is an Article 3 judge --

QUESTION: That's what I said.

MR. WEINSTEIN: -- then I think you have an Article 3 court, and I think the rights --

QUESTION: The only thing wrong with this is, it is not called a court, and you don't have an Article 3 judge. Those are the only two things. What else are you quarreling with?

MR. WEINSTEIN: Justice Marshall, that is of very major -- that is of very major importance that these are not Article 3 judges.

QUESTION: Well, what else are you quarreling about?

MR. WEINSTEIN: Excuse me?

QUESTION: What else do you complain about?

MR. WEINSTEIN: We are complaining --

QUESTION: That is all you are complaining about?

MR. WEINSTEIN: That is all we are complaining about, that we have no right to an Article 3 judge, and if I may illustrate what happened in this Stauffer arbitration, these judges are appointed at the whim of the federal --

QUESTION: But the magistrate are not Article 3 judges.

MR. WEINSTEIN: The magistrates don't have final power to decide the law.

QUESTION: Awful close.

(General laughter.)

MR. WEINSTEIN: It may be, but there is still an Article 3 judge who has that final power to accept or not accept recommendations from the magistrate.

QUESTION: How much law is there in a case like this? Maybe Congress intended just to set up kind of a civil law system for adjusting these kinds of claims, through kind of good conscience, equity, not any big, black letter law, but just let three arbitrators decide what seems to be fair.

Now, there is no reason Congress couldn't establish that kind of system of dispute adjudication, is there?

MR. WEINSTEIN: Justice Rehnquist, I think what you are suggesting is that you could have an adjudication of money claims, and they may very well and do involve legal issues. For example, the interpretation of this statute. What is the standard for compensation? That is a legal question.

QUESTION: Maybe Congress really didn't intend to have much of a standard. Maybe it just intended to turn the arbitrators lose.

MR. WEINSTEIN: Well, if it did that, then it violates Article 1, as we have claimed. There has to be some standard, some intelligible principle, and a court to review the exercise of the delegated power.

QUESTION: What if Congress said in so many words, we instruct the arbitrators to decide as justice and equity may indicate? Is that an adequate standard?

MR. WEINSTEIN: It may be. It may be an adequate standard, but who knows whether that is the standard in this case unless there is an Article 3 judge to say that is what Congress intended, and we leave that to arbitrators.

QUESTION: You insist on imprisoning this whole thing within a framework of Article 3 judges when maybe that isn't what Congress intended.

MR. WEINSTEIN: I don't think it is what Congress intended.

QUESTION: You are saying if they did intend it, it is invalid.

MR. WEINSTEIN: That is exactly what we are saying. We are saying --

QUESTION: Why is this any more ripe for decision than Monsanto last year, because Stauffer is not complaining?

MR. WEINSTEIN: Stauffer is very much complaining, and that is a misdirection that I think is totally inaccurate. The District Court below found that Stauffer was aggrieved by this award. The award was $50 million less than Stauffer asked for based on its legal theory of compensation.

What the problem is, this is the only remedy that Stauffer has, this suit. It can't go and ask for judicial review of an arbitration award. The statute prohibits judicial review of arbitration awards, and it is not within the power of the courts to judicially create a remedy that Congress has said they don't want. We have no other forum but this Court.

QUESTION: But there is litigation going on in the D.C. courts, is there not, on the amount of the award?

MR. WEINSTEIN: That's correct, PPG is trying to set the award aside.

QUESTION: Your position in that case is, there is no review?

MR. WEINSTEIN: Our position is that there is no review because that is what the statute says, and the only person who can change that is the Congress.

QUESTION: But your opponent takes a different view, I take it.

MR. WEINSTEIN: They take a different view. That is correct.

QUESTION: They say there is some sort of review. Why couldn't you in that case say we disagree with that entirely but file something in the nature of a conditional counterclaim saying that if there is in fact judicial review, we want our $50 million?

MR. WEINSTEIN: We have filed a conditional counterclaim, but the conditional counterclaim is based on the fact that there is no judicial review. If the statute is unconstitutional, as we claim, then the use of our data without an opportunity to be compensated in an Article 3 court is invalid.

QUESTION: Why is that use invalid? Is your claim against the government or against PPG?

MR. WEINSTEIN: We have sued EPA in this suit. This suit was brought prior to the PPG-Stauffer litigation to enjoin EPA from using appellees' data if there is no opportunity to obtain compensation in an Article 3 court.

The statute says that if data are used, compensation must be made available for the use. If there is no compensation, then the data should not be used. It is a simple quid pro quo, a simple principle of equity that Congress recognized.

QUESTION: Well, your claim then is strictly statutory. You don't have a just compensation claim under the Constitution against the government.

MR. WEINSTEIN: No, we do not. No, we simply seek to prevent the government from using data if there is no compensation in a constitutional court to obtain what Stauffer and the other appellees are entitled to.

QUESTION: Mr. Weinstein --

MR. WEINSTEIN: But this case is -- let me deal with one issue of ripeness and justiciability, and get that out of the way. This case is ripe because appellees have been injured. They have been deprived of the right to an Article 3 forum. It is exactly the same injury that Marathon Pipeline suffered in the Northern Pipeline case.

Marathon was forced against its will to give up an Article 3 adjudication of state law rights and other rights. That is exactly the situation we are in. Under the constitution, nothing more than this is required to have a justiciable case or controversy.

We are not depending on Stauffer for ripeness. But even if we were depending on Stauffer for ripeness, Stauffer has been through an award, and the District Court made a finding of fact that was not contested by the government below that Stauffer was

aggrieved by a $50 million shortfall in the award and by the absence of an Article 3 forum in which to obtain compensation.

The government on the record did not contest that Stauffer was aggrieved. Now it is trying to raise the argument, but I don't think that's right.

There is no question here that this case is justiciable. The deprivation of a right to an Article 3 forum is the same injury that Marathon suffered. It was permitted to file a motion to dismiss in Northern Pipeline, and we are in the same position, except we are plaintiffs instead of defendants, and that is the injury that appellees have suffered.

QUESTION: May I ask a question on that? Supposing there were standards in this statute that were perfectly clear. Now, maybe that is impossible, but that you got exactly 10 percent of your labor costs in submitting data or something by a readily verifiable record, and then there was an arbitration award, computed the 10 percent, and that is it, you are entitled to it. Would you be aggrieved because that was not done by an Article 3 judge?

MR. WEINSTEIN: If there was no law to apply whatscever.

QUESTION: I gave you one where there is law

to apply.

MR. WEINSTEIN: If there is law to --

QUESTION: Ten percent of your labor costs in --

MR. WEINSTEIN: If there is law to apply, then I believe only the federal courts, the judiciary has that power, the final power under the Constitution to say what the law is. The Constitution says the judicial power of the United States is in the judiciary.

Can Congress take that power to declare the law away from the judiciary and put it entirely in aribtators? If they can do that, then that independence does the judiciary have? If they can do it in this case, it can be done in other cases.

QUESTION: Well, we still get life tenure.

(General laughter.)

MR. WEINSTEIN: But that doesn't help my clients, Justice Rehnquist.

QUESTION: Do you think Congress and the statute can't delegate the enforcement of the statute with the power to adjudicate in an administrative agency and say that -- give the agency some standards, and then say that their determination shall not be subject to any judicial review? It is entirely -- we are going to put this entirely within the agency discretion.

MR. WEINSTEIN: Absolutely they cannot. They cannot do that. We have researched the law and found 28 other arbitration statutes, federal statutes that deal with arbitration.

QUESTION: Have you come across a Court of Appeals opinion, some circuit, I don't remember, which held that the International Claims Commission provision of final, binding conclusions by the Commission was valid?

MR. WEINSTEIN: I do not recall that, Chief Justice Burger. But of these 28 statutes that involve arbitration, FIFRA is the only one -- Chief Justice Burger, that statute involved consent of the parties. That was by consent. This is a non-consentual arbitration, and that is the distinction between that Act and this.

But of these 28 other laws, FIFRA is the only one that mandates arbitration of private rights and that prohibits judicial review, the only one of all 28, and that is a combination that we would submit violates Article 3.

I think the Article 3 --

QUESTION: What about the Federal Arbitration Act?

MR. WEINSTEIN: That arises under contract.

QUESTION: Congress can enforce a contract to arbitrate, but can't impose arbitration unilaterally?

MR. WEINSTEIN: The contract is entered into by the parties voluntarily.

QUESTION: Isn't that what we held in Brayman against Zapata?

MR. WEINSTEIN: That where it is done voluntarily I don't think we have an Article 3 problem. But this is not voluntary. This is mandatory, compulsory arbitration. The parties are forced into it retroactively.

QUESTION: Would you press your Article 3 argument if this statute permitted some judicial review of the arbitration award other than just fraud, misconduct, and so forth?

MR. WEINSTEIN: I have two answers to that. I think judicial review is an absolute minimum. The Court held in Northern Pipeline in the plurality opinion that more than mere judicial review was required.

In Northern Pipeline, don't forget that there was appellate review of the Bankruptcy Court, and the plurality said that was not enough. The essential attributes of judicial power have to be in an Article 3 court, so judicial review alone is not enough. There is a more important reason.

QUESTION: You are not giving up your Article 3 judge now, are you?

MR. WEINSTEIN: We want our Article 3 judge.

QUESTION: Yes, well, you have mentioned it right now. You are not giving it up?

MR. WEINSTEIN: I don't understand the question.

QUESTION: If there is a review, it must be before an Article 3 judge.

MR. WEINSTEIN: Yes.

QUESTION: You didn't say that.

MR. WEINSTEIN: That is what I meant.

QUESTION: I just wondered whether you had given it up.

MR. WEINSTEIN: If there is a review, it has to be before an Article 3 judge. That is just what we are saying.

QUESTION: Just as an agency, something coming from the Federal Communications Commission would come to the Court of Appeals. That is what you say would be satisfactory.

MR. WEINSTEIN: That would ordinarily involve a public right, if I am correct, the issues that --

QUESTION: Well, it might involve a private right. It might involve a broadcaster's license, which

is a private right. But that is the kind of review you want as a minimum?

MR. WEINSTEIN: We want the same kind of Article 3 involvement that was granted in Northern Pipeline in the plurality decision, which was that the essential attributes of judicial power, whatever those are, must be in an Article 3 court, not in arbitrators.

I think that is clearly what the Court held in Northern Pipeline. This situation that we have here under FIFRA is a far more egregious violation of Article 3 than what we had in Northern Pipeline. There are not only federal rights but state law rights that are being adjudicated.

QUESTION: What state law rights are being adjudicated?

MR. WEINSTEIN: In the arbitration, the arbitrators are deciding how much money is owed for the use of trade secrets, and this Court held in Monsanto that the extent to which these research data are trade secrets is a matter of state law. The arbitrators are adjudicating that issue, that is, a state law issue and a state right, and to the extent that we have trade secrets, we may be entitled to more compensation for that.

QUESTION: I thought at least the government

takes the position that the rights that are being sued over here are purely creatures of Congress.

MR. WEINSTEIN: It is correct to say that the right to compensation arises under FIFRA, under federal law. But what is being adjudicated includes state law rights, these trade secrets. The government has not disputed, as it didn't dispute in the Monsanto case, that these data are valuable trade secrets, and that they are property.

This is the subject of the adjudication: How much should be paid for the use of trade secrets? That is a state law issue, just like in Northern Pipeline. The contract that was being adjudicated was a state law issue. The arbitrators are adjudicating under a federal statute, but they are adjudicating state law, trade secrets.

QUESTION: Mr. Weinstein, is there any precedent for saying that? There is no disclosure of the trade secrets, and they are being used by a public agency to perform a public function --

MR. WEINSTEIN: Yes.

QUESTION: -- and you say there is state law fixes the measure of compensation?

MR. WEINSTEIN: I say that the adjudication resolves issues of state law, and the precedent --

QUESTION: What issue of state law?

MR. WEINSTEIN: My --

QUESTION: The issue is how much to pay, and you say that is an issue of state law?

MR. WEINSTEIN: Yes, because you are resolving how much to pay for the use of a trade secret. In Monsanto, this Court held that the use, not the disclosure, but the use of these trade secrets entitled Monsanto to a Fifth Amendment taking claim for just compensation.

It is the same data that we are dealing with here, the same trade secrets. They are being used. And the question is, how much do you pay for them? That is an issue of state law.

QUESTION: Did you argue that before the arbitrator, that the standard was fixed by state law?

MR. WEINSTEIN: We argued that the standard should be the same as we would receive in a state law proceeding, which was the value of the right to use the trade secret.

QUESTION: Can you cite me any state cases that have remotely discussed this issue?

MR. WEINSTEIN: State cases --

QUESTION: Yes.

MR. WEINSTEIN: -- that have discussed the

issue of --

QUESTION: How much to pay when you use somebody else's trade secret? That is, when a public body uses somebody else's trade secrets to grant a subsequent registration. I think you would probably have some trouble finding any state cases that discuss this.

MR. WEINSTEIN: I think state cases discuss the issue of the unauthorized use of a trade secret and what measure of compensation they should be entitled to.

QUESTION: Where they get access to the material, where they get access to the trade secret. There are a lot of state law cases --

MR. WEINSTEIN: Where they get the use -- the use is what is important here. In Monsanto this Court said the use of the trade secret --

QUESTION: I understand what the Court said in Monsanto. I am just puzzled that you are saying there are state cases that set the measure of compensation in this, and I wonder if you would be able to cite me any. Well, don't take up time.

MR. WEINSTEIN: Yes. I would like to get back to the essential point, which is that there is an Article 3 violation here, and why under Northern

Pipeline this is an Article 3 violation, if I can sum that up.

The arbitration system here completely strips the Article 3 courts of any adjudicatory power over this decision. The arbitrators have full authority to decide all matters of fact and law in the adjudication of money claims which in Crowell versus Benson and in Northern Pipeline this Court held to be a matter of private rights.

That is an exercise of the judicial power of the United States, deciding money claims for the use of trade secrets.

I would like to deal with one final point in my argument, and that is, assuming that the statute is unconstitutional, and that the Article 3 defects exist, what should be done about it?

Our position here is not that Congress does not have the power to require the licensing of these data, and we don't say that Congress doesn't have a lot to say about how it ought to be adjudicated.

All we are saying is, the system that Congress enacted here transgresses the limits of Article 3, and it is up to Congress to find a way to do it that is consistent with Article 3 and that meets its purposes. We are not trying to stop the application of this law.

We are simply saying that the way it has been done here is not the right way.

To comply with the Constitution there must be an opportunity for an Article 3 adjudication. But that can only be done by restructuring this statute. That is something that has to be done by Congress, not by the courts. That is what the Court said in Northern Pipeline.

EPA suggests that all you have to do is sever parts of the statute that offend Article 3. The Court rejected that in Northern Pipeline, and it is even more persuasively rejected here. Whether you sever parts of the statute is a question of Congressional intent.

Congress's intent was expressed very clearly here. They didn't want Article 3 courts involved in arbitrations. That's what they said. They were trying to create a quick, inexpensive, simple arbitration record without appellate review, the kind that traditionally arbitration provides.

They said in the statute that that arbitration is binding on the parties. They said this adjudication is final and conclusive, and no court or official of any -- of the United States shall review it.

That was their intent. The government is suggesting, despite that intent, why don't we judicially

create judicial review and cram it on top of an arbitration? That is exactly what Congress didn't want. That's why they provided for arbitration. They said no court review.

It is final and conclusive. It is binding. And the government says, well, disregard Congress's intent and cram this Article 3 adjudication on top of an arbitration. Let's have judicial review anyway, despite what Congress said.

I submit that severability is a question of Congressional intent, and the intent here is not to have Article 3 review with arbitration. Now, how do you restructure it? There are lots of ways that Congress can do this. They can create an adjunct.

They can get rid of arbitration. In 1982 they decided, let's do away with compensation altogether. That bill was passed by the House of Representatives. Let's have other ways of providing protection for proprietary information. There are lots of ways to do this.

It is up to Congress to decide what is the best way to meet its purposes in a manner consistent with Article 3, but this system, which bypasses the courts completely and lets arbitrators decide questions of law is not the right way to do it. It is not a

permissible way to do it.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Wallace?

ORAL ARGUMENT OF LAWRENCE GOULD WALLACE, ESQ.,

ON BEHALF OF THE APPELLANT - REBUTTAL

MR. WALLACE: If it please, Mr. Chief Justice, the difference that we see between Stauffer and Marathon with respect to the ripeness issue is that Marathon wanted its contract claim decided by another tribunal, whereas Stauffer has resisted any effort to get a redetermination of what compensation it is entitled to.

It is defending the arbitrator's award with respect to that question. It still wants to exclude its competitors rather than accept compensation, but is not attempting to get to the question of what compensation the statute gives it a right to decided by anyone else.

Now, it is commonplace for tribunals that are not Article 3 courts to make monetary awards for back pay under the National Labor Relations Act for workmen's compensation and so forth.

QUESTION: That always arises out of a contract, doesn't it?

MR. WALLACE: These are claims between persons

where there is a claim of a breach of rights under a contract.

QUESTION: Is that any different from two private parties agreeing under the Federal Arbitration Act?

MR. WALLACE: I am not speaking of arbitration. I am speaking of a decision of the National Labor Relations Board itself which would warrant back pay to someone.

QUESTION: That is subject to review.

MR. WALLACE: That is subject to review. But it isn't that the tribunal making the determination has to be an Article 3 court. If there is any Article 3 problem here it is with the limitation of judicial review, and the statute is both capable of a saving construction or of severability of the limitation on review should the Court concluded that a saving construction is not available.

QUESTION: And there is limited judicial review of NLRB decisions.

MR. WALLACE: That is correct, and of workmen's compensation decisions, and even more so of VA decisions and other kinds, but the point is that there is no need to describe the essence of the scheme that Congress created.

QUESTION: Now, what would this surgery be precisely, if you will restate that?

MR. WALLACE: It would just be to provide for as extensive judicial review as would be required, or just to drop the provision limiting the scope of judicial review, and have it the kind of judicial review that existed under the 1972 Act.

QUESTION: In what court would you do this? The Court of Appeals or the District Court?

MR. WALLACE: It would be -- the District Court would review an arbitration award, just as it could entertain an action under 1331 to enforce an arbitration award.

QUESTION: Over across the park they would think we were amending their statute, wouldn't they?

MR. WALLACE: Well, it amends it a great deal more to do what the District Court did, which was to say exactly the opposite of what Congress intended, that competitors cannot market these unpatented products during the 15-year period for which Congress provided for a sharing of the costs.

CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:54 o'clock p.m., the case in

the above-entitled matter was submitted.)

CERTIFICATION

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

#84-497 - LEE M. THOMAS, ACTING ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Appellant V. UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.

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

BY Paul A. Richardson

(REPORTER)