

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-621 & 85-642

TITLE COMMODITY FUTURES TRADING COMMISSION, Petitioner V.
WILLIAM T. SCHOR, ET AL.; and
PLACE CONTICOMMODITY SERVICES, INC., Petitioner V. WILLIAM T.
SCHOR AND MORTGAGE SERVICES OF AMERICA
Washington, D. C.

DATE April 29, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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COMMODITY FUTURES TRADING COM- :
MISSION, :
Petitioner, :
V. : No. 85-621
WILLIAM T. SCHOR, ET AL.; and :
CONTICOMMODITY SERVICES, INC., :
Petitioner, :
V. : No. 85-642
WILLIAM T. SCHOR AND MORTGAGE :
SERVICES OF AMERICA :

- - - - -x
Washington, D.C.
Tuesday, April 29, 1986
The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:43 o'clock a.m.

1 APPEARANCES:

2 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
3 Department of Justice, Washington, D.C.; on behalf
4 of the petitioner in No. 85-621.

5 ROBERT L. BYMAN, ESQ., Chicago, Illinois; on behalf of
6 the petitioner in No. 85-642.

7 LESLIE J. CARSON, JR., ESQ., Philadelphia, Pennsylvania;
8 on behalf of the respondents.

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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 Commodity Futures Trading Commission against
4 Schor and the consolidated case.

5 Mr. Wallace, I think you may proceed whenever
6 you are ready.

7 ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
8 ON BEHALF OF THE PETITIONER
9 IN NO. 85-621

10 MR. WALLACE: Mr. Chief Justice, and may it
11 please the Court, this is a case in which the respondent
12 is claiming a right to an Article III adjudication in a
13 situation where he was afforded that right by the
14 governing statute, but elected instead to use an
15 administrative remedy provided by Congress as a
16 convenient alternative. In other words, it amounts to
17 something of a claim that the Constitution should
18 protect him against himself and against the election of
19 remedies that he exercised.

20 The 1974 amendments to the Commodities
21 Exchange Act created the Commodities Futures Trading
22 Commission and directed it to establish a reparations
23 procedure for administrative adjudication of disputes
24 between brokers and their customers, and as we have
25 shown in our brief, more than 8,000 such disputes which

1 otherwise might have been brought in the federal courts
2 have been disposed of through this administrative remedy
3 since it went into effect.

4 From the outset, the implementing regulations
5 provided that counterclaims arising out of the same
6 transaction could be asserted in the course of the
7 administrative remedy. The counterclaim regulation was
8 pursuant to the very broad grant of authority in the
9 statute for the Commission to adopt regulations not only
10 to effectuate the provisions of the Act but also to
11 accomplish any of the Act's purposes, and as we have
12 detailed in our brief, the Act itself referred to
13 counterclaims. The enforcement provision of the Act
14 obviously contemplated that counterclaims would be heard
15 by the Commission since it gave a right of enforcement
16 either to the complainant or to any person for whose
17 benefit the Commission's order was made.

18 The House report initially referred to
19 counterclaims and anticipated that they would be
20 entertained, and Congress has subsequently revisited the
21 issue in amending the Act, and has quite explicitly
22 ratified the counterclaim practice that the Commission
23 had developed. All of that is set forth in our brief.

24 In many respects the present case is a model
25 case demonstrating the reasons for the administrative

1 reparations procedure and for the Commission's
2 counterclaim rule. The respondent here, owing a sizable
3 debit balance to his broker, brought a fraud claim
4 before the CFIC against the broker and one of its
5 employees. As is typical in such cases, the fraud claim
6 essentially required the Commission to use its expertise
7 in evaluating a complex set of facts rather than to
8 resolve any purely legal issues, and perhaps the
9 outstanding utility of the reparations procedure is that
10 it allows the facts to be evaluated by this expert
11 agency that understands the operation of the commodities
12 markets and these transactions.

13 The counterclaim arose in the following way.
14 Before the broker had noticed that the reparations
15 complaint had been filed, it had filed a diversity
16 action in the federal court to recover the debit balance
17 owing on its account, and the respondent, the customer
18 filed a counterclaim repeating its fraud charges to that
19 action, but also filed a motion to dismiss or stay the
20 court action, claiming that it was essentially
21 duplicative of the administrative remedy that it had
22 asserted before the Commission, and the motion that was
23 filed, there was a later one as well, but the more
24 telling part of it is in the joint appendix on Page 13
25 in the initial motion.

1 We at least find this page of the joint
2 appendix, Page 13, the most telling page in the joint
3 appendix, and the Court will note that respondents'
4 motion, recited in Paragraph 3, pursuant to the rules of
5 the CFTC, the plaintiff in the federal court case could
6 get its claim decided by filing a counterclaim before
7 the Commission, and in Paragraph 4, that the reparations
8 proceedings pending before the Commission will fully and
9 completely resolve all of the rights between the parties
10 with respect to the transactions; Number 5, that
11 therefore the federal court suit is merely duplicative
12 of the administrative proceeding that the respondent has
13 filed; and Number 6, which is our Exhibit A and B, the
14 reasons why the counterclaim rule is needed.

15 Respondent alleged two reasons why the court
16 suit would undermine the viability of the administrative
17 remedy. One was that under the Federal Rules of Civil
18 Procedure, it was required to assert the same claims it
19 was asserting before the Commission as a counterclaim to
20 the court suit, because it arose out of the same
21 transaction, therefore the whole case would be removed
22 into the federal court if the federal court suit went
23 ahead, and the other one was that in any event it would
24 be required at great cost and inconvenience to litigate
25 the issues before two different forums, and then the

1 final sentence of Paragraph 6, which reads like a
2 sentence out of the brief we have filed, "The effect
3 therefore would be to emasculate if not destroy the
4 purposes of the Commodity Exchange Act to provide an
5 efficient and relatively inexpensive forum for the
6 resolution of disputes in futures trading."

7 Now, as is also typical in these cases, the
8 counterclaim involved no additional factual issue other
9 than the question whether the fraud alleged in the
10 administrative complaint had occurred. The arithmetic
11 of the debit balance on the account was undisputed, and
12 the counterclaim involved no disputed legal issue. It
13 was simply a way fully to resolve the dispute over the
14 contested transactions in a single proceeding.

15 QUESTION: Of course, there is no question
16 that the counterclaim could have involved a disputed
17 legal issue, and it still would have been before the
18 CFTC.

19 MR. WALLACE: That is correct, Mr. Justice.
20 It is a rare occurrence for there to be a disputed issue
21 of state law. If there is one, of course, the
22 Commission will resolve it, and the Commission's orders
23 are subject to de novo review on a state legal issue in
24 the Federal Court of Appeals, which is, of course, an
25 Article III court.

1 QUESTION: But, of course, a state issue
2 involving Utah law -- what Court of Appeals would that
3 come before on review of the CFTC?

4 MR. WALLACE: Well, it would be the
5 appropriate Court of Appeals, and I am not sure that I
6 can answer the question without reference back to the
7 statute. This particular one wound up in the District
8 of Columbia Circuit Court for --

9 QUESTION: It wouldn't necessarily be the
10 Court of Appeals where some judges from that state might
11 be sitting?

12 MR. WALLACE: It would not necessarily be
13 that.

14 QUESTION: I guess there also could be state
15 law defenses to a counterclaim, could there not?

16 MR. WALLACE: Those would be heard by the
17 Commission. That is correct.

18 QUESTION: Do you take the position that
19 Congress can routinely give agencies pendant or
20 ancillary jurisdiction over state law claims that relate
21 in some way to the adjudication of a federal statutory
22 right?

23 MR. WALLACE: Well, we have argued in our
24 brief that even in the absence of consent of the
25 parties, Congress could require the adjudication of the

1 complete transaction in all claims between the parties
2 in the administrative agency with authority over the
3 claim, but we frankly do not believe that question need
4 be reached here, because the consent of the parties was
5 so evident. The respondent chose to follow the
6 administrative remedy knowing that the rules of the
7 Commission provided for the counterclaim to be asserted
8 there, and indeed he succeeded in persuading the broker
9 to dismiss its federal court suit in favor of asserting
10 the counterclaim before the agency, which is the course
11 that respondent preferred.

12 So this was not merely a case in which the
13 respondent had a right to be in an Article III court if
14 he chose to be. It is a case in which he actually was
15 in an Article III court and opted out of that court in
16 favor of having the agency adjudicate the rights between
17 the parties with respect to the entire transaction.

18 So, we think that the consent of the parties
19 is really controlling in this case, the consent to an
20 agency adjudication. In our view, this is not a
21 difficult case on the consent issue, such as Thomas
22 against Union Carbide of last term in which the question
23 of consent was to be inferred from the participation by
24 individuals in a statutory program that restricted the
25 resolution of disputes arising under that program to a

1 non-Article III forum.

2 Instead, this is a much more straightforward
3 case of election of remedies. Respondent was not so
4 restricted. And in our view the case is no different
5 for Article III purposes from a simple agreement by
6 parties to submit their dispute to an arbitrator rather
7 than to proceed in the federal courts.

8 QUESTION: Well, except if the parties submit
9 their dispute to an arbitrator, there is no question of
10 the allocation of the powers of the federal government
11 being involved at all. Here you are having a dispute
12 resolution under the auspices of the federal government,
13 and it really is not being done primarily by the
14 judicial branch.

15 MR. WALLACE: That is true. For the
16 convenience of persons participating in the commodities
17 market, Congress has exercised its Article I powers to
18 provide an expert administrative tribunal which can
19 serve by consent to resolve their disputes pursuant to
20 administrative procedures with a greater scope of
21 judicial review than the Article III courts and would be
22 true of arbitrators who would be less expert in the
23 field, and the parties have the option of going to an
24 Article III court rather than utilizing that procedure.

25 QUESTION: What if -- in the old Habrins case,

1 I think it was, where this Court said that judicial
2 officers shouldn't be passing and validating pension
3 claims where their decisions weren't final, would it
4 have made any difference there if the legislation said,
5 you don't have to submit it to the justices, but if you
6 want to, go ahead?

7 MR. WALLACE: Well, there is no improper use
8 of Article III judges or courts in this case. The
9 scheme here fully comports with the purpose of Article
10 III in preserving the independence of the federal courts
11 and their role as the ultimate expositors of the federal
12 law.

13 Now, in this Court respondent has presented us
14 with something of a moving target by arguing principally
15 that it is not his own rights but states' rights that
16 are offended by his action of the administrative
17 remedy. The argument, it first must be said, is
18 particularly abstract on the facts of this case, where
19 the counterclaim involved no additional disputed issue
20 of fact, no issue of state law whatsoever, and arose
21 under a statutory scheme in which in the rare instance
22 when the Commission might decide an issue of state law,
23 its determination would be subject to de novo review in
24 an Article III court, as we have discussed.

25 And in any event, we regard the contention as

1 misconceived. Under our federal system, rights between
2 persons are often governed by both federal and state law
3 in various combinations, and it is commonplace and
4 consistent with and serves the rule of law for federal
5 officials of all kinds and agencies as well as Article I
6 courts to determine applicable state law to the best of
7 their ability and to apply it in the course of doing
8 their business, just as state officers, agencies, and
9 courts should apply applicable federal law.

10 CHIEF JUSTICE BURGER: We will resume there at
11 1:00 o'clock, Mr. Wallace.

12 (Whereupon, at 12:00 o'clock p.m., the Court
13 was recessed, to reconvene at 1:00 p.m. of the same
14 day.)
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ORAL ARGUMENT OF ROBERT L. BYMAN, ESQ.,
ON BEHALF OF THE PETITIONER
IN NO. 85-642

I believe that the Deputy Solicitor General has adequately covered the ground on the first and third of these issues, and I would like to only add one or two small footnotes. It is the second issue, whether or not Congress may provide for non-Article III dispute resolution with the consent of the parties, which I think is the real meat of this case, and which I would like to address most of my remarks to.

14

1 issue of Congress's intent in this case, I think it is
2 significant to point out that this is not a case in
3 which Congress has ratified by an off chance remark in
4 one or two pages out of thousands of pages of
5 legislative history.

6 Rather, in the 1982 reauthorization of the
7 Commodity Futures Trading Commission, both the Senate
8 and the House used identical language which was cited in
9 all of the briefs, but it might get lost in the fact
10 that we cited only one set of language because we didn't
11 want to cite twice.

12 Both the House and the Senate said that the
13 reparations program seeks to pass upon the entire
14 controversy, including counterclaims which arise out of
15 the same transaction. It is also significant that both
16 the Senate and the House versions of the bill were
17 reported to give the Commission broad authority, and in
18 fact the House report talked about the fact that the
19 House wanted to exempt the Commission from the usual
20 application of the Administrative Procedures Act, again,
21 to give it broad authority in this case.

22 Turning quickly to the third issue in this
23 case, whether there was consent here, we believe that
24 this is a relatively easy question. Schor did not
25 simply consent to adjudication by a non-Article III

1 body. He demanded it. He demanded that Conti dismiss
2 its federal action. The federal judge in that case
3 declined to accede to that demand, but Conti voluntarily
4 dismissed upon Schor's representation.

5 He only raised this issue after the
6 Administrative Law Judge had announced his preliminary
7 findings and directed Conti to prepare a proposed
8 order.

9 Turning then to --

10 QUESTION: Are these counterclaims
11 compulsory?

12 MR. BYMAN: In the federal sense, Your Honor?

13 QUESTION: Yes, if someone gets sued before
14 the Commission, does the Commission say there should be
15 a counterclaim if there is one?

16 MR. BYMAN: No, Justice White. In the
17 Commission, Conti had the option of ignoring reparations
18 or its counterclaim and going directly to federal court
19 or filing it on a voluntary basis, but obviously the
20 goal that was fostered by the --

21 QUESTION: But certainly it is permitted,
22 counterclaim is permitted.

23 MR. BYMAN: Absolutely.

24 QUESTION: And Congress, you say, intended it,
25 so anybody who sues, a plaintiff who sues before the

1 Commission, what do you say, he brings an action, or
2 what does he do before the Commission?

3 MR. BYMAN: He brings a reparations action to
4 seek redress.

5 QUESTION: All right, he brings a reparation.
6 He then knows that he may face a counterclaim.

7 MR. BYMAN: Exactly, and Schor knew that. At
8 the time that he filed his action in reparations, the
9 Seventh Circuit, which is the circuit in which Conti had
10 filed its federal action, had already held some three or
11 four years earlier that a private right of action
12 existed under the commodity --

13 QUESTION: But Schor couldn't go any place
14 else, could he?

15 MR. BYMAN: Pardon me?

16 QUESTION: Schor couldn't go any place else.

17 MR. BYMAN: He could have gone to voluntary
18 arbitration if the parties had agreed.

19 QUESTION: Could he go to court anywhere?

20 MR. BYMAN: He could have gone to state court
21 at that time. There has been a recent amendment to the
22 Commodity Exchange Act that creates exclusive
23 jurisdiction in the federal courts, but at the time that
24 he filed his claim --

25 QUESTION: But in any event, he could have

1 gone to court somewhere.

2 MR. BYMAN: That is right, and in fact he was
3 in court.

4 QUESTION: And he still could today if -- I
5 mean, any person in his position could now go to court.

6 MR. BYMAN: That is right, Your Honor.

7 QUESTION: But he would have to go to federal
8 court.

9 MR. BYMAN: That is right. He still has his
10 choice of his Article III remedy or his Congressionally
11 created reparations remedy, but if he chooses the
12 reparations remedy, he takes as the Arnett case called
13 it, the bitter with the sweet. He takes the
14 implications of the procedure that he has decided to
15 elect.

16 QUESTION: Well, like now, if he goes through
17 a federal court, he is going to have to face a
18 counterclaim.

19 MR. BYMAN: Well, if he were to go to a
20 federal court now, Your Honor, he would be estopped by
21 res judicata, since he is litigating --

22 QUESTION: Well, I know, but I mean an
23 ordinary plaintiff.

24 MR. BYMAN: That's right, Your Honor.

25 QUESTION: Yes. He knows that he may face a

1 state law counterclaim.

2 MR. BYMAN: Exactly, Your Honor.

3 QUESTION: Would there be a risk of time
4 factor, too, in some circumstances?

5 MR. BYMAN: There could be, Your Honor. In
6 this case, this contract is governed by Illinois law.
7 Illinois has a ten-year statute for contract claims.

8 I would like to turn then to that second
9 issue, can Congress permissibly create a non-Article III
10 remedy with the consent of the parties, and this goes to
11 the question that Justice Rehnquist asked the Deputy
12 Solicitor General. In fact, it is the issue which
13 drove, we believe, the Court of Appeals to its
14 decision. It is the issue which drives this case, and
15 that is, may the federal government allocate its
16 resources for the voluntary application of a non-Article
17 III remedy to give litigants an option.

18 I would like, if I may, Your Honors, to pose a
19 hypothetical. We know from the Southman case, we know
20 from the pronouncements of various members of this Court
21 that this Court favors arbitration, favors the parties
22 turning to alternate dispute resolution foras. If
23 Congress were to try to aid that arbitration process and
24 cure one of the evils that now exist in arbitration,
25 this case poses serious risks to that kind of a remedy.

1 The example that I have in mind is under
2 Triple A arbitration, for example. That forum, the
3 American Arbitration Association, is a very effective
4 one for private litigants to turn to, but litigants are
5 often wary of it because of the unevenness of the
6 arbitration panel.

7 Some arbitrators are lawyers. Some
8 arbitrators are associated with industry and have no
9 legal background. Some arbitrators, the parties simply
10 don't know who they are. And indeed, when the Triple A
11 gives lists of arbitrators to the parties that have
12 proposed arbitration, the parties are free to strike all
13 of the names, and in that instance the Triple A will
14 simply appoint someone with the parties having no input
15 whatsoever as to the panel that they will have to
16 resolve their disputes.

17 Congress could correct that problem by
18 appointing a core of professional full-time qualified
19 federal arbitrators to whom the parties would turn only
20 on a voluntary basis, and yet if the Court of Appeals
21 decision is upheld in this case, Congress could not do
22 that.

23 The Court of Appeals decision would tell
24 Congress that it could not use federal resources to help
25 the citizens of this country resolve their disputes even

1 though the citizens wished to resolve their disputes in
2 a consensual manner.

3 QUESTION: Well, Mr. Byman, no one thinks that
4 the Federal Mediation Service is unconstitutional, does
5 it?

6 MR. BYMAN: The Mediation Service, of course,
7 doesn't issue binding orders. It merely aids the
8 parties in forming their own agreement as to final
9 resolution, so it is a slightly different situation.
10 There also, of course, are labor arbitrators, but that
11 deals with a specialized area of federal law.

12 Here we are talking about state law concepts
13 where the parties voluntarily go to those proceedings,
14 and our position, Your Honor, is that the parties may do
15 that, that Congress could permissibly create a federal
16 corps of arbitrators to hear nothing but state law
17 claims so long as the parties consented to go that
18 forum.

19 That, we believe, is the nub of --

20 QUESTION: What is the extended judicial
21 review, Mr. Byman?

22 MR. BYMAN: Under the current system, Your
23 Honor?

24 QUESTION: Yes.

25 MR. BYMAN: Justice Brennan, at this point,

1 the judicial review is that after the Commission has
2 entered a binding order, an appeal may be taken as of
3 right to the Circuit Court of Appeals for the district
4 -- for the circuit, rather, in which the reparations
5 proceeding was held.

6 QUESTION: Now, the counterclaim, what is the
7 standard of review?

8 MR. EYMAN: The same standard, Your Honor, and
9 it is a standard of the substantial weight of the
10 evidence. It is not strictly a de novo review, nor is
11 it a clearly erroneous standard. It is more a middle
12 standard.

13 QUESTION: Where does the reparations action
14 have to be brought?

15 MR. EYMAN: The reparations action may be
16 brought in any location in which either the broker or
17 the customer are located. Typically reparations will be
18 filed where the individual customer happens to reside.
19 In this case, Judge Painter, who was sitting, of course,
20 in Washington, asked the parties, who were a customer
21 who resided in New Jersey and a brokerage firm which was
22 a resident of Chicago, if they would be willing to come
23 to Washington for the hearing. They both agreed to, and
24 that was the reason that the D.C. circuit had
25 jurisdiction of the appeal.

1 Your Honors, we believe that it is incumbent
2 in the Constitution that the Constitution is an
3 architecture designed to protect the citizens of this
4 country. It is not an architecture in and of itself,
5 but rather, it is designed to aid the legitimate goals
6 of people who reside in that architecture.

7 We are aware of no right under the
8 Constitution granted to its citizens which cannot be
9 waived by individuals. This is exactly that type of
10 situation. If there was a Article III right for Mr.
11 Schor in this case, he waived it. If there is an
12 Article III right of litigants to have their disputes
13 heard in common law controversies in Article III courts,
14 they waive it by going to reparations. We believe it is
15 as simple as that.

16 We would direct Your Honor's attention to the
17 portion in our brief in which we talk about the fact
18 that Conti's counterclaim in this case should not be
19 affected no matter what the ultimate resolution of the
20 broader issue is, but we respectfully suggest, unless
21 the Court has further questions, that the judgment below
22 be vacated.

23 CHIEF JUSTICE BURGER: Very well.

24 Mr. Carson.

25 CRAL ARGUMENT OF LESLIE J. CARSON, JR., ESQ.,

1 ON BEHALF OF THE RESPONDENTS

2 MR. CARSON: Mr. Chief Justice, and may it
3 please the Court, the first construction of the
4 Commodity Exchange Act with respect to counterclaims and
5 reparations proceedings was by the CFTC and took place
6 when it was promulgating its proposed regulations
7 implementing that program.

8 It construed the Act at that time as
9 presenting a substantial question of whether it had any
10 authority to entertain counterclaims other than
11 counterclaims which were based upon violations of the
12 Commodity Exchange Act. It answered that substantial
13 question by promulgating a proposed regulation which
14 restricted its jurisdiction over counterclaims to
15 counterclaims which alleged violations of the Commodity
16 Exchange Act.

17 It did so based upon a reading of the Act,
18 based upon a reading of the Act shortly after the
19 enacting Congress had passed it, and it did so with
20 express recognition that the counterclaim regulation
21 that it was proposing was a counterclaim category which
22 would be indeed very narrow.

23 Now, to be sure, thereafter based upon
24 comments received by the Commission from the industry,
25 which basically stated that brokers commented that it

1 would be unfair to them as brokers, the Commission
2 promulgated the counterclaim regulation which brings us
3 here today, but it is, I think, important to note that
4 on the statutory construction issue, the first
5 impression of the Commission was that it did not have
6 this authority.

7 The other bases of construing this statute
8 which were referred to by the Solicitor General, the
9 legislative history, I just want to point out that the
10 legislative history, while it refers to counterclaims,
11 we have no issue with respect to counterclaims, it does
12 not refer to counterclaims that are based other than on
13 the Act.

14 The Act itself, Section 14 of the Commodity
15 Exchange Act, the reparations section, refers not once
16 but three times to the jurisdiction of the Commodity
17 Exchange -- or to the Commodity Futures Trading
18 Commission as to award reparations based upon violations
19 of the Act. No other authority is conferred by that
20 section. The section has been amended in 1983, but
21 still it does not state anything with respect to non-Act
22 counterclaims.

23 Indeed, the legislative history to which Mr.
24 Eyman referred likewise makes no reference nor explicit
25 reference to non-Act counterclaims, so that on the basis

1 of statutory construction, when, of course, the
2 Commission looked at this, they looked at it without any
3 reference to any constitutional issues. Now, of course,
4 a constitutional issue has been raised, and based upon
5 the fact that a fair reading, a reading the Commission
6 itself made initially would permit avoidance of that
7 constitutional issue; therefore the Act should be
8 construed as not raising the issue, as limiting the
9 Commission to the jurisdiction it said it had initially,
10 that is, counterclaims based on Act violations.

11 However, if the Court feels it must reach the
12 constitutional issue, the issue has been stated by
13 counsel for Centicommodity Services as indicating or as
14 being whether or not Congress may create a program in
15 which state law created rights are adjudicated by a
16 federal tribunal with the consent of the parties.

17 We submit as to the latter factor, consent of
18 the parties, consent is irrelevant. There is, of
19 course, an enormous and consistent body of law that says
20 consent of the litigants cannot vary or expand the
21 jurisdiction of a tribunal, certainly cannot vary or
22 expand the jurisdiction of a court, a constitutional
23 court or a state court, and there is no reason why it
24 should be able to expand the jurisdiction of this
25 administrative tribunal.

1 Beyond that, of course --

2 QUESTION: May I inquire, Mr. Carson, about
3 that argument? It does seem to me that consent of the
4 litigants in one form or another was a factor relied
5 upon by this Court in Thomas versus Union Carbide. And
6 I think that it also has been a factor in the actions of
7 courts supporting the Magistrates Act, which permits a
8 magistrate to adjudicate with consent of the parties
9 even state law claims.

10 MR. CARSON: That is true, Justice O'Connor.
11 The Magistrates Act, however, presents two distinct
12 differences from what we have here. Number One, the
13 magistrates are adjuncts, employees, if you will, of an
14 Article III court. They exist within the court. They
15 are supervised by Article III judges in a very close
16 way. They are appointed by Article III judges. They
17 are, it may be stated, beholden not to the Congress but
18 to Article III judges.

19 Moreover, the Magistrates Act provides in this
20 Article III context for express consent, express consent
21 by the parties litigant to the use of the magistrate,
22 who, of course, is not appointed under Article III.
23 Thus you have explicit consent, statutorily authorized
24 consent.

25 QUESTION: Well, I suppose in the Thomas case

1 the form of consent relied upon was not even as explicit
2 as it was in this case, was it?

3 MR. CARSON: The form of consent --

4 QUESTION: It was just consenting to submit to
5 the registration scheme.

6 MR. CARSON: That -- while it was not explicit
7 in the sense that there was a provision in the statute
8 relative to consent, the statute itself called for
9 individuals to accede to this system in order to be a
10 part of it. Also in Thomas I believe the decision was
11 rendered by arbitrators, arbitrators who were
12 themselves, if I recall correctly, not appointed by
13 Congress or by the executive branch, so that there you
14 may not even have a judicial power situation, but be
15 that as it may, if the arbitrators in Thomas were the
16 subject of consent, Thomas itself represents not a state
17 created right of action.

18 It was explicitly rejected by this Court that
19 a state law created right was being adjudicated there,
20 and indeed the Court rejected the proposition that the
21 rights being adjudicated there were any replacement of a
22 state law created action, so that that is distinguished
23 from -- this case is distinguishable from Thomas as we,
24 I think, point out in our brief, based on the fact that
25 it is a state law created right of action, and that

1 there is a special relationship or special protection
2 for state law created rights of action under Article
3 III.

4 QUESTION: Mr. Carson, what is the evil, if I
5 may call it that, which our Article III jurisprudence
6 cases seem to be directed? Perhaps we ought to know,
7 but certainly we can ask you.

8 (General laughter.)

9 MR. CARSON: Well, of course, the objective of
10 the tenure and salary protection provisions of Article
11 III was to render the judges appointed thereunder as --

12 QUESTION: Then is it to keep federal judges
13 employed to make sure that all conceivably judicial
14 business goes to federal judges and not somebody else in
15 the federal system.

16 MR. CARSON: It is, I believe, certainly a
17 fair reading of Article III, in fact, the judicial power
18 of the United States is to be exercised by judges who
19 benefit from those tenure and salary protection
20 provisions.

21 QUESTION: Is that then a right that is for
22 the benefit of the individuals who are to have their
23 cases decided by those judges?

24 MR. CARSON: It certainly is. The separation
25 of powers and other concepts which relate to the

1 independence of federal judges conferred by Article III
2 are, of course, for the purpose of improving the
3 performance of the exercise of judicial power.
4 Obviously, that provision of the framers was not for the
5 benefit of federal judges. It was for the benefit of
6 the quality of government, particularly of judicial
7 administration, that the new nation would offer.

8 QUESTION: Well, maybe it was to ensure the
9 litigants that the judges weren't being pushed around by
10 the parties or by politicians operating under undue
11 influence.

12 MR. CARSON: Absolutely, Justice White. That,
13 of course, was the means to better judicial
14 administration the framers selected.

15 QUESTION: But insofar as it is a right of the
16 parties, it certainly could be waived by consent.

17 MR. CARSON: No, I do not agree with that,
18 Justice Rehnquist. The right of the parties is not, I
19 submit, a significant or relevant factor when it comes
20 to Article III. Article III with respect to state
21 created rights of action is a jurisdictional article.
22 It determines who may hear certain kinds of controversy,
23 subject matter jurisdiction.

24 QUESTION: Do you question the right of an
25 individual to make a binding agreement to waive his

1 right to use an Article III judge and to go final and
2 binding nonreviewable arbitration?

3 MR. CARSON: I do, Mr. Chief Justice. I
4 submit that an individual may not confer the judicial
5 power of the United States by consent on any person who
6 is not the beneficiary of the protections under Article
7 III. In other words, while I may agree to appear before
8 an arbitrator who is not appointed by Congress or the
9 executive branch and not paid by Congress or the
10 executive branch, I cannot agree to appear before a
11 person who is employed by the federal government and who
12 is beholden and paid by the federal government, and have
13 that person exercise in my controversy, the judicial
14 power of the United States.

15 QUESTION: What does Mr. Schor lose by having
16 Judge Painter as opposed to perhaps a New Jersey state
17 judge, an Illinois state judge, or a federal judge
18 decide his case?

19 MR. CARSON: What does he lose by having Judge
20 Painter -- what he loses by having Judge Painter decide
21 his case is that his personal loss is perhaps not the
22 answer to your question. He has, of course, the loss of
23 the independence protection features of Article III that
24 are provided in Article III which are not accorded to
25 Judge Painter or to his supervisors, the Commissioners.

1 QUESTION: But if it is the state law element
2 of the case that is so important, he might well go
3 before a state court judge who didn't have any great
4 amount of tenure either.

5 MR. CARSON: That, I think, Justice Rehnquist,
6 goes to the exact point that we are making here, which
7 is that the treatment or the decision by federal
8 authorities of state created rights, the adjudication of
9 those rights is something that was limited by the
10 framers in the context of the rather significant
11 controversy over whether such authority would be
12 conferred upon the federal judiciary, whether it could
13 decide in the context of diversity, the narrow context
14 of diversity, state created rights.

15 That controversy, we submit, was overcome,
16 that is, that opposition was overcome in the context of
17 the independence conferred upon the federal courts by
18 Article III. Obviously, any litigant is entitled to
19 appear, or bring his controversy to a state court, and
20 there, of course, Article III does not apply, but the
21 part of the benefit of Article III is the preservation
22 to the extent of its limitations on the exercise of the
23 federal judicial power over state related or state
24 created actions, the benefit that it confers upon the
25 relationship between the federal government and the

1 states.

2 In other words, in addition to separation of
3 powers directly conferred upon the judges by Article
4 III, it also indirectly renders those judges independent
5 in their decisions with respect to state related causes
6 of action.

7 QUESTION: Independent of whom?

8 MR. CARSON: Independent of Congress. One of
9 the concerns that was expressed during the debates was
10 the power of the legislature and its threat it
11 represented to the power of the states. While I do not
12 believe the state can be demonstrated to have been as
13 focused as it is here today during the drafting of the
14 constitution, I can point to one quotation which is
15 quoted by Judge Friendly in the article that is cited in
16 the briefs which -- in which an anti-Federalist who
17 styled himself Agrippa, took the position that -- asked
18 the question rhetorically, by what rule will these
19 national courts decide diversity cases, and he answered
20 his own question by stating, by its own rule or by that
21 of its employer, the Congress.

22 Now, the implication of that answer is that of
23 course the relationship that the Congress had to the
24 courts as employer would in some way enable the Congress
25 to have an unwanted influence over the national courts.

1 That argument, of course, would be and presumably was
2 overcome by pointing out to Aggripa and the other
3 anti-Federalists that there could be no such influence
4 by Congress because these judges would have independence
5 by virtue of their salary and tenure protection.

6 Turning just to consent, which seems to be the
7 major argument of the petitioners, the consent that we
8 have been confronted with is, of course, not consent.
9 We may have been -- we may not be in fact consistent
10 throughout this litigation, but the fact of the matter
11 is that when we took the position that they have alluded
12 to in the federal court in Chicago, we lost. Our
13 position was rejected, and when we then were confronted
14 with the counterclaim in the reparations proceeding in
15 Washington, we did at a later time to be sure raise the
16 issue of statutory construction. That issue was raised
17 before the Administrative Law Judge, who commented in
18 his initial decision on it by stating it was a neat
19 legal point, but he was bound by agency regulations and
20 policies.

21 We raised it also in our petition for review
22 to the Commission, and we raised it again in the Court
23 of Appeals. Of course, it was the Court of Appeals who
24 raised sua sponte the constitutional issue at the
25 appellate level, so that we did raise this issue as to

1 jurisdiction in a statutory construction manner, and
2 therefore cannot be said to have consented.

3 QUESTION: But, Mr. Carson, when you are given
4 two alternative methods of proceeding to try to get the
5 relief that you want one by the Commission with a rule
6 providing for counterclaims, an another going to federal
7 court where you will get your Article III judge, you
8 choose the first of them. Certainly there is a lot of
9 our doctrine that would say you consented.

10 MR. CARSON: Mr. Justice Rehnquist, as I have
11 said before, consent is not relevant to the decision in
12 this case, we submit, but in addition to that our
13 selection was made, as Mr. Byman mentioned, prior to
14 this Court's decision in Merrill Lynch versus Curran,
15 and in that case that was the first case, that was the
16 case which settled the issue of whether there was a
17 private cause of action based on the Commodity Exchange
18 Act and violations thereof.

19 Until that decision was made, there was a
20 conflict in the circuits and a conflict in the
21 decisions. The lower court here collects some of those
22 cases. Basically, though, until five members of this
23 Court decided there was a private cause of action, that
24 was an issue that was up in the air, and --

25 QUESTION: Was the circuit in which you were

1 acting a circuit which had recognized the jurisdiction
2 over counterclaims, however?

3 MR. CARSON: The Seventh Circuit had.

4 QUESTION: Yes, so as far as you were
5 concerned in that circuit that was the rule.

6 MR. CARSON: That was the rule in the circuit,
7 but the issue of whether or not that would have
8 prevailed by the conclusion of the case was far from
9 certain because there was obviously a conflict in the
10 circuits, and clearly it was going to be dealt with
11 ultimately by this Court, and this Court by one vote
12 upheld a private right of action.

13 For the reasons we have stated, A, the statute
14 does not authorize hearing of these state law
15 counterclaims, and because Article III especially
16 protects the states against the trial of state law
17 issues in the absence of the provisions of the
18 Constitution specifically authorizing that by other than
19 Article III judges, and because consent here is not
20 relevant and did not in fact take place, we submit that
21 the judgment of the lower court should be affirmed.

22 Thank you.

23 CHIEF JUSTICE BURGER: Very well.

24 Mr. Wallace.

25 ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

1 ON BEHALF OF THE PETITIONER

2 IN NO. 85-621 - REBUTTAL

3 MR. WALLACE: Mr. Chief Justice, and may it
4 please the Court, the Commission in its first notice of
5 proposed rulemaking did propose a counterclaim rule that
6 would be limited to claims under the CEA. It is an
7 overstatement, however, to say that there was anything
8 in the notice that interpreted the Act as limiting the
9 Commission's authority in that regard.

10 It did state that there was a substantial
11 question whether a broader counterclaim rule would be
12 authorized. The comments, it is fair to say, in looking
13 at this whole history -- the Commission at that time, of
14 course, was inexperienced with the administration of the
15 reparations procedure.

16 The comments pointed out what the Commission's
17 experience has later borne out, that the great bulk of
18 counterclaims that would have to be heard in order for
19 the transaction fully to be resolved would be
20 counterclaims against customers that would not state a
21 claim under the CEA unless the customer happened to be
22 registered as a broker as well, and only one such
23 counterclaim in the 8,000 cases that the Commission has
24 had has arisen thus far that the Commission can recall,
25 the Commission staff can recall.

1 So, the comments on the proposed rule
2 persuaded the Commission that the scheme just would not
3 work without a broader counterclaim rule that would
4 dispose of the entire transaction.

5 Now, with respect to the election of remedies
6 in this case, it is true as Justice O'Connor pointed out
7 that Mr. Schor had the option under then existing
8 Seventh Circuit precedent, and this Court had not yet
9 precluded this, of bringing his claim in federal court.
10 Beyond that, he was already in federal court with his
11 claim as a counterclaim to Centi's diversity action
12 against him under the diversity jurisdiction of the
13 court, so that he himself prior to Merrill Lynch had the
14 means of getting his claim. His counterclaim was the
15 equivalent of his claim before the Commission, so he
16 himself was in federal court, and said he preferred to
17 have the Commission resolve the matter.

18 Now, with respect to the question that has
19 been asked about the purposes of Article III and whether
20 our position comports with those purposes, I think the
21 purposes are largely to be divined from the complaint
22 and the declaration of independence that the English
23 king had subjected the courts in the colonies to his
24 will. It was largely designed to assure that
25 independent tribunals would serve as the ultimate

1 expositors of the law, of federal law in particular.

2 And there was a corresponding benefit to
3 litigants. It is not an absolute benefit. Litigants
4 have not been upheld in claims that there was something
5 wrong with having a judge on a recess appointment sit in
6 their case rather than one already enjoying life
7 tenure. But to the extent that there is a protection
8 for the litigants, the Court has always recognized that
9 that aspect of Article III protection can be waived in
10 favor of what the litigant finds a more convenient means
11 of resolution, and of course Article I courts such as
12 the Tax Court exist.

13 The power to decide issues of state law
14 resides not only in the Tax Court in the many
15 specifications we have mentioned, but the Internal
16 Revenue Service itself can resolve a question of state
17 law in assessing a deficiency, and the litigant can
18 acquiesce in that. The taxpayer can acquiesce in that
19 by not challenging it in court. There is nothing wrong
20 with having a federal official determine a state law
21 issue.

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

24 (Whereupon, at 1:35 o'clock p.m., the case in
25 the above-entitled action was submitted.)

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:

#85-621-COMMODITY FUTURES TRADING COMMISSION, Petitioner V. WILLIAM T. SCHOR,
ET AL.; and

#85-642-CONTICOMMODITY SERVICES, INC., Petitioner V. WILLIAM T. SCHOR AND
MORTGAGE SERVICES OF AMERICA

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

BY Paul A. Richardson

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