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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1259

TITLE EDWARD LUNN TULL, Petitioner V. UNITED STATES

PLACE Washington, D. C.

DATE January 21, 1987

PAGES 1 thru 46



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EDWARD LUNN TULL, :

4 Petitioner :

5 v. : No. 85-1259

6 UNITED STATES :

7 - - - - -x

8 Washington, D.C.

9 January 21, 1987

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 12:59 o'clock p.m.

1 APPEARANCES:

2 RICHARD N. NAGEOTTE, ESQ., Woodbridge, Va.;

3 on behalf of Petitioner

4 LAWRENCE G. WALLACE, ESQ., Dep. Sol. Gen.,

5 Department of Justice, Washington, D.C.

6 on behalf of Respondent

7 RICHARD N. NAGEOTTE, ESQ., Woodbridge, Va.;

8 on behalf of Petitioner - rebuttal

C O N T E N T S

ORAL ARGUMENT OF

PAGE

RICHARD N. NAGEOTTE, ESQ., Woodbridge, Va.;

on behalf of Petitioner

4

LAWRENCE G. WALLACE, ESQ., Dep. Sol. Gen.,

Department of Justice, Washington, D.C.

on behalf of Respondent

23

RICHARD N. NAGEOTTE, ESQ., Woodbridge, Va.;

on behalf of Petitioner - rebuttal

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1 PROCEEDINGS

2 CHIEF JUSTICE BRENNQUIST: Mr. Nageotte, you
3 may proceed whenever you're ready.

4 ORAL ARGUMENT OF
5 RICHARD R. NAGEOTTE, ESQ.,
6 ON BEHALF OF PETITIONER

7 MR. NAGEOTTE: Mr. Chief Justice, and may it
8 please the Court:

9 The constitutional issue for decision in this
10 case this afternoon is whether a citizen of the United
11 States who finds himself to be the defendant in a suit
12 brought by the federal government in a federal court,
13 that is a federal district court, under a federal
14 statute, subjecting that citizen to a substantial civil
15 penalty, whether that citizen is entitled to trial by
16 jury under the Seventh Amendment.

17 The facts briefly stated in this case are that
18 in July 1981, the federal government, the Department of
19 Justice, filed suit in the United States District Court
20 in Norfolk alleging that Mr. Tull had filled properties,
21 had developed properties and in some cases had sold those
22 properties, in some cases more than five years prior to
23 filing this suit.

24 In all cases at least more than six months
25 later property having been filled and partially sold in

1 December, 1980. The complaint in that case, while it did
2 ask for a conclusionary injunctive relief, the primary
3 thrust of that case was to impose substantial civil
4 penalties.

5 Interestingly in this case, Mr. Tull, in 1976,
6 in order to avoid just this result, upon the advice of
7 his attorney had asked for a jurisdictional inspection
8 to be made by the District Engineer who is charged with
9 enforcement of the statute.

10 This jurisdictional inspection was made in July
11 of 1976 by no less than the District Engineer and eight
12 key people of this department, including several
13 department heads and two attorneys. And the attorney's
14 specific job was to make jurisdictional determinations
15 to determine whether or not permits were required.

16 Mr. Tull proceeded with his activity after
17 having been told that in only two locations were permits
18 required.

19 QUESTION: Mr. Nageotte, we granted certiorari
20 only on the jury trial issue in this case.

21 MR. NAGEOTTE: Yes, Your Honor, I'm simply
22 trying to briefly summarize the facts. Mr. Tull demanded
23 a jury trial. That jury trial demand was denied on the,
24 and the basis of the trial court's denial was that all
25 issues in this case were equitable or in regards to

1 opinions requested from the court.

2 The case today falls squarely within the case
3 of Curtis v. Leether, the only distinction being that in
4 that case the issue, the legal relief was punitive
5 damages and in this case it is civil penalties. We would
6 point out that the government suggests that this case
7 involves disgorgement of profits as a form of equitable
8 relief.

9 Say to the court that the complainant in this
10 case made no mention of disgorgement of profits or
11 profits in any regard. In both counts one, two and three
12 of the complaint filed in this case, the government asked
13 for the imposition of civil penalties under that
14 provision of the statute, 33 U.S.C. 1319(d).

15 QUESTION: Mr. Nageotte, if the language of the
16 statute had made clear that the so-called civil sanction
17 was to be related to disgorgement of economic benefit for
18 example, would you think the Seventh Amendment would
19 then guarantee a right to trial by jury?

20 MR. NAGEOTTE: That would really depend on the
21 precise language used. Of course, disgorgement, if
22 properly disgorgement under the equitable principles of
23 disgorgement could be an equitable remedy bestowed in
24 this statute by Congress in any number of ways. But
25 whether or not it is in fact an equitable remedy, in

1 other words what I'm saying is --

2 QUESTION: Well, you would concede that it
3 could be an equitable remedy?

4 MR. NAGEOTTE: Yes. I don't like the term
5 disgorgement. I don't think that's particularly correct,
6 but restitution is probably a more appropriate term.
7 Restitution has always been a form of equitable relief
8 that is to put the parties into the same position that
9 they would have been in but for the action.

10 QUESTION: Well, is it possible that we could
11 interpret this statute as essentially one for that type
12 of relief even though it's not express?

13 MR. NAGEOTTE: Justice O'Connor, I don't
14 believe that that could be done in this case for this
15 very specific reason. Justice Marshall, in his opinion
16 in *Curtis v. Loether*, pointed it out and Chief Justice
17 Rehnquist in his concurring opinion in *Albemarle Paper*
18 pointed it out.

19 The distinction between an equitable remedy and
20 the discretion of the equitable court is whether or not
21 under the statute the imposition of relief is
22 discretionary, irrespective of the act of the
23 violation. And in this particular statute you don't
24 have that.

25 I believe Justice, Chief Justice White's exact

1 words were to the extent that discretion is replaced by
2 words which follow as a matter of course. If 33 U.S.C.
3 1319(d), which is the civil penalty provision of the
4 Clean Water Act, it requires that on a finding of a
5 violation of the statute that a civil penalty be imposed,
6 so for that reason I say it's no longer, it's not
7 discretionary. Now, of course, if that whole wording was
8 changed then perhaps, but that's --

9 QUESTION: Would you clarify one thing
10 factually for me? Was your client offered an
11 opportunity to repair the damage or fill in the canal in
12 lieu of a penalty?

13 MR. NAGEOTTE: Yes, Your Honor, he was. But
14 it really was not an option because as the trial court
15 noted this ditch, which the court called a canal, had
16 been filled in as much as five years before this suit was
17 brought and the government watched this whole thing being
18 filled in.

19 It stood, stayed back and did nothing,
20 notwithstanding an affirmative obligation of the District
21 Engineer to issue a cease and desist order. But
22 irrespective of that, Mr. Tull had already filled,
23 developed and sold each and every one of those lots that
24 that ditch went through. And he had sold them to third
25 parties; he could not get them back.

1 The court recognizes, the trial court
2 recognizes that numerous points in the trial which we
3 cite in our brief and in addition to that we came in
4 after the trial and asked for an option to restore the
5 ditch in a different location because he could not
6 restore it in the original location.

7 So the, it's a very long answer to your
8 question, but the answer is that if he still owned it,
9 perhaps he could, but he couldn't in this case and so
10 that restoration really didn't come into it. It was a
11 remedy that was moot at the time it was offered.

12 QUESTION: Mr. Nageotte, do I understand you to
13 say that there is no discretion as to whether or not a
14 civil penalty shall be imposed under the statute?

15 MR. NAGEOTTE: That's correct,
16 Justice Scalia. If you look at the statute --

17 QUESTION: Says that any person who commits a
18 violation shall be subject to a civil penalty.

19 MR. NAGEOTTE: Yes, sir. Shall be.

20 QUESTION: Yes, shall be subject to.

21 MR. NAGEOTTE: Shall be subject, I read the
22 words, "shall be" to require the imposition of some
23 penalty and that's the government's position in most of
24 these cases, that it's not a discretionary item, that the
25 court must impose some civil penalty in each case.

1 QUESTION: If someone is subject to
2 deportation, it means he must be deported. If someone
3 is, if someone who commits a particular crime is subject
4 to death, it means the death penalty must be imposed? I
5 don't read the phrase, "subject to" that categorically.

6 MR. NAGEOTTE: Well, if you read, if you read
7 it together with the criminal penalties which are
8 provided in 33 U.S.C.1319(c), the criminal penalties
9 provide for a willful or negligent violation. So the
10 civil penalties are imposed even in cases where there's
11 no willful or wrongful intent --

12 QUESTION: I agree that you're subject to
13 them. I'm just -- do you have any case that says that,
14 that a penalty must be imposed, that the court has no
15 discretion not to impose a penalty in this case?

16 QUESTION: No, Your Honor, these are -- this is
17 simply from my experience in trying these cases at the
18 district court level. That's the position the government
19 takes in argument to the trial court that there is no
20 discretion, based on that language in the statute.

21 The, getting to, back if I could to this
22 disgorgement of profits as equitable relief as raised by
23 the government, first of all I would point out that in
24 all three counts of the complaint the relief sought
25 specifically by the government in each count was civil

1 penalties under the civil penalty provision of the
2 statute.

3 There were no other either specific statutory
4 allegations or factual allegations which would lend
5 themselves to a position of disgorgement of profit. I
6 went back through after reading that in the government's
7 brief and looked at the closing argument of the
8 government.

9 With respect to Pel Creek the closing argument
10 of the government was that there was one day of
11 violation; they were entitled to a \$10,000 fine equating
12 a day of violation to a day of fill. With regard to Mire
13 Pond I, they said there was ten days of filling, they
14 were entitled to a \$100,000.

15 With respect to Ocean Breeze they said there
16 was a hundred days of filling and for Ocean Breeze they
17 were entitled to a \$1,000,000 in civil penalties. I also
18 checked their post trial brief and the post trial brief
19 specifically said the United States seeks a mandatory
20 injunction against the defendant for restoration, a
21 permanent injunction against further filling on the
22 island without first checking with the Army Corps of
23 Engineers to determine whether the location is within the
24 jurisdiction of the Corps and civil penalties for every
25 day of violation.

1 There was never at any time throughout this
2 case any suggestion that what the court sought was
3 disgorgement of profits. I'd also take issue to the
4 government's position that the court in this case could
5 of, that somehow the civil penalties were transformed
6 into some type of equitable relief from legal relief and
7 that this constituted, or was within equity's power to
8 provide complete relief.

9 The -- as I see it, the government's position
10 on that is not founded by the case law. It's clear from
11 the cases of this court and the point the government
12 seems to miss is that an item such as penalties,
13 forfeitures, and punitive damages, and we submit that in
14 this case civil penalties are most closely analogous to
15 punitive damages, that in those situations equity never
16 had jurisdiction in the first place and never could
17 award that type of relief.

18 So, when you talk about equity granting
19 complete relief you're talking about things like perhaps
20 in those cases where it takes, where it took, before
21 merger at least, money of some fashion to make the
22 parties whole and Porter v. Warner Holding Company made
23 that clear in that case the restitution of rent money was
24 all right but they said that the civil penalties were a
25 wholly different matter --

1 QUESTION: Well, if Congress had vested the
2 authority in an administrative agency to impose a civil
3 fine, I don't suppose you'd be here.

4 MR. NAGEOTTE: That's absolutely correct, Your
5 Honor. As Your Honor's opinion for unanimous court in
6 Atlas Roofing said that if it's in an administrative
7 agency there's no Seventh Amendment right to a jury
8 trial.

9 QUESTION: And so you are in effect saying
10 Congress made its choice. It's put the collection of
11 penalties in the court and they're stuck with it.

12 MR. NAGEOTTE: Well absolutely, Your Honor.
13 I'm not sure I'd use the term, "stuck with it" --

14 QUESTION: Well, (Inaudible) but is there a
15 jury trial.

16 MR. NAGEOTTE: Yes, Justice White, and it was,
17 and they knew, I mean they knew, we have, what we have is
18 a coin that has heads and tails. On the heads side is
19 your opinion in Atlas Roofing and the tails side is
20 Justice Marshall's opinion in Curtis v. Loether, both
21 unanimous decisions, different sides of the coin.

22 In this case the federal government opted for
23 trial in the district court and so fully must of intended
24 the Seventh Amendment to apply when civil penalties were
25 sought.

1 I'd just like to, if I could, point out that
2 this court in Elizabeth --

3 QUESTION: Is there any administrative
4 mechanism for imposing civil penalties under the Clean
5 Water Act?

6 MR. NAGEOTTE: No, sir. not at --

7 QUESTION: None at all?

8 MR. NAGEOTTE: -- not in this context in this
9 case. The Clean Water Act covers numerous things that
10 have to do with other areas like NPDES permits and that
11 type of thing. But in the context of filling wetlands
12 that comes clearly within this one which is just simply
13 the various forms of relief.

14 And I think that distinction is important to
15 bear in mind while we discuss Congress' intent, because
16 you see unlike the statute, the Title VIII statute in
17 Curtis v. Loether where the cause of action and all of
18 the relief including the injunctive relief which was
19 equitable and the legal relief in the form of
20 compensatory and punitive damages were a part of the same
21 section of the same statute.

22 In this case Congress went out of its way to
23 break apart the legal and equitable relief. The
24 equitable relief is provided in 33 U.S.C. 1319(b);
25 criminal relief in 33 U.S.C. 1319(c); and legal relief

1 in the form of civil penalties in 33 U.S.C. 1319(d).

2 Now if the follow the government's argument to
3 its logical conclusion then the criminal penalties of 33
4 U.S.C. 1319(c) are magically transformed into equitable
5 relief because all three flow from one cause of action,
6 violation of the Clean Water Act.

7 And, that's the same thing that Justice
8 Marshall dealt with in Curtis v. Loether. The punitive
9 damages and compensatory damages flow from the single
10 cause of action, violation of the Fair Housing Statute.
11 The --

12 QUESTION: Would you be satisfied with an
13 advisory jury?

14 MR. NAGEOTTE: Justice Marshall, as a trial
15 lawyer, I would never be satisfied with any advisory jury
16 because I -- well, I have to say as a trial lawyer I
17 take anything I can get, but I don't think that the
18 advisory jury can supplement the Seventh Amendment
19 requirement for a jury because we have issues out of
20 chancery in which there are --

21 QUESTION: Well that's the usual chancery rule
22 (Inaudible) called it an advisory jury. Is that right
23 gone, or is it still there?

24 MR. NAGEOTTE: It's -- well, it's rarely, I
25 just have to say from my own experience in Virginia it's

1 not granted very often anymore because the trial court
2 just usually doesn't grant it.

3 If you can show a very clear situation in which
4 there's a direct conflict of evidence which needs to be
5 resolved or something like that perhaps you can get them,
6 but it doesn't help a, it doesn't help a defendant
7 because it does exactly what the Seventh Amendment was
8 designed not to do and that is to put back in the hands
9 of a judge or the government, whether or not the citizen
10 gets a trial by his peers, a jury.

11 And that's precisely what the Seventh Amendment
12 sought to avoid. And it doesn't help the defendant in
13 federal court or any court if you say, well, you can
14 have a jury if we decide we'll give you one, but you
15 can't have one as a matter of your right under the
16 Constitution.

17 The cases, Elizabeth v. American Nicholson said
18 that punitive damages could not be awarded in an equity
19 court. And also, and more importantly in Livingston v.
20 Woodworth this Court says that punitive damages are
21 incompatible with the principles and practices of equity
22 and for the same reason civil penalties are incompatible
23 with the principle and practice of equity, because equity
24 courts were never designed to punish and that's what
25 civil penalties do.

1 That's what punitive damages do. They punish.
2 I point out, if I could, that the government statement in
3 Mugler, that the Seventh Amendment did not apply to
4 causes of action which were nuisance and tryable
5 inequity. That's certainly the true test of the law, but
6 Mugler like all of the other cases cited by the
7 government did not hold that an equity court can impose
8 penalties, fines, forfeitures of punitive damages.
9 That's the distinction.

10 QUESTION: Isn't Mugler a state court case?

11 MR. NAGEOTTE: Yes, Your Honor.

12 QUESTION: So the Seventh Amendment wouldn't be
13 involved there anyway. I mean, that wouldn't be
14 precedent against the use of the Seventh Amendment.

15 MR. NAGEOTTE: Well perhaps, but most clearly,
16 most clearly there was, jury trial was never even an
17 issue in Mugler.

18 QUESTION: And even if it had been the Seventh
19 Amendment has never been held to guarantee jury trial in
20 state courts. Your client was tried in a federal court.

21 MR. NAGEOTTE: That's correct. That's correct,
22 Your Honor. The, I had prepared a, quite a detailed
23 analysis of Curtis v. Loether versus this case, but I
24 won't have time to give it. I certainly would ask that
25 the Court consider the petitioner's brief in Curtis v.

1 Loether against the government's brief in this case.

2 They precisely mirror on all of the points that
3 the government (Inaudible), and as we point out this
4 Court unanimously rejected those positions. I would
5 state that the, it's important to discuss for a moment
6 this business of equitable relief whether it's incidental
7 to, or part of the equitable clean up doctrine for just a
8 moment for this reason, it's very important to trial
9 lawyers and trial judges that we don't go back to the old
10 rule which has since been discarded by Dairy Queen,
11 Beacon Theatres and Ross v. Bernhard for this reason.

12 Under the requirements of notice pleading only
13 in the federal court, when you have to decide somewhere
14 along in the trial whether equitable relief is really
15 incidental to the legal relief sought which is the main
16 case, or the legal relief is merely incidental to the
17 equitable relief as you go along through the trial.

18 And on the other hand you have to make your
19 jury trial demand with the first, at the beginning of the
20 case. You have to do these things. What's going to
21 happen if we ever go back to that old rule, you're going
22 to end up half way down the line in a trial and find out
23 that based on the evidence that came in because there was
24 notice pleading that you may have to go back and redo the
25 whole thing and then afford a jury.

1 It's better to leave it the way it is with
2 Dairy Queen and Ross v. Bernhard to insure that that
3 doesn't happen. Simply have the civil penalties, or
4 punitive damages or forfeitures be the legal relief which
5 is split off from the equitable relief tried first as to
6 issues of fact and the relief and then the court can
7 provide whatever additional equitable relief might be
8 necessary in the case.

9 I'd like to point out that in this particular
10 case it's clear that when you apply the three element
11 test which Justice White set out in Ross v. Bernhard,
12 it's clear that the civil penalties require a jury
13 trial. Those three elements are: What was the
14 pre-merger custom with reference to such questions.

15 Now as we point out there's no question here in
16 this case that as to civil penalties the pre-merger
17 custom would have been trial by a jury because equity
18 courts simply, even though they had jurisdiction to award
19 complete relief, never had jurisdiction to award
20 penalties or punitive damages.

21 Second, I'd also point out that in the case of
22 Hepner v. United States, and I acknowledge to some extent
23 the character of that, of those statements that of
24 course, they were entitled to have a jury summoned. I've
25 seen it written as dictum, on the other hand that's

1 pretty strong dictum when you cannot impose, or when you
2 cannot get to the underlying question, which in those
3 cases were whether or not a directed verdict could be
4 granted, whether that would, whether that would violate
5 the Seventh Amendment.

6 In the government's brief, their own brief,
7 their own brief in that case said that it is evident
8 therefore that the distinction between civil action for
9 penalties and technical criminal prosecution was an old
10 distinction in common law, well-known at the time of the
11 adoption of the Constitution, as we cite in our brief.

12 Penalty actions were well known at that time.
13 Secondly, in their supplemental brief at Page 7 and 8 in
14 Hepner the government said, we answered that such a suit
15 is not a criminal prosecution, that the defendant is not
16 entitled to a jury at all, except be it under the Seventh
17 Amendment as to civil actions and then in such actions
18 the court can direct a verdict.

19 Last, I'd simply point out that in this case
20 the civil penalties are clearly, when you compare them,
21 with punitive damages, clearly on all fours match
22 punitive damages. Even in the EPA guidelines they say,
23 and these are guidelines of June 3, 1977, and civil
24 penalties bear similarities to punitive damages. They
25 were imposed in this case as punishment. Last --

1 QUESTION: Now is there, if a government cleans
2 up a site or something and spends money for it does it
3 have a cause of action to recover from the, from a
4 private party, the cost of the clean up?

5 MR. NAGEOTTE: Not in --

6 QUESTION: Is there an action like that under
7 the Clean Water Act?

8 MR. NAGEOTTE: Under the Clean Water Act, no,
9 Justice, I would say under this particular section of the
10 Clean Water Act, it's different than RCWA and the answer
11 is no. They can have injunctive relief, they can have
12 civil penalties and they can have criminal relief, but
13 there is no suit for compensatory damages as such.

14 QUESTION: If there were would you suppose a
15 jury trial would be required?

16 MR. NAGEOTTE: Well, I would have to see it in
17 that context but I would suspect --

18 QUESTION: Well, it just says, when the, if the
19 government undoes the pollution they can sue the party
20 responsible for the costs of undoing it.

21 MR. NAGEOTTE: Well, if what resulted was a
22 judgment, an enforceable judgment --

23 QUESTION: Yes. Yes, for money, yes.

24 MR. NAGEOTTE: -- for money, then I would say
25 that the Seventh Amendment would apply. If it were some

1 other category and that's the distinction, is that it's a
2 money judgment?

3 QUESTION: It just isn't disgorging?

4 MR. NAGEOTTE: Well, I wouldn't see where clean
5 up costs would be disgorgement in that sense.

6 Disgorgement presupposes that I have taken something from
7 you and won't give it, unlawfully, and I won't give it
8 back and therefore you have to force me to give it back
9 to you.

10 QUESTION: Well, you may have taken it, but
11 you've done something to me and I refuse to pay you for
12 it.

13 MR. NAGEOTTE: Well now that's a, now that's a
14 different story when, if it's an action in debt --

15 QUESTION: Yes.

16 MR. NAGEOTTE: -- or an action in assumpsit
17 then you have a little different situation. That's not
18 disgorgement, that's not disgorgement, that, otherwise we
19 could simply wipe it up with Seventh Amendment
20 (Inaudible).

21 QUESTION: But the key is not whether it's a
22 money judgment. Because you get a money judgment in
23 disgorgement and you get a money judgment in restitution
24 which you acknowledge is equitable relief.

25 MR. NAGEOTTE: Yes, sir, Justice Scalia, but

1 what I'm saying is that it takes more, I was answering it
2 strictly in the frame of --

3 QUESTION: Yes.

4 MR. NAGEOTTE: -- Justice White's question if
5 it was a money judgment to get X dollars because I went
6 out and had to do something. That's the same as a breach
7 of contract action. If I agree to you sell you widgets
8 and I breach and I won't sell, you have to go buy the
9 widgets somewhere else.

10 QUESTION: But, the key is what it's for --

11 MR. NAGEOTTE: Yeah.

12 QUESTION: -- not that it's a money judgment.

13 MR. NAGEOTTE: That's correct. But, being a
14 money judgment is one of the factors involved because
15 there are judgments other than money judgments. Last was
16 the practical limitation of juries. I've just stated
17 that it's obvious that juries routinely hear antitrust,
18 medical malpractice, products liability. They can handle
19 those cases. There is no practical limitation for a jury
20 to hear a Clean Water Act case. Thank you.

21 (Inaudible).

22 QUESTION: Thank you. Thank
23 you, Mr. Nageotte. I'll hear from you now, Mr. Wallace.

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

25 ON BEHALF OF PETITIONER

1 MR. WALLACE: Thank you, Mr. Chief Justice, and
2 may it please the Court:

3 I'd like briefly to address some questions that
4 were raised from the bench before proceeding with my
5 argument. With respect to whether penalties are
6 mandatory under the Act, we have addressed that briefly
7 in Footnote 23 of our brief, Justice Scalia, on Page 29.
8 We do not take the position that penalties are invariably
9 mandatory although some government counsel have made that
10 argument in the past. It's only in preparing this brief
11 that we focused on that issue.

12 QUESTION: You haven't addressed it at all.
13 You've just said some penalty ordinarily is assessed
14 (Inaudible) --

15 MR. WALLACE: That is what has been held and
16 that is the (Inaudible).

17 QUESTION: Have you addressed whether it must
18 be assessed.

19 MR. WALLACE: I'm addressing it right now.

20 QUESTION: Good.

21 MR. WALLACE: And, I've said that we don't say
22 that it has to be assessed in every case. The discretion
23 we rely on is not the discretion of whether or not to
24 assess a penalty. It's the fact that the penalty under
25 the Act is not for a fixed sum or a readily ascertainable

1 sum, but it's a penalty to be arrived at through the
2 exercise of discretion on the part of the judge. That is
3 the discretion on which we rely.

4 QUESTION: Forever to the expense to the
5 government for cleaning up?

6 MR. WALLACE: Well, under this statute the
7 government doesn't undertake to clean up. It may through
8 collateral proceedings. I don't say that it's unfettered
9 discretion, Justice White, but I do --

10 QUESTION: Well does it have, is it, should it
11 have some relation to the cost of undoing the pollution
12 if you're ever going to undo it?

13 MR. WALLACE: It has relation to various
14 factors which I plan to discuss in connection with the
15 legislative history of the statute, but there still is
16 a --

17 QUESTION: Is willfulness one of them? Just
18 sheer willfulness? How much warning the individual had?

19 MR. WALLACE: Yes, that is it.

20 QUESTION: And he went crashing ahead --

21 MR. WALLACE: Yes, that is it.

22 QUESTION: -- and even though he caused --

23 MR. WALLACE: That is a factor.

24 QUESTION: -- little damage to the government
25 you'd hit that kind of an individual a lot harder?

1 MR. WALLACE: The penalties have a --

2 QUESTION: Right.

3 MR. WALLACE: -- deterrent component. They're
4 intertwined with the other remedies which are injunctive
5 and restorative.

6 QUESTION: Well, what were you arguing in the
7 district court was the \$1,000 a day, I gather from your
8 opponent. Or, \$10,000 a day.

9 MR. WALLACE: For the particular violations we
10 specified that those penalties were available. The asked
11 for penalties. But the remedy --

12 QUESTION: Mr. Wallace, that doesn't sound like
13 it has anything to do with restitution. That sounds like
14 it's a penalty or a fine, you know, thirty days/\$30,
15 something like that.

16 MR. WALLACE: Well, that is the statutory
17 maximum which is what was referred to for purposes of the
18 complaint. When the plan was submitted during the course
19 of the trial in proposing a remedy, we've summarized the
20 plan briefly in Footnote 31 of our brief on Page 38.

21 The plan, the main features of the plan were to
22 provide for restoration and mitigation through the
23 converting of other properties to wetlands when some of
24 those that had been unlawfully filled could not be
25 converted because of the need to protect innocent third

1 parties, and --

2 QUESTION: But, in addition to the plan you
3 also asked for these civil penalties.

4 MR. WALLACE: We also asked for civil penalties
5 and the penalties that were provided in all instances
6 except with respect to the filling in of a navigable
7 canal, Fowling Cut Extension, they were calculated on the
8 basis of disgorgement of the net profit.

9 I'm not talking about what was asked for, but
10 I'm talking about what the judge actually ordered. On
11 Page 60 (a) of the Appendix to the Petition for
12 Certiorari we have the rationale used by the judge in
13 deciding on various components of the penalty and in the
14 very first full paragraph on page 60 (a) the judge said
15 that he realized approximately \$5,000 net profit per lot
16 with respect to the lots that the court was then
17 considering and thus for the filling of wetlands lots
18 120, 121, etc., there were seven of them if you count
19 those numbers, the court is assessing a penalty of seven
20 times \$5,000, or \$35,000.

21 QUESTION: Mr. Wallace, in this case, he may
22 have done that. Do you think he was required to do
23 that?

24 MR. WALLACE: He was required to take that
25 factor into account.

1 QUESTION: Could he of --

2 MR. WALLACE: He isn't limited to that.

3 QUESTION: Having computed \$5,000 per lot could
4 he have also said, well, this fellow had notice over and
5 over again, he deliberately did things we told him not to
6 do, he's a bad man for all sorts of reasons so I'll add
7 an extra \$1,000 per lot. Could he have done that?

8 MR. WALLACE: Yes, he could have done that.

9 (Inaudible) --

10 QUESTION: Then the measure is not limited to
11 the same remedy with the inequity, is it?

12 MR. WALLACE: It's not limited to
13 disgorgement. It's a discretionary remedy but it's
14 intertwined --

15 QUESTION: Couldn't the trial judge in a
16 criminal case decide an appropriate fine would be
17 measured by the amount of money the person stole or
18 something like that? And that wouldn't make it
19 disgorgement would it? I mean I suppose you can always
20 take it into account.

21 Unless you're required to take it into account,
22 why is that legally relevant?

23 MR. WALLACE: We're looking for historical
24 analogues to the modern statutory action. There was no
25 precise action, there was no Clean Water Act at common

1 law and no precise action such as we have here. So --

2 QUESTION: But we're looking for analogues to
3 the action, Mr. Wallace, not to analogues to what
4 happened to have been done by the judge in this case.

5 MR. WALLACE: That is correct. And I was --

6 QUESTION: The disgorgement if not an analog to
7 the action.

8 MR. WALLACE: Well it is a component part of
9 what is supposed to be considered with respect to the
10 penalty remedies which are a part of the remedies that
11 may be imposed under the action.

12 QUESTION: On Page 61 (a), the page right
13 after, when you --

14 MR. WALLACE: Yes.

15 QUESTION: -- the judge goes on to say for the
16 unlawful filling of a navigable waterway of the United
17 States, the Defendant shall pay a fine in the sum of
18 \$250,000.

19 MR. WALLACE: Right.

20 QUESTION: He doesn't seem to say there that
21 that's tied into any restoration costs.

22 MR. WALLACE: It is not. That portion of the
23 penalty order, Mr. Chief Justice, is in the alternative.
24 If he has the choice of restoring this navigable canal or
25 paying \$250,000.

1 Since he filled in lots and has sold them on
2 this waterway, in order to restore the navigable canal he
3 would have to re-purchase those lots so that the penalty,
4 which is not, incidentally, anything that we asked for in
5 the case, the penalty serves in effect as a cap on the
6 expense that he would be required to go to, to repurchase
7 those lots.

8 I mean, since the court could not order the new
9 owners to sell the lots, if the court simply ordered him
10 to restore the canal regardless of the costs, the new
11 owners would be in a position to charge him as much as
12 they could possibly get for them. As it is this serves
13 as a cap on what he will have to pay for the lots plus
14 the work of restoring the canal.

15 And if it comes to the point where it exceeds
16 \$250,000 he will have the choice of paying the \$250,000.
17 This kind of equitable adjustment of the remedy to the
18 needs of the case is part of the reason why --

19 QUESTION: (Inaudible) -- but you also had the
20 order to restore.

21 MR. WALLACE: In that case he had the
22 alternative with respect to Fowling Gut Extension. He
23 could either restore or pay the \$250,000 under that
24 paragraph of the order.

25 QUESTION: Well I know, but what was the, and

1 what were the fines imposed?

2 MR. WALLACE: The other fines were imposed on
3 the basis of \$5,000, his average profit per lot for the
4 number of lots that he unlawfully filled in.

5 QUESTION: Oh, I (Inaudible).

6 MR. WALLACE: In this case, that was the way
7 the fines were imposed.

8 QUESTION: I know, but he could, he had never
9 recovered those fines.

10 MR. WALLACE: Well he's ordered to pay them.
11 They're --

12 QUESTION: Oh, ordered to pay them and to
13 restore?

14 MR. WALLACE: And, to do some --

15 QUESTION: So where does that leave

16 MR. WALLACE: -- restoration work where it
17 needs to be done.

18 QUESTION: Well so how does, where does that
19 leave these fines that he can't get out of? He has these
20 fines to pay but he also has to restore. So the fines
21 can hardly be to represent the cost of restorations since
22 he's going to have to do that again.

23 MR. WALLACE: No, those fines were not designed
24 to represent the cost of restoration.

25 QUESTION: So they are just plain old fines.

1 MR. WALLACE: They are more in the nature of
2 disgorgement of profits. If one looks to the history of
3 the Clean Water Act, after all the inquiry into an
4 historical analog that's required under this Court's
5 Seventh Amendment jurisprudence is basically a two-step
6 process. If one, the first step is to identify with some
7 care the particular modern statutory right and remedy
8 that are at issue --

9 QUESTION: (Inaudible)

10 MR. WALLACE: -- and only then can the
11 historical comparison meaningfully be drawn. And the
12 statutory provision at issue here is the civil remedy
13 provisions of the Clean Water Act which are applicable to
14 all violations of the Clean Water Act, whether they
15 involve the filling of wetlands as in this case, and it's
16 a mistake to concentrate too much on the filling of
17 wetlands, or whether they involve discharges of
18 pollutants into rivers or other waters of the United
19 States by industrial discharges, etc.

20 Those are the statutes that we are dealing with
21 here. This is the remedial provision. And the Clean
22 Water Act originated as the Federal Water Pollution
23 Control Act of 1948, without any civil penalty
24 provisions. It embodied only an embatement remedy.

25 The Clean Water Act embodies a series of

1 numerous amendments that were designed to strengthen that
2 law over the years and the civil penalty provisions were
3 first added to the statute in 1972. Prior to that time
4 the abatement remedy was quite cumbersome and relatively
5 ineffective to the point where the United States
6 attorneys were more frequently relying on the old Rivers
7 and Harbors Act remedy when they could.

8 Either the civil injunctive remedy or the
9 criminal provisions but that had certain disadvantages in
10 that it didn't apply to sewage discharges at all or to
11 discharges into the tributaries of streams that were
12 navigable in fact.

13 The Clean Water Act has a broader reach in that
14 respect. And the basic purpose of adding the civil
15 penalty provision in 1972 was a purpose that this Court
16 identified in the Albemarle Paper Company opinion as one
17 of the purposes of the back pay remedy under Title VII of
18 the Civil Rights Act. The need to have an incentive, or
19 a spur or catalyst to bring about compliance with the
20 Act.

21 Experience showed that this was needed because
22 otherwise somebody could profit from discharging
23 pollutants into the waters and just wait to be sued and
24 for an abatement remedy to be issued. But, if --

25 QUESTION: What if they used a criminal penalty

1 for that purpose, you wouldn't be here arguing that you
2 don't need a jury trial (Inaudible) --

3 MR. WALLACE: The criminal penalty was added at
4 the same time as the civil penalty provision in 1972.
5 Prior thereto there was no incentive in the Act to bring
6 about compliance and the criminal provision is sometimes
7 resorted to in the case of willful violators. Of course,
8 we have a higher burden of proof --

9 QUESTION: What, my point is, what does that
10 have to do with what I understand everyone agrees is the
11 issue before us, whether in 1791 this would have been
12 essentially an equitable or a legal action.

13 MR. WALLACE: But, what it has to do --

14 QUESTION: Anymore than the fact that it added
15 the criminal penalty later to achieve the original goals
16 of the act has anything to do with whether that's a
17 criminal action now.

18 MR. WALLACE: What it has to do, it's
19 essentially a recognition that this was one ball of wax
20 added to in order to accomplish the original purpose of
21 the Clean Water Act, which is defined right in the
22 statute and has been quoted by this Court to restore and
23 maintain the chemical, physical and biological integrity
24 of the waters. That is the focus of relief and what is
25 sought to be (Inaudible).

1 QUESTION: Well that's very interesting, but
2 that's the purpose of the criminal penalty too.

3 MR. WALLACE: Well, that's --

4 QUESTION: I just don't see what it has to do
5 with the point before us.

6 MR. WALLACE: What it has, you see, the civil
7 penalty provision is an adjunct to that purpose. This is
8 not a statute designed to secure revenues for the federal
9 treasury. It's a statute designed to preserve and
10 maintain and restore the waters in their ecosystem.

11 QUESTION: Is that what penalty provisions
12 normally are? Civil penalties are mainly designed to
13 raise revenue. They may not be. In an another
14 statute --

15 QUESTION: They're usually designed to --

16 MR. WALLACE: -- to either but, we're talking
17 about this statute and whether the fact that the penalty
18 provision is part of the remedies changes the nature of
19 the equitable action that was available prior to the 1972
20 amendments because this additional remedy has been added.

21 QUESTION: Nobody is arguing that the nature of
22 the other action, which is equitable, is altered. The
23 issue is not whether the nature of that action is
24 altered, the issue is whether this action for --

25 MR. WALLACE: This is not a different action.

1 QUESTION: -- civil penalties is equitable.

2 MR. WALLACE: This is not a different action,
3 Mr. Justice. It is the same cause of action. It is just
4 an additional remedy that's available to the court at its
5 option under the same cause of action.

6 QUESTION: But, you had both set of --

7 MR. WALLACE: It's not an additional action.
8 That's our point.

9 QUESTION: Mr. Walsh, you had those same kind
10 of things in Beacon Theatres and Dairy Queen and the
11 court said where it's equitable you go without a jury,
12 but where you add in something that is legal then you
13 get a jury trial. I don't think the whole ball of wax
14 argument works.

15 MR. WALLACE: Those two cases both involved a
16 combination of two causes of action with overlapping
17 factual controversies whereupon a collateral estoppel
18 effect would control the legal cause of action if the
19 facts were determined in the equitable cause of action.

20 QUESTION: Well, but I'm sure it could have
21 been argued that it was all one ball of wax and that
22 sort of thing, but the court said, No, you don't get off
23 that way.

24 MR. WALLACE: The court recognized that it was
25 two causes of action rather than one cause of action with

1 two remedies.

2 QUESTION: Well, do you think this turns on
3 whether we decide that these claims on the complaint on
4 the Clean Water Act are "one cause of action" or "two
5 causes of action?"

6 MR. WALLACE: Well I don't think it's our only
7 argument, but I do think that the distinction between the
8 Beacon Theatres/Dairy Queen line of cases and what some
9 people take to be a line of cases in conflict with that
10 the Porter line of cases which we discuss in our brief
11 is --

12 QUESTION: Well, the Porter case never
13 referred in any place to the right to jury trial. I
14 just re-read it.

15 MR. WALLACE: And Mitchell against DeMario
16 Jewelry, they did say that remedies otherwise available
17 at law could be given by a court of equity.

18 QUESTION: But, I don't think you can take that
19 phrase or that dicta and apply it to the jury trial
20 situation when there was no question of jury trial rights
21 in Porter.

22 QUESTION: Have you prevailed on this claim
23 before any other Court of Appeals?

24 MR. WALLACE: No Court of Appeals has ruled to
25 the contrary and I --

1 QUESTION: This is the first time it's ever
2 come up in a Court of Appeals, the right to jury trial
3 on a civil penalty under the Clean Water Act?

4 MR. WALLACE: There is another case pending
5 before the court on petition from the Eleventh Circuit,
6 the MCC case in Florida which is being held for this
7 one, in which we also prevailed. It was not a wetlands
8 case.

9 QUESTION: And you take the same view towards
10 the Court of Appeals Case, Judge Findley's case, as the
11 Fourth Circuit did in this case where he said --

12 MR. WALLACE: The J.B. Williams case you're
13 speaking of?

14 QUESTION: Yes.

15 MR. WALLACE: Yes. Well, we have taken the
16 point of view that that case while it --

17 QUESTION: Just out of --

18 MR. WALLACE: -- apparent conflict with our two
19 holdings under the Clean Water Act did not have a
20 persuasive answer to the point that the remedies under
21 this Act are discretionary and require the exercise of
22 equitable discretion.

23 QUESTION: Judge Findley didn't understand the
24 one ball of wax doctrine.

25 (Laughter)

1 MR. WALLACE: Well, I don't want to belittle a
2 very scholarly opinion on his part. He later wrote an
3 opinion that we cite called Securities and Exchange
4 Commission against (Inaudible) --

5 QUESTION: I don't think the Chief Justice was
6 belittling it, I don't think it --

7 MR. WALLACE: I know, I think he was hinting
8 that we might be, and that is far from our
9 mind. There was a dissenting opinion in that case which
10 is also of some persuasiveness, but Judge
11 Findley later wrote the opinion in Securities and
12 Exchange Commission against Commonwealth Chemical
13 Securities in which he rejected a claim of a right to a
14 jury trial for disgorgement of profits in an action by
15 the Securities and Exchange Commission in federal court.
16 He said that that was equitable in nature and has been
17 recognized as such.

18 QUESTION: Well, think of how efficient it
19 would have been to have an administrative agency to
20 collect these fines.

21 MR. WALLACE: That was precisely the question
22 during the 1977 Amendments, although no one ever thought
23 that it would effect whether there was a right to jury
24 trial, but these were the amendments at which the
25 policies of how to calculate the penalties were most

1 specifically considered by Congress.

2 And at that time, the Conference Report said
3 that they had decided against giving EPA an
4 administrative remedy for the penalties but expressed
5 approval of EPA's enforcement policy and said that they
6 were going to wait and see whether it will have success
7 "in implementing its penalty policy through the courts."

8 QUESTION: When was that?

9 MR. WALLACE: That was the 1977 Amendments, the
10 Conference Report, which appears in Volume 123 of the
11 Congressional Record -- we have cited this -- at Page
12 39190. And appended to this committee report then is a
13 letter from the EPA to Senator Muskie, responding to his
14 request for the agency to elaborate upon the agency's
15 policies with regard to the calculation of civil
16 penalties which it had developed for purposes of
17 entering into settlements under the statute.

18 And what the agency points out is that the
19 penalties should be utilized first of all to at least
20 remove any economic gain achieved by non-compliance and
21 emphasized it was important to do so in order to relieve
22 competitive inequities between industrial polluters for
23 example, who would profit by violating the law for
24 several years as against their competitors who were
25 complying with the law.

1 QUESTION: Mr. Wallace, are you saying that the
2 government is only going to seek that degree of penalty
3 in the future, only disgorgement?

4 MR. WALLACE: Well it's not only disgorgement
5 in these policies that were approved by Congress. I am
6 saying that these are guidance to what we seek and what
7 the courts should give. But they added on that when the
8 degree of environmental harm is great or the degree of
9 willfulness something should be added, then of course,
10 they discounted it by the likelihood of success.

11 They were talking about settlements. In some
12 cases they would defer or reduce it because the payment
13 of the full amount would render it too difficult for the
14 source of the pollution to install the required pollution
15 controls, et cetera.

16 This requires a balancing of equities of
17 considerations such as these which is equitable in nature
18 and which is not unfettered in the discretion of the
19 district court. But it still is in the district courts a
20 proper exercise of discretion and the application of the
21 penalties would be subject to proper appellate review.

22 That is what the court held in Albemarle Paper
23 Company, that ordinarily the back pay remedy should be
24 awarded. It isn't up to a district court to decide
25 without basis not to award the back pay remedy quoting

1 from Chief Justice Marshall's opinion sitting on Circuit
2 in the Aaron Burr case that when a matter is committed to
3 the discretion of a court that means that it is
4 committed not to its inclination but to its judgment and
5 that judgment must be based on sound legal principles.

6 So there is some statutory guidance in the
7 legislative history of the 1977 Amendments for the
8 way the penalty provisions should be applied in the
9 exercise of discretion. But we had in this case
10 something difficult to foresee in any guidelines -- the
11 need to put a cap on the remedy that was required
12 because of the filling in of a waterway, of a navigable
13 waterway.

14 There are other possibilities there. As
15 Counsel for the Petitioner mentioned there was a
16 subsequent hearing in December of 1983, and this appears
17 in Volume 21 of the Court of Appeals Appendix, in which
18 petitioner asked instead to be allowed to re-route this
19 canal through other areas where he still owned the land
20 and the court said it couldn't hear that claim at that
21 time because he did not substantiate his request with any
22 scientific evidence and didn't have an expert witness
23 with him who could substantiate it.

24 But that possibility remains open for possible
25 modification of the decree. The basic purpose of the

1 remedy, as in administration of the statute in general,
2 was to try to protect these wetlands which are on the
3 eastern flyways and the ecosystem of these wetlands.

4 And the penalty is very much ancillary and
5 adjunct to this and used to assure there will be an
6 incentive to comply and to bring about the purposes of
7 the Act, which are to protect the waters. We think that
8 the proper historical analog, when the Act is understood
9 this way is to the common nuisance or public nuisance
10 cases that are well-recognized in opinions of this
11 court, such as Justice Frankfurter's concurring opinion
12 in the steel workers and in the English Common Law.

13 We have discussed it in some detail. The
14 petitioner's reply brief takes issue with our reading of
15 one of the English cases and I would like to refer
16 briefly to that. On page 4 of the Reply Brief, in
17 Footnote one there is a quotation from the English case
18 which we pointed to as particularly close to ours in
19 which petitioner contends that the case turns on the
20 fact that the Crown claimed ownership of all tidal lands
21 including harbor lands.

22 As we read the case, we don't think that's what
23 it turns on. The italicized sentence in this excerpt is
24 where the question is of nuisance only and the evidence
25 doubtful there may be a need for a jury which probably

1 referred to the advisory jury that was used by the
2 Chancery.

3 But this is not a case where the question is of
4 nuisance only. This is a case, as it goes on to say of
5 purpresture and nuisance, purpresture being a form of
6 common or public nuisance where there is an obstruction
7 of a common waterway, so the detriments of many people
8 and not just a nuisance to the particular land owner.

9 QUESTION: Well, Mr. Wallace, --

10 MR. WALLACE: That is the --

11 QUESTION: In order to win your case and cases
12 like this, in this particular case were there real
13 factual disputes?

14 MR. WALLACE: There were some factual
15 disputes. There was no dispute that filling occurred,
16 et cetera, but there was some factual disputes.

17 QUESTION: And would it be a really serious
18 matter for a jury, those factual disputes? I take it
19 there is some claim on the other side that
20 the jury would have to determine the penalty also?

21 MR. WALLACE: Yes, well we think that there is
22 no basis for that and we cited the appropriate --

23 QUESTION: Right, right, but --

24 MR. WALLACE: -- case law on that.

25 QUESTION: Put that aside --

1 MR. WALLACE: Yes.

2 QUESTION: -- put that aside. You think in the
3 run of the mill case like this it really wouldn't be a
4 terrific burden on the government to have a jury because
5 of the complicated facts or what?

6 MR. WALLACE: Well, the jury's --

7 QUESTION: It would cost money wouldn't it?

8 MR. WALLACE: Yes, and the juries might not
9 always be sympathetic with this kind of enforcement
10 action. It would be the same kind of facts that the
11 court would determine in issuing an injunction. These
12 aren't facts that a court can't ordinarily determine.

13 QUESTION: Thank you, Mr.
14 Wallace.

15 Mr. Nageotte, you have two minutes remaining.

16 REBUTTAL ARGUMENT OF
17 RICHARD R. NAGEOTTE, ESQ.
18 ON BEHALF OF PETITIONER

19 MR. NAGEOTTE: Unless there are any questions
20 from the Court I really have nothing further to add.

21 QUESTION: Mr. Nageotte, are you really serious
22 in your claim that the jury would have to set, if you
23 have a right to jury trial, you have a right to have the
24 jury set the fine?

25 MR. NAGEOTTE: Yes, Your Honor. Both find the

1 facts and to set the amount of the civil penalty, the
2 same as they would in a case of punitive damages, where
3 they would set the amount of the punitive damages using
4 the same grace factors.

5 CHIEF JUSTICE REHNQUIST: Thank you,
6 Mr. Nageotte. The case is submitted.

7 (Whereupon, at 1:58 p.m., the above-entitled
8 case was submitted).
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CERTIFICATION

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85-1259 - EDWARD LUNN TULL, Petitioner V. UNITED STATES

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