

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

GWALTNEY OF SMITHFIELD,

Petitioners,

V.

CHESAPEAKE BAY FOUNDATION, INC.,

AND NATURAL RESOURCES DEFENSE

COUNCIL

No. 86-473

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SUPREME COURT, U.S.

WASHINGTON, D.C. 20543

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v.	: No. 86-473
CHESAPEAKE BAY FOUNDATION, INC.	:
AND NATURAL RESOURCES DEFENSE	:
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Washington, D.C.

Monday, October 5, 1987

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

E. BARRETT PRETTYMAN, JR., WASHINGTON, D.C.; on behalf of the
Petitioner.

LOUIS F. CLAIBORNE, ESQ., SAN FRANCISCO, CALIFORNIA; on behalf
of the Respondent.

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

2 (11:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: Cause Number 86-473,
4 Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.

5 Mr. Prettyman, you may begin whenever you're ready.

6 ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.

7 ON BEHALF OF THE PETITIONER

8 MR. PRETTYMAN: Mr. Chief Justice, and may it please
9 the Court:

10 This case is here on certiorari to the 4th Circuit
11 Court of Appeals and it involves the question of whether
12 citizens can sue for purely past violations as opposed to on-
13 going violations under the Clean Water Act.

14 Congress has set up a rather interesting dual system
15 of regulating effluent discharges into the nation's waterways.
16 The states adopt these plans, which are approved by the
17 Administrator of EPA, the states issue permits, which set forth
18 the effluent limitations and standards under which the permit
19 holders can discharge, and then to demonstrate that he is
20 operating within the ambits of his permit, the discharger is
21 required to constantly test the effluents and to fill out DMRs
22 or discharge monitoring reports which are on public file and
23 which anyone can go see.

24 These DMRs show on their face when the permit holder
25 is operating within the parameters of the permit and they also

1 show on their face if, in fact, the discharger is exceeding
2 those limits. Thus, citizens groups like Respondent can review
3 these DMRs on the public record and then give sixty day notice
4 if they're going to sue for alleged violations and if the suits
5 are not settled, then you -- they can collect \$10,000 a day,
6 which has now been upped to \$25,000 a day, except when I say
7 collect, I really mean that that money, of course, goes to the
8 United States and not to them.

9 They allege in their allegations the permit holder to
10 be in violation. They usually attach these DMRs to their
11 complaints and as I say, in theory at least, the recovery goes
12 to the United States.

13 When Gwaltney of Smithfield purchased a meat
14 rendering and packing plant from ITT toward the end of 1981, it
15 found after the purchase that it had inherited some problems,
16 principally with the biological treatment system.

17 QUESTION: It had no prior knowledge?

18 MR. PRETTYMAN: They did have knowledge that ITT had
19 had problems. They thought the problems had been solved. They
20 found after they purchased that the problems had not been
21 solved.

22 These problems involved primarily chlorine, fecal
23 coliform, and total kjeldahl nitrogen or TKN, and it thereafter
24 experienced various excedences and various parameters of its
25 permits. However, it then installed two new systems and it's

1 undisputed that all of the excedences had, in fact, stopped
2 prior to this suit. The Court of Appeals so held. It was so
3 stipulated between the parties and the Respondents even
4 conceded in their question presented before this Court that
5 this case involved only past violations.

6 First, as to chlorine, I'll touch on these just
7 briefly, as to chlorine, we have found many problems in
8 installing a new automatic chlorinator, but that finally fell
9 into place in October of '82, so that there were no excedences
10 for some twenty months or almost two years prior to the trial
11 in this matter.

12 With the exception of start-up excedences, which I'll
13 talk about a little bit more later, the same is really true for
14 fecal coliform; that is, that they substantially ended in 1982.

15 We had more problem with the TKN and had to install
16 largely a new system and there were various fits and starts,
17 including a six-month delay by the State Water Control Board
18 itself, but the system was finally approved by the state and it
19 began operation in October of '83 and it was fully on line in
20 December.

21 So that the only TKN excedences between then and --

22 QUESTION: Is that a coined word or something?

23 MR. PRETTYMAN: Yes, Your Honor. It's the
24 alternative to violation because if you use violation, there
25 seems to be some import --

1 QUESTION: Is it coined for this industry or
2 something?

3 MR. PRETTYMAN: Pardon? Pardon me?

4 QUESTION: Was it coined for this statute?

5 MR. PRETTYMAN: No. It is my understanding it is
6 regularly used in the industry. It's not just for this case.

7 What it means is, Your Honor, that you have exceeded
8 the limits in your permit, but an exceedence, of course, could
9 be a permissible upset or could be for other permissible
10 reasons. Therefore, it's not necessarily a violation.

11 And as I was saying, the exceedences here, as far as
12 TKN is concerned, were the unavoidable start-up exceedences
13 before suit. The District Court held that there is no way to
14 start-up a biological treatment system without violations.

15 But the important point here, really, to focus on is
16 that the last fecal coliform exceedence was four months before
17 suit, TKN was a full month before suit, and, of course, the
18 chlorine was twenty months ago. So, the case comes to you with
19 the rather pristine question of whether citizens can sue for
20 purely past violations, those which have abated prior to suit.

21 The Court of Appeals held that they can. We say that
22 they can't. The Solicitor General interprets the Act as we do,
23 as to past violations. We disagree with him only in respect as
24 how he interprets the word "alleged" in the statute and,
25 therefore, with his recommended disposition.

1 QUESTION: Mr. Prettyman, did the District Court have
2 an alternative holding below that there were continuing
3 violations?

4 MR. PRETTYMAN: What it had, Justice O'Connor, was --

5 QUESTION: I was under the impression that it did,
6 and that that holding was just not reviewed by the Court of
7 Appeals.

8 MR. PRETTYMAN: That alternative holding, which was
9 in a footnote, was that even if you couldn't sue for past
10 violations, that there was a good faith allegation of on-going
11 violations.

12 I would emphasize in regard to that, first of all, as
13 you point out, the --

14 QUESTION: So, even if you were right, what, at best,
15 what would happen? It would be vacated and remanded so that
16 that could be considered?

17 MR. PRETTYMAN: Well, if you reach that question,
18 because you don't have to reach it, of course, if you reach
19 that question, I would certainly think you would want to remand
20 to the Court of Appeals for its consideration, but you
21 shouldn't have to reach that question at all because in view of
22 the fact that it is quite clear, both from the facts, the
23 holding and the stipulation, that everything had stopped, had
24 abated prior to the suit, it really didn't make any difference
25 whether the allegations were good faith or not.

1 QUESTION: Well, unless the trier of fact thought
2 that there was, indeed, a likelihood of some continuing
3 problem, for example, with the TKN-type discharge.

4 MR. PRETTYMAN: In that regard, Justice O'Connor, I
5 wonder if I could call your attention to Footnotes, I think
6 they are, 25 and 26 of the District Court's opinion because he
7 very well addressed those particular matters.

8 25 and 26, where he, in effect, said some question
9 has arisen as to whether these problems would continue, but I
10 regard that as entirely too speculative to find. He, in effect,
11 holds in these two footnotes that the problem has entirely
12 ceased and I want to point out to you that the Respondents are
13 not here arguing anything about good faith allegations or that
14 these were on-going violations.

15 What they are here arguing is that they can sue for
16 past violations period. They posed the suit because --

17 QUESTION: Mr. Prettyman, can the EPA Administrator
18 bring a civil penalty action for purely past violations?

19 MR. PRETTYMAN: That is an interesting question, and
20 we really don't know the answer to that yet. The Government
21 said yes, but it's interesting that --

22 QUESTION: The language is the same.

23 MR. PRETTYMAN: No. With great respect, Your Honor,
24 it is not the same. The language in regard to the Government is
25 in Section 309 or 1319, and the language is quite different.

1 It is so different that the Government, when it seeks
2 to bring a suit for past penalties, doesn't even rely on this
3 statute. It relies on the judicial code.

4 QUESTION: The Government relies on statutes outside
5 because of the similarity of the language perhaps.

6 MR. PRETTYMAN: Right. And the reason they do that
7 is the language is really not clear in this statute itself as
8 to whether -- it's a very convoluted statute when it comes to
9 the Government's rights, but certainly even if the -- the point
10 I want to make is that even if the Government can sue for past
11 violations, it is quite clear that the language and the rights
12 are very different from those that relate to a citizen and the
13 Solicitor General is very strong on that point, that he does
14 not believe for a moment that a citizen has the same rights as,
15 and comes under the same language as, the Government does.

16 QUESTION: Mr. Prettyman, the language governing
17 private civil actions doesn't say has violated, but it doesn't
18 say is violating either. It says is in violation of.

19 MR. PRETTYMAN: Yes.

20 QUESTION: Now, that, it seems to me, means something
21 quite different from is now violating. If you're caught by
22 radar exceeding the speed limit and a police car pulls along
23 side you after you realized that you've been caught and you've
24 lowered your speed, he doesn't say into your window, you are
25 violating the speed limit, you were violating it five miles

1 back. He will say, you know, you were in violation of the
2 speed limit.

3 MR. PRETTYMAN: That would be very fair, Your Honor,
4 if that's all the further we went, but the fact is that this
5 statute, two things go to that. First of all, this statute
6 uses the present tense in at least four other places in this
7 same 1365.

8 QUESTION: But the present tense speaking of a
9 status, the status of being in violation.

10 Now, what if I think that that status means you
11 violated it in the past and you haven't done anything that
12 seems likely to eliminate that possibility of violation in the
13 future? What if I considered that to be what in violation of
14 means?

15 MR. PRETTYMAN: You may then be engaged in an on-
16 going violation and, in fact, under our definition, you may be
17 able to sue because an on-going violation is a present non-
18 compliance because of a failure to correct an underlying
19 difficulty, and if you have, in fact, violated for several
20 times, you have done nothing about it, and the suit is brought,
21 that may be an on-going violation, may be perfectly proper to
22 sue.

23 That's not what happened here. In this suit, what
24 happened was there were a series of excedences and we did
25 something about it. We put in place two new systems which were

1 supposed to deal with it. After the systems were in place, we
2 had unavoidable start-up exceedences, which could not be
3 avoided, the District Court so held, they were no more normal,
4 the District Court again held, than you would expect in an
5 ordinary case, and it was right at the tail end of this,
6 knowing that the situation had abated, knowing that it had been
7 corrected and had come to a close, that Respondents come in and
8 sue.

9 QUESTION: Is that knowledge clear? You said that
10 the last violation, the TKN violation, was, exceedence, if you
11 want to put it that way, was one month before suit was filed.

12 But at the time suit was filed, was it clear that the
13 new equipment you had put in would do the job?

14 MR. PRETTYMAN: I don't think there's any question
15 about that, Your Honor. As the District Court ultimately held
16 and the footnotes that I pointed out to you and where he said
17 we were, in fact, in compliance, and also --

18 QUESTION: I didn't ask whether you were; I asked was
19 it clear at the time that the suit was filed that the new
20 equipment was effective to do the job.

21 MR. PRETTYMAN: I think so, and this is the reason
22 that I say so, Your Honor. First of all, they knew that the
23 new equipment had been put in. Secondly, they knew that it had
24 been completed. They attended a meeting in March of the State
25 Water Control Board at which this was discussed, and the State

1 Water Control Board said, look, we've seen it, it looks to us
2 like you're getting this thing under control. There's no need
3 for any further action.

4 Then, there were some unavoidable start-up
5 excedences. I keep emphasizing that because you cannot start a
6 new plant, much less fix an old plant, without having some of
7 these unavoidable start-up excedences.

8 QUESTION: But the fact it's unavoidable doesn't get
9 you off the hook. I mean, the statute doesn't require
10 negligence or wilfulness to make it an excedence.

11 MR. PRETTYMAN: Well, let me say two things to that,
12 Your Honor. First of all, even the unavoidable start-up
13 excedences had ceased prior to suit, but, secondly, even if
14 they had been going on, it may well be that a start-up
15 excedence could be a past violation that, for example, the
16 state could go after.

17 But by definition, it cannot be an on-going
18 violation. An on-going violation is something where something
19 is going on because of a problem and you are not fixing it, you
20 are not doing anything about it. This is a situation where
21 we've done everything about it. We put in a new system. We
22 spent \$265,000 putting it in. It is now -- the crust is
23 starting to form on the lagoon which takes a long time. That's
24 a problem getting that into shape, and those excedences cannot
25 possibly constitute an on-going violation by their very nature.

1 They are the tail-end of abatement.

2 The whole purpose of the statute is abatement. The
3 statute, you've got to remember, follows directly upon the
4 Clean Air Act, and the Clean Air Act, as you will recall, had
5 only an injunctive provision in it, and it related only to
6 compliance, only to on-going, only to abatement.

7 The one thing that this statute added to the Clean
8 Air Act was the remedy of penalty, and that, by adding the
9 penalty, what, it seems to me, Congress clearly did was to say
10 we're going to add an extra incentive for you to stop sooner
11 because by saying that you're going to get penalties and not
12 just an injunction, it becomes very much to your advantage to
13 stop at the earliest possible moment during the sixty-day
14 period, for example.

15 You get your sixty-day notice. If you can abate in
16 there and stop, you have avoided your penalties and that's what
17 the Act is entirely about.

18 QUESTION: Well, Mr. Prettyman, what's the test for
19 violation and to get into court in this citizens suit? You
20 don't really take the position, as I read your brief, that
21 there has to be a violation on the day the suit is filed.

22 MR. PRETTYMAN: Correct. I'm not sure I can define
23 it any better than I did a little while ago, and that is
24 present non-compliance for failure to correct the situation.
25 Our definition would be that if there -- the 5th Circuit

1 pointed this out in Sierra Club v. Shell Oil that you can't
2 just take an excedence here, an excedence there, and kind of
3 bunch them all together and say this is an on-going violation.

4 What you do is you kind of look behind them and you
5 see is there a reason for this, is it on-going, do you have
6 here somebody who has just turned off the spigot in order to
7 avoid a suit, is it a periodic episodic violator who is just
8 trying to avoid suit.

9 In other words, the District Court can look at the
10 facts very much as he does in a regular injunction proceeding
11 to determine whether there is a problem which is creating
12 excedences which you have not corrected, you have not done
13 anything about. If you have not, then it is an on-going
14 violation.

15 QUESTION: And if there's any question about the
16 efficacy of the so-called correction, is that something that
17 would entitle the citizen to sue and litigate about?

18 MR. PRETTYMAN: Might well. Now, for example, let's
19 suppose you have taken some action, but it's the improper
20 action, it's ineffective action, it's not enough action, it
21 won't work, that's something that the court would be entitled
22 to look to to see whether, in fact, there is an on-going
23 problem that you have not properly addressed.

24 QUESTION: So, possibly, the Plaintiffs below had at
25 least that much of a complaint with regard to the TKN problem.

1 MR. PRETTYMAN: With great respect, Justice O'Connor,
2 that just isn't possible in this case because they knew that we
3 had installed a system. They knew that the system had been
4 approved by the state. They knew that thereafter the state met
5 and said we think we've got this under control. They knew --

6 QUESTION: Mr. Prettyman, didn't the District Court
7 find, I think this is the word they used, that the attempt to
8 correct was lackadaisical and exceedingly unconcerned attitude
9 toward correcting anything, and in the thirty-one months prior
10 to the suit, the plant was in compliance with permit conditions
11 only four months?

12 MR. PRETTYMAN: That, Your Honor, related to the
13 prior period, when we were still wrestling with getting this
14 whole thing into place, and we may well have been in violation,
15 in an on-going violation at that time. It may be that we could
16 have sued at that time, but he's not referring to the later
17 period where, if you'll see, I think it's Joint Appendix 115,
18 in that area, where he says that at the end, which is the
19 period we're talking about, just before they brought suit,
20 these were unavoidable and were anticipated.

21 As a matter of fact, in all the plans that the state
22 had looked at prior to that, they had always put in a period
23 for excedences after the system went into effect because they
24 knew that even after you put the system into effect, you're
25 going to have a period of excedences that you can't avoid.

1 QUESTION: Mr. Prettyman?

2 MR. PRETTYMAN: Yes, sir.

3 QUESTION: If they put it in twelve months ahead of

4 time, they wouldn't have had that problem, would they?

5 MR. PRETTYMAN: If they had put the new system in

6 before they did, it would have stopped sooner?

7 QUESTION: Yes.

8 MR. PRETTYMAN: There's no question about that, Your

9 Honor, and I'm not --

10 QUESTION: There would have been no possibility of

11 filing a suit.

12 MR. PRETTYMAN: That's --

13 QUESTION: But they didn't.

14 MR. PRETTYMAN: Well, I wouldn't say that there's no

15 possibility of filing a suit, depending upon how quickly they

16 did it and what manner, but this suit is not about, and even

17 Respondents do not say it is about, whether the penalties were

18 correct, assuming that penalties should be issued because we

19 didn't move quickly enough.

20 What the suit is about is whether you can get

21 penalties at all for purely past violations as --

22 QUESTION: Mr. Prettyman, suppose there is an on-

23 going violation under your own definition at the time the suit

24 is filed, but within two or three months, the whole matter is

25 cleared up, now, you would say the suit was proper at the

1 outset, but does it then -- should it then be dismissed when
2 there is compliance?

3 MR. PRETTYMAN: If there was jurisdiction at the time
4 that the suit was brought because there was an on-going
5 violation at that time, the District Court got jurisdiction.

6 QUESTION: Got jurisdiction and the citizens suit was
7 proper at that time.

8 MR. PRETTYMAN: Correct.

9 QUESTION: What happens then when there is
10 compliance?

11 MR. PRETTYMAN: Well, first of all, I assume if he
12 was satisfied with the compliance, he would not issue an
13 injunction, but he may well issue penalties.

14 QUESTION: For what?

15 MR. PRETTYMAN: For the period up until the time that
16 they stopped.

17 QUESTION: Why could he -- well, why should he be
18 able to issue penalties for violations prior to the filing of
19 the suit?

20 MR. PRETTYMAN: Because, Your Honor, at the time the
21 suit was filed, there was jurisdiction and the reason that
22 there was jurisdiction was that this statute required an on-
23 going violation at the time suit was filed and in your
24 hypothetical, there was an on-going violation.

25 QUESTION: So, you essentially agreed with the

1 Government in that regard?

2 MR. PRETTYMAN: Absolutely. The Government and we
3 are very close on our interpretation of that, and perhaps I
4 ought to turn then to one difference between us and the
5 Government before I come back to other matters.

6 QUESTION: Mr. Prettyman, I take it your answer to
7 one of Justice White's questions, however, is, or is it, that
8 under those circumstances, the District Court should dismiss
9 the complaint?

10 MR. PRETTYMAN: No.

11 QUESTION: Jurisdiction and then there was
12 compliance, what happens to the lawsuit?

13 MR. PRETTYMAN: No. What I would say under those
14 circumstances is that he should not issue an injunction if he's
15 satisfied that there is true compliance and abatement, but that
16 he may well decide to issue penalties because he had
17 jurisdiction at the time that the suit was brought.

18 Now, I want to say just one thing before I get to
19 this business of allegations. I just want to point out to you
20 that, really, this statute makes no sense if you're going to
21 treat it as going to past violations.

22 Let me just give you two brief examples. The citizen
23 would be giving notice of something that's already abated. All
24 the courts that have looked at this agree that one of the
25 purposes of giving sixty-day notice to the permit holder is to

1 allow him to get himself into shape and to abate, to get rid of
2 the problem.

3 Here you have a situation where somebody is suing for
4 penalties five years old, maybe fifteen years old, because we
5 don't know what the statute of limitations is. There is none
6 in the statute.

7 So, you're suing for fifteen years old and you're
8 giving the man sixty days notice for what? It doesn't make any
9 sense. The only thing that makes sense is that you're giving
10 him sixty days notice of an on-going violation.

11 One other example. The citizen couldn't sue for past
12 violations when the Administrator is already suing for on-going
13 violations. I realize this is a little difficult, but if you
14 will look at the language in 1365, you will see that what it
15 says is that when the Administrator is actively prosecuting a
16 suit for compliance, the citizen can't come in and sue.

17 Now, the only way that makes any sense at all is if
18 they're both trying to sue for the same thing; that is, the
19 citizen is trying to sue for an on-going violation, and the
20 Government is suing for an on-going violation.

21 If you have the citizen stopped from suing for past
22 violations because the Government is suing for present or the
23 Government is not suing for present and they are both suing at
24 the time, same time, for past, it doesn't -- the statute
25 doesn't hang together. It makes no sense.

1 But let me move then to the one point of difference
2 between us and the Solicitor General, and that is this business
3 of the allegation. He puts a great deal of stress on the word
4 "alleged", and he feels that a good faith allegation of on-
5 going violation gets the citizens past the jurisdictional
6 requirements of an on-going violation.

7 Now, I want to emphasize, as we've already pointed
8 out, that the Court of Appeals never passed on this, and that
9 even the District Court said that the good faith allegation
10 related only to TKN and, Justice O'Connor, TKN was the smaller
11 part, as you know, of the award. A million dollars was for
12 chlorination, which stopped twenty months before.

13 But even as to TKN, that's very confusing because the
14 Government concedes that once you make an allegation and we
15 contest it under 12(b)(1), the Court can go behind it, and all
16 we're saying is here, you can allege all you want to that
17 something is on-going, but if, in fact, we challenge you, you
18 have the burden of proving that it's true.

19 This is true in any kind of a suit. It's true in a
20 suit where I file a suit against you on diversity grounds in
21 Pennsylvania and I attach all of your prior reports to show you
22 were there and you file a motion dismissing saying I'm sorry I
23 moved into your state of Maryland since my last report.

24 QUESTION: Isn't the Government's position that it
25 should apply something like Rule 11 of good faith belief?

1 MR. PRETTYMAN: Yes, but look what that does, Your
2 Honor. Someone who files a group of DMRs just as someone who
3 files your last ten quarterly reports would, in good faith,
4 believe that we are in the midst of an on-going violation or
5 that you are located in Pennsylvania. But if that is attacked
6 and, in fact, you have moved from Pennsylvania into Maryland
7 and if, in fact, our violations have come to a halt prior to
8 suit, they have been abated, they have been cleaned up and
9 stopped, which is the purpose of the Act, then all we're saying
10 is that you can't go ahead with a suit where a mere allegation
11 gets you to trial.

12 If the allegation is wrong, it doesn't make any
13 difference what your good faith is, it is wrong.

14 I see I don't have much time left, and if I could,
15 I'd like to save just a few moments for rebuttal.

16 Thank you.

17 CHIEF JUSTICE REHNQUIST: Very well, Mr. Prettyman.
18 We'll hear now from you, Mr. Claiborne.

19 ORAL ARGUMENT OF LOUIS F. CLAIBORNE

20 ON BEHALF OF RESPONDENT

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

23 It may be useful to begin by indicating the degree to
24 which both the District Court and the Court of Appeals did deal
25 with the question of whether there was a risk of repetition of

1 the violations which it had noticed for the past.

2 I simply want to draw the Court's attention to two
3 footnotes, both reproduced in the Appendix to the Petition. The
4 first one is from the District Court Opinion and appears on
5 page 38(a). It's Footnote 8, and there one finds the District
6 Court's holding, alternative holding, that at the time the
7 complaint was filed, there was sufficient ground to believe in
8 good faith that the problem had not been cured.

9 What is more, the Court itself indicates --

10 QUESTION: Is that in Footnote 8, on page 38(a)?

11 MR. CLAIBORNE: Yes, Your Honor. The problem of
12 determining whether a violation is continuing is highlighted.

13 Well, in this case, skipping a bit, with the history
14 of violations, its TKN violations, in the winter time, Gwaltney
15 had just experienced another winter of repeated violations,
16 despite the change it had implemented in its waste water
17 treatment system.

18 At the time of trial in December 1984, now that's six
19 months after the complaint was filed, one of Gwaltney's own
20 witnesses expressed doubt as to whether Gwaltney would meet its
21 TKN violations -- limitations. It was not until Gwaltney had
22 experienced a full winter, the following winter, after the
23 trial, without problems that it could make its motion to
24 dismiss based on its present compliance with a secure belief
25 that it was, indeed, in compliance.

1 Now, the Court of Appeals, and here I refer the Court
2 to page 7(a) of the Appendix and Footnote 9, looking at the
3 second paragraph of that footnote, and the second sentence of
4 that paragraph, the Court of Appeals says "a very sound
5 argument can be made that Plaintiff's allegation of continuing
6 violations were made in good faith despite the fact that
7 Gwaltney had not actually violated the Act since May 15th,
8 1984."

9 QUESTION: Well, Mr. Claiborne, what about the
10 Footnotes 25 and 26 that Mr. Prettyman referred to in the
11 District Court Opinion, which basically say the District Court
12 believes that to conclude there were continuing violations
13 would be too speculative on the present record?

14 MR. CLAIBORNE: I think those, Justice O'Connor,
15 those two statements can be reconciled. What the Court is
16 saying is that at the time of filing and at the time of trial,
17 there was ground to fear that there would be repetition of the
18 excedences, so called; that is to say, violations in winter
19 time.

20 By the time this opinion is written in June of 1985,
21 the Court, having experienced a winter without violations, is
22 now saying we don't have ground to fear for the future any
23 longer. They are different times we are talking about.

24 QUESTION: You don't think the District Court Opinion
25 reflects the situation as of the conclusion of the trial?

1 MR. CLAIBORNE: I do, Your Honor.

2 QUESTION: And that these footnotes indicate that the
3 Court found that too speculative to find an on-going violation
4 at that time?

5 MR. CLAIBORNE: That is exactly -- Justice O'Connor,
6 I may have mis-spoken. What I meant to indicate was that the
7 Court found that in June of 1984, when the complaint was filed,
8 and in December of 1984, when the trial was held, there was
9 still ground to fear that the system, the new system, would not
10 handle the problem during the winter.

11 When this opinion is written and that is what the
12 ultimate footnotes are addressing now, judgment being entered,
13 it would be speculative to suppose that -- the winter having
14 gone by without incident, it would be speculative to suppose
15 that there would be problems for the future.

16 QUESTION: Once the trial was over, how does the
17 Court know what's happened between the time the record is
18 closed and he writes the opinion?

19 MR. CLAIBORNE: I don't know. Your Honor, I,
20 frankly, don't know whether the Court was made aware of the
21 absence of violations between December and June.

22 QUESTION: Well, I would suppose that he was
23 reflecting in these footnotes what was true at the termination
24 of the trial.

25 MR. CLAIBORNE: Well, I'm attempting to tax the

1 District Judge with --

2 QUESTION: That would be the normal -- wouldn't that
3 be the normal assumption?

4 MR. CLAIBORNE: Well, Your Honor, --

5 QUESTION: That he'd be writing his opinion based on
6 the record that was made.

7 MR. CLAIBORNE: -- the footnote to which I have
8 referred, Footnote 8, very clearly indicates that not only in
9 the Court's view, but in view of the expert for the Defendant
10 there was ground to fear that the problem had not been solved
11 as of the date of trial in December 1984.

12 QUESTION: Well, why shouldn't the rule be for this
13 jurisdictional argument or the citizen bringing suit, at the
14 time of filing the suit, which in a lot of courts will be an
15 awful long time before the trial, --

16 MR. CLAIBORNE: Your Honor, this is only a preamble
17 to say, as Your Honor has indicated, there is perhaps a little
18 logic in focusing on the state of mind of the Plaintiff and the
19 grounds for objective belief at the time of filing as opposed
20 to the time of judgment, and, yet, my learned friend, seem to
21 indicate that he would condone the assessment of penalties
22 entirely for the past provided that at the time of filing there
23 were an on-going violation, even though it had been
24 demonstrated that the problem was cured before judgment was
25 entered.

1 Now, that, to us, highlights the reason why it is not
2 sensible to focus on the notion of on-going violation at all,
3 whether at the time the suit is filed or at the time when
4 judgment is entered, and it is for that reason that we cannot
5 embrace either the 1st Circuit's decision or the Government's
6 brief here, albeit they might resolve this case favorably to
7 us, because it seems to us that the logic must be that if it
8 matters whether there's an on-going violation, the time when
9 that matters is when penalties are being assessed, not when the
10 suit is being filed.

11 QUESTION: So, you want us to take the case as it
12 comes to us and decide whether the Court of Appeals is right or
13 wrong?

14 MR. CLAIBORNE: Indeed.

15 QUESTION: On its theory?

16 MR. CLAIBORNE: On its theory.

17 QUESTION: On your construction of the statute, what
18 do you make of the purpose of the sixty-day notice provision,
19 which your opponent says doesn't make sense unless it's given
20 opportunity to abate?

21 MR. CLAIBORNE: I'm grateful to the Chief Justice for
22 having focused my attention on that question. Legislative
23 history as to the reason why that sixty-day provision was
24 inserted never mentions one reason being to afford the violator
25 an opportunity to get off the hook. That is nowhere suggested

1 in the legislative history as a reason for the notice.

2 The reason for the notice is to allow the Government,
3 indeed, both Governments, federal and state governments, to
4 take this opportunity to decide whether they wish to enforce
5 the Act and thereby preempt the citizen's suit, and that is --

6 QUESTION: But the notice doesn't just go to the
7 Government; it's notice both to the Government and to the
8 violator. What's the reason for the notice to the violator?

9 MR. CLAIBORNE: I suppose, Justice Scalia, that there
10 are two reasons for the notice going to the violator. The
11 first is that when a violator or an alleged violator is being
12 reported to the authorities as such, as violating the Act, it
13 seems only fair to give him notice of that, not so that he can
14 get off the hook for the past violations, but perhaps so that
15 he will more quickly come into compliance and afford himself an
16 opportunity to be liable for fewer penalties for a shorter
17 time.

18 It does have that effect of goading the violator into
19 ceasing more quickly, not in order to be totally absolved for
20 the past, but to shorten the period for which he will owe
21 penalties.

22 If, indeed, penalties are appropriate and we do not
23 maintain that penalties are always appropriate no matter how
24 isolated the violation, no matter how old it may be, no matter
25 how quickly it was corrected, those are matters which the

1 District Court in its discretion may determine at the penalty
2 phase it had no bearing on the jurisdiction of the Court to
3 entertain the case --

4 QUESTION: Well, Mr. Claiborne, --

5 MR. CLAIBORNE: -- and ever bearing on the --

6 QUESTION: -- I'm troubled by suppose we have a
7 situation of two or three isolated violations, five years
8 before the suit is filed, and the citizen files the suit
9 seeking only civil penalties for those prior violations.

10 Now, you want us to hold that that kind of a suit is
11 perfectly permitted and that the Court has jurisdiction, right?

12 MR. CLAIBORNE: I would say, Justice O'Connor, there
13 may be a question about whether five years is beyond --

14 QUESTION: Well, there's no statute of limitations.

15 MR. CLAIBORNE: Well, that's not entirely clear.

16 There is a suggestion that the statute --

17 QUESTION: , Well, let's not go off on that. Let's
18 assume there is none.

19 MR. CLAIBORNE: It so happens the statute of
20 limitations would be applicable as a five-year one which is the
21 only reason I mentioned it. But let's say it's four years ago
22 and otherwise the matters are as Your Honor suggested, that is
23 a case in which we would say there is jurisdiction in the
24 District Court to entertain the citizen complaint.

25 QUESTION: Well, now, the penalties go only to the

1 Government, is that right?

2 MR. CLAIBORNE: That is so.

3 QUESTION: And how does the citizen have standing in
4 a constitutional sense to come in and get those?

5 MR. CLAIBORNE: Well, let me say, first, that the
6 question of standing had not been taken to this Court.

7 QUESTION: Well, I know, but doesn't that form an
8 interpretation of the statute?

9 MR. CLAIBORNE: Well, it may be that because the
10 standing in strict sense is jurisdictional, it's before this
11 Court in any event, and I'm not trying to avoid the question;
12 I'm just giving a preparatory explanation.

13 In our view, standing in the citizen complainant, and
14 he must be under the statute not any citizen but one who is
15 aggrieved by the pollution which occurs, that means, and as is
16 true in this case, that a member or more members of the
17 organization must live on or near the affected water and be
18 injured by its pollution, either in his commercial or
19 recreational activities there. That shows that he has injury in
20 fact.

21 Now, it is perfectly true that the assessment of
22 penalties will not immediately and directly redress that
23 injury, but it will have a substantially beneficial effect on
24 his interest in that river in the following three ways: first,
25 the threat of the imposition of such penalties is likely as the

1 EPA policy on penalties is at pains to indicate to deter him
2 from violating in the first place.

3 But even after he has violated, if he has been
4 assessed substantial penalties, it is an assurance that he will
5 not return to his old ways. Even in circumstances where
6 injunction would not have been necessary, the assessment of
7 penalties against him does obviously deter him from doing it
8 again.

9 QUESTION: Well, it seems to me --

10 MR. CLAIBORNE: But, thirdly, --

11 QUESTION: -- that really is stretching any
12 traditional notice of standing.

13 MR. CLAIBORNE: Your Honor, I think not. It has a
14 very particular effect on the particular river and the
15 particular injury that this individual Plaintiff is concerned
16 about, and the third way in which it relieves his concern is
17 that it deters not merely that same violator but others on the
18 same river or river system who would otherwise feel free to
19 pollute the river until enjoined.

20 QUESTION: On that analysis, you would say that
21 Congress would have the power to confer standing upon any
22 citizen to prosecute violations of crimes within his community,
23 right? Congress could pass a law saying the United States
24 Attorney shall no longer be the sole person who can prosecute
25 crimes, but any person in the community in which a crime

1 occurred may bring a prosecution?

2 MR. CLAIBORNE: Justice Scalia, there are, I assume,
3 independent reasons not related to standing why an individual
4 ought not be permitted to prosecute criminally. So far as the
5 answer on standing, I suppose the answer must be yes, that
6 prosecuting for crimes and prosecuting for penalties would
7 serve the interest and protect the values in that river to the
8 same degree, but --

9 QUESTION: But I thought your answer to Justice
10 O'Connor's question was that you had to be affected by the
11 particular pollution in question before you could sue as a
12 citizen and, therefore, it seems to me your answer to Justice
13 Scalia ought to be the logical counterpart would be to allow
14 victims to bring a prosecution for crime but not just anyone in
15 the community.

16 MR. CLAIBORNE: Well, I suppose that Justice Scalia
17 was really asking me, and I shouldn't be making such
18 assumptions, whether this same citizen who lives on or near the
19 river would have equal standing to bring a criminal prosecution
20 as he does in my submission to bring an action for civil
21 penalties, and put that way, my answer is yes, he's got equal
22 standing, but the privilege of prosecution is one that, for
23 other constitutional reasons, not standing, are not available
24 to the ordinary citizen.

25 QUESTION: You never got to your third reason, the

1 third way that a citizen -- that this person is affected.

2 MR. CLAIBORNE: Justice White, the third way is in
3 deterring others --

4 QUESTION: I see.

5 MR. CLAIBORNE: -- on the same river who would
6 otherwise feel sanguine about polluting the river, and I must
7 say that we are talking here about the imposition of civil
8 penalties, not a marginal peripheral unimportant sanction.

9 It is, as the EPA policy has made clear, probably the
10 most important sanction in government enforcement. One would
11 suppose that when the citizen is given the privilege of
12 standing in for the Government, provided he has standing or
13 personal interest in the matter, he ought to have as much as
14 possible the same weapons.

15 Now, he cannot issue administrative orders. He
16 cannot institute criminal prosecutions, but when it comes to
17 civil actions, one would expect him to be able to obtain like
18 relief and this relief, the imposition of penalties, is the
19 most important instrument because, otherwise, a polluter has
20 every incentive to delay compliance and to profit by his
21 advantage over complying competitors and to delay the
22 expenditures.

23 QUESTION: Are attorneys' fees available in these
24 suits?

25 MR. CLAIBORNE: They're available in both directions,

1 Your Honor. Congress was well aware that there might be a
2 tendency to abuse the citizens supervision, so it provided and
3 the legislative history notes it that attorneys' fees are
4 available to the Plaintiff, but they're available against him
5 if he files frivolous, vexatious or harassing litigation, and
6 that, of course, is a deterrent to the frivolous plaintiff who
7 --

8 QUESTION: Mr. Claiborne, what is the status of the
9 civil plaintiff who's a property owner along the river who says
10 his property was damaged by the pollution? Does he have any
11 remedy?

12 MR. CLAIBORNE: Under this Court's holding that there
13 is no action for damages in federal law, he would not be able
14 to invoke either the Clean Water Act or the Federal Common Law
15 in order to make himself whole, but he would be free to invoke
16 state damage remedies.

17 QUESTION: Isn't that sort of anomalous?

18 MR. CLAIBORNE: It would be state law to obtain
19 damages.

20 QUESTION: Isn't it sort of anomalous that there's no
21 federal remedy for the direct injury, but there's standing to
22 sue on behalf of the Government for penalties?

23 MR. CLAIBORNE: Well, it isn't --

24 QUESTION: Not really on behalf of, but --

25 MR. CLAIBORNE: It would be extraordinary if the

1 solution to the standing problem were to have a Treetom action,
2 which the Court has more than once indicated presents no
3 constitutional problem, which Congress only last year
4 reaffirmed and widened with respect to the False Claims Act,
5 thereby if we had a Treetom action in which the informer had a
6 pecuniary interest because he got a share of the assessment
7 and, yet, he would widen the class of potential plaintiffs to
8 include any citizen, as is true under the False Claims Act, now
9 that simply cannot be a way one solves a constitutional
10 standing problem and, yet, it would seem to be, if this Court
11 were to hold that there is such a problem, a simple remedy for
12 Congress at the next session.

13 Now, I want to -- I am making a very disconnected
14 argument, but I want to stress that Congress did not use
15 language in this statute with all the precision that one might
16 have hoped for. There is loose language. There is misuse of
17 language. That is easily demonstrated by anyone who reads the
18 Act.

19 It seems to us that the Court ought to prefer to tax
20 Congress with loose language, a lapse of tense perhaps, not
21 clearly but perhaps, even somewhat illiterate sentences here
22 and there, rather than to attribute to Congress a scheme which
23 is downright nonsense. It is downright nonsense to say there
24 shall be penalties assessable in citizen suits. As to that,
25 there can be no question. The statute says so. It certainly

1 works. And then to say oh, but, that means only in those rare
2 cases, because they must be rare, in which despite having been
3 notified sixty days before, the polluter is so perverse and so
4 improvident as to continue his evil ways until the day of
5 filing or perhaps the day of judgment, maybe that's the
6 Government's position, I'm not sure, because otherwise he is
7 excused from all penalties and the Court has no power to impose
8 them.

9 One thing or the other. It is conceivable to
10 hesitate to give the power to assess penalties going to the
11 Treasury for private payment. One can understand that, but once
12 you do give a plaintiff that power, you don't take it all back
13 from him and make it available only in that rare case that it
14 will almost never occur; that is the case where the polluter is
15 so perverse and so improvident as to continue his violation
16 long enough to give the Court jurisdiction to enter these
17 awards. That simply cannot have been the intent of Congress.

18 The -- it was mentioned that Section 505(1)(b), this
19 is reproduced in Petitioner's brief at page 3, refers to an
20 action to require compliance and that is an action to require
21 compliance by a citizen which would be barred if the Government
22 had previously filed.

23 And the suggestion is that an action for penalties is
24 not an action to require compliance; therefore, Congress is
25 telling us here that it never intended to authorize an action

1 for penalties. Now, we know it did. So, we're a bit at a
2 loss, but the other thing to be noticed about this provision is
3 that it doesn't use language quite so fastidiously.

4 The words are that the Federal or State Governments,
5 the citizens suits will not lie if the Federal or State
6 Governments has commenced and is diligently prosecuting a civil
7 or criminal action in a court of the United States to require
8 compliance with the standard of limitations and so forth.

9 Let me say a criminal action is not, strictly
10 speaking, an action to require compliance any more than an
11 action to collect penalties. What is proved here is simply
12 that Congress was not punctilious in its use of language, not
13 that it meant that there was no action by the citizen to secure
14 an assessment of penalties.

15 Indeed, the Congress, in 1985-86 and '87, made quite
16 clear that it understood itself some years earlier to have
17 authorized citizens suits in respect of wholly past violations
18 and to the assessment of penalties without an injunction in
19 those circumstances.

20 I draw the --

21 QUESTION: Mr. Claiborne, that section may bring the
22 realization of the question I asked you because it permits the
23 citizen to intervene as a matter of right in the criminal
24 action apparently.

25 MR. CLAIBORNE: Again, Justice Scalia, I wonder

1 whether they really meant it. I think that is rather a lapse.
2 We do not claim that right.

3 The Section 309(d) was added in 1987. It had been
4 prepared in 1985 and 1986, the provision, for quite independent
5 reasons, was vetoed by the President, and, so, was not enacted
6 in its final form until 1987.

7 Its purpose, so far as we're concerned, was to add to
8 the Clean Water Act an ability for the Administrator to assess
9 penalties administratively. He had already issued cease and
10 desist orders administratively, but he could not assess
11 penalties in this way.

12 Having given the Administrator that authority and we
13 are clear on both sides that this authority relates solely to
14 past events, solely to past violations, which attract the civil
15 penalties, Congress went on to say that a citizens suit would
16 lie in respect of the same violations only if notified or filed
17 before the Administrator acted.

18 Now, according to the Petitioner, that was
19 unnecessary to say because there could be no citizen suit
20 notified or filed in respect to purely past violations. Here
21 is Congress indicating that it understood otherwise.

22 I may say that the Petitioner himself obviously
23 understood otherwise during the eleven months before the filing
24 of the motion to dismiss on this ground and when it took the
25 trouble to seek amendment of the summary judgment that had been

1 entered in August 1984, to absolve itself in respect of the
2 violations that had occurred before it acquired the property,
3 what was the point of that, except that it feared that
4 penalties would be assessed in respect of those old violations.

5 It was only eleven months later that, and only when
6 the 5th Circuit handed down its Hamford decision that anybody
7 for the first time focused on the present tense in 505 and
8 said, oh, this qualifies, the entire statute, we had it wrong,
9 no penalties can be assessed in a citizen suit, except only,
10 when for reasons not easy to understand, when they are, in
11 effect, combined with an injunction. The one time you don't
12 need penalties because the injunction serves the purpose and
13 its violation will, of course, attract civil and criminal
14 contempt penalties of its own.

15 For these reasons, we pledge affirmance of the
16 judgment of the Court of Appeals.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Claiborne.
18 Mr. Prettyman, you have two minutes remaining.

19 ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.

20 ON BEHALF OF PETITIONER - REBUTTAL

21 MR. PRETTYMAN: Just a few very quick points, Your
22 Honor.

23 I would urge that you read the end of Footnote 9,
24 which my good friend for the Respondents did not get to, and
25 call your attention to the first part of it.

1 We filed a motion to dismiss almost a year after the
2 last violation, which clearly alerted the District Court Judge
3 that there had been no violations during the course of that
4 year when he ruled he was fully familiar with that.

5 I have to go outside of the record to make the
6 following statement, and that is that there have been none for
7 now four years, and I say that with equanimity because I am
8 sure my Respondents won't dispute it. There was one hurricane
9 upset, but other than that.

10 The problem with the Article 3 is that I think it may
11 be directed in your questions, Justice Scalia, to perhaps the
12 wrong point. The real problem with Article 3 is
13 redressability; that is, when all of the penalties go to the
14 Government and you don't have an injunction going to the
15 underlying fact, you have an injury that is not redressed by
16 any remedy and that closes the Article 3.

17 And I would urge the Court to be very careful here if
18 it's going to open the flood gates to these past suits because
19 you know you're not only going to have these federal suits for
20 going back we don't know how many years, maybe fifteen, but
21 we're going to have many state claims, you're going to be
22 trying state claims in federal courts going back fifteen years,
23 which is going to be attached to those federal claims, which is
24 going to cause great hazard to the federal courts.

25 Thank you very much.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Prettyman.
2 The case is submitted.

3 (Whereupon, at 12:02 o'clock p.m., the case in the
4 above-entitled matter was submitted.)

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C E R T I F I C A T E

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